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May 8, 2020

Mr. Dominic Sims
CEO
International Code Council
500 New Jersey Avenue, NW
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Washington, DC 20001

**VIA EMAIL**: dsims@iccsafe.org
mpfeiffer@iccsafe.org

**RE: AHRI Appeal of the 2019 Proposed Change to the International Energy Conservation Code – RE 126-19**

Dear Mr. Sims,

The Air Conditioning, Heating, and Refrigeration Institute (AHRI) respectfully submits the following appeal to the International Code Council Appeals Board in response to the 2019 Proposed Change to the 2018 Edition of the International Energy Conservation Code (IECC), RE 126-19.

AHRI is the trade association representing manufacturers of heating, cooling, water heating, and commercial refrigeration equipment. More than 320 members strong, AHRI develops standards for and certifies the performance of many of the products manufactured by our members. In particular, AHRI members manufacture almost all water heaters sold in the United States, including gas-fired storage, electric storage, heat pump, tankless, grid-enabled, and solar water heaters. AHRI members' products are installed in all 50-states and U.S. territories.

I am writing today to ensure you are aware that several of the proposed amendments in RE-126 violate federal law. On those grounds, and also because of the improper tabulation of voting for RE 126-19, AHRI is formally requesting that the ICC disapprove the amendments set forth in proposal RE-126 and to exclude its amendments from the 2021 Edition of the International Energy Conservation Code.

The Energy Policy and Conservation Act (EPCA), as amended by the National Appliance Energy Conservation Act of 1987 (NAECA),[1] contains strict preemption provisions that prohibit states and localities from adopting energy regulations that conflict with Department of Energy

[1] Hereafter "EPCA." The Energy Policy and Conservation Act was the original statutory framework for the Department of Energy's appliance regulatory program. It was amended in 1987 by NAECA to include strong preemption and prohibition of state and local regulation. Many in the industry refer to both EPCA and NAECA interchangeably. In this appeal, for consistency, AHRI will use the terms "EPCA" to refer to the governing law codified at 42 U.S.C. 6291 *et seq.* that term is inclusive of the amendments in NAECA. When referring to the specific amendments codified at 42. U.S.C. 6297, AHRI will use the term "NAECA."

requirements. Each of the following proposals in RE-126 separately and independently violates EPCA's preemption provisions:

1. Minimum efficiency requirements for gas water heaters in excess of the federal standard;

2. Design requirements for electric water heaters that surpass the federal requirements, including: heat pump technology requirements, renewable energy-use requirements, and separately, "grid-enabled" technology requirements;

3. A definition of "grid-enabled" water heater that conflicts with Department of Energy regulations and with the American Energy Manufacturing Technical Corrections Act (AEMTCA);

4. Efficiency regulations and definitions for solar water heaters, inconsistent with DOE's proposed rulemaking.

If adopted by state or local jurisdictions, the above provisions would be facially preempted, would violate federal law, and would subject the enacting jurisdiction to litigation.

A memorandum outlining the applicable federal law is attached as Exhibit 1. The national framework of appliance regulations created by federal preemption is not just legally required; it is important and essential public policy. Due to the vital role of preemption, and, in the interest of full disclosure, AHRI intends to pursue every possible avenue of appeal to ensure the full force and effect of federal preemption is upheld.

## I. Procedural Background

This letter is far from the first notice to ICC that the provisions about which we write run afoul of federal law. Indeed, the IECC Technical Committee twice rejected the provisions about which AHRI now appeals, at least once explicitly on the basis that the provisions were inconsistent with other legal requirements. Additional detail on the procedural history of these provisions is below.

