BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

IN THE MATTER OF ***COMPLAINT AGAINST AND REQUEST FOR INVESTIGATION OF CALCERTS, INC.***	**Docket No. 12-CAI-01**

The Committee hereby submits its *[Proposed] Decision Dismissing With Prejudice the Pending Complaint and Investigation Proceedings Against CalCERTS, Inc*., pursuant to California Code of Regulations, title 20, section 1230 and following.

Dated: June 22, 2012, at Sacramento, California.

Original Signed By:
KAREN DOUGLAS
Commissioner and Presiding Member
Committee re Complaint and Investigation
Against CalCERTS, Inc.

Original Signed By:
ANDREW McALLISTER
Commissioner and Associate Member
Committee re Complaint and Investigation
Against CalCERTS, Inc.

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[PROPOSED] DECISION DISMISSING WITH PREJUDICE THE PENDING COMPLAINT AND INVESTIGATION PROCEEDINGS AGAINST CALCERTS, INC.

Introduction

Erik Hoover and Patrick Davis brought an action against CalCERTS, Inc. alleging CalCERTS violated provisions of the Energy Commission's Home Energy Rating System Program ("HERS Program" or "Program") and requirements for constitutional procedural due process, when it decertified them as "Raters" eligible to conduct residential home energy ratings under the HERS Program.

Hoover and Davis seek three remedies: (1) reversal of the decertifications; (2) an investigation of CalCERTS's disciplinary process for handling Rater mistakes; and (3) a requirement that CalCERTS adopt a written Rater discipline procedure that complies with HERS Program and constitutional procedural due process requirements.

The parties appeared at a May 11, 2012, evidentiary hearing and presented documentary evidence and witness testimony. (See 5/11/12 Reporter's Transcript (RT) and attached Exhibit List.) They also submitted pre- and post-hearing pleadings.

As discussed below, the evidence and law do not support Hoover and Davis's claims.

Factual Background[1]

At all relevant times, CalCERTS was a privately held corporation certified by the Energy Commission as a "Provider" under the Commission's HERS Program. (RT 116-117.) Hoover and Davis were CalCERTS-certified "Raters." (RT 41-42; 50; 52.)

[1] The following summary presents the facts most pertinent to the pleading allegations addressed by this decision.

The Program defines a "Rater" as an individual trained, tested, and certified by a Provider to perform one or more of the functions or procedures used to develop a "California Whole-House Home Energy Rating," a "California Home Energy Audit," or the field verification and diagnostic testing required for demonstrating compliance with Part 6 of the Commission's Building Energy Efficiency Standards. (Cal. Code Regs., tit. 20, § 1670.)[2]

The Program defines a "Provider" as an organization that administers a home energy rating system in compliance with the Program regulations. (*Id*. at § 1671.) A "rating system" encompasses materials, analytical tools, diagnostic tools and procedures to produce home energy ratings and provide home energy rating and field verification and diagnostic testing services. (Regs., § 1671.)

Both Raters and Providers must obtain certifications as prerequisites to acting under the HERS Program. Providers obtain certification from the Commission. (Regs., § 1674.) Raters obtain certification from Providers. (Regs., §1673, subd. (a).)

The HERS Program

The Energy Commission created the HERS Program pursuant to Public Resources Code section 25942, adopted in 1991. Section 25942 tasked the Commission to establish a statewide residential home energy rating program with criteria including consistent, accurate, and uniform ratings based on a single statewide rating scale; training and certification procedures for home raters, and quality assurance procedures to promote accurate ratings and protect consumers. (Pub. Resources Code, § 25942, subd. (a)(1), (3).)[3] Under Section 25942, individuals could perform home energy rating services on and after January 1, 1996, only if the Commission certified the services as compliant with applicable statutory and program requirements. (§ 25942, subd. (c).)

In enacting Section 25942, the Legislature found and declared: [4]

> (a) There is a growing need to encourage energy efficiency measures that will help homeowners, rental property owners, and renters to use energy efficiently, preserve environmental quality, increase energy security,

[2] All subsequent regulatory references are to the Commission's Regulations found in California Code of Regulations, title 20, unless otherwise specified.

[3] All subsequent statutory references are to the Public Resources Code unless otherwise specified.

[4] The Legislature adopted Section 25942 together with two companion statutes: Public Resources Code Section 25402.9 and Civil Code section 2079.10. Section 25402.9 augmented the Warren-Alquist Act to require the Commission to develop, adopt, and publish an informational booklet that educates and informs a wide range of persons about the HERS Program. Civil Code section 2079.10 addresses the delivery of the booklet to transferees in connection with the transfer of real property.

reduce energy bills, and make housing more affordable in California.

(b) To increase the energy efficiency and the affordability of homes in California, homeowners, owners of rental properties, renters, purchasers, real estate agents, lenders, appraisers, and others need to know which energy efficiency measures can reduce energy utility bills, and how much those measures will cost.

(c) Home energy ratings can provide information necessary to encourage homeowners, owners of real properties, and renters to make informed decisions on cost-effective options to improve home energy efficiency.

(d) It is the policy of this state to facilitate the development and implementation of a statewide home energy rating program as soon as is practical.

(See Historical and Statutory Notes, 56B West's Ann. Pub. Resources Code (2007 ed.) foll. § 25402.9, pp. 401-402.)

In 1999, the Commission adopted regulations creating the HERS Program.[5] These initial regulations established the Program's basic operating framework, recognized two categories of actors to provide services under the Program ("Providers" and "Raters"), defined the relationship between Providers and Raters, and created performance criteria for both. In 2009, the Commission supplemented the Program with provisions for whole-house home energy ratings for existing and newly constructed homes.

