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Via electronic mail: sbcc@des.wa.gov

Washington State Building Code Council
Attn: Council and *Ex Officio* Council Member
1500 Jefferson St. S.E.
Olympia, WA 98501

September 16, 2021

Dear Councilmembers,

The Washington State Building Codes Council (SBCC) Commercial Energy Code (Code) Technical Advisory Group (TAG), under the chairmanship of Kjell Anderson, has reviewed various commercial code proposed amendments concerning space and water heating requirements during the summer of 2021.[1] The TAG is comprised of members who bring, at best, technical expertise to buildings' use of energy. It is not a body with policy-making experience or expertise in social equity or environmental justice, evaluating regional energy requirements, or performing broad economic analyses. Yet during the TAG proceedings, various proposals have been submitted and approved for further consideration by the SBCC that, if adopted, will have significant and harmful impacts in these areas—precisely because there has not been thoughtful and informed consideration by true source-matter experts. Additionally, the commonality among some proposals, and indeed underlying the Chair's messaging and the resulting actions by the TAG, appears to be a mistaken reliance on statutory authority vested in agencies *other than* the SBCC and an ill-informed yet express intent to ban natural gas.

The TAG's recommendations violate at the very least state law in aiming to deny the residents and business owners of Washington access to natural gas as an energy service. State policy assures residents access to abundant energy services, and the authority to modify that legislatively established policy does not rest with the TAG or the SBCC. The TAG's deliberations have lacked appropriate decorum required for a meaningful and respectful public discussion. No corrective instructions were given to the TAG members to either rein in or redirect the behavior. Additionally, the direction that *was* provided to the TAG and TAG discussions themselves were simply dismissive of decarbonization legislation and progress in newer, high-efficiency end-use gas technology. The TAG simply took it upon themselves to do an end-run around the legislation and the companies – and their ratepayers --that are subject to it.

In addition to the direct and indirect impacts that would undeniably affect residents and businesses, an unintended but significant consequence of these proposed natural gas code-based bans is their chilling effect on an informed, data-driven evaluation of the state's complete energy picture, the

[1] For example, Proposals 21-GP1-103 - HP Space Heating, 21-GP1-136 - HP Service Water Heating and 21-GP1-179 – Electrification readiness.

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ongoing and deliberate efforts to decarbonize the gas system, the current drive to innovate end-use gas equipment and, most importantly, the lasting consequences of the proposed actions. Prohibiting natural gas service hamstrings Washington's ability to attract investments in clean fuels innovation and further limits the cost-effective ways to meet the state's emission reduction goals. Buildings lacking gas connections cannot benefit from technological and other advances in decarbonizing a variety of gases including but certainly not limited to natural gas. We are certain this is not the intent of our Legislature.

For the reasons below, we respectfully but firmly urge that the SBCC probe the behavior, record and recommendations of the TAG and weigh them against commanding constitutional provisions, state legislation and public policy. We believe that the SBCC should not embrace the TAG's dismissive approach to its role in revising the state's commercial energy policy, but instead should give appropriate consideration, with full participation by all relevant stakeholders, to *all* laws and *all* the impacts that amendments to the building code will trigger. The recognized value of this balanced, democratic process *should be* full, knowledgeable discourse among participants that values the voices, perspectives, expertise, and input of parties.

STATE POLICY ASSURES PUBLIC ACCESS TO NATUAL GAS AS AN ENERGY SERVICE

Under Article II of the Washington Constitution, "the legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington. . ."

The Washington Legislature has declared that "it is the policy of the state to:

(1*) Preserve affordable energy services to the residents of the state*;
(2) *Maintain and advance the efficiency and availability of energy services* to the residents of the state of Washington;
(3) Ensure that customers pay only reasonable charges for energy services;
(4) Permit flexible pricing of energy services."[2]

Lawful energy services in Washington include natural gas delivered by regulated utilities. *See*, *e.g.,* RCW 80.28. In other words, preserving access to natural gas as an energy service for the citizens of Washington[3] is the law of the land.

