



2024 INTERNATIONAL ENERGY CONSERVATION CODE (IECC) COMMERCIAL & RESIDENTIAL COMMITTEE FINAL BALLOTS – APPEALS

Staff Analysis Memo to ICC Appeals Board Appeals Related to Consensus Building Forum Issues

February 2024

Three entities – the American Gas Association (AGA), the American Public Gas Association (APGA), and the Region VI Chapter of ICC (Region VI) – have appealed certain final actions taken by the 2024 International Energy Conservation Code (IECC) Commercial and Residential Committees. These appeals allege that the Consensus Building Forum through which certain members of the committees reached compromises violated the due process safeguards, including due to a lack of openness and transparency. More details regarding the allegations in the appeals, as well as ICC staff’s response, are set forth below.

RELEVANT POLICIES

I. Council Policies

For purposes of the appeals at issue, two sections of CP-01 are of particular relevance:

- Section 6.3.7 provides: Review by the Appeals Board shall be limited to matters of process and procedure. The Board of Appeals shall not render decisions on the relative merits of technical matters.
- Section 6.3.8 provides: In order to sustain the appeal, or any part thereof, the Appeals Board must find that there was a material and significant irregularity of process or procedure.

II. IECC Committee Procedures

The IECC Committee Procedures set forth the procedures for the development of the 2024 IECC, Chapter 11 of the International Residential Code (IRC), and future editions. For purposes of the appeals at issue, the following sections of the IECC Committee Procedures are particularly relevant:

Development Process

The process shall be an open, transparent and deliberative process in accordance with Section 8 of the ICC Consensus Procedures.

- All meetings of the Committee and Subgroups shall be open with adequate notice provided.

- Meetings of the Committee shall be conducted in accordance with Section 7 of the ICC Consensus Procedures. To the extent practical, the meeting agenda shall identify the public comments to be considered at the meeting.
- All documents shall be posted on a dedicated website to be used exclusively for the update of the IECC and Chapter 11 of the IRC.

Resulting Code Technical Requirements

It is imperative that the resulting technical requirements consider the following:

- Be consistent with the Intent statement in both codes (including the requirements for zero energy building pathways).
- Include an assessment of cost effectiveness in accordance with the Intent statement in both codes. Such an analysis shall consider any changes to the code as they impact the building owner, occupants and the energy system as a whole.
- Be coordinated with the provisions of the family of I-Codes, where applicable.
- Result in comprehensive energy provisions which will facilitate code use and adoption.
- Provide for the provisions of ANSI/ASHRAE/90.1 as an alternative to the IECC - Commercial Provisions.

The final decision on code content rests with the members of the Committee with voting in accordance with Section 9.0 of the ICC Consensus Procedures.

III. ICC Consensus Procedures

For purposes of the appeals at issue, the following sections of the ICC Consensus Procedures are particularly relevant:

6. Subgroups Created by the Committee

When one or more subgroups (subcommittees, working groups, technical subcommittees, project teams, writing groups, etc.) are formed to expedite the work of the committee, their formation (and later disbandment) requires approval by a majority vote of the committee and appropriate public notice. The scope and duties delegated to the subgroup shall be approved at the time it is formed, and subsequent changes in scope or duties shall also require approval. The charge to the subgroup shall clearly state whether:

- a) The subgroup is responsible for the definitive content of one or more standards and for responding to views and objections thereon. Such subgroups shall comply with these procedures.
- b) The subgroup is responsible for assisting the committee (e.g. draft all or a portion of a standard, drafting responses to comments, draft positions on international standards, or other purely advisory functions).

6.1 Approval of Standards. Draft standards and any substantive change in the content of a standard proposed by a subgroup shall be referred to the committee for approval.

6.2 Subgroup Identification. A subgroup roster that includes the subgroup title and scope, and identifies the Chair and other members by name, representation and affiliation shall be made publicly available.

7. Meetings

Committee meetings shall be held to conduct business, such as making assignments, receiving reports of work, considering draft standards, resolving differences among subgroups, and considering views and objections from any source.

7.1 Open Meetings. Meetings of the committee shall be open to all members and others having a direct and material interest. At least four weeks' notice of scheduled in-person meetings shall be given by the ICC Secretariat in ANSI's Standards Action; or in other media designed to reach directly and materially affected interests; or in both. This notice can be reduced to 2 weeks' notice for virtual committee meetings. The notice shall describe the purpose of the meeting and shall identify a readily available source for further information. An agenda shall be available and shall be distributed in advance of the meeting to members and to others expressing interest. The ICC Secretariat may optionally maintain a permanent mailing list of other interests.

IV. Leading the Way Framework

"The IECC is central to the Code Council's objective. It establishes a minimum set of requirements and serves as the basis for the formulation of additional tools that meet the policy needs of all levels of governments and the private sector entities that have set energy, GHG emissions and cost saving targets. To meet this objective, the development process for the IECC will use the Code Council's standards development procedures in order to allow for more in-depth scientific and economic deliberations, quicker progress to meeting public and private sector goals, and the development of a broader consensus that will support wider application and adoption."

THE APPEALS

I. AGA Appeal

AGA claims that ICC's February 15, 2022 Memorandum violated due process because it provided guidance midway through the code development process. Further discussion of this assertion is covered in the Staff Analysis on Scope and Intent.