The HERS Program specifies educational, experiential, and performance requirements for Raters and, in turn, tasks Providers to train, test, and certify Raters and evaluate Rater performance. (Regs., § 1673.) Before a Provider may include a Rater in its registry, the Provider must certify to the Energy Commission that the Rater satisfied the Program's training requirements and entered into a Program-mandated agreement with the Provider. (Regs., § 1673, subds. (b), (d).) The Provider-Rater agreement must require Raters to:

- Provide home energy rating and field verification services in compliance with the HERS Program.
- Provide true, accurate, and complete data collection, analysis, ratings, and field verification and diagnostic testing.
- Not accept payment or consideration in exchange for reporting data gathered for a rating, analytical results used for a rating, or a rating result that was not in fact conducted and reported in compliance with the HERS Program.

[5] The HERS Program provisions are at Regulations sections 1670-1675.

- Comply with the conflict of interest requirements as specified in the HERS Program. (Regs., § 1673, subds. (b), (d), (j).)

Notwithstanding the different functions of Providers and Raters, the Program holds both to the following standard:

> Providers and Raters shall not knowingly provide untrue, inaccurate, or incomplete rating information or report rating results that were not conducted in compliance with these regulations. Providers and Raters shall not knowingly accept payment or other consideration in exchange for reporting a rating result that was not in fact conducted and required in compliance with these regulations.

(Regs., § 1672, subd. (m).)

The Program requires Providers to establish and implement a quality assurance (QA) program to verify Rater adherence to this standard. (Regs., § 1673, subd. (i)(3).) In particular, the Provider must "annually evaluate the greater of one rating ... or one percent of the Rater's past 12 month's total number of ratings," for each measure tested by each Rater. The Provider must document the evaluations in its database, including results of all testing performed by its QA personnel. (Regs., §1673, subd. (i)(3)(C).) If the QA personnel determine that a Rater's results do not meet the criteria for truth, accuracy, or completeness, the Program instructs the Provider to report the QA failure on its Rater registry website for a period of six months and evaluate two additional ratings of the failed measure performed by the Rater in the previous 12 months. If these additional actions show a second deficiency, then all Providers must evaluate two percent of the Rater's ratings for the failed measures for the next 12 months. (*Id*.)

The Program imposes an additional duty on Providers to verify Rater adherence to the standard of conduct, by requiring them to establish and implement a system for responding to and resolving complaints related to ratings and field verification and diagnostic testing services and reports. (Regs., § 1673, subd. (i)(5).)

Neither the Public Resources Code HERS Program regulations nor Commission staff imposes requirements for, or limitations on, Provider complaint investigations or Rater discipline, suspension, or decertification. (Regs., § 1673; RT 119; 152; 155; 205-211; 216-222; 225-227; Ex. 205.)

CalCERTS Rater Agreements with Hoover and Davis

Hoover and Davis, respectively, entered into various agreements with CalCERTS. (RT 53-56; 57-59; 59-62; 64-66; Exs. 19, 20; 200; 201; 202; 203; 231.) One agreement – the

"CalCERTS Certified Rater Agreement" – authorizes CalCERTS to reprove, suspend, or decertify Hoover or Davis for acts including: failing to comply with any of the terms and conditions of this Agreement, the subscriber agreement or any other agreement between the Rater and CalCERTS; willfully failing to provide a true, accurate and complete rating, field verification or diagnostic testing; or showing a pattern of failure to provide a true, accurate, and complete rating, field verification, diagnostic testing or data entry, whether willful or not. (Exs. 19; 20; 200; 201; 202; 207; 248.)

The Rater Agreement authorizes CalCERTS to investigate Rater actions pursuant to a certified written complaint based on the investigation, to temporarily suspend or permanently revoke certification if the Rater commits one or more of the specified acts or omissions constituting grounds for disciplinary action. The Commission had no role in preparing the Rater Agreement or crafting its language. (RT 118-119; 225-227.)

CalCERTS Operations

At all relevant times, CalCERTS was the only Provider authorized to train and certify Raters to rate new homes under the HERS Program. (RT 210:4-8; 43:7-44:2.) Nothing in Section 25942 or the HERS Program prevents entities other than CalCERTS from obtaining Provider certification. (§ 25942; Regs., §§ 1670-1675.) Commission staff took no action to limit Provider certification to CalCERTS. (RT 221-222.)

There is no evidence that CalCERTS's management and QA personnel were employed, appointed by, or affiliated with the Commission.

Suspension and Decertification of Hoover and Davis

By separate e-mails dated December 16, 2011, CalCERTS notified Hoover and Davis, respectively, that they "failed a QA review" and were under a 15-day suspension. (Exs. 3; 4; 207; 214.) The e-mails listed residences that failed QA inspections and instructed Hoover and Davis to contact CalCERTS within the suspension period to schedule a meeting. The e-mails advised that failure to contact CalCERTS as specified would result in decertification. The e-mails also advised that Hoover and Davis could present documents at the meeting.

Hoover and Davis timely contacted CalCERTS and participated in meetings (referred to in testimony as "interviews.") (RT 36; 80; 92-93; 105; 139; 143-146.) Before the interviews, CalCERTS provided Hoover and Davis with a list of addresses related to the failed QA reviews. (RT 36:13-18; 36:1 – 12.) The list was not exhaustive, as CalCERTS introduced additional addresses during the interview. (RT 38; 39.) Hoover and Davis

came to the interviews prepared to discuss the addresses in the e-mails; however, they were not prepared to discuss any particular tests as CalCERTS did not identify the failed tests. (RT 94; 95; 97-98.)

During the interviews, CalCERTS discussed most of its findings and presented Hoover and Davis with documents and photos, but did not produce all of the documents concerning its claim of failed QA reviews. (RT 36-37; 70-72; 75; 76-85; 143-145; 229-233.)