Yet, the TAG Chair seems intent on subverting this right of access, and through his actions and under his chairmanship, the TAG has voted to forward several proposed amendments to

[2] Emphasis added. RCW 19.27.020
[3] Id.

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Washington's commercial code that would in effect ban natural gas.[4] The TAG's actions and these proposals – expressly intended to deny residents' ability to access affordable natural gas – appear to be in clear violation of Washington law.

THE TAG'S ACTIONS, AND ANY SUBSEQUENT SBCC ADOPTION OF THE TAG'S RECOMMENDATIONS, EXCEED THE SBCC'S AUTHORITY AND CONTREVENE STATE LAW

Administrative agencies only possess those powers expressly granted to them by statute or those impliedly authorized by their enabling statutes. *Lenander v. Dep't of Ret. Sys*., 186 Wn.2d 393, 404, 377 P.3d 199 (2016). "Administrative rules or regulations cannot amend or change legislative enactments." *Ass'n of Washington Bus. v. Washington State Dep't of Ecology*, 195 Wn.2d 1, 9, 455 P.3d 1126 (2020), quoting *Dep't of Ecology v. Campbell & Gwinn*, LLC, 146 Wn.2d 1, 19, 43 P.3d 4 (2002) and *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998). "[R]ules that are inconsistent with the statutes they implement are invalid." Id. (quoting *Bostain v. Food Express, Inc*., 159 Wn.2d 700, 715, 153 P.3d 846 (2007)). It is unquestionable that "[a]dministrative [r]ules must be written within the framework and policy of the applicable statutes.'" *Wash. State Hosp. Ass'n v. Dep't of Health,* 183 Wn.2d 590, 595, 353 P.3d 1285 (2015). An agency exceeds its statutory authority if it adopts a rule that is not reasonably consistent with the controlling statutes.

The Legislature knows how to ban the use of a certain energy source. Washington's Clean Energy Transformation Act, RCW 19.405 (CETA) explicitly eliminates coal from the acceptable fuel mix in Washington beginning in 2026.[5] If the Washington Legislature intended to eliminate natural gas from the energy sources that must be preserved to the residents of Washington state, it knows how to do it. It has not done so. Nothing in CETA gives any state agency, board, or commission the authority to undertake rulemaking to ban natural gas from the energy supplies that the citizens of Washington are entitled to, yet that is precisely what the instructions to the TAG seem intent on doing and have misguided the TAG into, in fact, doing so.

The reduction and elimination of greenhouse gases has been addressed by a variety of Washington laws. Most recently, the Climate Commitment Act (SB 5126, 2021) (Cap and Invest) established requirements for the deliberate decarbonization of Washington's energy supply. Cap and Invest applies to <u>both</u> electric <u>and</u> natural gas providers, and the inclusion of natural gas is tacit acknowledgment that natural gas *remains* a lawful and necessary source of energy service in Washington. As with CETA, nothing in Cap and Invest gives any state agency, board, or commission the authority to ban natural gas as an energy service.

No authority exists for the SBCC to ban natural gas through rulemaking of state building codes. The purpose of RCW 19.27, State Building Codes, is not so broad.[6] Notably, TAG proposals 21-GP1-

[4] E.g., 21-GP1-103, 21-GP1-136, 21-GP1-179.
[5] RCW §§ 19.405.010(2).
[6] RCW 19.27.020: **Purposes - Objectives—Standards**.

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103 and 21-GP1-136 *do* provide unwarranted preferential treatment to specific products and rejection of the related minority amendments achieve precisely what RCW 19.27.020(4) prohibits, namely "retard[ing] the use of new materials and methods". Additionally, proposal 21-GP1-179 unnecessarily increases construction costs in residential dwelling units while providing no energy savings. As an advisor to the SBCC, the TAG cannot recommend that the SBCC do what is not lawful or recommend that it attempt to legislate a natural gas ban in excess of their authority.

