STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

CALIFORNIA LIVING & ENERGY (a division of William Lilly & Associates, Inc.) and DUCT TESTERS, INC., Complainants, vs. MASCO CORPORATION and ENERGYSENSE, INC., Respondents.	Docket Number 08-CRI-01 **RESPONDENTS' APPLICATION FOR SUBPOENA TO TAKE THE VIDEOTAPED DEPOSITION OF TOM HAMILTON**

DOCKET
08-CRI-1
DATE NOV 05 2008
RECD. NOV 05 2008

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Pursuant to Title 20, Section 1203(b) of the California Code of Regulations, Masco Corporation ("Masco") and EnergySense, Inc., ("EnergySense") (collectively "Respondents"), respectfully request that the California Energy Commission ("CEC") issue a subpoena for the videotaped deposition of Tom Hamilton for use in this proceeding. As set forth below, there is good cause supporting this application because Mr. Hamilton has relevant testimony which is important to Respondents' defense of this matter, and we were just informed that he is unable or unwilling to testify at the pending evidentiary hearing. A deposition is the only way to secure Mr. Hamilton's testimony.

Given the fast-approaching evidentiary hearing set for December 10, 2008, and the importance of Mr. Hamilton's testimony to Respondents' defense, Respondents also request that this application be heard at the prehearing conference on Wednesday, November 12, 2008.

I. Background

By order dated August 5, 2008, the CEC's Efficiency Committee served Respondents with a Complaint filed by California Living & Energy, and Duct Testers, Inc. ("Complainants"), alleging that Respondents are in violation of various conflict of interest provisions under Titles

20 and 24 of the California Code of Regulations.[1] In sum, the Complaint alleges that EnergySense, a Masco subsidiary, has received contracts to perform independent third-party inspections ("Title 24 inspections") of HERS-related installations performed by other Masco subsidiaries, thereby violating the conflict of interest provisions.

Mr. Hamilton is currently an energy consultant with the firm of ICF International. Previously, Mr. Hamilton was the Executive Director of California Home Energy Efficiency Rating Services ("CHEERS"), a non-profit organization approved by the CEC that trains and certifies HERS raters. During his tenure as CHEERS Executive Director, Mr. Hamilton discussed with Masco in some detail the conflict of interest provisions in the Title 24 Regulations and their application to EnergySense. As a result of discussions with and advice provided by Mr. Hamilton, Masco and EnergySense created an organizational structure that enabled EnergySense to operate independently from the Masco subsidiaries that perform HERS-related installations, consistent with the CEC's Regulations.

On September 10, 2008, Ivor E. Samson, counsel for Masco and EnergySense, met with Mr. Hamilton who described his involvement and the advice that he gave to EnergySense as CHEERS Executive Director in 2006. In early October, Mr. Samson contacted Mr. Hamilton by telephone and asked if he would be willing to come to Sacramento to testify on EnergySense's behalf in this proceeding. Mr. Hamilton said that he would be pleased to do so "subject to his management's approval." (Declaration of Ivor E. Samson in Support of Respondents' Application for Subpoena to Take the Videotaped Deposition of Tom Hamilton ("Samson Dec'l") at ¶ 4.) On October 30, Mr. Samson again called Mr. Hamilton to confirm that he would

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[1] Titles 20 and 24 create a regulatory scheme whereby persons conducting home inspections for compliance with the California Home Energy Rating System ("HERS") Program (called "raters") must be independent from entities engaged in the installation of HERS-related products. In particular, a rater is required to be an "independent entity" from the builder or contractor on a home construction project. Cal. Code Regs. tit. 20, § 1673(i). An "independent entity" is defined as "having no financial interest in, and not advocating or recommending the use of any product or service as a means of gaining increased business with," a builder or subcontract installer. Cal. Code Regs. tit. 20, § 1671. A "financial interest" is defined as "an ownership interest, debt agreement, or employer/employee relationship . . . ." Cal. Code Regs. tit. 20, § 1671.

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testify. Instead, he told Mr. Samson that Complainant California Living & Energy had, within the last week, hired his consulting firm, ICF International. As a result, Mr. Hamilton said that there was a relationship "conflict of interest" such that he could no longer voluntarily agree to testify in this matter. (Samson Dec'l at ¶ 4.)

II. Legal Standard for Issuing Subpoenas

Title 20 of the California Code of Regulations provides that the chairman or presiding member of a California Energy Commission Committee may "[i]ssue subpoenas and subpoenas duces tecum at the direction of the commission, on his motion or upon application of any party. The application of a party shall be supported by a declaration of good cause." Cal. Code Regs. tit. 20, § 1203(b). Additionally, in any proceeding before the CEC, "each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence against such party." Cal. Code Regs. tit. 20, § 1212(c). As a result of Complainant's actions effectively taking Mr. Hamilton "off the table," Respondents will be denied the opportunity to present relevant evidence and to rebut Complainants' assertions unless a subpoena for Mr. Hamilton's videotaped testimony is issued.

Under the California Code of Civil Procedure, "the deposition of a natural person, whether or not a party to the action, shall be taken at a place that is, at the option of the party giving notice of the deposition, either within 75 miles of the deponent's residence, or within the county where the action is pending and within 150 miles of the deponent's residence." Cal. Civ. Proc. Code § 2025.250(a). A court is without authority to order a non-party witness to appear for deposition beyond these limits. Cal. Civ. Proc. Code § 2025.250(a). Accordingly, authorization of a videotaped deposition is appropriate here, where Mr. Hamilton's residence in Los Angeles County is further than 75 miles from Sacramento where this proceeding is pending.