CalCERTS gave Hoover and Davis an opportunity during the interviews to present documents, ask questions, and explain the identified failures. (RT 38-39; 67:21- 68:68; 68:2-5; 106; 159-160.) CalCERTS provided Hoover and Davis with an additional opportunity to submit questions or comments after interviews. (RT 85; 148-149; 151.)

Letters dated January 30, 2012 notified Hoover and Davis, respectively, they were decertified. (Exs. 6; 7; 212; 218.) The letters stated in pertinent part that "[a] Quality Assurance investigation by CalCERTS, Inc. has determined that your actions as a California HERS Rater are in violation of Title 24 and/or Title 20." The letters generally identified the failures and characterized them as "egregious, establish[ing] a pattern, and ... not rectifiable." (*Id*.) The interviews addressed most or all of the items listed in the letters. (RT 105-111.)

The QA investigation referenced in the January 30 letters arose from a complaint against Hoover and Davis's employer regarding its Raters' conduct. (RT 87; 125- 126; 186 - 187; Ex. 206, p. 55.) The complaint investigation included field reviews and other elements of its QA process. (RT 125-132; 151-152; 179; 188-189; 191; 265 – 270.) CalCERTS's President authorized the decertification on his own initiative, with no direction, input, or influence from the Commission, for rating failures. (RT 152-153; 221.) CalCERTS QA personnel did not consult with, defer to, or use Commission resources in investigating and decertifying Hoover and Davis. (RT 125-132; 151-152; 179; 188-189; 191, 265 – 270; 206-210; 216-221.) CalCERTS suspended and decertified Hoover and Davis under the Rater Agreements. (RT 119.)

CalCERTS created and implemented its discipline and decertification process without input or direction from Commission staff. (RT 206-210; 225-227.)

DISCUSSION

Hoover and Davis argue two grounds for reversal of the decertifications: (1) the HERS Program QA provisions did not authorize CalCERTS to decertify Hoover and Davis and (2) CalCERTS is a "state actor" that failed to provide pre-deprivation procedural due process required by the federal and California constitutions when it decertified Hoover and Davis. The evidence does not support these claims.

A. CalCERTS Complied with Applicable HERS Program Requirements in Decertifying Hoover and Davis

As discussed above, the Program requires Providers to annually evaluate Rater performance under a Provider-established QA program. (Regs., §1673, subd. (i)(3)(A).) When the evaluations reveal ratings failing to satisfy mandatory Program criteria, Providers must further evaluate Rater ratings and log identified failings in the Provider registry. (Regs., § 1673, subd. (i)(3)(C)). Thus, Hoover and Davis contend CalCERTS had an exclusive, limited course of action to address their alleged failures.

Yet, the undisputed evidence shows that CalCERTS decertified Hoover and Davis pursuant to a complaint investigation. The undisputed testimony further reveals that CalCERTS's investigation uncovered a pattern of failures by Hoover and Davis to provide true, accurate, and complete ratings. CalCERTS subsequently suspended and then decertified Hoover and Davis for these failures under the Rater Agreement.

The Program provisions make it clear that the recurring duties imposed on Providers by the Program's QA requirements are separate and distinct from a Provider's obligation to respond to and resolve complaints related to ratings and field verification and diagnostic testing and reports. (Regs., §1673, subd. (i)(1) - (i)(5).) The Program imposes no requirements or prohibitions regarding a Provider's exercise of discretion in investigating, responding to, and resolving complaints. Nor does the Program prohibit Providers from taking measures to discipline or decertify Raters as a result of complaint investigations.

Further, CalCERTS did not transform its complaint investigation against Hoover and Davis into the mandated QA process by incorporating QA practices into the investigation. Even if this transformation occurred or Hoover's and Davis's actions were otherwise detected by the mandatory quality assurance process, there is no evidentiary support for the claim that the Program limited CalCERTS's remedies solely to additional quality assurance evaluations and registry updates, or otherwise prohibited

decertification. Indeed, the Program is silent on the breadth and scope of Provider-Rater relations and their mutual agreements for severing the relationship and decertification.

Hoover and Davis agreed by contract terms that CalCERTS could decertify them if, as a result of a complaint investigation, their conduct showed a pattern of failure to provide a true, accurate and complete rating, field verification or diagnostic testing or date entry, whether willful or not. Any limitations on or prohibitions against these contract terms are beyond the scope of the issues presented in this matter.

B. CalCERTS's Actions to Decertify Hoover and Davis were those of a Private Entity with No Constitutional Obligation to Provide Procedural Due Process

Hoover and Davis contend CalCERTS is a "state actor" that was required by federal and state constitutional law to have provided procedural due process before decertifying them. (Complaint, pp. 7-8.) This claim derives from federal and California constitutional prohibitions against a state depriving or terminating a protected property interest without procedural due process safeguards. (U.S. Const. 14th Amend.; Cal.Const., art. I, § 7.) These prohibitions may extend to private conduct abridging individual rights if the private person or actor can be fairly characterized as a "state actor" when it took the complained of actions. (*Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001) 531 U.S. 288, 295 [121 S. Ct. 924, 930] (*Brentwood*); *Adams v. Department of Motor Vehicles* (1974) 11 Cal.3d 146, 153.)

