

1 STATE OF CALIFORNIA  
2 ENERGY RESOURCES CONSERVATION  
3 AND DEVELOPMENT COMMISSION  
4

5 CALIFORNIA LIVING & ENERGY (a  
6 division of William Lilly & Associates,  
7 Inc.) and DUCT TESTERS, INC.,

8 Complainants,

9 vs.

10 MASCO CORPORATION and  
11 ENERGYSENSE, INC.,

12 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

13  
14 Pursuant to Title 20, Section 1203(b) of the California Code of Regulations, Masco  
15 Corporation ("Masco") and EnergySense, Inc., ("EnergySense") (collectively "Respondents"),  
16 respectfully request that the California Energy Commission ("CEC") issue a subpoena for the  
17 videotaped deposition of Tom Hamilton for use in this proceeding. As set forth below, there is  
18 good cause supporting this application because Mr. Hamilton has relevant testimony which is  
19 important to Respondents' defense of this matter, and we were just informed that he is unable or  
20 unwilling to testify at the pending evidentiary hearing. A deposition is the only way to secure  
21 Mr. Hamilton's testimony.

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

25 **I. Background**

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

1 20 and 24 of the California Code of Regulations.<sup>1</sup> In sum, the Complaint alleges that  
2 EnergySense, a Masco subsidiary, has received contracts to perform independent third-party  
3 inspections (“Title 24 inspections”) of HERS-related installations performed by other Masco  
4 subsidiaries, thereby violating the conflict of interest provisions.

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

14 On September 10, 2008, Ivor E. Samson, counsel for Masco and EnergySense, met with  
15 Mr. Hamilton who described his involvement and the advice that he gave to EnergySense as  
16 CHEERS Executive Director in 2006. In early October, Mr. Samson contacted Mr. Hamilton by  
17 telephone and asked if he would be willing to come to Sacramento to testify on EnergySense’s  
18 behalf in this proceeding. Mr. Hamilton said that he would be pleased to do so “subject to his  
19 management’s approval.” (Declaration of Ivor E. Samson in Support of Respondents’  
20 Application for Subpoena to Take the Videotaped Deposition of Tom Hamilton (“Samson  
21 Dec’l”) at ¶ 4.) On October 30, Mr. Samson again called Mr. Hamilton to confirm that he would  
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23 <sup>1</sup> Titles 20 and 24 create a regulatory scheme whereby persons conducting home inspections for  
24 compliance with the California Home Energy Rating System (“HERS”) Program (called  
25 “raters”) must be independent from entities engaged in the installation of HERS-related  
26 products. In particular, a rater is required to be an “independent entity” from the builder or  
27 contractor on a home construction project. Cal. Code Regs. tit. 20, § 1673(i). An “independent  
28 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.

1 testify. Instead, he told Mr. Samson that Complainant California Living & Energy had, within  
2 the last week, hired his consulting firm, ICF International. As a result, Mr. Hamilton said that  
3 there was a relationship “conflict of interest” such that he could no longer voluntarily agree to  
4 testify in this matter. (Samson Dec’1 at ¶ 4.)

5 **II. Legal Standard for Issuing Subpoenas**

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

17 Under the California Code of Civil Procedure, “the deposition of a natural person, whether  
18 or not a party to the action, shall be taken at a place that is, at the option of the party giving notice  
19 of the deposition, either within 75 miles of the deponent’s residence, or within the county where  
20 the action is pending and within 150 miles of the deponent’s residence.” Cal. Civ. Proc. Code §  
21 2025.250(a). A court is without authority to order a non-party witness to appear for deposition  
22 beyond these limits. Cal. Civ. Proc. Code § 2025.250(a). Accordingly, authorization of a  
23 videotaped deposition is appropriate here, where Mr. Hamilton’s residence in Los Angeles  
24 County is further than 75 miles from Sacramento where this proceeding is pending.

