

International Association of Plumbing and Mechanical Officials-  
Petitions Clerk of the Board of Directors  
4755 East Philadelphia Street  
Ontario, CA 91761-2816

Re: Petition to IAPMO Board of Directors

### **Section 1: Petitioner**

NASSCO, Inc., represented by SkarlatosZonarich LLC

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### **Section 2: Standards Council Action at Issue**

IAPMO Standards Council Decision Docket #02-21 (“**Decision**”)  
Date of Decision: November 25, 2019  
2021 Uniform Plumbing Code – Section 715.3

### **Section 3: Grounds for Petition**

Petitioner requests that the Board of Directors of IAPMO review the issues presented by Petitioner in its Appeal to Standards Council, Item #125 - Section 715.3 of the 2021 Edition of the Uniform Plumbing Code (“**UPC**”) dated October 14, 2019 (“**Appeal**”) and take action to preserve the integrity of IAPMO’s standards development process. And, as the UPC is an American National Standard, this Petition asks the Board to protect the integrity of the American National Standards Institute (“**ANSI**”) and IAPMO’s status as an ANSI Audited Designator. During the development process for the 2021 Edition of the UPC, the IAPMO Plumbing Technical Committee (“**TC**”) rejected Item #125, a proposal that sought to delete the second and third sentences in Section 715.3 of the 2018 Edition of the UPC. Petitioner contends that language added to Section 715.3 during the development of the 2018 Edition of the UPC creates a ban on the use of certain technologies to repair or replace existing building sewer and building storm sewer pipes without any technical or scientific justification, creating an unreasonable restraint on trade. This ban was developed in a manner that violates IAPMO’s procedures and exposes IAPMO and individuals acting under the authority of IAPMO to potential antitrust liability and liability for unfair business practices. In the Decision, the Standards Council accorded great deference to the standards development process and applied a standard of review that permits the Standards Council to “overturn the result recommended through that process only where a clear and substantial basis for doing so is demonstrated.” Decision, p. 1. Petitioner contends that the facts related to the development of the tainted language and the rejection of Item #125, when viewed in an objective manner, clearly reveal that immediate action by the Board of Directors is both warranted and necessary to preserve the integrity of IAPMO’s standards development process and that of ANSI’s process for the development of American National Standards.

The Appeal outlines the development and adoption of the objectionable language in Section 715.3 and the rejection of Item #125 that attempted to eliminate the objectionable language and, pursuant to IAPMO’s instructions, will not be restated in this Petition; the Board is referred to pages 4-6 and 9 of the Appeal, which are incorporated by reference into this Petition. The language at issue was proposed by an interested member of the TC that represents the industry that directly benefited from the ban. That interested member advocated for the ban

without providing any substantial or technical justification. The result is an unreasonable restraint on trade that prevents consumers from utilizing an effective, economical and proven means of repairing or replacing existing building sewer and building storm sewer pipes.

The Decision rejects Petitioner's arguments regarding violations of IAPMO regulations during the development process for the 2018 Edition and the 2021 Edition of the UPC. The Decision addresses only Petitioner's claim that the TC's Committee Statement was not sufficiently detailed, so as to convey the TC's rationale for its action as required by IAPMO's regulations. Decision, p. 2. The Decision rejects that claim by noting the "Regulations do not require such justification nor the need for the Technical Committee to prove any fact or statement." *Id.*

The Decision states that Appellant's sole claim that the TC violated applicable Regulations is that the TC Committee Statement was not sufficiently detailed, Decision, p.2, but the Decision ignores and fails to address the detailed listing and discussion of violations of IAPMO's Regulations Governing Committee Projects and Guide for the Conduct of Participants in the IAPMO Codes and Standards Development Process by a member of the TC set forth on pages 7-9 of the Appeal, which are incorporated into this Petition by this reference. It is unclear why the Standards Council did not address all of the claims in the Appeal, especially given the statement in the Decision that "[t]he Council has reviewed the entire record concerning this appeal and has considered all the arguments raised by it[,] Decision, p.2; these claims remain unresolved as of this point in time.