The Law

In *Brentwood,* the United States Supreme Court makes it clear that state actor analysis is not amenable to a single, dispositive test. Instead,

> [w]hat is fairly attributable [as state action] is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

(*Brentwood*, *supra,* 531 U.S. 295-296.) Based upon a summary review of leading state actor cases, the Court identified independent, potentially relevant factors for state action analysis: (1) the challenged activity results from the state's exercise of coercive power; (2) the state provides significant encouragement, either overt or covert; (3) the private actor operates as a willful participant in joint activity with the State or its agents; (4) a

nominally private entity is controlled by an agency of the state; (5) the state delegated a public function to the private entity; (6) the challenged activity is entwined with governmental policies; and (7) the government is entwined in the nominally private entity's management or control. (*Brentwood*, *supra*, 531 U.S. 296.)

Courts apply the *Brentwood* factors as appropriate to determine whether a private entity's conduct meets established compulsion/coercion, public function, or joint action/close nexus tests. (See, e.g., *Rendell-Baker v. Kohn (1982)* 457 U.S. 830, 840-842 [102 S.Ct. 2764, 2770-2772]; S*utton v. Providence St. Joseph Med Ctr.* (9th Cir. 1999) 192 F.3d 826, 835-837.) In particular, the coercion/compulsion test primarily involves factors (1) and (2); the joint action/close nexus test primarily involves factors (3), (4), and (7); and the public function test primarily involves factors (5) through (6).

The joint action/close nexus test is met when the relationship between a private entity and the government is "so overborne by the pervasive entwinement of public institutions and public officials in its composition and workings" that action of the private entity must be viewed as actions of the state. (*Brentwood*, *supra*, 531 U.S. 298.) The relevant inquiry under the public function test is whether the challenged activity is "traditionally the exclusive prerogative of the State." (*Rendell-Baker v. Kohn, supra,* 457 U.S. 842.) Under the compulsion/coercion test, a private entity may be considered a state actor when it acts pursuant to the coercive power of the the state or was controlled by the state. (*Blum v. Yaretsky* (1982) 457 U.S. 991, 1004 [102 S.Ct. 2777, 2786].) The outcome under each test is entirely contingent on the unique facts presented.

Discussion

Hoover and Davis fail to explicitly identify the factors or tests applicable to their claims. However, their pleadings suggest a focus primarily on the close nexus/joint action and public function tests. They allege in pertinent part:

- the State of California (i.e., Energy Commission) granted CalCERTS a licensing monopoly over training and certification for new construction and because of this unique position, CalCERTS's denial of a certification to a Rater, or its decertification of a Rater, effectively denies Hoover and Davis access to a government-controlled profession;
- it is impossible for Hoover and Davis to be excluded from the profession without the support and assistance of government power; and
- CalCERTS's power to act is possessed by virtue of state law and made possible only because it is clothed with the authority of state law. (Complaint, pp. 4-7; Post-Hearing Brief; pp.5-14.)

The purpose of the joint action/close nexus test is to "assure that constitutional standards are invoked only when it can be said that the state is *responsible* for specific conduct of which the plaintiff complains." (*Blum v. Yaretsky*, *supra*, 457 U.S. 1004, emphasis original.)

Brentwood establishes a benchmark for joint action/close nexus. There, a private parochial school brought an action against a not-for-profit athletic association (Association) in which it had membership. Even though the Association was a membership corporation organized to regulate interscholastic sports among its public and private high school members, the Court found pervasive entwinement based on such factors as the Association was an organization of schools and not natural persons; the Association was overwhelmingly composed of public schools and their officials; all of the Association's selected representatives were public officials; the selected representatives adopted and enforced the operational rules and regulations for athletic competitions; and the Association's ministerial employees were eligible for state retirement system membership. (*Brentwood*, supra, 531 U.S. 299-302.)

Cases before and after *Brentwood* provide equally striking examples of joint action/close nexus. For instance, in *Anchor Pacifica Management Company v. Green* (2012) 205 Cal.App.4th 232, the court found state action when a private party evicted a tenant from subsidized housing. There, the government approved leases; had oversight over operation of housing complex; established the number of low and very low income units in the complex and related rents; identified eligible tenants for low and very low income units; selected housing subsidy recipients; and paid the housing subsidies. In *Lugar v. Edmonston Oil Co. Inc., supra,* 475 U.S. 942, the Court similarly found state action where the state created a system allowing a private party to obtain prejudgment possession of another's property and the state, under that system, actively helped the private entity obtain the property. A unifying factor among these cases is the obvious conjoined private-state action, whether by virtue of the state having controlling membership of the private entity, making pertinent operational and management decisions such that it subsumed the private entity's independent decision-making and discretion, or otherwise acting complicity or conspiratorially.

The facts in this action against CalCERTS bear no resemblance to those considered in *Brentwood* and like cases finding state action. Nor do they illustrate the unifying factor among these cases. Rather, this action presents another example where the requisite nexus was absent *because the actions complained of were made at the sole discretion of the private actor, independent of any influence, direction, or complicity with the state.* (See, e.g., *Blum v. Yaretsky*, *supra*, 457 U.S. 1004 [finding that decisions of physicians and administrators of privately owned and operated nursing home to transfer Medicaid

patients were not state action because the decisions were based on the independent judgment of the private actors and not the result of state direction or action]; *Rendell-Baker v. Kohn*, *supra*, 457 U.S. 840 [finding no state action in employee discharge decisions of a privately owned and operated school because the decisions originated with the school based on its independent actions and judgment].)

As in the cited cases, the evidence in this matter shows that CalCERTS acted alone and on its own initiative in all pertinent aspects of Hoover's and Davis's decertification. For example, CalCERTS created its agreements with Raters, with no input or direction from Commission staff or HERS Program provisions regarding Rater discipline or decertification; set mutually agreed upon terms in those agreements allowing it to discipline or decertify Raters; used its own resources and self-created procedures to investigate the complaint against Hoover and Davis, with no input or direction from Commission staff or the HERS Program provisions; relied solely on the actions and judgment of its employees conducting QA in concluding that Hoover and Davis engaged in conduct that allowed it to take remedial action under the Rater Agreements.