In 2019, the Natural Resources Defense Council submitted a proposal, RE-126, to revise the International Energy Conservation Code. Last spring, April-May 2019, the ICC held full Committee Action Hearing in Albuquerque, New Mexico, where the IECC Technical Committee considered the revisions proposed in RE-126. That Committee unanimously rejected the revisions in RE-126 by a vote of 11-0, citing concerns about federal preemption. In July 2019, the NRDC re-submitted the proposals, with minor structural adjustments. (Exhibit 2). The IECC again considered the proposal at the 2019 Group B Public Comment Hearings in Las Vegas in October, 2019. At those hearing, the IECC Technical Committee discussed the revisions, had an opportunity to ask questions and evaluate the record, and again, the Technical Committee experts voted to disapproved of the proposal.

Pursuant to ICC procedure, in November and December 2019, the rejected proposal was put forth for an online vote of government employees (OGCV), along with dozens of other complex revisions to various chapters and aspects of the IECC. These nameless voters, who bear no accountability to the ICC, and who bear no accountability to the state and local governments who face litigation if this revision is adopted, voted, by a slim margin, to overturn two unanimous disapprovals of the Technical Committee.

On April 8, 2020, the Final Action Results of the OGCV on the modified proposal RE 126-19 was posted on the ICC website. AHRI now timely submits this appeal pursuant to Section 12 of the ICC Code Development Policy.

## II. The Appeals Board Must Disapprove the Amendments to the 2018 IECC proposed by RE-126 on the Ground of Federal Preemption

As noted above, a summary of the federal preemption provisions of EPCA are enclosed with this letter as Exhibit 1. A detailed explanation of how those provisions apply to each of the five preempted sections is set forth below.

### A. Federal Preemption is Essential and Sound Public Policy

Appliance efficiency standards have made a dramatic impact on efficiency improvements since 1978 when Congress passed the Energy Policy and Conservation Act. However, strong preemption language was not adopted until NAECA passed in 1987, after more than a decade of market disruption. Appliance manufacturers are the engine of energy efficiency, and if their resources are burdened by a patchwork of multiple competing regulations, then innovation, technological advancement, and consumers are harmed. AHRI cannot advocate for the importance of strong preemption provisions more eloquently than the statesmen who passed the National Appliance Energy Conservation Act did in 1987.

The day the House voted to pass NAECA, Democratic Congressman Phil Sharp of Indiana had this to say about the bill, "The central tenet of this legislation is conceptually simple: the more efficient the appliance, the less energy is consumed…. The glue that binds the appliance standards bill is a tradeoff between strong Federal standards and a strong preemption of state regulation. That tradeoff has engendered an extraordinary coalition of appliance manufacturers, who need the uniformity and predictability of a national standard for their long-range planning, and environmental and consumer groups, who support the positive effects of nationwide appliance regulation…. The collaborative efforts of this broad coalition stand as a model of consensus legislation, and I hope we can build on this foundation in the 100$^{th}$ Congress and beyond."

Sharp's Republican colleague Carlos Moorhead of California noted that "the National Appliance Energy Conservation Act resolves a 12-year debate among appliance manufacturers, environmentalists, conservationists, the Department of Energy, and the states over the role of appliance energy efficiency standards." He noted that the strong preemptions provisions of the 1987 Act would resolve "the worst possible situation [ ] evolving in the United States today"—contemporaneous state and federal appliance efficiency requirements. He lauded the bill because it "assures that Federal energy standards will be set at a level reasonable for all parties. It prevents a patchwork of State standards from interrupting interstate commerce and fragmenting the national marketplace. It gives appliance manufacturers sufficient time to redesign, retool, and produce appliances that meet the required standards."

### B. DOE Holds Exclusive Authority to Regulated EPCA-Covered Products

The Department of Energy's (DOE's) purview is both broad and deep. EPCA coverage includes over 20 residential appliances ("covered products"), which expand to hundreds of defined product

classes.[2] DOE has exclusive authority to regulate the energy use and energy efficiency of these specified covered products.