AGA further claims that the substance of the memorandum "facilitated extra-procedural conduct in direct conflict with the ICC's procedural safeguards" by encouraging the creation of the Consensus Building Forum. Rather than using ICC's code development process, the Consensus Building Forum operated as a "shadow committee" in a manner that lacked openness, transparency, balance of interests, and due process. AGA claims that the Consensus Building Forum negotiated an "omnibus" set of proposals, which were submitted to the committee as a whole, which "thwarted individual submission of proposals that would be subject to review and comment through ICC processes and procedures." Prior commenters on the constituent parts of the omnibus were not given the opportunity to submit comments on the omnibus. Submission of the omnibus as a whole to the IECC "was used as a false basis to claim all comments on the constituent parts of the omnibus were addressed," which resulted in the rejection of proposals without a proper technical rationale.

II. APGA Appeal

APGA asserts that a group of IECC consensus committee members scheduled non-ICC affiliated meetings to discuss proposals that APGA claims would likely have failed balloting individually. They developed a set

of unrelated proposals that was then put to ballot as one proposal and referred to as “the omnibus.”

APGA argues that ICC’s code development process “has always required a provision to stand on its own and be debated in a public forum at a time and location that was appropriately noticed before the meeting.” It notes that the creation of subgroups by a consensus committee is permitted under Section 6 of the Consensus Procedures, but “requires approval by a majority vote of the committee and appropriate public notice.” APGA contends that the subgroup that developed the omnibus proposal did not follow the transparent approved process needed for creation. Many stakeholders, including APGA, were not made aware of the meetings. ICC staff acknowledged these meetings, but stated they did not require public notice because they were not ICC-sanctioned.

III. Region VI

Region VI likewise asserts that code changes and agreements were made outside of public view and at meetings that were not publicized. Region VI argues that the Consensus Building Forum meetings constituted “meetings” as defined by the ICC Consensus Procedures. The meetings included more than half of the consensus committee and participants discussed committee business and made agreements. Section 7 of the ICC Consensus Procedures require meetings to be open to all members and have a minimum of two weeks’ notice. Region VI claims that the Consensus Building Forums were not open to all committee members and members were not all notified of the meetings. One committee member, Eric Tate, expressed his concern and frustration about this issue during the 2/17/23 Electrification sub-committee meeting at approximately 2 hours and 1 min into the meeting.

Additionally, Region VI contends that each submission to the committee should be reviewed publicly on its own merit by all stakeholders, which was not the case here.

ICC STAFF RESPONSE

The substance of the February 2022 staff memo was not problematic because it interpreted the intent statement of the code, rather than changing the intent statement. Similarly, the timing of the staff memo was not problematic because it was issued sufficiently early in the development process. Code change proposals for this code were due October 2021. Committees started looking at the proposals in December and January 2022. Subcommittees reviewed the proposals and submitted recommendations to the consensus committees. A majority vote of the consensus committee was required for approval. Each of the proposals that was made passed through this process individually before moving to balloting of the Committee Action Report. Consensus Committees had not taken any votes on Electric Vehicles, Electric Readiness and Demand Response prior to the staff memo in February 2022.

The Consensus Building Forum was formed after a number of proposed code changes received significant numbers of negative comments in the Residential Consensus Committee’s first committee ballot. After the first committee ballot, a Residential Consensus Committee member, Gayathri Vijayakumar, on her own initiative, reached out to all committee members to see if there was an interest in reaching a compromise position on some of the issues on the ballot. A series of meetings ensued – which they called a Consensus Building Forum. These were explicitly not committee meetings. Staff and committee leadership were aware of these meetings because they were included on the emails, but they did not participate in the meetings and the meetings were conducted on non-ICC meeting platforms. The entire committee was informed of the activities of this Forum.

The participants in the Consensus Building Forum ultimately decided to move forward with a plan relating to twelve of the sixteen proposals that had received one-third or more negative votes in the ballot. Consensus Building Forum participants submitted their proposal for resolution of continued negative ballots on the

second recirculation ballot (ballot #3). Essentially, this proposal combined twelve of the outstanding proposals at issue within one large proposal (REPI-33-21) and recommended that the other eleven items receive negative votes. All committee members were able to see the specific language of the proposal through the ballot report and in the agenda for the September 26-27, 2022 consensus committee meeting, which was circulated two weeks in advance. All committee members were also able to see all comments submitted and how other committee members were voting. At the meeting to discuss negatives, there was open discussion of all the comments, including those associated with REPI-33-21. This proposal was ultimately approved by the committee on a vote of 38-9.

No policy prohibits committee members from meeting or discussing the issues raised in committees or from trying to reach compromise positions outside of formal committee meetings. Indeed, one factor leading to the change in development process for the IECC to a standards development process was to support increased consensus. Further, the primary rationale for holding committee meetings to discuss negatives is to encourage compromises.¹

Under the consensus process, committee members are permitted to develop change proposals outside of the formal request for code change proposals. It is not uncommon for committee members to agree on language outside of a meeting. In practice, committee members often avoid drafting language during a meeting and prefer to develop and refine language in smaller, informal groups outside of committee meetings. Similar activities happen during the governmental consensus process where people go to back of the room to hash out language.

Similarly, no policy prohibits the combination of several proposals into one larger proposal. As mentioned, one major reason for moving these codes to a standards development process was to increase opportunities for building consensus. ICC has previously emphasized while the code development process handled change proposals individually, the standards development process “[a]llows committees to work holistically across the code’s provisions to identify strategies to ease compliance and cost savings while maintaining or increasing energy efficiency.”² Likewise, reaching a compromise with respect to multiple proposals is consistent with the goal of creating “comprehensive energy provisions,” as expressed in the IECC Committee Procedures.

¹ Notably, appellants are not arguing that all of the provisions that passed through REPI-33-21 should be removed from the code. Instead, they have requested the removal of only a subset of the provisions from the code. Appellants received some important concessions in the compromise that should not be ignored.

² See https://www.iccsafe.org/wp-content/uploads/ICC_Advancing_Energy_Efficiency.pdf.