EQUITY AND AFFORDABILITY

The Gas Utilities representatives on the TAG have made motions asking the TAG to request that the appropriate committees (SBCC and Office of Equity) examine the equity and economics of banning natural gas (assuming that doing so is lawful, which we reject). Those motions were challenged by activists in the TAG meetings and were summarily repudiated by vote. Clearly the TAG is repeatedly acting in derogation of what it *is* charged to do:

> 6. When reviewing proposed amendments to the codes, Technical Advisory Groups **shall identify proposed changes that may have an economic impact** on small businesses, housing affordability, construction costs, life-cycle costs, and the cost of code enforcement and shall **report those findings to the Economic Impact, Enforcement, Correlation and Construction Committee**.[7]

(Emphasis supplied).

In their zeal to achieve decarbonization through a *de facto* natural gas ban via code amendments, the TAG and Chair have candidly expressed their lack of concern about the economic impacts of the various amendments. The proponents of Proposals 21-GP1-103 (the gas space heat ban) and 21-GP1-136 (the gas water heat ban) acknowledged that the construction costs alone from compliance will increase yet made no attempt to analyze the impacts to affordability of housing, small businesses, or the costs of enforcement. There is little if any disagreement that the burden of

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The purpose of this chapter is to promote the health, safety and welfare of the occupants or users of buildings and structures and the general public by the provision of building codes throughout the state. Accordingly, this chapter is designed to effectuate the following purposes, objectives, and standards:
(1) To require minimum performance standards and requirements for construction and construction materials, consistent with accepted standards of engineering, fire and life safety.
(2) To require standards and requirements in terms of performance and nationally accepted standards.
(3) To permit the use of modern technical methods, devices and improvements.
(4) To eliminate restrictive, obsolete, conflicting, duplicating and unnecessary regulations and requirements which **could unnecessarily increase construction costs or retard the use of new materials and methods of installation or provide unwarranted preferential treatment to types or classes of materials or products or methods of construction.**
(5) To provide for standards and specifications for making buildings and facilities accessible to and usable by physically disabled persons.
(6) To consolidate within each authorized enforcement jurisdiction, the administration and enforcement of building codes.

[7] https://sbcc.wa.gov/sites/default/files/2019-12/ga_TAG_purpose-bylaws-jmc%5B2%5D.pdf

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energy costs as a proportion of household income spent on utilities falls more heavily on BIPOC (Black, Indigenous and People of Color) communities. Rising costs exacerbate the proportionately heavier cost burden these communities *already* bear. Indeed, Governor Jay Inslee recently extended the moratorium on utility disconnects and late fees again out of concern that ratepayers are still overburdened as a result of the COVID-19 global pandemic.

Coupled with the unanimous recognition of the major transmission providers and utilities in the Pacific Northwest that the electric industry faces serious resource adequacy threats,[8] the most basic tenets of supply and demand hold that electric costs will rise. This is already happening in Seattle, which just raised its electric rates by an average of 3.5% per year over the next five years, information that was simply met with a verbal shrug.[9] Rather than encourage or even facilitate an honest discourse about the accuracy of data presented in support of certain proposed amendments' costs, the Chair has at times intervened to redirect the conversation away from costs. For example, at the June 4, 2021, at minute 18:43 of the TAG meeting he stated

> "[t]he State mandates on costs say that any new measures, standards or requirements adopted must be technically feasible – that's kind of one of ***our jobs is to make sure it's technically feasible –*** commercially available and developed to yield the lowest overall cost of building owner and occupant while meeting the energy reduction goals. So, there does not need to be – all proposals do not need to be cost-effective ***and the code itself does not need to be cost-effective***. It *can* be, and maybe *will* be, but it doesn't *need* to be per the State mandates. It just needs to be the lowest cost way of getting to the State energy use mandates." [Emphasis supplied]

When information was presented that indicated the path being chosen by the TAG was not the least-cost path, the Chair permitted derisive comments to enter the record unchecked, unchallenged and unquestioned. The comments mocked, demeaned and minimized the input of utility TAG representatives when attempting to explain how cost figures into electrification. To illustrate, the following exchange occurred on June 25, 2021 when proposal number 21-GP-156 (Carbon Emissions Factors) was under discussion. Chris Boroughs, Puget Sound Energy's representative to the TAG, was explaining the challenges that electric utilities face to decarbonize in effort to give context to the discussion:

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[8] https://www.nwpp.org/private-media/documents/2019.11.12_NWPP_RA_Assessment_Review_Final_10-23.2019.pdf

[9]The following statement made by Emma Johnson of Seattle City Light, at minute 180:45 of the July 16 TAG meeting that "yeah, yeah, and I think that um utilities raise rates for inflation and cost reasons and the 20% [increase] is accurate over five years and it's not out of the norm" demonstrates the cavalier attitude towards the impacts on ratepayers, and more broadly an inability (at best) or outright disregard (at worst) for inclusion of basic equity concepts in the code making process. An increased energy burden has different consequences to a household or business owner with lower income and fewer resources compared to a those with a median or greater income.

> Chris Boroughs: "In order to go all electric, we would need to install 100 new miles of transmission line . . . Anybody who's been around the Bellevue area knows we have this East Side Transmission Link we're trying to put together; we're trying to get built, that's only 16 miles, and that has been at least a six, seven-year process and very difficult to do. So imagine it's going to take 100 extra miles of transmission line throughout Western Washington in order to do this. We'd have to have 110 more substations which is kind of crazy – right now we have 300 so we'd add another third on top of it – . . . thinking about where you're going to put those in the middle of neighborhoods. So, there's a lot of overall costs to a system with no gas is by 2040 would be an extra $5.5 billion for just our system. If we can find a way to keep that minimum [gas] throughput plus peak, the cost to our electric system to get there is only around $800 million. So there's a significant cost impact to all of the people in Washington state, every single customer in Washington state, is going to have a significant cost impact if we continue to go down this road"
>
> Mark Frankel: "Yeah and maybe the cost of everything else that's happening because we're burning gas we should count too?" (chuckles, source unknown) "I mean that's the goal, right, is to decarbonize our economy?"
>
> Chris Boroughs: "Exactly, and that's our goal too."
>
> Mark Frankel: "We've got to pay for electric transmission, or we've got to pay for cooling centers for emergencies and sea walls and what have you, right? It seems like a reasonable choice to me."
>
> (Verbatim transcript beginning at 2:10:15).
>
> Duane Jonlin: "the alarmist things we've heard about spending billions of dollars on new substations and so forth, must be taken with a grain of salt.

While financial impacts and a least-cost path may be of little or no interest to the Chairman or the majority of the TAG members, it is of great concern to the Washington Legislature, which has declared that "[a]ffordable housing, inclusive of the costs to power homes, is an essential factor in stabilizing communities."[10] In fact, utilities have a statutory mandate to provide energy at least cost to their customers.[11] It is the state's goal "to coordinate, encourage, and direct, when necessary, the efforts of the public and private sectors of the state and to cooperate and participate, when necessary, in the attainment of a decent home in a healthy, safe environment for every resident of the state. The legislature declares that attainment of that goal is a state priority."[12]

Regulatory actions that increase costs of energy service can serve as a barrier to achieving affordable housing. To that end, the Legislature expressly found, when acting on RCW 19.27.020,

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[10] RCW 43.185B.005(1)(c)
[11] RCW 80.28.020
[12] RCW 43.185B.007

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that “building codes are an integral component of affordable housing. In accordance with this finding, the state building code council shall consider, and review building code provisions related to improving affordable housing." Intent—Finding—2003 c 291 §4. In this vein, we requested through a motion in the TAG that the Office of Equity prepare an Equity Impact Statement that accounts for, among other things, the cost challenges to increased electrification prior to engaging in any rulemaking for the Commercial Energy Code update to ensure that the decision-makers are fully informed of the consequences of their actions.

Allowing or passively condoning, through silence, the mocking of utility representatives attempting to share the impediments to achieving both carbon reduction goals while maintaining reliability of service at an affordable cost is a disservice to the SBCC, the Legislature and most importantly, the customers that they serve. The TAG’s disregard for any equity consideration was confirmed by the vote on the Office of Equity motion—which failed with three in favor, six opposed and three abstaining. Immediately after the vote concluded, an RMI representative posted his approval of the motion’s defeat in the meeting chat. He stated: “hurray”.