Legally, DOE alone occupies the field of appliance efficiency standards, and the IECC has forged a valuable path for building energy codes. Convention has served both the IECC and DOE well for decades—DOE publishes appliance efficiency standards while the IECC drives safe and efficient design of building envelopes through insulation, windows, and air quality requirements and mitigates the split incentive market barrier between builders and homeowners. This system has worked, not just because the law requires it, but also because the division of labor makes sense. DOE has the resources, the expertise, the experience, and, importantly, the legal sanction, to be the ultimate authority on appliance regulation. RE-126 was not subject to even a modicum of the rigor by which DOE water heater regulations are promulgated, which is evidenced by its technological and economic deficiencies. Appliance standards play an important role in energy savings, and the continued success of the appliance standard program relies on the experts at DOE occupying that role exclusively.

Energy codes also have an important role in driving innovation and energy savings. The IECC has saved U.S. consumers $15.6 billion since 1992 by helping to ensure the construction of efficient and cost-effective homes. Appliance standards themselves, however, are outside of the purview of the IECC. Plain statutory language, Congressional intent, judicial precedent, and decades of successful practice demonstrate that energy codes legally cannot, and furthermore should not, be used as an end-run around the preemption provisions of NAECA. RE-126 must be disapproved as contrary to legal requirements.

### C. RE-126 is an Appliance Standard that Violates Preemption

RE-126 contravenes federal regulation in several different ways. The proposal mandates more stringent technology features than federal regulation; it creates definitions that are contrary to federal law; and it requires consumers and builders to select water heaters that exceed the federal efficiency minimum.

RE-126 applies to residential water heaters which, as an EPCA-covered product, are exclusively regulated by the Department of Energy. States and localities are preempted from issuing regulations "concerning the energy use" or "energy efficiency" of residential water heaters.[3] All of the water heaters impacted by RE-126 fall within the scope and definition of DOE-regulated water heaters, therefore each element of the proposal that deviates from federal law is preempted. As discussed in more detail below, the narrow exception for building codes does not permit backdoor efficiency regulations of covered products, therefore the IECC must disapprove the proposed amendments in RE-126.

#### 1. The IECC Cannot Increase Federal Minimum Efficiencies for Gas-Fired Water Heating Equipment

[2] 42 U.S.C. 6292(a) & (b)
[3] 42 U.S.C. 6297

RE-126 proposes to increase the minimum energy efficiency requirements for gas storage water heaters above those set by the federal government. The table below compares the proposed minimums with the federal minimums published in the Code of Federal Regulations.

**Gas-fired storage water heaters (≥ 20 gal to ≤ 55 gal)**

| 10 CFR 430.32 (d) Water heaters[4] | | | RE 126-19 | |
|---|---|---|---|---|
| **Draw Pattern** | **Uniform Energy Factor** | **Large Tank (32 or 50 Gallon)** | **First Hour Rating a.** | **Minimum UEF** |
| Very Small | .3456 – (0.0020 x Vr) | .2816 | Very Small | 0.24 |
| Low | .5982 – (0.0019 x Vr) | .5032 | Low | 0.50 |
| Medium | .6483 – (0.0017 x Vr) | **.5633** | Medium | 0.64 |
| High | .6920 – (0.0013 x Vr) | **.6270** | High | 0.68 |

*The first hour rating of a water heater is determined by the federal test procedure. It is listed on the Energy Guide label affixed to the water heater.*

In the above table, Vr represents rated volume of the storage water heater. The third column reflects the minimum federal efficiency requirement for common sizes of water heaters—rated at either 32 gallons (for very small draw patterns) and 50 gallons (for low, medium, and high draw patterns). RE-126 proposes minimum efficiencies that are higher than the federal standard for larger-sized water heaters in the 20- to 55-gallon product class with medium- and high- draw patterns. Two of the four UEF requirements in the RE-126 table exceed federal standards and are plainly preempted. It is also inadvisable for the IECC to adopt minimum efficiencies that are lower than the federal minimum. The federal efficiency standard is represented as a function of rated volume, but the efficiency requirements in RE-126 are represented as static—i.e. independent of volume. Therefore, in some cases, the minimums set forth in RE-126 will confuse installers, consumers, and inspectors by suggesting that water heating equipment below the federal minimum is permissible when it is not.