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

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

1 possibility of offering Title 24 inspections through EnergySense as a subsidiary company.  
2 Notably, in early 2006, before EnergySense had been established, Kenneth G. Cole, Masco  
3 Associate General Counsel, and other individuals from Masco discussed with Mr. Hamilton the  
4 possibility of conducting Title 24 inspections through a subsidiary. (Samson Dec'1 at ¶ 2.) Mr.  
5 Hamilton expressed approval of a proposed organizational structure in which EnergySense would  
6 operate independently from the Masco subsidiaries engaged in HERS-related home installations,  
7 and would not cross-market services provided by those other Masco subsidiaries, nor share in  
8 profits generated by other Masco subsidiaries and vice-versa. (Samson Dec'1 at ¶ 2.) Essentially,  
9 Mr. Hamilton, in early 2006, reviewed EnergySense's current organizational structure and gave it  
10 his "seal of approval" because EnergySense has no financial interest in, and does not advocate or  
11 recommend the use of any product or service as a means of gaining increased business with any  
12 other Masco subsidiary, thereby satisfying the definition of an "independent entity" under Title  
13 20, section 1671 of the California Code of Regulations.

14 In addition to Mr. Hamilton's initial approval of the EnergySense organizational structure,  
15 he provided additional guidance to Masco in mid-2006, when California Living & Energy  
16 informally complained about EnergySense's business model to the CEC. Importantly, on or  
17 about July 6, 2006, Mr. Hamilton had a telephone call with CEC staff members, Bill Staack and  
18 Tav Cummins, about California Living's allegations and outlined EnergySense's compliance  
19 with the Title 24 Regulations. (Samson Dec'1 at ¶ 3.) The context of that 2006 conversation is  
20 nearly identical to the present action. Accordingly, Mr. Hamilton's deposition testimony of that  
21 and other conversations relating to the Title 24 Regulations and EnergySense's organizational  
22 structure has a direct bearing on this proceeding and is necessary to rebut the allegations in the  
23 Complaint.

24 In addition to the CEC's power to issue subpoenas, Title 20 provisions on the rules of  
25 evidence and use of testimony illustrate the Efficiency Committee's obligation to hear all  
26 evidence relevant to the issues in this proceeding. *See* Cal. Code Regs. tit. 20, §§ 1212(c),  
27 1224(b). Not only do the regulations give each party the right to examine witnesses with relevant  
28 information, but they authorize the Committee to hear any relevant testimony, whether written or

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

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

8 **IV. Conclusion**

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

11  
12 Dated: November 5, 2008

SONNENSCHN NATH & ROSENTHAL LLP

13  
14 By 

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1                                   **BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT**  
2                                   **COMMISSION OF THE STATE OF CALIFORNIA**

3  
4       **Complaint / Request for Investigation**  
5       **Regarding EnergySense / MASCO**

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

6  
7       **INSTRUCTIONS: All parties shall (1) file a printed, original signed document plus 12**  
8       **copies OR file one original signed document and email the document to the Docket**  
9       **address below, AND (2) all parties shall also send a printed OR electronic copy of the**  
10       **document, plus a proof of declaration, to each of the entities and individuals on the Proof**  
11       **of Service List:**

11       CALIFORNIA ENERGY COMMISSION 12       Attn: DOCKET NO. 08-CRI-01 13       1516 Ninth Street, MS-4 14       Sacramento, CA 95814-5512 15 <u><a href="mailto:docket@energy.state.ca.us">docket@energy.state.ca.us</a></u>	
16       California Living & Energy 17       Attn: Bill Lilly, President 18       3015 Dale Court 19       Ceres, CA 95307	Duct Testers, Inc. Attn: Dave Hegarty P.O. Box 266 Ripon, CA 95366
20       Carol A. Davis 21       CHEERS Legal Counsel 22       3009 Palos Verdes Drive West 23       Palos Verdes Estates, CA 90274	Energy Inspectors Attn: Galo LeBron, CEO 1036 Commerce Street, Suite B San Marco, CA 92078
24       Certified Energy Consulting 25       John Richau, HERS Rater 26       4782 N. Fruit Avenue 27       Fresno, CA 93705	ConSol Attn: Mike Hodgson 7407 Tam O'Shanter Drive Stockton, CA 95210-3370
28       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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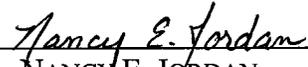
**DECLARATION OF SERVICE**

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

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