HEARING

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
CALIFORNIA LIVING AND ENERGY	)	
and DUCT TESTERS, INC.	)	Docket No.
v.	)	08-CRI-01
MASCO CORPORATION and	)	
ENERGY SENSE, INC.	)	
_____	)	

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET

HEARING ROOM A

SACRAMENTO, CALIFORNIA

TUESDAY, MARCH 17, 2009

9:05 A.M.

Reported by:
Peter Petty
Contract No. 150-07-001

COMMISSIONERS PRESENT

Arthur H. Rosenfeld, Commissioner
Presiding Member, Efficiency Committee

Julia A. Levin, Commissioner
Associate Member, Efficiency Committee

ADVISORS and STAFF PRESENT

David Hungerford, Advisor

James Bartridge, Advisor

Dennis Beck., Jr., Senior Staff Counsel

Bill Pennington

Eurlyne Geizler

ALSO PRESENT

Complainant

Brett L. Dickerson, Attorney
Gianelli and Associates
representing California Living and Energy

Kirk Dall
AllStar Home Inspection Services

Bill Lilly, President
California Living and Energy

Respondent

Steven H. Frankel, Attorney
Brett A. Crawford, Attorney
Sonnenschein Nath and Rosenthal, LLP
representing Masco Corporation and Energy Sense, Inc.

David Short

Jaime Padron, Energy Sense

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1 P R O C E E D I N G S

2 9:05 a.m.

3 PRESIDING MEMBER ROSENFELD: Good

4 morning, everybody. I'm Art Rosenfeld; I'm

5 Commissioner on --

6 MR. PENNINGTON: I think we want a

7 record here, so is there any issue --

8 REPORTER: Oh, no, no, we're getting a

9 record; I'm recording it all. It's just not being

10 amplified.

11 PRESIDING MEMBER ROSENFELD: I'll just

12 do introductions, try again.

13 Good morning, everybody; I'm

14 Commissioner Art Rosenfeld. I'm the Chair of the

15 Energy Efficiency Committee under which this

16 matter comes.

17 To my left is Julia Levin. On her left

18 is her Advisor, Jim Bartridge. On my right is my

19 Advisor, Dave Hungerford. And on my extreme right

20 is Dennis Beck, who is going to run most of the

21 show today.

22 I guess we should start with

23 introductions. I'm just going to go around the

24 room starting with Bill, and ask you if you'll

25 introduce yourself. Bill Pennington.

1 MR. PENNINGTON: I'm Bill Pennington.
2 I'm the Manager of the High Performance Buildings
3 and Standards Development Office.
4 And Eurlyne Geizler will be at my right,
5 when she returns. She is the Supervisor in the
6 office in charge of building standards, compliance
7 and enforcement.
8 MR. LILLY: I'm Bill Lilly, President of
9 California Living and Energy.
10 MR. DICKERSON: I'm Brett Dickerson of
11 the law offices of Gianelli and Associates, here
12 on behalf on complainants --
13 PRESIDING MEMBER ROSENFELD: I'm sorry,
14 on the volume. I'm writing down Bill Lilly, and I
15 just -- yell a little more.
16 MR. DICKERSON: Okay. Brett, B-r-e-t-t,
17 Dickerson. I'm here on behalf of complainants.
18 PRESIDING MEMBER ROSENFELD: Good
19 morning.
20 MR. FRANKEL: Good morning. Steve
21 Frankel with the Sonnenschein firm on behalf of
22 Masco Corporation and Energy Sense, Inc.
23 MR. CRAWFORD: Brett Crawford, also with
24 Sonnenschein, representing Masco and Energy Sense.
25 PRESIDING MEMBER ROSENFELD: What was

1 your last name, again? Crawford?
2 MR. CRAWFORD: Crawford, yes.
3 MR. PADRON: Jaime Padron with Energy
4 Sense.
5 PRESIDING MEMBER ROSENFELD: Say your
6 name again, please.
7 MR. PADRON: It's Jaime, it's spelled
8 J-a-i-m-e.
9 PRESIDING MEMBER ROSENFELD: J-a-i-m-e.
10 MR. PADRON: And the last name is
11 P-a-d-r-o-n.
12 PRESIDING MEMBER ROSENFELD: P-a-d?
13 MR. PADRON: Um-hum.
14 PRESIDING MEMBER ROSENFELD: All right.
15 (Electronic sound interruption.)
16 MR. LILLY: I'm not asleep no more.
17 (Laughter.)
18 ASSOCIATE MEMBER LEVIN: Everybody awake
19 now?
20 (Parties speaking simultaneously.)
21 PRESIDING MEMBER ROSENFELD: Let's try
22 it.
23 MR. SPEAKER: Every dog in the country
24 should --
25 PRESIDING MEMBER ROSENFELD: Testing,

one, two, three, four. My mike's still not working. Oh, I see, we have --

MR. BECK: There it goes.

PRESIDING MEMBER ROSENFELD: Testing, one, two, three, four. Does that work?

MR. SPEAKER: Yes.

PRESIDING MEMBER ROSENFELD: Good. All right.

MR. SPEAKER: Sorry about that, everybody.

PRESIDING MEMBER ROSENFELD: Eurlyne, you weren't here to introduce yourself.

MS. GEIZLER: Eurlyne Geizler, Building Standards Implementation Office.

PRESIDING MEMBER ROSENFELD: Okay. I am ready to turn this meeting over to Dennis Beck on this. Did you have any comments you wanted to make?

Listen, I'm going to ask your indulgence. I'm expecting one or two very short phone calls this morning. I would normally ask everybody to turn his cellphone off, but can I leave mine on for --

(Laughter.)

PRESIDING MEMBER ROSENFELD: All right.

1 Thank you very much. I'll try not to abuse your
2 confidence.
3 Dennis, are you ready to run this show?
4 MR. BECK: Yes. We're here today for
5 the hearing on the complaint/request for
6 investigation filed by the complainants California
7 Living and Energy and Duct Testers, and they'll be
8 known collectively as complainants for this
9 hearing, against Masco Corporation and Energy
10 Sense, who will be collectively known as
11 respondents. The docket number is 08-CRI-01.
12 My name is Dennis Beck; I'm Senior Staff
13 Counsel of the Chief Counsel's Office of the
14 Energy Commission.
15 We have an agenda today which lays out
16 the procedure. If you didn't get a copy of it,
17 there are copies on the front table as you come
18 into the room. The agenda lays out the steps in
19 the proceeding which will be similar generally to
20 that of a trial.
21 The rules of evidence that we'll be
22 following are contained in section 1212, section
23 1212 of Title 20 of the California Code of
24 Regulations. And I will go ahead and just read
25 those into the record at this point.