The "renewable" requirements in RE-126 are similarly problematic. It is unclear how onsite renewable energy is defined, but as discussed in more detail below, to the extent that it mandates specific design or energy-use requirements for federally regulated equipment, it is facially preempted.

**2. The IECC Cannot Prescribe Design Requirements for Federally Regulated Electric Water Heating Equipment**

Energy conservation standards take different forms. In most cases, DOE sets minimum performance requirements. In some instances, efficient design elements are mandated by regulation. For water heaters, DOE has published performance minimums in the form of UEF values. The IECC aims to interpose design requirements onto electric water heaters that are already

[4] *Id.*

subject to performance minimums. This wasteful double regulation is expressly preempted by NAECA.

The surplus design requirements proposed by RE-126 are: (1) heat-pump technology requirements and (2) renewable energy requirements; and (3) so-called "grid-enabled" technology requirements.

DOE has set the performance efficiency UEF values for all types of electric storage water heaters, regardless of design or technology, pursuant to the table below:

| | | | |
|---|---|---|---|
| **Electric Storage Water Heaters** | ≥20 gal and ≤55 gal | Very Small | $0.8808 - (0.0008 \times V_r)$ |
| | | Low | $0.9254 - (0.0003 \times V_r)$ |
| | | Medium | $0.9307 - (0.0002 \times V_r)$ |
| | | High | $0.9349 - (0.0001 \times V_r)$ |
| | >55 gal and ≤120 gal | Very Small | $1.9236 - (0.0011 \times V_r)$ |
| | | Low | $2.0440 - (0.0011 \times V_r)$ |
| | | Medium | $2.1171 - (0.0011 \times V_r)$ |
| | | High | $2.2418 - (0.0011 \times V_r)$ |

RE-126 appears to consider DOE-minimum performance requirements as the Christmas tree on which it hangs the heavy ornaments of costly design requirements. RE-126 is structured such that even if an electric storage water heater meets all of the above-listed performance metrics, it cannot be installed in a new home unless it also either uses heat pump technology to heat the water (rather than traditional electric resistance); renewable energy to heat the water (impermissibly excluding gas fired equipment), or it possesses additional communicating capabilities that would, theoretically, operate with the electric utility in a demand-response program. All of these characteristics are excellent design features for the right consumer—but they are neither necessary nor feasible for all homes, and—most important—they are not required by federal law. DOE made the deliberate decision not to mandate heat pump, renewable or connected-equipment design features for baseline, minimally compliant electric water heaters. In fact, prescribing the design features in the IECC would eliminate the vast majority of electric storage water heaters on the market today (and potentially all gas-fired water heaters). A key feature of DOE rulemaking is extensive economic analysis on cost increases triggered by that kind of market disruption. The ICC and the proponents of RE-126 have not even scratched the surface of such important economic considerations.

If there is any doubt that design features were contemplated by NAECA's preemption provision, they are resolved by EPCA. The legal definition of an "energy conservation standard" in 42 U.S.C. 6291 is: "(A) a performance standard which prescribes a minimum level of energy efficiency [and] (B) *a design requirement*." It follows that if states cannot set energy efficiency performance requirements, then efficient design requirements and technology mandates are also categorically preempted. And for good reason. The elimination of a substantial segment of the electric storage water heater market should be studied by experts at DOE with the appropriate resources to evaluate consumer impacts and cost effectiveness rather than unsystematically being included in building codes that are not subject to equivalent rigor.

### 3. The IECC Cannot Define "Grid-Enabled" Water Heaters Differently from Congress

RE-126 also creates two new definitions— "grid-enabled" and "solar fraction"—both of which are problematic. This section will address the objectionable "grid-enabled" definition. Simply put, the IECC cannot define "grid-enabled water heaters" because Congress already has. The statutory definition is significantly different than the definition in RE-126, further exposing the proponents' inadequate research into existing federal requirements before submitting the proposed language.