The Standards Council's silence regarding those violations may be interpreted as acquiescence to behavior by a member of the TC and participant in IAPMO's code development process in failing to: act honestly and in good faith, Guide for the Conduct of Participants in the IAPMO Codes and Standards Development Process, §3-3(b); disseminate all information necessary to enable full and fair consideration of all points, *Id.* at §3-3(c); not withhold information, *Id.* at §3-3(d); be candid and forthcoming about any weakness in their position, *Id.* at §3-3(c); and base all advocacy, voting, and other standards development activities on sound technical and scientific bases and should act in the interest of safety and IAPMO's other purposes and goals. *Id.* at §3-3(d). The Standards Council appears to have condoned the TC's violation of rules by (1) allowing TC members to further their business and commercial interests, *Id.* at §3-1(f); and (2) allowing TC members to disseminate false or misleading information and withhold information necessary to a full, fair, and complete consideration of the issues before their committee. *Id.* at §3-1(h). Another interpretation is that the Standards Council does not object to the TC adopting language in its standard that creates an unreasonable restraint of trade without providing any technical, scientific, or safety rationale to support the need for that restraint of trade, particularly when that language is proposed and advocated for by a member of the TC representing the segment of the industry directly benefitting from the restraint of trade created by the UPC standard. While IAPMO's Regulations Governing Committee Projects may allow the TC to take that action without providing justification, in this case, doing so violates IAPMO's stated purpose "to promote the interests of the arts and science of plumbing and mechanical building codes, and the officials in connections therewith, and to promote the interests of all persons whose responsibility it is to interpret plumbing and mechanical building laws and practices to the public, and those other purposes specified in the Association's Article of Incorporation[.]" IAPMO Bylaws §1.2. Such action should not be countenanced or remain unchecked.

The violations of IAPMO's regulations that occurred in the process of the development of UPC Section 715.3 calls into question the integrity of the UPC and IAPMO's code development process. ANSI specifically requires that American National Standards "be developed in accordance with applicable antitrust and competition laws[.]" ANSI Essential Requirements: Due process requirements for American National Standards, §3.3, and considers whether an ANSI

Audited Designator has designated an American National Standard that contains an unfair provision. *Id.* at §5.2g.

Further, IAPMO and those involved in proposing and advocating for the objectionable language may be exposed to liability under antitrust and unfair competition laws. Courts have long recognized that the activities of standards development bodies present opportunities for anticompetitive activity. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*, 456 U.S. 556 (1982). Actions taken in the standard setting process can lead to anticompetitive results even if the rules of the standards setting bodies were followed. “An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide [safeguards sufficient to prevent the standards setting process from being biased by members with economic interests in retraining competition].” *Allied Tube & Conduit Corporation v. Indian Head, Inc.*, 486 U.S. 492, 509 (1988).

The objectionable language in Section 715.3 creates a ban on the use of trenchless methodologies to repair or replace cast iron soil pipes and fittings. As explained in pages 5-6 of the Appeal, which are incorporated into this Petition by reference, the support cited for this ban is void of any technical or scientific justification. By prohibiting use of trenchless methodologies to replace cast iron soil pipes in existing building sewers and building storm sewers without the expense and dangers associated with open trench construction, Section 715.3 of the UPC negatively impacts competition and decreases the efficiency in the competitive process involved in the rehabilitation of existing cast iron soil pipes and fittings in building sewers and building storm sewers. The result of this anticompetitive process is not merely theoretical, the prohibitive language contained in Section 715.3 has real world implications; the ban adversely impacts individuals, small business, municipalities, utility companies, and state governments, all without any legitimate technical substantiation. See page 9 of the Appeal for additional details. Section 715.3 of the UPC creates an unreasonable restraint on trade and constitutes unfair methods of competition and unfair or deceptive acts or practices. The anticompetitive intent of Section 715.3 is shown by the materially misleading rationale for the amended rule, the lack of technical justification, and the fact that it was proposed by the industry that benefited from the amended rule. In fact, some jurisdictions considering adoption of the UPC have come to that conclusion and are proceeding toward adoption of the UPC without Section 715.3 in their jurisdictions. Transcript p. 80.