Further, even if CalCERTS currently holds an essential monopoly under the HERS Program for new home training and certification, this fact alone cannot support a state action claim.[6] (*Jackson v. Metropolitan Edison Company* (1974) 419 U.S. 345, 352 [95 S.Ct. 449, 454] (*Jackson*).) In *Jackson,* a privately owned and operated utility corporation terminated a customer's service. The corporation held a certificate of public convenience and necessity issued by a state public utility, was subject to extensive regulation by a state commission, and essentially held a governmentally protected monopoly. Even so, the Court said:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. [citation] Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities do so. [citation] It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so the action of the latter may be fairly treated as that of the State itself. [citation] The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required to determine whether the test is met.

(*Jackson*, *supra*, 419 U.S. 350.)

[6] No evidence supports Hoover and Davis's claim that the State of California or the Energy Commission "granted CalCERTS a licensing monopoly over training and certification for new construction."

As discussed above, no facts in evidence supplement the monopoly claim to meet the joint action/close nexus test. And, as discussed below, there are no facts satisfying the public function test.

Hoover and Davis also advance the monopoly claim under a public function argument. They contend the Commission, in implementing the HERS Program, not only delegated a public function to CalCERTS but also made CalCERTS the sole source of Rater training and certification for new homes. Hoover and Davis contend these Energy Commission actions effectively cloaked CalCERTS's actions under the color of state law and were therefore state actions. (*Lugar v. Edmonston Oil Co., Inc, supra*, 457 U.S. 937.)

Hoover and Davis rely on *West v. Atkins* (1988) 487 U.S. 42 [108 S.Ct. 2250] (*West*).[7] In *West*, a prison inmate (West) brought an action against a physician for inadequate medical treatment, alleging violation of the federal constitutional prohibition against cruel and unusual punishment. The physician provided services to the inmate under a contract with the state and as a state employee. The Court found this to be a distinction without a difference in finding state action. Under state law, West could only receive medical treatment from the state through its authorized agents; the state had an affirmative obligation to provide adequate medical care to West; the state delegated that function to West; and respondent voluntarily assumed that obligation by contract. (*West, supra*, 487 U.S. 54 - 56.) In light of the state's legal obligation to provide essential medical care to inmates and its determination to provide those services through a contract physician, the Court determined the state delegated a public function to the physician.

West is inapposite. Neither California nor the Energy Commission has a legal obligation to provide Rater certifications, let alone home energy rating services. The Commission's obligation, as set forth in Section 25942, was to establish and adopt a program allowing others to provide such services. The Commission fulfilled this obligation by establishing the HERS Program. The Program allows – but does not entitle – individuals to obtain Rater certification from certified Providers. While the Program creates a marketplace for Rater and Providers services, it does not limit the marketplace of possible Providers. Nor is there evidence that Energy Commission staff limited the marketplace to CalCERTS.

In addition to misplacing reliance on *West,* Hoover and Davis otherwise fail to establish facts satisfying the public function test. Under this test, the relevant question is not

[7] Several courts identify *West* as an example of state action through delegation of a public function. (See, e.g., *Brentwood*, *supra*, 51 U.S. 296.)

simply whether a private group is serving a public function; instead, the question is whether the challenged activity is an exercise of powers "traditionally the exclusive prerogative of the State."

Here, the critical inquiry is whether CalCERTS's decertification of Hoover and Davis is "traditionally associated with sovereignty" or was an exercise of powers "traditionally the exclusive prerogative of the State." There is no evidence that the provision of home energy rating services were traditionally the exclusive prerogative or responsibility of the state or Energy Commission. Rather, as discussed above, the California Legislature only recently (in 1991) took steps to promote energy efficiency, preserve environmental quality, increase energy security, reduce residential energy bills, make housing more affordable in California, and protect consumers *by way of a home energy rating system program*. Further, although state law required the Energy Commission to establish the HERS Program, the Program creates an open marketplace for both Raters and Providers to provide beneficial public services to the public. As a matter of law, "that a private entity performs a function which serves the public – even the alleged public service is arguably an essential service – does not make its acts state action." (*Rendell-Baker*, *supra*, 457 U.S. 842.) Nor is it dispositive that the private actor is heavily regulated. (*Jackson*, *supra*, 419 U.S. 350-351.)[8]

As mentioned above, Hoover and Davis do not explicitly invoke the compulsion/coercion test. Even if they had done so, no facts support this claim. Under the compulsion/coercion test, a private actor can transform into a state actor if the state controlled the private actor or the action arose from the state's coercive power. (See *Lebron v. Nat'l R.R. Passengers Corp*. (1995) 513 U.S. 374, 411-412 [115 S.Ct. 961, 980] [finding government control over Amtrak, even though its enabling statute says it is not an agency or instrumentality of the United States, because the federal government created Amtrak by special law to further government objectives; and the government retains permanent authority to appoint a majority of Amtrak's governing directors]; *Blum v. Yaretsky*, *supra*, 457 U.S. 1005-1010 [finding no coercion when private actors transferred Medicare patients to less expensive facilities despite state and federal regulations encouraging private nursing homes to transfer patients to less expensive facilities when appropriate]; *Rendell-Baker v. Kohn*, *supra*, 457 U.S. 841, 842 [finding no state action by coercion or compulsion regarding a private school's termination of employees even though the school received virtually all of its funding from the state, was subject to state regulation, and contracted with the state to perform certain services for students, because the regulations minimally addressed personnel issues].)

[8] This conclusion would be the same even if the inquiry was broadened to encompass CalCERTS's actions generally in training and certifying Raters.