RE-126 defines "grid-enabled" water heaters as **"**An electric water heater that includes controls that enable activation for use as part of an electric thermal storage or demand response program." Not only is this definition unclear and unhelpful—but it is irrelevant because Congress has already spoken on this issue.

The AEMTCA[5] amended EPCA and set the definition for "grid-enabled" water heaters in 2012:

> (6) Additional standards for grid-enabled water heaters
>
> (A) Definitions
>
> In this paragraph:
>
> (i) Activation lock
>
> The term "activation lock" means a control mechanism (either a physical device directly on the water heater or a control system integrated into the water heater) that is locked by default and contains a physical, software, or digital communication that must be activated with an activation key to enable the product to operate at its designed specifications and capabilities and without which activation the product will provide not greater than 50 percent of the rated first hour delivery of hot water certified by the manufacturer.
>
> (ii) Grid-enabled water heater
>
> The term "grid-enabled water heater" means an electric resistance water heater that--
>
> (I) has a rated storage tank volume of more than 75 gallons;
>
> (II) is manufactured on or after April 16, 2015;
>
> (III) has--
>
> (aa) an energy factor of not less than 1.061 minus the product obtained by multiplying--
>
> (AA) the rated storage volume of the tank, expressed in gallons; and
>
> (BB) 0.00168; or
>
> (bb) an equivalent alternative standard prescribed by the Secretary and developed pursuant to paragraph (5)(E);
>
> (IV) is equipped at the point of manufacture with an activation lock; and
>
> (V) bears a permanent label applied by the manufacturer that--
>
> (aa) is made of material not adversely affected by water;
>
> (bb) is attached by means of non-water-soluble adhesive; and

[5] 42 U.S.C. 6295(e)

(cc) advises purchasers and end-users of the intended and appropriate use of the product with the following notice printed in 16.5 point Arial Narrow Bold font:

IMPORTANT INFORMATION: This water heater is intended only for use as part of an electric thermal storage or demand response program. It will not provide adequate hot water unless enrolled in such a program and activated by your utility company or another program operator. Confirm the availability of a program in your local area before purchasing or installing this product.

The IECC cannot adopt a different, separate definition of "grid-enabled water heaters" from the federal definition not only because it is preempted,[6] but also because it is confusing. First "grid-enabled water heaters" are primarily commercial products; therefore, most "grid-enabled" products are not eligible for the kinds of residential installations contemplated by RE-126. Secondly, federally regulated "grid-enabled" products are labeled as such, confusing inspectors who would be tasked with differentiating between a federally regulated "grid-enabled" water heater and an IECC-mandated "grid-enabled" water heater—one of which is a is a narrowly tailored commercial product with a specific form of grid-activated technology that requires the intervention of a utility program to unlock and activate, and the other is a traditional 40-gallon electric resistance or heat pump water heater with any type of connected demand response technology. Experience dictates that builders, contractors, distributors, and manufacturers will all waste hours explaining to building inspectors why a given product is or is not the correct type of "grid-enabled water heater." Jobs will be delayed, and more waste will accrue as the result of inconsistent, poorly executed double regulation. This kind of market confusion is another important factor undergirding the value of a national regulatory regime rather than a patchwork of local ones.

The careless drafting of RE-126, which misappropriates a federally defined statutory term and ignores relevant references to existing consensus standards, should be grounds enough to overturn this proposal. And even if it were not, federal preemption precludes the IECC from creating novel definitions for statutorily defined terms. The definition of "grid-enabled water heaters" should be rescinded and disapproved on grounds of federal preemption.

### 4. Solar Water Heating Equipment is an EPCA-Covered Product

The preemption provisions of NAECA apply to all efficiency regulations on covered products, even if DOE has not yet adopted a standard for such products.[7] Solar water heaters are a covered product within the purview of DOE. A 2015 Federal Register notice proposed amended definitions for the terms "solar-assisted fossil fuel storage water heater" and "solar-assisted electric storage water heater" that are inconsistent with the proposal for "solar fraction" in RE-126. 80 Fed. Reg. 18790 (April 8, 2015). On its face, state and local governments may not set standards for solar water heaters.