1 The following rules of evidence shall
2 apply to an adjudicatory proceeding of the
3 Commission, and in such other proceedings as the
4 Commission may determine by order.
5 a) the hearing need not be conducted
6 according to technical rules relating to evidence
7 and witnesses. Any relevant, noncumulative
8 evidence shall be admitted if it is the sort of
9 evidence on which responsible persons are
10 accustomed to rely in the conduct of serious
11 affairs.
12 b) oral and written testimony offered by
13 any party shall be under oath. And I believe the
14 court reporter is the one who will administer the
15 oath or affirmation.
16 c) subject to the exercise of the lawful
17 discretion of the presiding committee member, as
18 set forth in section 1203(c), each party shall
19 have the right to call and examine witnesses, to
20 introduce exhibits, to cross-examine opposing
21 witnesses on any matters relevant to the issues in
22 the proceeding, and rebut evidence against any
23 such party.
24 Questions of relevance shall be decided
25 by the presiding committee member. Commissioner

1 Rosenfeld, as the Presiding Member, has delegated
2 to me the authority to, as a threshold, rule on
3 any objections that counsel may have during the
4 proceeding, subject, of course, to final decision,
5 if need be, by the Presiding Member.
6 And d), hearsay evidence may be used for
7 the purpose of supplementing or explaining other
8 evidence, but shall not be sufficient in and of
9 itself, to support a finding unless it would be
10 admissible over objections in civil actions.
11 The Presiding Member may establish such
12 additional rules, as necessary, for the orderly
13 conduct of the proceeding.
14 So, what that means is this is not
15 obviously a trial, a civil trial. The technical
16 rules of evidence do not apply. There may be some
17 questions that are not strictly relevant or more
18 likely, questions that call for some sort of
19 hearsay. Those will generally be allowed. But as
20 the rules state, an assertion that is hearsay
21 shall not be the only factor that can be relied on
22 when making a finding.
23 But I would ask counsel to keep these in
24 mind, and that to keep the objections generally to
25 a minimum. Again, the technical rules of

1 evidence, technical rules of hearsay are not
2 applicable.
3 The Commissioners, staff, parties and
4 witnesses have been provided with a binder which
5 contains the record in this proceeding, which
6 means all documents that have been filed to the
7 docket up until this point. Those binders are in
8 front of you and there's also one at the witness
9 stand.
10 As such, there is no need to introduce
11 documents into evidence that have already been
12 submitted to the docket. You can simply refer to
13 those items that have been submitted to the
14 docket. And, as such, some of the more voluminous
15 documents that are in the docket, such as the
16 second submission by CHEERS, have been Bates
17 stamped.
18 So when you are questioning a witness
19 and you want, or making an assertion to the
20 Commission during argument, if you would please
21 refer to the binder sections and page numbers
22 during the proceeding.
23 At the front of the binder there is a
24 table of contents which lists what all 26 tabbed
25 entries are in the binder.

1 As I said, my role in this hearing will
2 be sort of as a de facto hearing officer.
3 The issues involved in this proceeding
4 are relatively narrow, i.e., whether there is a
5 conflict of interest on the part of the
6 complainants in violation of the HERS regulations
7 found in Article 8 of Title 20 of the California
8 Code of Regulations, sections 1670 through 1675.
9 I have been asked by the Committee to
10 insure that the evidence presented and arguments
11 are confined to those relevant issues. And I have
12 been asked to help guide the parties back to those
13 issues if they begin to go afield.
14 So, again, please keep that mind that
15 the issues that we're dealing with are fairly
16 narrow. And even at this point, with the docket
17 that we have, with the record that we have,
18 perhaps even the factual issues in dispute have
19 been narrowed to some degree.
20 I would note that the prehearing briefs
21 submitted by both parties in the last few days
22 have primarily focused on the legal issue of
23 whether or not the structure of the way Energy
24 Sense and Masco do business is or is not a
25 violation of the conflict of interest rules.

1 Anyway, with that, we can have opening
2 statements or comments by the parties. But,
3 please keep in mind that we have read your
4 prehearing briefs. So if you have anything to
5 supplement, let us know.
6 Also, one last thing. To address the
7 request for continuance that was made last week by
8 the complainants. As we said, we are going to go
9 forward with the hearing today. But, if, at the
10 end of the hearing, at the end of the testimony,
11 if either party believes that more evidence needs
12 to be adduced, the parties can make their pitch at
13 that time for additional hearing and for perhaps
14 the additional subpoenas or requests for
15 documents.
16 So, with that, Mr. Dickerson, do you
17 have anything in introduction to say?
18 MR. DICKERSON: Well, just one
19 preliminary matter. I've provided Mr. Frankel a
20 booklet of our proposed exhibits. We may not use
21 them all. He has reviewed them, I believe. At
22 least for preliminary purposes, we have agreed
23 that from a foundational standpoint they purport
24 to be what they claim to be.
25 MR. BECK: Are those documents already

1 submitted to the docket, or are they in addition
2 to?
3 MR. DICKERSON: They are in addition to
4 the docket. These are our admissions, according
5 to what I read admissibility of exhibits will be
6 determined during this period of time. It can be
7 done at the end of the hearing, if necessary.
8 So, he has a copy, or a set. I have a
9 set. And then I have a third set for you or
10 whoever may want to have it, so it's there for
11 your reference.
12 MR. BECK: Okay.
13 MR. DICKERSON: So they're here. I
14 don't know, do you want them?
15 MR. BECK: Yes.
16 MR. DICKERSON: As far as the opening
17 statements go, I concur that briefs have been done
18 and if Mr. Frankel is amenable to it, we can
19 dispense with opening statements and just proceed.
20 MR. FRANKEL: I actually would like to
21 make some remarks, if everybody's in agreement.
22 MR. DICKERSON: Well, if we're going to
23 have opening remarks, I'll make a couple, myself,
24 then. And then I guess we'll go forward.
25 MR. BECK: Just speak -- I'm sorry.