No facts in evidence show that CalCERTS's decertification decisions were compelled or coerced by the Energy Commission or its regulations. CalCERTS is, and operates as, a private entity with no state agency or employee membership, direction, or management. And, while the HERS Program sets CalCERTS's Provider duties for education, training, and certifying Raters and verifying Rater performance, it has no other provisions regarding Provider-Rater relations or Rater discipline or decertification. The Program's silence (and Commission staff's silence) regarding Rater discipline and certification make it clear that CalCERTS acted on its own in investigating and decertifying Hoover and Davis. Even if this silence could fairly be characterized as state acquiescence or approval, decisional law shows that mere approval of or acquiescence in the actions of a private party is not sufficient to justify holding the State responsible for those actions. (*American Mfrs. Mut. Ins. Co. v. Sullivan* (1999) 526 U.S. 40, 52.)

Conclusion

Hoover and Davis failed to establish their state action claims. Because state action is an essential predicate for a procedural due process claim, we do not consider the parties' due protected interest and due process arguments.

C. The Facts Provide No Support for the Requested Remedies

For the foregoing reasons, we deny Hoover and Davis's request for reversal of the decertifications. Further, because the evidentiary hearing encompassed complaint allegations and a request for an investigation of CalCERTS's disciplinary process,[9] no additional investigation of CalCERTS's complaint investigation and disciplinary processes are warranted. (Regs., §1230, subd. (a) [providing that a single adjudicatory proceeding may involve both a complaint and an investigation].)

Significantly, the evidence shows that before CalCERTS decertified Hoover and Davis it provided each of them with notice of its concerns, opportunity to question CalCERTS about those concerns; an opportunity to explain their conduct and provide supporting documents; and opportunity to ask questions and present additional explanations and documents after meeting with CalCERTS personnel. However, the hearing also revealed an unrefined, informal, and seemingly improvised discipline and decertification process.[10] It seems the process lacks features such as published written procedures

[9] Hoover and Davis brought this action under Regulations section 1675 and sections 1230 and following. Section 1675 authorizes any person or entity to file a complaint alleging a violation of the HERS Program. Sections 1230 and following allow any person to file a complaint or request for investigation regarding any statute, order, decision, or regulation within the Commission's jurisdiction.

[10] A committee order dated May 12, 2012 directed the parties to submit post-hearing briefs on topics including whether there are requirements for fair procedure applicable to non-state actors under California

and full and complete discipline-related notices. These deficiencies – as well more general matters involving Provider-Rater relations – warrant broader Commission inquiry. We intend to explore these matters pursuant to a Commission Order Instituting Investigation, or similar proceeding, that creates a forum for participation by all stakeholders and interested persons. It would be through this proceeding, if at all, that the Commission would impose a requirement for Providers to adopt written procedures governing aspects of the Provider-Rater relations.

DISPOSITION

For the foregoing reasons, the complaint and investigations proceedings identified by Commission docket number 12-CAI-01 are dismissed with prejudice.

IT IS SO ORDERED.

decisional law. The briefs on this topic focus primarily on *Pinsker v. Pacific Coast Society of Orthodontists* (1969) 1 Cal.3d 160 and related cases. Those cases focus on exclusion or expulsion from private membership organizations, where membership involves practical or economic necessity. We are not persuaded that the cited cases apply to CalCERTS's discipline and decertification process, but nonetheless observe (without deciding the issue) that the process applied to Hoover and Davis seems to meet the standard of a "substantively rational and procedurally fair proceeding" discussed in CalCERTS's post-hearing brief.

Docket Number: 12-CAI-01 Date: May 11, 2012

Project Name: Complaint Against and Request for Investigation of CalCERTS, Inc.

EXHIBIT LIST

Exhibit	Brief Description	Stipulation	Offered	Admitted	Refused	CEC Use Only
Complainants' Exhibits						
1	Complaint Against and Request for Investigation of CalCERTS, Inc.; dated February 13, 2012, and docketed on February 13, 2012; Docket No. 12-CAI-Ol	**X**	**X**	**X**		
2	Answer of CalCERTS, Inc. to Complaint and Request for Investigation; dated March 26, 2012	**X**	**X**	**X**		
3	CalCERTS e-mail to Erik Hoover, dated December 16, 2011	**X**	**X**	**X**		
4	CalCERTS e-mail to Patrick Davis, dated December 16, 2011	**X**	**X**	**X**		
5	CalCERTS Quality Assurance Program, dated August 22, 2003		**Withdrawn**			
6	CalCERTS decertification letter to Hoover, dated January 30, 2012	**X**	**X**	**X**		
7	CalCERTS decertification letter to Davis, dated January 30, 2012	**X**	**X**	**X**		
8	CalCERTS QA Summary Report, Erik Hoover, undated	**X**	**X**	**X**		
9	CalCERTS QA Summary Report, Patrick Davis, undated	**X**	**X**	**X**		
10	CalCERTS QA Action Report, Erik Hoover, dated January 17, 2012	**X**	**X**	**X**		
11	CalCERTS QA Action Report, Patrick Davis, dated January 17, 2012	**X**	**X**	**X**		
12	CalCERTS e-mail to Erik Hoover, dated January 3, 2012	**X**	**X**	**X**		
13	CalCERTS e-mail to Hoover, dated January 18, 2012	**X**	**X**	**X**		
14	Haddock letter requesting documents and information, dated April 4, 2012	**X**	**X**	**X**		
15	Gatlin letter responding to requests for documents and information, dated April 23, 2012	**X**	**X**	**X**		
16	Hoover certification card, dated October 1, 2011	**X**	**X**	**X**		
17	Davis certification card, dated October 1, 2011	**X**	**X**	**X**		
18	Disciplinary actions taken against HERS raters and prospective HERS raters by HERS providers, dated December 19, 2011	**X**	**X**	**X**		
19	CalCERTS certified rater agreement for Erik Hoover, dated December 12, 2009	**X**	**X**	**X**		