TAG MEETINGS LACK PROPER PROCEDURE LIMITING MEANINGFUL PARTICIPATION BY STAKEHOLDERS

A final and significant area of concern is the egregious meeting process demonstrated by the Chair in conducting the critical code proceedings that are intended to shape the energy future of millions of Washington residents. To illustrate, and not by way of limitation, the handling of proposal 21-GP1-103 relating to space heating was outrageous.

This proposal was introduced for discussion on July 9, 2021. It would ban natural gas as a heat source in commercial buildings, certain multi-family housing structures and large retrofits. It quickly became clear that the proposal was not fully thought out and there was no consensus among the TAG members about it. In the course of the chaotic proceedings, the Chair allowed the proposal to go back to the proponent and invited interested parties to participate in a group led by the proponent outside of the TAG process to address the myriad of issues with the proposed amendment. Several utility representatives, including Chris Boroughs with PSE and Kevin Duell with NW Natural volunteered to serve on that committee.

At the very next TAG meeting on July 16, 2021, it was revealed that a significantly modified and previously undisclosed version would be brought forth for a vote that day. It was announced that this substantially revised proposal was submitted after 10 pm the previous night. This 11th hour reveal is the result of a process that was not intended to bring forward thoughtful and well-vetted amendments. Indeed, the allowed process inhibited or blocked TAG members’ and other stakeholders’ ability to explore thoughtful amendments.

Despite the last-minute nature of the overhauled proposal, the Chair pushed for the proposal to move to a vote – even after it became immediately clear that there was considerable confusion about the revised proposal. Meeting attendees agreed that it was not satisfactory as written and would need to be revised by a sub-committee. However, a motion to table the matter and refer it to committee was defeated nearly unanimously. Despite unanimous agreement that the proposal as

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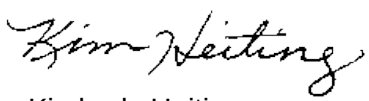
written was confusing to the TAG itself, the proposal was passed nearly unanimously with the understanding (but not requirement) that the proposal would be rewritten yet again and brought back to the TAG. Despite the chaos and confusion about what they had just voted to approve (to wit: it was acknowledged that a rewrite was already in order) the Chair indicated that comment regarding the new proposal would be limited to the revisions created by the sub-committee, stifling any further debate about the language, and if no revisions were brought forth the proposal would be recommended to the SBCC – *despite unanimous agreement it was inappropriate as written.* The amended and revised proposal was accepted by the TAG and revised yet again in another meeting.

As a closing illustration of what has occurred at the TAG, we call your attention to Chair's repeated mischaracterizations of what the TAG is required by law to do. More than once, the Chair has directed TAG members that they needed to pass proposals that would achieve a 19% reduction in energy consumption per Code cycle. This is inaccurate, a fact the Chair ultimately but begrudgingly acknowledged. When a natural gas utility representative pointed out the newest gas technology (already commercially available and on the market) would meet the Chair's 19% criteria, his testimony was disregarded. This underscores what is at best a misinformed belief of the Chair that he and the TAG have a mandate to effectuate a ban on natural gas in order to reach certain decarbonization goals. In his demonstrated zeal to ban natural gas, the Chair has steered the TAG in a direction inconsistent with Washington law.

We hope this letter alerts the SBCC to the significant and potentially actionable questions we have about the recommendations from the TAG to the SBCC. We urge that the methods used by the TAG to advance amendment proposals 21-GP1-103 (heat pump space heat), 21-GP1-136 (heat pump water heat), and 21-GP1-179 (carbon emissions factors) be scrutinized for what they were, and that the SBCC take actions that are appropriately informed by the laws and policies of the state of Washington and that account for the economic and equitable effects on *all* Washington residents. Those actions would require that the SBCC act without deference to the TAG recommendations given the reasons discussed above and **refuse to advance proposals 21-GP1-103, 21-GP1-136 and 21-GP1-179** into the Washington Commercial Code.

Sincerely,



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