1 ASSOCIATE MEMBER LEVIN: I would just
2 like to underscore, though, please, not to repeat
3 things that are in your opening briefs. Because
4 we really are trying to keep this as efficient as
5 possible for everyone's sake.
6 MR. DICKERSON: Very well. What I will
7 do is I will submit my opening brief as my opening
8 statement for the purposes of levity, so we can
9 get through this.
10 MR. FRANKEL: I just had just a few
11 remarks on behalf of respondents. I actually
12 agree with what Mr. Beck said at the commencement,
13 that this is a very narrow issue. And I --
14 PRESIDING MEMBER ROSENFELD: Excuse me,
15 I'm going to ask you to talk a little closer to
16 the mike.
17 MR. FRANKEL: Oh, I'm sorry.
18 ASSOCIATE MEMBER LEVIN: It may not be
19 on, either.
20 MR. FRANKEL: It appears the green
21 light's on.
22 MR. BECK: Just make sure, for
23 everyone's sake, that everybody can hear, to put
24 your mouth as close as you feel comfortable doing,
25 to the microphone.

1 MR. FRANKEL: Okay. I believe that this
2 is a very narrow issue. And, in addition, with
3 respect to where the parties are in terms of what
4 is in dispute, I also agree it is very narrow.
5 I believe that this issue is a legal
6 issue. When you look at the language in 1673 and
7 the definitions in 1671, the question is whether
8 Energy Sense raters can test under Title 20 and
9 make field tests and verifications of work done by
10 separate Masco subsidiaries. I believe that's
11 what the language of Title 20 says.
12 And I also believe that whether we're
13 looking at the raters employed by Energy Sense, or
14 Energy Sense, itself, under the strict language of
15 1673 and the definitions in 1671, that neither
16 Energy Sense's raters nor Energy Sense, itself,
17 has a financial interest in the other Masco
18 installing subsidiaries whose work is being
19 tested.
20 In particular, they do not have a debt
21 agreement, they do not have an ownership interest,
22 and they're not employees or employers of the
23 Energy Sense subsidiaries. And they also do not
24 advocate or recommend the use of those services.
25 There's no evidence in the record, based

1 on the discovery that's taken place in this
2 proceeding, that those facts are incorrect.
3 And --
4 MR. DICKERSON: Objection, he's arguing
5 evidence in his opening statement.
6 MR. BECK: That's okay. You are, in a
7 sense, reiterating what's already in here.
8 MR. FRANKEL: Well, I think that this
9 proceeding may be expedited if there's an
10 understanding of what's in dispute and what isn't
11 in dispute, i.e., that the respondents admit that
12 Energy Sense raters do Title 24 testing of work
13 done by other Masco subsidiaries. That's not
14 disputed.
15 The question is do those Energy Sense
16 raters have a prohibited financial interest in the
17 work that they're inspecting, or the companies
18 whose work they're inspecting.
19 And, two, are they advocating or
20 recommending the use of those installing
21 companies, if you will, for purposes of gaining
22 more business. There's nothing that supports that
23 notion.
24 In addition, with respect to issues that
25 I've seen raised in the briefs and in other

1 matters, that this dates back to 2002, this
2 dispute, it's --
3 MR. DICKERSON: Objection. This is not
4 what we're supposed to be doing in this opening
5 statement.
6 MR. BECK: Mr. Dickerson, he can go
7 ahead and continue. If you have something to
8 respond -- but, again, Mr. Frankel, you're
9 reiterating what's already in your brief and --
10 MR. FRANKEL: Well, I was really trying
11 to do it for purposes of trying to focus what was
12 going to be presented in this hearing. And if the
13 focus is going to be based on what I've seen in
14 the papers about the complainants' complaints to
15 CHEERS, the complainants' previous complaints to
16 the California Energy Commission about this
17 matter, I don't believe any of that is relevant.
18 The question is, does Energy Sense and
19 its raters operate in accord with the conflict of
20 interest provisions or do they not.
21 MR. BECK: I would agree. And, as I
22 said at the outset, that the relevant issue is
23 what is Masco and Energy Sense doing. And is that
24 that their corporate structure and the way that
25 they operate on the ground, so to speak, is that

1 or is that not a violation of the conflict of
2 interest provisions.
3 The prior contacts with CHEERS or the
4 Commission may be of some relevance. We'll just
5 have to see. But we don't want to prejudge that,
6 and I don't want to unnecessarily limit the scope
7 of what Mr. Dickerson plans to present.
8 So we'll deal with those issues as they
9 arise, but I think Mr. Dickerson does understand,
10 the complainants understand that the issue is
11 whether or not there's a conflict.
12 MR. DICKERSON: I would hope that we
13 have two things that we're going to try to resolve
14 here today. I would hope that what we're going to
15 resolve is, one, the issue as to whether there's a
16 conflict between Masco and Energy Sense.
17 Two, I hope that we're going to resolve
18 the steps that took us to this point six years
19 later, and that still has not been resolved, so
20 that this issue does not arise in the future. I
21 would hope that the CEC is interested in that.
22 MR. BECK: Well, it may be, and we are.
23 But the scope of this proceeding is the former and
24 not the latter. What the Commission did or didn't
25 do to try to resolve this issue up until the

1 point, is not of relevance.
2 If your concern is wanting to create a
3 record that shows that the Commission should have
4 done more to resolve this issue, or that CHEERS
5 should have done more to resolve this issue, this
6 is not the place for it.
7 We're here to -- the complaint that was
8 filed was based on an allegation of conflict of
9 interest. So, we are going to ask that you
10 restrict your presentation of evidence and
11 arguments to that narrow issue.
12 Again, there may be some aspects of
13 prior investigations and prior contacts between
14 the respondents and CHEERS and the respondents and
15 the Energy Commission that may be relevant in
16 terms of bringing to light the facts that would
17 prove or disprove that there is a conflict of
18 interest.
19 But if the presentation of evidence is
20 to, again, show that the Commission should have
21 done more or where the Commission may have made
22 missteps or was less than diligent in trying to
23 resolve the issue, that's not relevant for the
24 purposes of this hearing.
25 MR. DICKERSON: How about information

1 that the Commission essentially made decisions on
2 this matter, at least tentatively, twice in the
3 last five years? Is that relevant?
4 MR. BECK: There may be some relevance
5 to that if there are issues that were, but they're
6 factual issues. But, again, something, even if
7 the Commission had made some tentative or
8 threshold decision -- there was no decision.
9 The fact that the Commission may have
10 expressed, or somebody in the Commission may have
11 expressed an opinion as to whether or not what
12 Masco and Energy Sense was doing was or was not a
13 violation of conflict of interest rules, that's
14 not particularly relevant, because this is the
15 proceeding. This adjudicatory proceeding is the
16 one that's going to decide whether or not there
17 was a conflict of interest.
18 And the opinions expressed by individual
19 staff members of the Commission, I don't think
20 there's been any expression of opinion by the
21 Commission, as a whole, or the Efficiency
22 Committee.
23 But, the individual opinions of
24 individual staff members of the Commission are not
25 particularly relevant because they may not have

been in possession of all the facts that we've accumulated during this proceeding, and that we're going to get here today.