20	CalCERTS certified rater agreement for Patrick Davis, dated December 12, 2009	**X**	**X**	**X**		
21	Evaluation of CalCERTS Quality Assurance for Valley Duct Testing Raters by John Flores, dated May 1, 2012		**Withdrawn**			
22	E-mail from Roger Fuller, dated April 6, 2012		**Withdrawn**			
23	E-mail from Tav Commins, dated December 19, 2011		**Withdrawn**			
24	CalCERTS Declaration of Bachand, dated March 26, 2012	**X**	**X**	**X**		
Respondent's Exhibits						
200	Davis CalCERTS Certified Rater Agreement (12/12/09) & Acknowledgement of Rater Certification Status (12/12/09)	**X**	**X**	**X**		
201	Davis CalCERTS Subscription Agreement (12/12/09)	**X**	**X**	**X**		
202	Hoover CalCERTS Certified Rater Agreement (12/12/09) & Acknowledgement of Rater Certification Status (12/12/09)	**X**	**X**	**X**		
203	Hoover CalCERTS Subscription Agreement (12/12/09)	**X**	**X**	**X**		
204	Disciplinary Actions taken against HERS Raters and prospective HERS Raters by HERS Providers http://www.energy.ca.gov/HERS/documents/disciplinary_actions.pdf	**X**	**X**	**X**		
205	January 11, 2012, Letter from Mr. Dennis Beck, Senior Staff Counsel California Energy Commission	**X**	**X**	**X**		
206	Declaration of Charlie Bachand (March 26, 2012) (*Exhibits Omitted*)	**X**	**X**	**X**		
207	Davis – Notice Letter (12/16/2011)	**X**	**X**	**X**		
208	Davis – Letter Discussing Valley Duct Testing's Confidentiality Agreement dated January 2, 2012	**X**	**X**	**X**		
209	Davis – Quality Assurance Summary Report	**X**	**X**	**X**		
210	Davis – Quality Assurance Action Report	**X**	**X**	**X**		
211	Email to Davis dated January 17, 2012	**X**	**X**	**X**		
212	Davis Decertification Letter (1/30/2012)	**X**	**X**	**X**		
213	Davis – Quality Assurance Disposition	**X**	**X**	**X**		
214	Hoover – Notice Letter (12/16/2011)	**X**	**X**	**X**		
215	Hoover – Quality Assurance Summary Report	**X**	**X**	**X**		
216	Hoover – Quality Assurance Action Report	**X**	**X**	**X**		
217	Email to Hoover dated January 18, 2012	**X**	**X**	**X**		
218	Hoover Decertification Letter (1/30/2012)	**X**	**X**	**X**		
219	Hoover – Quality Assurance Disposition	**X**	**X**	**X**		
220	Email from D. Haddock dated January 20, 2012	**X**	**X**	**X**		
221	Letter from D. Haddock dated January 2, 2012	**X**	**X**	**X**		
222	Email from D. Haddock dated February 6, 2012	**X**	**X**	**X**		
223	CalCERTS Letter to D. Haddock dated February 8, 2012 (*Attachments excluded.)*	**X**	**X**	**X**		

224	CalCERTS Letter to D. Haddock dated February 9, 2012	**X**	**X**	**X**		
225	Letter from D. Haddock dated February 15, 2012	**X**	**X**	**X**		
226	Email from D. Haddock dated February 28, 2012	**X**	**X**	**X**		
227	CalCERTS Letter to D. Haddock dated March 6, 2012 (*Attachments omitted.)*	**X**	**X**	**X**		
228	Letter from D. Haddock dated April 4, 2012	**X**	**X**	**X**		
229	Email from D. Haddock dated April 12, 2012	**X**	**X**	**X**		
230	CalCERTS letter to D. Haddock dated April 23, 2012	**X**	**X**	**X**		
231	Testing Results for 1135 Popular Street (Davis) - QA Report – System 1 - Davis – CF-4R-MECH-21 - O'Neil – CF-4R-MECH-21 - Davis – CF-4R-MECH-25 - O'Neil – CF-4R-MECH-25 - Photos - O'Neil – Field Notes - QA Report – System 2 - Davis – CF-4R-MECH-21 - O'Neil – CF-4R-MECH-21 - Photos	**X**	**X**	**X**		
232	Testing Results for 346 Malbec Court (Davis) - QA Report - Davis – CF-4R-MECH-21 - O'Neil – CF-4R-MECH-21 - Davis – CF-4R-MECH-25 - O'Neil – CF-4R-MECH-25 - Photos - O'Neil – Field Notes - Photo of CF-1R	**X**	**X**	**X**		
233	Testing Results for 519 Merlot Lane (Davis) - QA Report - Davis – CF-4R-MECH-21 - O'Neil – CF-4R-MECH-21 - Davis – CF-4R-MECH-25 - O'Neil – CF-4R-MECH-25 - Photos - O'Neil – Field Notes	**X**	**X**	**X**		
234	Testing Results for 7755 Capella Drive (Davis) - QA Report - Davis – CF-4R-MECH-21 - O'Neil – CF-4R-MECH-21 - Photos - O'Neil – Field Notes	**X**	**X**	**X**		