We acknowledge that, legally, solar water heating equipment is one arena where the IECC holds a unique position and could legally consider setting efficiency standards. However, the structure

[6] A definition for "grid-enabled" equipment in this case is a "regulation concerning energy use" on a covered product. IECC may adopt definitions and regulations that mirror the Federal requirements but not impose additional restrictions.
[7] 42 U.S.C. 6297(b).

of RE-126 is incurably problematic because solar water heating equipment is only one option among many other preempted categories of regulated water heaters. Even if IECC may contemplate stand-alone solar water heater standards, it cannot mandate solar technology in a package of appliance standards that impact federally regulated products.

Importantly DOE has already started a regulation on this matter and manufacturers, energy efficiency advocates, and the government are all engaged in the development of a new standard for solar water heaters. It is inadvisable at this time for the IECC to expend resources on solar water heating equipment that is already an efficient and effective option for conservation minded consumers, particular when DOE will likely issue a rule that will preempt such standards in the near future.

### D. RE 126 Does Not Meet the Exceptions of EPCA's Preemption Provision as Alleged by NRDC.

It is settled law that regulations "concerning energy efficiency or energy use" of water heaters are preempted by NAECA. The proponents of RE-126 point to a narrow preemption exception for some building code provisions. The cited exception contains seven separate threshold elements—each of which must be met for the exception to apply. RE-126 fails to meet these elements. Importantly, the building code exception does not permit the sort of backdoor efficiency regulation of covered products such as would occur with RE-126.

Courts have interpreted NAECA's preemption provision to be expansive, finding that the term "concerning" suggests that Congress intended the provision to have a "broad preemptive purpose."[8] Two cases have affirmed Congress's intent. In *Air Conditioning, Heating & Refrigeration Institute v. City of Albuquerque,* the district court held that an Albuquerque building code requiring new buildings to have more efficient HVAC systems than required by the minimum federal standard was preempted because the code was, in effect, raising the federal minimum standard.[9] Subsequently, in *Building Industry Ass'n of Washington v. Washington State Building Code Council*, the Ninth Circuit agreed with the New Mexico District Court's finding, distinguishing a Washington building code that provided alternatives to higher efficiency standards from the Albuquerque ordinance that created "legal compulsion to use higher efficiency products."[10]

Any legal compulsion to use equipment at an efficiency level higher than the federal minimum is not permitted under NAECA. RE-126 eliminates federally compliant products from the market and requires consumers, builders, and installers to choose among higher efficiency products. NRDC points to one class of products that has survived an efficiency "mark-up" –the "tankless" option. First, federal regulations do not use the term "tankless." Rather, DOE has created two product classes that likely constitute the "tankless" products as referred to in the proposal: instantaneous gas-fired water heating equipment and instantaneous electric water heating

[8] *See* 42 U.S.C. §6297(b); *see also Metro. Life Ins. Co V. Massachusetts*, 471 U.S. 724, 739 (1985); *Nat'l Elec. Mfrs. Ass'n*, 2017 WL 65581234 at *5

[9] 2008 WL 5586316, at *7. When the code was revised to include the strict prescriptive code provision and two performance-based alternatives, the court struck down the prescriptive code provision as an alternative, holding that any other conclusion would "defeat the purpose behind [the] broad preemption provision." *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, 835 F. Supp. 2d 1133, 1137-38 (D. N.M. 2010).

[10] 683 F. 3d 1144, 1151-52 (9th Cir. 2012).

equipment. It is unclear whether "tankless" refers to both or only gas-fired equipment. While instantaneous water heaters are a valuable option for many consumers, they cannot, for a number of reasons, be the only option for builders.