MR. DICKERSON: I guess what we need then perhaps is maybe we go through some stipulations. What is Masco willing to stipulate to? He said that he's willing to stipulate to the fact that --

MR. BECK: Mr. Dickerson, would you just scoot over a little bit --

MR. DICKERSON: Okay, I'm sorry.

MR. BECK: -- just to make sure we all hear you.

MR. DICKERSON: Sure. What are they willing to stipulate to? Apparently they're willing to stipulate to the fact that Energy Sense does Title 24 testing of installations that are performed by other Masco companies.

Are they willing to stipulate that there are package deals that they put together where they sell the whole things in one package?

MR. FRANKEL: Well, I'm prepared to stipulate that --

PRESIDING MEMBER ROSENFELD: A little closer to the mike. Sorry.

1 MR. FRANKEL: I'm sorry. I'm prepared
2 to stipulate that raters employed by Energy Sense
3 do Title 24 testing and verification of
4 installations which, in some instances, have been
5 installed by other Masco subsidiaries.
6 And it only arises in one instance under
7 Title 24. And that is when a HERS rater employed
8 by Energy Sense tests the installation of high-
9 quality insulation. That's the only Title 24
10 measure where Energy Sense raters are inspecting
11 and testing the work of other Masco subsidiaries.
12 And --
13 MR. DICKERSON: Are they doing this by
14 way of packaged bids where the cost of the HERS
15 rating is done in conjunction, and on one big
16 price, submitted by the installer or the
17 contractor?
18 MR. FRANKEL: In connection with work
19 done by Energy Sense's raters the installing Masco
20 subsidiaries do submit bids to builders that
21 include bid prices for installation services, and
22 also prices for other things, as well as Title 24
23 HERS testing.
24 Those bid prices are prepared by the
25 installing subsidiaries, not by Energy Sense. And

1 the builders have the right to select which
2 components of those bids they're going to accept.
3 They can accept installing services,
4 reject testing services. They can accept testing
5 services and reject installing services.
6 And in that circumstance, pursuant to
7 contract, if testing services are accepted by the
8 builder, Energy Sense is advised and its raters
9 schedule the testing, perform the testing, report
10 the results to the builder and to the provider
11 CHEERS.
12 And when the builder makes payment under
13 that bid, it is sent to the installing company
14 that had the contract. And the price of Energy
15 Sense's testing services are then sent to Energy
16 Sense on a pass-through basis without any
17 deductions or mark-ups.
18 MR. DICKERSON: I don't want to
19 improperly characterize anything Mr. Frankel has
20 said. I'll ask Mr. Beck, did you interpret that
21 as a stipulation that yes, in fact, they do sell
22 packaged deals that include the cost of both?
23 MR. BECK: We would only be prepared to
24 stipulate to what Mr. Frankel said, or a
25 stipulation that you two can agree on.

1 MR. DICKERSON: Is Masco/Energy Sense
2 willing to stipulate that they refer business back
3 and forth to one another?
4 MR. FRANKEL: We are prepared to
5 stipulate that --
6 PRESIDING MEMBER ROSENFELD: Mr.
7 Frankel, I'm going to nag at you, sorry --
8 MR. FRANKEL: I'm sorry. We are
9 prepared to stipulate that the Masco installing
10 subsidiaries submit joint bids for testing
11 services and for installing services to builders.
12 Energy Sense, itself, and its raters do
13 not promote the services of the installing
14 subsidiaries.
15 ASSOCIATE MEMBER LEVIN: I'm sorry, Mr.
16 Frankel. A clarifying question. There was a lot
17 of content in that, --
18 MR. FRANKEL: I'm sorry.
19 ASSOCIATE MEMBER LEVIN: -- albeit very
20 brief statement. I appreciate your brevity, but
21 it may not be too brief.
22 MR. FRANKEL: Okay.
23 ASSOCIATE MEMBER LEVIN: You said you
24 submit joint bids --
25 MR. FRANKEL: Well, the bid --

1 ASSOCIATE MEMBER LEVIN: Joint with
2 whom, precisely.
3 MR. FRANKEL: Well, the installing --
4 there are contracts that were entered into between
5 Energy Sense and the installing subsidiaries at
6 the time that Energy Sense was formed.
7 Pursuant to those contracts Energy Sense
8 is a subcontractor to the installing companies and
9 submits is prices for testing services to the
10 installing companies. And end up to be bound by
11 the terms of any builder contracts that the
12 installing subsidiary and a builder might enter
13 into for either installation services or testing
14 services.
15 The installing company then presents
16 that big for testing services and installation
17 services to a builder. The builder is free to
18 choose which services it wants, it elects to
19 accept.
20 And in that circumstance it's the
21 installing companies that are promoting both the
22 installation services or the testing services.
23 It's not Energy Sense.
24 Energy Sense does no promotion or
25 marketing of any other services, other than its

1 own testing services.
2 ASSOCIATE MEMBER LEVIN: And those
3 installing companies are also subsidiaries of
4 Masco?
5 MR. FRANKEL: They are subsidiaries of
6 Masco.
7 ASSOCIATE MEMBER LEVIN: Okay, thank
8 you.
9 MR. DICKERSON: Well, I think we've gone
10 as far as we're going to get with this. We're
11 ready to roll.
12 MR. BECK: Okay. Go ahead, call your
13 first witness.
14 MR. DICKERSON: I'd like to call Kirk
15 Dall, please.
16 MR. BECK: First of all, before we
17 start, just to formally say, Mr. Frankel, your
18 statements that were made in response to Mr.
19 Dickerson's questions, you are stipulating that
20 that is true and correct on behalf of the
21 respondents, correct?
22 MR. FRANKEL: Yes.
23 MR. BECK: Okay.
24 MR. DICKERSON: We need somebody to give
25 an oath or affirmation to Mr. Dall.

1 Whereupon,

2 KIRK DALL

3 was called as a witness herein, and after first

4 having been duly sworn, was examined and testified

5 as follows:

6 REPORTER: Please state and spell your

7 full name for the record.

8 THE WITNESS: Kirk Dall, K-i-r-k, last

9 name Dall, D-a-l-l.

10 MR. DICKERSON: I'll attempt to keep

11 this limited to what we've spoken of earlier, the

12 scope of what we're talking about here. So if it

13 looks like I'm straying afield, feel free to speak

14 up.