In the Decision, the Standards Council stated:

It is clear upon review of the record that the consensus body adopted, at the start, the technical position that cured in place piping does not comply with product standards that govern cast-iron pipe. ... There is no evidence at all, within the complete record, to show that the consensus body’s technical opinion was anything other than genuine and not affected by malice, fraud or deceit.

Decision, p. 3. At no point in the process related to the development of the 2018 Edition of the UPC, the process related to the development of the 2021 Edition of the UPC or in the Standards Council’s Decision is there any rationale provided for why cured-in-place pipe (“CIPP”) should comply with product standards that are applicable to cast iron pipes or fittings. CIPP is a plastic pipe that replaces the cast iron pipe. See Transcript pp. 50-51, 55-57 & 74-75. A technical position that CIPP does not meet cast iron products standards is a red herring. The result of the process of installing CIPP is that the existing cast iron pipe is replaced with a structural plastic pipe designed specifically for the project undertaken to withstand all of the external and internal loads at issue. Transcript, pp. 50-51 & 74-75. CIPP is required to comply with Section 301.2.3 of the UPC and when used in building sewers, certified to NSF/ ANSI Standard 14, *Id.* p. 57. Requiring CIPP to meet cast iron pipe product standards is not appropriate whether or not that requirement

results from malice, fraud, deceit or a lack of understanding of the product at issue. (Exchanges during the question and answer portion of the Hearing reveal a general lack of understanding of the CIPP process and product by some members of the Standards Council. See *gen.* Transcript pp. 80-93.) Further, basing decisions on the development of a uniform standard on the fact that one type of piping does not meet the product standards of a completely different type of piping is illogical and fails at a basic principle of standards development adopted by IAPMO, “[t]o promote the development of codes and standards that are scientifically and technically sound...” Guide for the Conduct of Participants in the IAPMO Codes and Standards Development Process, Section 2(c). The Guide for the Conduct of Participants in the IAPMO Codes and Standards Development Process states that individuals involved in the development of standards “should maintain a high level of knowledge and competency in the areas of interest and/or expertise that are related to their activities within the IAPMO standards development process.” *Id.*, Section 3-3(b). If individuals involved in the standards development process do not understand a technology before them, they should obtain knowledge of such technology prior to making a determination of a standard, rather than blindly accepting assertions of an interested TC member when even a cursory review of the assertions reveals that they are incomplete and misleading.

IAPMO’s Board of Directors is empowered to take any action necessary to fulfill its obligations to preserve the integrity of the standards development process when extraordinary circumstances require such action. Regulations Governing Committee Projects §1-7.1. The actions of the TC in continuing to include in the UPC a standard that was adopted during a process that violated IAPMO’s written regulations and that benefits one segment of an industry through creating an unreasonable restraint of trade, thus harming the reputation and integrity of IAPMO’s standards development process, present the extraordinary circumstances contemplated by the authority granted to the Board. The Board should exercise its powers to send Section 715.3 back to the TC for further study and move forward with the language of Section 715.3 as it existed prior to the inclusion of the tainted language.

#### **Section 4: Relief Requested**

Petitioner requests that the Board of Directors take action to fulfill its obligations to preserve the integrity of the standards development process by either adopting Item #125 or by returning that portion of the Report on Comments related to Section 715.3 to the TC with instructions for further study and return to the text of Section 715.3 as it existed prior to the actions of the TC giving rise to the grounds for this Petition – the language of Section 715.3 in the 2015 Edition of the UPC. If the Board rejects this Petition, Petitioner requests that the issue related to the violations of IAPMO’s regulations during the process of developing Section 715.3 of the 2021 Edition of the UPC be reported to ANSI as unresolved.

SkarlatosZonarich LLC

By:   
Nathan D. Berry, Attorney for NASSCO, Inc.

Date: January 3, 2020