III. Good Cause Exists for a Subpoena to Take the Videotaped Deposition of Tom Hamilton

The testimony of Tom Hamilton is vitally important to this proceeding for a variety of reasons. Mr. Hamilton was Executive Director of CHEERS when Masco first explored the

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possibility of offering Title 24 inspections through EnergySense as a subsidiary company. Notably, in early 2006, before EnergySense had been established, Kenneth G. Cole, Masco Associate General Counsel, and other individuals from Masco discussed with Mr. Hamilton the possibility of conducting Title 24 inspections through a subsidiary. (Samson Dec'l at ¶ 2.) Mr. Hamilton expressed approval of a proposed organizational structure in which EnergySense would operate independently from the Masco subsidiaries engaged in HERS-related home installations, and would not cross-market services provided by those other Masco subsidiaries, nor share in profits generated by other Masco subsidiaries and vice-versa. (Samson Dec'l at ¶ 2.) Essentially, Mr. Hamilton, in early 2006, reviewed EnergySense's current organizational structure and gave it his "seal of approval" because EnergySense has no financial interest in, and does not advocate or recommend the use of any product or service as a means of gaining increased business with any other Masco subsidiary, thereby satisfying the definition of an "independent entity" under Title 20, section 1671 of the California Code of Regulations.

In addition to Mr. Hamilton's initial approval of the EnergySense organizational structure, he provided additional guidance to Masco in mid-2006, when California Living & Energy informally complained about EnergySense's business model to the CEC. Importantly, on or about July 6, 2006, Mr. Hamilton had a telephone call with CEC staff members, Bill Staack and Tav Cummins, about California Living's allegations and outlined EnergySense's compliance with the Title 24 Regulations. (Samson Dec'l at ¶ 3.) The context of that 2006 conversation is nearly identical to the present action. Accordingly, Mr. Hamilton's deposition testimony of that and other conversations relating to the Title 24 Regulations and EnergySense's organizational structure has a direct bearing on this proceeding and is necessary to rebut the allegations in the Complaint.

In addition to the CEC's power to issue subpoenas, Title 20 provisions on the rules of evidence and use of testimony illustrate the Efficiency Committee's obligation to hear all evidence relevant to the issues in this proceeding. *See* Cal. Code Regs. tit. 20, §§ 1212(c), 1224(b). Not only do the regulations give each party the right to examine witnesses with relevant information, but they authorize the Committee to hear any relevant testimony, whether written or

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oral, sworn or unsworn. *See id.* The expansive scope of these regulations indicates that the Committee has broad authority to elicit Mr. Hamilton's testimony.

Mr. Hamilton has key knowledge of both the Title 24 Regulations and EnergySense's corporate structure, and made recommendations on how to align EnergySense to comply with those Regulations. His testimony is critical to EnergySense's defense. Since Mr. Hamilton cannot be compelled to travel to Sacramento to testify in this proceeding, the only way to secure his testimony is by deposition.

IV. Conclusion

For the reasons set forth above, Respondents respectfully request that the CEC issue a subpoena for the videotaped deposition of Tom Hamilton for use in this proceeding.

Dated: November 5, 2008

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By _____

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT

COMMISSION OF THE STATE OF CALIFORNIA

Complaint / Request for Investigation
Regarding EnergySense / MASCO

DOCKET NO. 08-CRI-01
Proof of Service List

INSTRUCTIONS: All parties shall (1) file a printed, original signed document plus 12 copies OR file one original signed document and email the document to the Docket address below, AND (2) all parties shall also send a printed OR electronic copy of the document, plus a proof of declaration, to each of the entities and individuals on the Proof of Service List:

CALIFORNIA ENERGY COMMISSION Attn: DOCKET NO. 08-CRI-01 1516 Ninth Street, MS-4 Sacramento, CA 95814-5512 docket@energy.state.ca.us	
California Living & Energy Attn: Bill Lilly, President 3015 Dale Court Ceres, CA 95307	Duct Testers, Inc. Attn: Dave Hegarty P.O. Box 266 Ripon, CA 95366
Carol A. Davis CHEERS Legal Counsel 3009 Palos Verdes Drive West Palos Verdes Estates, CA 90274	Energy Inspectors Attn: Galo LeBron, CEO 1036 Commerce Street, Suite B San Marco, CA 92078
Certified Energy Consulting John Richau, HERS Rater 4782 N. Fruit Avenue Fresno, CA 93705	ConSol Attn: Mike Hodgson 7407 Tam O'Shanter Drive Stockton, CA 95210-3370
California Certified Energy Rating & Testing Services (CalCERTS) Attn: Mike Bachand 31 Natoma Street, Suite 120 Folsom, CA 95630	California Building Performance Contractors Association (CBPCA) Attn: Randel Riedel 1000 Broadway, Suite 410 Oakland, CA 94607
California Home Energy Efficiency Rating System (CHEERS) Attn: Robert Scott 20422 Beach Boulevard, Suite 235 Huntington Beach, CA 92648	

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DECLARATION OF SERVICE

I, Nancy E. Jordan, deposited copies of the attached **RESPONDENTS' APPLICATION FOR SUBPOENA TO TAKE THE VIDEOTAPED DEPOSITION OF TOM HAMILTON** in the United States mail on **November 5, 2008**, at San Francisco, CA, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, Sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

Nancy E. Jordan
NANCY E. JORDAN

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