15 MR. BECK: I will.

16 MR. DICKERSON: Okay. Or, Mr. Frankel,

17 you, as well.

18 DIRECT EXAMINATION

19 BY MR. DICKERSON:

20 Q What's your current occupation, Mr.

21 Dall?

22 A I'm a business owner of AllStar Home

23 Inspection Services. We do HERS rating and Title

24 24 home inspection services.

25 MR. BECK: Mr. Dall, please do us a

1 favor. Move that microphone, this one, up again.
2 Just so --
3 THE WITNESS: How's this.
4 MR. BECK: Yes, again, as close to it as
5 you feel comfortable.
6 THE WITNESS: Okay.
7 BY MR. DICKERSON:
8 Q Are you currently rated as HERS rater?
9 A Yes, I am.
10 Q Are there more than one level of HERS
11 raters?
12 A Yes, there are.
13 Q What's the distinction between the
14 various rater certifications?
15 A Well, it begins with training. The core
16 program allows you to just do duct leakage
17 testing. Further training allows you to do other
18 things like quality installation services.
19 Q Which one of the ratings do you hold?
20 A I believe I have all the ratings, all
21 the levels.
22 Q Okay. Can you give us and the
23 Commission some, you know, just a sample of the
24 energy saving measures that you test in
25 conjunction with doing HERS ratings?

1 A For example, duct leakage testing?
2 Q Sure. Anything that would require HERS
3 testing.
4 A Well, the one that I do mostly is duct
5 leakage testing. I also to a lot of QII. Those
6 are probably 99 percent of the HERS rating that we
7 do.
8 PRESIDING MEMBER ROSENFELD: I'm sorry,
9 what's QII?
10 THE WITNESS: Quality insulation --
11 PRESIDING MEMBER ROSENFELD:
12 Installation.
13 THE WITNESS: Installation.
14 MR. BECK: Was that quality insulation
15 installation, is that correct?
16 THE WITNESS: Yes.
17 MR. DICKERSON: Yeah. That's a hard
18 one.
19 THE WITNESS: QII is easier to say.
20 BY MR. DICKERSON:
21 Q Is the installation of windows ever
22 subject to the HERS 24 testing?
23 A No. Not at this time.
24 Q Not at this time. Okay. Do you have
25 any experience with bidding a project for Pulte

1 Homes a couple years ago?
2 A Yes, I do.
3 Q When was that?
4 A In 2006.
5 Q 2006. Can you tell us a little bit
6 about that?
7 A It was a project in Manteca called Del
8 Webb. The 55-and-older community that they were
9 going to build, 1400 homes. And because of my
10 relationship with the vice president of land
11 acquisition of Pulte Homes, I was asked to contact
12 the purchasing agent at Pulte Homes in Ripon.
13 And through that process was able to bid
14 on the development for the duct leakage testing.
15 And so put together a bid package for them.
16 Was told by their purchasing agent that
17 I had won their bid, that I was half of the price
18 of my competitor.
19 Q Did you have to take any steps, extra
20 steps, in order to get approval to do that job?
21 A Yes, I did. I had to go out -- well,
22 once I was told that I won the bid, I was told
23 that the next step in the process was to obtain a
24 million dollars worth of professional liability
25 coverage, general liability and workmans

1 compensation.
2 And they gave me a -- well, it took me
3 three weeks to put that package together. And
4 submitted it back in to Pulte Homes.
5 And the next step in the process I was
6 told that I was going to come in and sign the
7 contract.
8 Q Did you ever sign the contract?
9 A No, I did not.
10 Q Why did you not sign the contract?
11 A Because, as that day approached they
12 told me that -- the purchasing agent had told me
13 that their hands were tied, that they had a
14 national contract with my competitor. And even
15 though he was twice the price that I was, that he
16 was forced to use their HERS raters.
17 Q Was the HERS raters that they were
18 forced to use, to your knowledge, from a Masco
19 company?
20 A Well, I wasn't told at the time who it
21 was, but --
22 Q Did you subsequently discover who it
23 was?
24 A Yes, I did.
25 Q Who was the HERS rater that they were

1 using?
2 A It was Energy Sense.
3 Q Energy Sense was doing the work. Okay.
4 Mr. Dall, do you have any knowledge of the time it
5 takes for work to be corrected once a HERS rating
6 has failed?
7 A Yes, I do.
8 Q Okay. And does it take quite awhile for
9 that to be done?
10 A In some cases it does.
11 Q Okay, so is it beneficial to a company
12 to avoid having to come back in and redo work
13 after it has been rated unsatisfactory?
14 A Would you say that again?
15 Q Is it beneficial to an installer to not
16 have to come back in and redo work?
17 A Absolutely.
18 Q Okay, generally, who pays for the
19 original inspection for HERS ratings?
20 A The builder does.
21 Q The contractor?
22 A The builder. In my case it would have
23 been Pulte Homes paying me.
24 Q Okay. In the event that the HERS rating
25 fails and it has to be reinspected, who has to pay

1 for the reinspection?
2 A Typically it's the contractor.
3 Q Who performed the inadequate
4 installation?
5 A Correct.
6 Q Okay.
7 MR. DICKERSON: That's all I have for
8 Mr. Dall.
9 MR. FRANKEL: Just a few questions, Mr.
10 Dall.
11 MR. BECK: And, Mr. Frankel, these --
12 MR. FRANKEL: I'm sorry.
13 MR. BECK: Sorry. I'm hard of hearing
14 and I think Mr. Rosenfeld may be, too.
15 MR. FRANKEL: I will do my best.
16 MR. BECK: So, --
17 PRESIDING MEMBER ROSENFELD: The reason
18 I have to keep nagging at you.
19 MR. FRANKEL: I will try.
20 MR. BECK: Sorry.
21 MR. FRANKEL: Sorry.
22 CROSS-EXAMINATION
23 BY MR. FRANKEL:
24 Q Mr. Dall, how long have you been a HERS
25 rater?

1 A Since early 2006.
2 Q And am I correct that only individuals
3 can be certified as HERS raters?
4 A They are certified individually,
5 correct. But many times companies pay for their
6 training and put them through --
7 Q That wasn't my question. Can a company,
8 itself, become a HERS rater, as far as you know?
9 A No.
10 MR. FRANKEL: I don't have anything
11 further.
12 REDIRECT EXAMINATION
13 BY MR. DICKERSON:
14 Q Are you familiar with circumstances
15 where companies have paid for their raters to be
16 certified?
17 A Oh, absolutely.
18 Q So, it's the company, itself, that is
19 really financing and sponsoring the raters to
20 become raters?
21 A And paying them --
22 MR. FRANKEL: Objection, calls for
23 speculation.
24 MR. DICKERSON: Only on the basis of his
25 knowledge.

