STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

DOCKET	
08-CRI-1	
DATE	MAR 13 2009
RECD.	MAR 13 2009

Complaint / Request for Investigation Regarding Energy Sense / MASCO	)	Docket Number 08-CRI-01

EFFICIENCY COMMITTEE DECISION REGARDING COMPLAINANTS' REQUEST FOR CONTINUANCE OF THE HEARING, FOR ISSUANCE OF SUBPOENAS, AND FOR DOCUMENT PRODUCTION FROM RESPONDENTS

Introduction and Summary

This order sets forth the decision of the Efficiency Committee to deny the Complainants' request for a continuance, for subpoenas, and for production of documents and responses from Respondents. The hearing in this matter shall begin on Tuesday, March 17, 2009, as previously scheduled. If, after the presentation of evidence at the hearing, the Complainants believe that the requested subpoenas or documents are still needed, they may renew their request(s) and, if granted, the hearing may be continued for further proceedings on a future date.

Background and Procedural History

On March 11, 2009, the Efficiency Committee received the Complainants' Application for Witness Subpoenas ("Complainants' Application"), in which the Complainants requested the issuance of subpoenas for three employees of the Energy Commission (William Pennington, Tav Commins, and William Staack), as well as three other persons (Doug Beaman, David Bell, and Kirk Dall).

Senior Staff Counsel Dennis L. Beck, Jr., then responded to the Complainants' legal counsel, Brett Dickerson, via e-mail. Mr. Beck noted that the request came only four business days from the start of the March 17, 2009, hearing date in this matter, and that the reasons given for the need for such subpoenas were somewhat vague. Mr. Dickerson responded to Mr. Beck, also via e-mail, and requested that the hearing be vacated and continued to a future date in order to conduct further investigation prior to the hearing.

Later the same day, the Respondents' legal counsel, Steven H. Frankel, e-mailed Mr. Beck and Mr. Dickerson, and stated that the Complainant's Application was untimely and defective and that the Complainants opposed any continuation of the hearing.

On March 12, 2009, Mr. Dickerson, via e-mail, withdrew the Complainants' Application as it applied to the request for subpoenas for four of the original persons (Messrs. Beaman, Commins, Bell, and Dall), but reiterated the Complainants' request for a continuance.

On March 11, 2009, Respondents filed with the Efficiency Committee their Responses to the Complainants' Supplemental Interrogatories and Request for Production of Documents ("Respondent's Response"). This was in response to the Complainants' Supplemental Interrogatories and Request for Production of Documents from Masco and Energy Sense ("Complainants' Request"), filed with the Efficiency Committee on February 26, 2009.

On March 12, 2009, Mr. Dickerson e-mailed Mr. Beck and Mr. Frankel, stating that the Respondent's Response was insufficient, and asking the Efficiency Committee to compel the production of outstanding documents and responses. Mr. Frankel responded via e-mail, again disputing the need for a continuance.

Decision and Order

1. Request for Subpoenas in the Complainants' Application

The need for a decision regarding this issue has largely been obviated by the Complainants' partial withdrawal of the request. Messrs. Pennington and Staack, the only two remaining persons to be subpoenaed, are employees of the Energy Commission. Mr. Pennington will be at the hearing and will be available to give relevant testimony during the hearing. Mr. Staack will be out-of-state during the week of March 16-20, but can be made available subsequently if necessary.

Also, the Complainants' Application was unsupported by a declaration of good cause. Section 1203, subd. (b), of Title 20 of the California Code of Regulations (CCR) states that the Chairman or Presiding Member of a Committee may issue subpoenas upon application of a party, and that such application shall be supported by a declaration of good cause. The Complainants' Application is deficient without such declaration.

2. Request for Continuance by the Complainants

Pursuant to Section 1203, subds. (d), (e) and (f), of Title 20 of the CCR, the Presiding Member may set the time of hearings, cancel a scheduled hearing, and, for good cause shown and upon proper notice, shorten or lengthen required time frames.

The Complainants' request for a continuance of the hearing came only four business days before the beginning of the hearing. The request for the continuance was in e-mail form and was unsupported by a declaration of good cause. Mr. Dickerson asserted that the continuance was necessary in order to conduct further investigation, based on documents recently received from the Energy Commission and the California Home Energy Efficiency Rating Services (CHEERS). The request for a continuance was strongly opposed by the Respondents.

As timely and proper notice was not given for the requested continuance, and such request was not supported by good cause, the request is denied. However, after evidence has been presented at the March 17 hearing, if either of the parties believes that additional testimony or other evidence is needed, they may request that the Efficiency Committee continue the hearing to later date to hear and receive such evidence. The Efficiency Committee may make a ruling at the hearing, or take the matter under submission and make a ruling at a later date.

3. Complainants' Request for Documents from the Respondents

Complainants' Request was made on February 26, 2009. Respondents were allowed to file their response to the request no later than March 11, which they did. On March 12, Mr. Dickerson, via e-mail, asserted that the response was inadequate and requested that the Energy Commission compel the production of further documents and responses to the Complainants' Request. The e-mail was not supported by a declaration of good cause.

Both the initial request and the subsequent e-mail request were defective because they were unsupported by the required declaration of good cause. Further, both requests were made in very close proximity to the date of the hearing. As such, the Complainants' Request, as such pertains to an order for a subpoena for additional documents and responses from Respondents, is denied. However, as with the Complainants' request for a continuance, after evidence has been presented at the March 17 hearing, if either of the parties believes that additional testimony or other evidence is needed, they may request that the Efficiency Committee continue the hearing to later date to hear and receive such evidence. The parties may also request

that the Energy Commission use its subpoena powers to compel the production of documents and information relevant and necessary to the purposes of the proceeding. The Efficiency Committee may make a ruling at the hearing, or take the matter under submission and make a ruling at a later date.

Dated: March 13, 2009

ARTHUR H. ROSENFELD, Ph.D.
Commissioner
California Energy Commission
Presiding Member, Efficiency Committee

JULIA LEVIN
Commissioner
California Energy Commission
Member, Efficiency Committee

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

Complaint / Request for Investigation
REGARDING ENERGY SENSE / 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 e-mail 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 service declaration, to each of the entities and individuals on the proof of service list:

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ConSol
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Oakland, CA 94607

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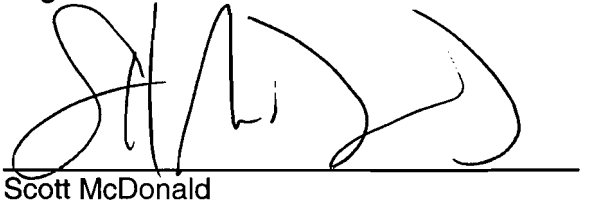
DECLARATION OF SERVICE

I, _Scott McDonald_, deposited copies of the attached EFFICIENCY COMMITTEE DECISION REGARDING COMPLAINANTS' REQUEST FOR CONTINUANCE OF THE HEARING, FOR ISSUANCE OF SUBPOENAS, AND FOR DOCUMENT PRODUCTION FROM RESPONDENTS in the United States mail on March 13, 2009, at Sacramento, 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.



Scott McDonald