

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
TIA UPC-002-18
Date of Decision: November 25, 2019
2018 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 Request for Tentative Interim Amendment (“TIA”) of Section 715.3 of the 2018 Edition of the Uniform Plumbing Code (“UPC”) dated October 11, 2019 (“Request for TIA”) and take action to preserve the integrity of IAPMO’s standards development process and, as the UPC involves 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. 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. The Standards Council Decision regarding the Request for TIA states only “Upon review of the full record including oral testimony provided during the hearing, the Council hereby rejects the proposed TIA.” The Standards Council provided Petitioner with no basis or explanation for the rejection.

The Request for TIA outlines the development and adoption of the objectionable language and, pursuant to IAPMO’s instructions, will not be restated in this Petition; the Board is referred to pages 3-5 of the Request for TIA, which are incorporated into this Petition by reference. Petitioner contends that an objective review of the process of the development of the objectionable language leads to the conclusion that the language creates an unreasonable restraint on trade and deprives consumers of an effective and economical technology for repairing or replacing building sewers and building storm sewers pipe. The objectionable language was proposed by a member of the IAPMO Plumbing Technical Committee (“TC”) who represented the very industry that directly benefitted from the ban created by the language. The supporting justification provided by this partisan member of the TC did not provide all pertinent information and is easily characterized as vague and misleading, creates an unreasonable restraint on trade and deprives consumers of an effective and economical technology for repairing or replacing

building sewers and building storm sewers pipe. The result is an unreasonable restraint on trade, causing significant harm to consumers, while protecting the proponent of the objectionable language. A violation of the federal antitrust laws and state antitrust and unfair competition laws by such actions could not be clearer.

The Standards Council's Decision on the Request for TIA provides no basis for the rejection of the arguments advanced by Petitioner, which showed the technical deficiencies in the "substantiation" provided to support adoption of the objectionable language. Nor does the Decision 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 set forth on pages 6-8 of the Request for TIA, which are incorporated into this Petition by reference. 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 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 when uncovered.

The violations of IAPMO's regulations that occurred in the process of the development of UPC Section 715.3 and the resulting unreasonable restraint of trade 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.

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 restraining 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 4-5 of the Request for TIA, which are incorporated into this Petition by reference, the support cited for this ban does not justify the ban in any technical or scientific manner. By prohibiting use of trenchless methodologies to repair or 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 market for the rehabilitation of existing cast iron soil pipes and fittings in building sewers and building storm sewers. See page 8 of the Request for TIA 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. When viewed in an objective manner, the ban created by Section 715.3 of the UPC, resulting from a proposal submitted and advanced by a member of the TC representing the segment of the industry that directly benefits from the ban and not supported by substantive scientific or technical need or reasoning, can lead to the conclusion that IAPMO’s standards development process was utilized as a means to benefit one segment of the industry to the detriment of the public and other segments in the industry. 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.

The Standards Council Decision subject to this Petition provides no insight into the Council’s decision to reject the Request for TIA. Testimony from the hearing on the Request for TIA suggests that at least one member of the Standards Council was operating under the incorrect impression that a TIA is justified only if the request “affect[s] the health and safety or prevent[s] the death ...” Transcript p. 112. IAPMO’s Regulations Governing Committee Projects, Section 5 sets forth the regulations governing Tentative Interim Amendments. Section 5 does not limit a TIA to circumstances that affect human health and safety or prevent death. Without the Standards Council providing any basis for its decision, Petitioner cannot know if the decision stemmed from the misunderstanding of the purpose and rules for granting a TIA that was vocalized by a member of the Standards Council during the hearing.

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 IAPMO Board must intercede and correct this situation. The TC violated IAPMO’s written regulations and, at the instigation of a TC member representing the benefited industry, adopted a rule that benefits one segment of an industry. The result is a standard that constitutes an unreasonable restraint of trade. Worse, the Standards Council summarily and without explanation rejected the Request for TIA. Thus, to avoid further exposure to antitrust claims, the Board should exercise its powers to either (1) reject the language included in Section 715.3 during the development process for the 2018 Edition of the UPC or (2) 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 (1) rejecting the language included in Section 715.3 during the development process for the 2018 Edition of the UPC or (2)

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.

SkarlatosZonarich LLC

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

Date: January 3, 2020