1 MR. BECK: Go ahead and answer.
2 THE WITNESS: Well, yes, I've met other
3 raters in the training classes and know that their
4 companies pay them to be, you know, at class, and
5 also, you know, pay for the training.
6 MR. DICKERSON: Okay, that's all I have.
7 Thank you, Mr. Dall.
8 Okay, I'd like to call Mr. Bill Lilly,
9 please.
10 Whereupon,
11 BILL LILLY
12 was called as a witness herein, and after first
13 having been duly sworn, was examined and testified
14 as follows:
15 MR. LILLY: I affirm my testimony. Yes,
16 I affirm.
17 REPORTER: Please state and spell your
18 name for the record.
19 MR. DICKERSON: Bill, state and spell
20 your name for the record.
21 THE WITNESS: My name is Bill Lilly.
22 Everybody hear me okay? I don't want to get
23 called on the carpet.
24 PRESIDING MEMBER ROSENFELD: Yeah.
25 THE WITNESS: My name is Bill Lilly; I'm

1 the President of California Living and Energy.
2 And my name spelling is B-i-l-l L-i-l-l-y.
3 DIRECT EXAMINATION
4 BY MR. DICKERSON:
5 Q Mr. Lilly, what is your occupation?
6 A President of an energy inspection firm
7 and engineering firm, California Living and
8 Energy.
9 Q Okay. How long have you been employed
10 in that business?
11 A Energy calculations, over 20 years.
12 Q Okay. What type of work do you do?
13 A We do engineering, mechanical layouts.
14 We do HERS testing and we do solar testing. We do
15 energy calculations here and other states.
16 Q Okay. How long have you done Title 24
17 HERS testing?
18 A Over 20 years.
19 Q Are you the person who initiated the
20 present complaint?
21 A Yes.
22 Q Why did you initiate this complaint?
23 A I saw on a case -- the reason why is
24 that I saw the Energy Commission is a big part of
25 my business, do a tremendous amount of work over

1 the years to make this, the integrity of the
2 system.
3 And in 2002 I saw, in my opinion that
4 all this work was going for nothing because that
5 we had a company called Masco, a billion-dollar
6 company coming in and, in that sense, were doing
7 jobs violating the third-party standard.
8 And all this work that the Energy
9 Commission's gone through to get all this
10 together, I didn't think it was right. So I
11 brought it up to Bill Pennington.
12 Q Okay, so Mr. Pennington was the first
13 time you spoke to anybody from the CEC?
14 A Yes.
15 Q Okay. Tell us about the initial
16 conversation that you had with Mr. Pennington.
17 A In 2002 I called Bill and I asked him,
18 hey, we got a situation here, I want to know what
19 you think what the situation is. This is what I
20 see out there in the field is happening.
21 And Bill said --
22 MR. FRANKEL: I'm going to object. This
23 is hearsay.
24 MR. BECK: Well, if it's being offered
25 to as the effect on Mr. Lilly as what he was told

1 and what he did as a result of getting this
2 information.
3 You can go ahead and answer.
4 MR. DICKERSON: Thank you.
5 THE WITNESS: I saw that this
6 information that this Masco was testing out there
7 in the field, I believe, was a violation of the
8 standards.
9 And since all of us in California are
10 going through a lot the last 20, 30 years to put
11 this together, I didn't think it was right. So I
12 brought it up to Bill Pennington to look into it.
13 BY MR. DICKERSON:
14 Q Did you have any email communications
15 with Mr. Pennington?
16 A Yes.
17 Q I'd like to refer you to what has been
18 marked as exhibit, shown as exhibit 36 -- I'm
19 sorry, 37.
20 MR. BECK: And you're referring to your
21 stipulated --
22 MR. DICKERSON: My stipulated, yeah.
23 MR. BECK: -- group of documents --
24 MR. DICKERSON: If I could be --
25 MR. BECK: -- not that prepared by the

1 Commission?
2 MR. DICKERSON: If I'm going to be going
3 to the docket booklet, I'll notify you. So unless
4 I tell you I'm going to the docket I'll be going
5 to my own exhibits.
6 MR. BECK: Okay.
7 MR. DICKERSON: Okay.
8 PRESIDING MEMBER ROSENFELD: Let me get
9 it straight. This is new, this is not in the
10 docket?
11 MR. DICKERSON: This is not in the
12 docket. Well, actually this may be in the docket
13 because this is a copy of an email that was
14 submitted as an exhibit with Mr. Lilly's original
15 complaint. But it's just subsumed within there.
16 I have simply taken the liberty of
17 moving it out individually so it's easy to get to
18 and people can look at it.
19 PRESIDING MEMBER ROSENFELD: Thanks.
20 ASSOCIATE MEMBER LEVIN: Mr. Beck, if
21 somehow you could reference the date of the email,
22 that would help us --
23 MR. DICKERSON: Okay, sure.
24 ASSOCIATE MEMBER LEVIN: -- to find
25 easily whether or not we have a copy in our

1 binders.
2 MR. DICKERSON: Okay. The date.
3 BY MR. DICKERSON:
4 Q If you could, give the date of that
5 email.
6 A The date, there's two of them. June 26,
7 2002 and October 6, 2002. And a third one,
8 October 5, 2002.
9 MR. DICKERSON: If you give me a moment
10 I'll see -- okay. This is actually, so you can
11 see it, this is under tab number 1 of the docket
12 information, and it is Bates stamped number 51.
13 BY MR. DICKERSON:
14 Q Now, at the bottom of that email you
15 have apparently requested some information from
16 Mr. Pennington, correct?
17 A Yes.
18 Q Okay. What is his response to that
19 request for information?
20 A On June 26th Bill Pennington sent me an
21 email, Tom Hamilton of CHEERS, John Eash, Rob
22 Hudler, EnergySoft and Bill Hughes of SMUD.org, he
23 wrote: Commission Staff is waiting a letter from
24 Masco explaining their process. When that arrives
25 we will decide how it relates to the conflict of