235	Testing Results for 3994 Borderlands Drive (Davis) - QA Reports - Davis – CF-4R-MECH-23 - O'Neil – CF-4R-MECH-23 - Installer - CF-6R-ENV-21-HERS - Davis – CF-6R-ENV-21-HERS - Davis – CF-4R-ENV-22 - O'Neil – CF-4R-ENV-22 - Davis – CF-4R-MECH-20 - O'Neil – CF-4R-MECH-20 - Photos - O'Neil – Field Notes	**X**	**X**	**X**		
236	Testing Results for 303 Russi Court (Davis) - QA Report - Davis – CF-4R-MECH-21 - O'Neil – CF-4R-MECH-21 - Davis – CF-4R-MECH-25 - O'Neil – Field Notes	**X**	**X**	**X**		
237	Testing Results for 9531 Richdale Way (Hoover) - QA Report – System 1 - Hoover – CF-4R-MECH-20 - O'Neil – CF-4R-MECH-20 - Hoover – CF-4R-ENV-22 - O'Neil – CF-4R-ENV-22 - Hoover – CF-4R-MECH-25 - O'Neil - CF-4R-MECH-25 - Photos System 1 - QA Report – System 2 - Hoover – CF-4R-MECH-20 - O'Neil – CF-4R-MECH-20 - Hoover – CF-4R-ENV-22 - O'Neil – CF-4R-ENV-22 - Hoover – CF-4R-MECH-25 - O'Neil - CF-4R-MECH-25 - Photos System 2 - O'Neil – Field Notes	**X**	**X**	**X**		
238	Testing Results for 334 Malbec Court (Hoover) - QA Report - Hoover - CF-4R-MECH-21 - O'Neil – CF-4R-MECH-21 - Davis – CF-4R-MECH-25 - O'Neil – CF-4R-MECH-25 - O'Neil – Field Notes - Photos	**X**	**X**	**X**		
239	Testing Results for 15987 Crescent Park (Hoover) - QA Results - Hoover – CF-4R-ENV-20 - O'Neil – CF-4R-ENV-20 - Hoover – CF-4R-ENV-22	**X**	**X**	**X**		

	- O'Neil - CF-4R-ENV-22 - Hoover- CF-4R-MECH-20 - O'Neil - CF-4R-MECH-20 - Hoover- CF-4R-MECH-23 - O'Neil - CF-4R-MECH-23 - O'Neil – Field Notes - Photos					
240	Testing Results for 800 Ferry Launch Ave (Hoover) - QA Report - Hoover – CF-4R-ENV-20 - O'Neil – CF-4R-ENV-20 - Hoover – CF-4R-ENV-22 - O'Neil - CF-4R-ENV-22 - Hoover- CF-4R-MECH-20 - O'Neil - CF-4R-MECH-20 - Hoover- CF-4R-MECH-23 - O'Neil - CF-4R-MECH-23 - O'Neil Field Notes - Photos	**X**	**X**	**X**		
241	Building Permits for Homes Tested in Vintage Plaza, Stockton California	**X**	**X**	**X**		
242	California Tax Credit Allocation Committee Project Staff Report for Vintage Plaza http://www.treasurer.ca.gov/ctcac/staff/20091216/602.pdf	**X**	**X**	**X**		
243	Community Description for Vintage Plaza; Visionary Home Builders http://www.visionaryhomebuilders.org/vintage-plaza/	**X**	**X**	**X**		
244	Complaint and Request for Investigation of Valley Duct Testing Dkt. No. 12-CAI-02	**X**	**X**	**X**		
245	Declaration of William Barrett Dkt. No. 12-CAI-02	**X**	**X**	**X**		
246	Residential Compliance Manual For California's 2008 Energy Efficiency Standards CEC-400-2008-016-CMF-Rev1 http://www.energy.ca.gov/2008publications/CEC-400-2008-016/CEC-400-2008-016-CMF-REV1.PDF	**X**	**X**	**X**		
247	Residential Appendix for the 2008 Energy Efficiency Standards CEC-400-2008-004-CMF http://www.energy.ca.gov/2008publications/CEC-400-2008-004/CEC-400-2008-004-CMF.PDF	**X**	**X**	**X**		
248	HERS Home Energy Rating System Regulations CEC-400-2008-011-CFM http://www.energy.ca.gov/2008publications/CEC-400-2008-011/CEC-400-2008-011-CMF.PDF	**X**	**X**	**X**		
249	Email from John Flores regarding Davis and Hoover complaint dated April 11, 2012	**X**	**X**	**X**		
250	Email from John Flores to Mark Wiese dated October 14, 2010	**X**	**X**	**X**		

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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IN THE MATTER OF
COMPLAINT AGAINST AND REQUEST FOR INVESTIGATION OF CALCERTS, INC.

Docket No. 12-CAI-01
(*Revised* 6/21/12)

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DECLARATION OF SERVICE

I, RoseMary Avalos, declare that on June 22, 2012, I served and filed copies of the attached [PROPOSED] DECISION DISMISSING WITH PREJUDICE THE PENDING COMPLAINT AND INVESTIGATION PROCEEDINGS AGAINST CalCERTS, INC., dated June 22, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at:

http://www.energy.ca.gov/HERS/12-cai-01/index.html.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(*Check all that Apply*)

For service to all other parties:

_X_ Served electronically to all e-mail addresses on the Proof of Service list;

_X_ Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses NOT marked "e-mail preferred."

AND

For filing with the Docket Unit at the Energy Commission:

_X_ by sending an electronic copy to the e-mail address below (preferred method); *OR*

___ by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

CALIFORNIA ENERGY COMMISSION – DOCKET UNIT
Attn: Docket No. 12-CAI-01
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.ca.gov

OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

___ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission
Michael J. Levy, Chief Counsel
1516 Ninth Street MS-14
Sacramento, CA 95814
michael.levy@energy.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Original Signed By:
RoseMary Avalos
Hearing Advisers Office

*indicates change