NRDC suggests that because a consumer can select a so-called "tankless" product at the federal minimum level, the IECC can disregard federal preemption for all other water heating equipment product classes. There is neither case law nor statutory language to support this position. The notion that building codes can set aside federal preemption because one of many federally regulated product classes has survived increased efficiency mandates defies the law and undermines DOE product class regulatory structure.

Product classes are not a menu from which builders and consumers select; rather they are a tool to classify products based on technology and application. Generally, one class, one type, and one size of water heater is the best fit for a specific application in a given climate, geographic area, home size, etc. Efficiency is just one of many factors that drive the selection of water heating equipment, and it is the purview of DOE, not the IECC, to set appliance efficiency standards that methodically weigh the efficiency, cost effectiveness, utility, function, and availability of each product class without pitting application-specific technologies against each other. The Department of Energy is exclusively tasked with ensuring that the best equipment for the application is also efficient and cost effective. Building codes that mandate higher efficiency technology for one or any class of covered products undermine these policy goals and defy the law.

A closer look at the language of the building code exception to preemption demonstrates that it is not intended to be a backdoor to efficiency hikes. The statutory language is clear, seven separate requirements must be met for the building code exception to apply. If even one of these requirements is not met, the building code provision is not exempt. One of those factors expressly prohibits efficiency standards greater than the federal minimum:

> **(3)** [A] regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered products is not superseded by this part if the code complies with all of the following requirements:
> **(B)** The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 6295 of this title [unless the Secretary has issued a waiver].

The "covered product" in this case is water heating equipment: gas water heaters are covered equipment, as are electric storage water heaters, grid-enabled water heaters, and solar water heaters. RE-126 requires that each of these covered products have an energy efficiency exceeding the applicable energy conservation standard established by the DOE.

Section 6297 of Title 42 reiterates that any installation requirement that exceeds the federal standards is not applicable without a waiver from DOE:

> **(4)(B)** If a building code requires the installation of covered products with efficiencies exceeding…the applicable Federal standard established in or prescribed under section 6295 of this title [ ] such requirement of the building code shall not be applicable unless the Secretary has granted a waiver for such requirement [ ].

RE-126 is a clear-cut appliance efficiency standard and is preempted by NAECA. If it is adopted into the IECC and incorporated into state or local building codes, then states and localities will undoubtedly be subject to lawsuits challenging such provisions as preempted by NAECA.

### E. The Tabulation and Certification of Votes for RE 126-19 was Undertaken in an Incorrect Manner and in Contravention of ICC Policy

Section 10.1[11] of the CP#28-05 - Code Development Policy states that upon the closing of the online ballot period, the votes will be combined with the vote tally at the Public Comment Hearing to determine the final vote on the code change proposal.

Here, the tabulation of the votes for RE 126 from the Public Committee Hearing and Online Governmental Consensus Ballot were not added correctly. For example, the total votes tabulated for AS (As Submitted) is off by two votes and the votes tabulated for D (Disapprove) is off by also two votes. Thus, the votes were not properly tabulated in accordance with Section 10.1 of the Code Development Process.

## III. Conclusion

The IECC is a leader in driving efficient home design. However, it lacks legal authority to set appliance efficiency standards for federally regulated water heaters. AHRI hereby appeals the vote of the Online Governmental Consensus Vote because it exceeds the authority of the ICC and contravenes federal law. If the IECC publishes the proposed revisions in RE-126 it will be subjecting its constituent state and local governments to litigation. AHRI requests that the Appeals Review Board disapprove the revisions in RE-126. AHRI is willing to engage with all stakeholders on a satisfactory resolution of this issue that is within the parameters of the law.

Respectfully Submitted,

Caroline Davidson-Hood
General Counsel

Enclosures: Exhibit 1 – Legal Memorandum
Exhibit 2 – RE-126
Exhibit 3 – List of Interested Parties

[11] https://www.iccsafe.org/wp-content/uploads/CP28-05.pdf