1 interest rules.
2 Q Okay. Did you ever receive any response
3 from Mr. Pennington?
4 A Yes.
5 Q Okay. Was that in response to your
6 follow-up email in October?
7 A Yes.
8 Q Okay. Can you tell us what Mr.
9 Pennington said to you in that follow-up email
10 dated October 6, 2002?
11 A Bill said: Independent third-party
12 field verification is required for measures in the
13 standards that require such verification. The
14 Masco quality control process does not satisfy
15 this requirement.
16 Q Did you have any further communication
17 with anyone from the CEC on this matter?
18 A Not at that time.
19 Q Okay, when did you next have a
20 discussion with the CEC on this issue?
21 A It happened again in 2005, about three
22 years later.
23 Q And why did you reopen communications
24 with them?
25 A I told Bill that, remember what you

1 wrote me about Masco, it's happening again. What
2 are we going to do about it.
3 Q Okay. Did you receive any response?
4 A Yes.
5 Q What was the response that you received?
6 A I don't remember what the response was
7 at that time. Generally it follows up most times,
8 it's either that or the year later when Bill
9 Pennington referred it to Tav Commins.
10 Q Did you have any communications with
11 CHEERS during this period of time?
12 A Yes.
13 Q What was your communication with CHEERS?
14 A I emailed Tom Hamilton in 2002 about the
15 same situation. I asked him just what he thought,
16 realizing that he didn't hear absolutely
17 everything. And I talked to Bill Pennington,
18 people at the CEC. And what he thought.
19 Q Did you ever have any communications
20 with Tav Commins from the CEC on this matter?
21 A Yes.
22 Q I'd like to refer you to -- let's go
23 back to CHEERS and your discussions with CHEERS.
24 Were you aware that CHEERS was working
25 with Masco regarding the Energy Sense matter at

1 the time you were speaking to them in 2006?
2 A Not at that time, no.
3 Q Who were you speaking to at CHEERS at
4 that point in time?
5 A Bill Pennington --
6 Q I'm sorry, not at the CEC, CHEERS.
7 A CHEERS would be Tom Hamilton and one of
8 the administrative assistants in 2005.
9 Q What was Tom Hamilton's role with CHEERS
10 at that time?
11 A He was the Executive Director of CHEERS.
12 Q Did you have any -- at any point in time
13 did Mr. Hamilton -- I may have asked this -- did
14 he advise you that he was in communication with
15 Masco on the Energy Sense program?
16 A He never did.
17 Q I'd like to refer you to what has been
18 marked as exhibit 3.
19 Have you seen that document before?
20 A Yes.
21 Q Where have you seen it? Where do you
22 recognize it from?
23 A This is a document that was sent to us
24 within the group that came from Masco and CHEERS.
25 Q Did it come from Masco or did it come

1 from CHEERS?
2 A CHEERS.
3 Q It came from CHEERS, so these are
4 documents that were produced to us by CHEERS?
5 A Correct.
6 Q Do you recognize the name that this
7 letter is addressed to?
8 A Some of them, yes. All of them.
9 Q Who are they?
10 A Brad Townsend, Dale Camany, Dave Bell,
11 David Short, Rick Davenport.
12 Q Okay, and who is the email from?
13 A Tom Hamilton.
14 Q The names that it's addressed to, you
15 said you recognize them. Do you know who those
16 people work for?
17 A Masco.
18 Q So all the people there are Masco
19 employees?
20 A Correct.
21 Q Okay.
22 MR. DICKERSON: For purposes of a clear
23 record I'd like to have either Mr. Lilly or myself
24 read what has been marked as exhibit 3 onto the
25 record.

1 MR. BECK: I don't think it needs to be
2 read into the record. We've got it. It's
3 duplicative of what -- if we're going to receive
4 these documents into the record, it's duplicative
5 to have the witness read it into the record.
6 MR. DICKERSON: Okay. I just want to
7 insure that this particular document is read by
8 the Committee. Okay.
9 MR. BECK: All the documents that will
10 be submitted and that have been submitted will be
11 read and considered.
12 MR. DICKERSON: Mr. Frankel, do you have
13 any objection to that document being admitted as
14 an exhibit?
15 MR. FRANKEL: I have no objection.
16 MR. BECK: My understanding was that all
17 of the documents that are contained in the binder
18 that was submitted today were going to be
19 stipulated to, is that correct?
20 MR. FRANKEL: I stipulated to their
21 authenticity. I didn't stipulate to the --
22 PRESIDING MEMBER ROSENFELD: Louder.
23 MR. FRANKEL: I stipulated to their
24 authenticity. I did not stipulate that they
25 necessarily should be admitted into evidence. I

1 have no objection to this July 7, 2006 email
2 that's behind tab 3 being admitted.
3 ASSOCIATE MEMBER LEVIN: Gentlemen, I
4 just want to remind you we're not in court. And
5 so to the extent that we can avoid some of these
6 formalities, they're not all required, we will be
7 able to move through this more effectively and
8 really focus on the issues at heart here.
9 So I don't think that we need to
10 stipulate to every piece of evidence, as Mr. Beck
11 said. And I think we should not make this more
12 formal or more cumbersome than it needs to be.
13 MR. DICKERSON: Okay. I just want to
14 insure that there's no objections from Mr. Frankel
15 before I submit a piece of evidence as an exhibit.
16 MR. BECK: Actually, --
17 MR. DICKERSON: Okay.
18 BY MR. DICKERSON:
19 Q Mr. Lilly, could you take a look at
20 what's been marked as exhibit 29, please.
21 A Okay.
22 Q Have you seen that document before?
23 A Yes.
24 Q Okay. Could you look to page 8 of 9,
25 please. Actually, before you look at page 8 of 9,

1 could you just identify what that document is
2 titled?
3 A It's from AHC Group, Inc., experts in
4 corporate strategy and social response.
5 Q What's the date of that document?
6 A The date is June 20, 2007.
7 Q Are there some certain speakers and such
8 that are identified on there that are going to
9 make presentations at this --
10 A Yes.
11 Q Okay. If you could move to page 8 of 9,
12 please.
13 PRESIDING MEMBER ROSENFELD: Sorry,
14 trying to follow along. Is this in --
15 MR. BECK: No, this is the documents
16 that were submitted.
17 MR. DICKERSON: You have a copy of them?
18 MR. BECK: I have a copy.
19 MR. DICKERSON: Okay.
20 BY MR. DICKERSON:
21 Q In looking at page 8 of 9, do you see
22 the Masco logo anywhere?
23 A Yes.
24 Q What name is there?
25 A Masco Contractor Services Dave Bell,

1 Vice President of Marketing.
2 Q So David Bell is listed as the Vice
3 President of Marketing of Masco Contracting
4 Services?
5 A Yes.
6 Q Are you aware if during 2007 Mr. Bell
7 occupied any other companies with any Masco-
8 related entities, or any other positions?
9 A Yes.
10 Q What position are you aware that Mr.
11 Bell occupied?
12 A President of Energy Sense.
13 Q So in 2007 Mr. Bell was not only the
14 President of Energy Sense, he was the Vice
15 President of Marketing of Masco Contracting
16 Services?
17 A Yes.
18 MR. FRANKEL: Objection. He can only
19 testify as to what the document states. I mean he
20 doesn't know what positions Mr. Bell had.
21 MR. BECK: Unless he has some other
22 independent knowledge.
23 THE WITNESS: I've known David Bell
24 probably about ten years and we've talked at
25 different meetings, residences, so I do have some

1 exterior knowledge.
2 ASSOCIATE MEMBER LEVIN: Mr. Frankel, is
3 it your position that he did not hold both
4 positions at the same time?
5 MR. FRANKEL: That is correct. This is
6 in error. And this is not a Masco document.
7 MR. DICKERSON: Well, that particular
8 document came off the internet.
9 PRESIDING MEMBER ROSENFELD: I'd like to
10 get the two titles straight, too. You say one
11 document said that Mr. Bell was the VP of Masco?
12 MR. DICKERSON: The Vice President of
13 Marketing of Masco.
14 THE WITNESS: Yes.
15 PRESIDING MEMBER ROSENFELD: VP
16 Marketing. And the other title was?
17 THE WITNESS: President of Energy Sense.
18 MR. BECK: And it is true that in
19 looking at this document it is something that was
20 pulled off of the internet, but there are a number
21 of different companies listed here. It does not
22 appear to be a Masco- or Energy Sense-generated
23 document.
24 MR. DICKERSON: But it does list Mr.
25 Bell as being the Vice President of Marketing --

1 MR. BECK: It lists Mr. Bell as Vice
2 President of Marketing for Masco Contractor
3 Services.
4 It'll be given the weight due,
5 considering that it's not a document from Masco;
6 it's something that was on an internet website,
7 even if it is by the companies.
8 MR. DICKERSON: That's fair.
9 PRESIDING MEMBER ROSENFELD: Let's see.
10 I'm puzzled. There is something from the web?
11 MR. BECK: There's just a -- and really,
12 these documents should be -- I wish that you had,
13 if you're going to refer to them, then we would
14 all have a copy of them, so the Commissioners
15 could refer to them.
16 But what we have is several web pages
17 from a conference in 2007 regarding -- well, let's
18 see, it doesn't really say, but it has a number of
19 different companies --
20 THE WITNESS: It's a workshop on
21 corporate strategy, to strategize, I think it is,
22 Mr. Beck.
23 MR. BECK: -- and it just lists David
24 Bell as, in one part of this, under Masco
25 Contractor Services it says David Bell, Vice

1 President of Marketing. And has the Masco website
2 name, and that's it.
3 PRESIDING MEMBER ROSENFELD: The role --
4 MR. BECK: It has the Masco Contractor
5 Services logo.
6 PRESIDING MEMBER ROSENFELD: Where does
7 Energy Sense appear?
8 MR. BECK: It doesn't appear here.
9 PRESIDING MEMBER ROSENFELD: It does
10 not?
11 MR. BECK: Does not.
12 BY MR. DICKERSON:
13 Q Just to clarify. Referring your
14 attention to what's been marked as exhibit 9 --
15 ASSOCIATE MEMBER LEVIN: Mr. Dickerson,
16 could you refer to Bates stamp numbers, please.
17 Because it's not clear to us, as the
18 Commissioners, when something is in our binder
19 already, or whether it is not.
20 MR. DICKERSON: Well, if all I say is
21 it's a certain exhibit number, it doesn't appear
22 in this number.
23 MR. BECK: It does. That particular
24 letter, it does appear --
25 MR. DICKERSON: It does and I'm looking

1 for it now.
2 MR. BECK: -- so please make all
3 references that you can to the docket and to the
4 record that we all --
5 THE WITNESS: Would that -- in my
6 ignorance, does that mean that this number, the
7 lower right-hand corner, would be the --
8 MR. BECK: Well, that is what we have to
9 do. We have to -- actually, that letter is the
10 one from David Bell to Tav Commins. And that is
11 actually contained in its entirety, I believe, in
12 the section 18, response to complainant's first
13 amended subpoena from California Energy
14 Commission. I believe it is attachment B, b as in
15 boy.
16 PRESIDING MEMBER ROSENFELD: I'm sorry,
17 I'm at tab 18, now what do I --
18 MR. BECK: Tab 18, and let me find the
19 Bates stamp number. The Bates stamp number would
20 be -- well, it's under --
21 MR. BARTRIDGE: -- 150, well, it's
22 attachment B, which would be page number 158 if
23 you go by the other numbers.
24 MR. BECK: Attachment B, numbers 1
25 through 3.

1 PRESIDING MEMBER ROSENFELD: Okay, I'm
2 at attachment 3, now where do I go?
3 MR. BECK: Now it's -- turn the page.
4 And it's that letter.
5 PRESIDING MEMBER ROSENFELD: Dear Tav.
6 MR. BECK: Yes. And there's no date on
7 this letter.
8 MR. DICKERSON: The "Dear Tav" letter.
9 THE WITNESS: Yeah, the "Dear Tav"
10 letter.
11 BY MR. DICKERSON:
12 Q That particular document, have you seen
13 that before?
14 A Yes.
15 Q The letterhead is who?
16 A Letterhead is Energy Sense.
17 Q Who's the signatory to that letter?
18 A David Bell, President, Energy Sense.
19 Q Okay, so whenever that letter was
20 written apparently Mr. Bell was, in fact, the
21 President of Energy Sense?
22 A Correct.
23 MR. BECK: Well, the document will speak
24 for itself.
25 PRESIDING MEMBER ROSENFELD: I want to

1 make sure I get this straight. So we have
2 evidence that Mr. Bell was both a VP of Masco and
3 signed himself as President of Energy Sense?
4 THE WITNESS: Yes.
5 MR. BECK: We have documents that -- we
6 have the internet webpage that has him listed as
7 that. But it is not a Masco document. It is done
8 by -- compiled by a different person, by a
9 different entity, so --
10 MR. FRANKEL: And we will be able to
11 show that that was an error. The only position as
12 an officer of any Masco company that Mr. Bell
13 occupied at this time was President of Energy
14 Sense, Inc. He did not hold a position as an
15 officer of any other Masco company.
16 ASSOCIATE MEMBER LEVIN: Mr. Frankel, I
17 think there are two issues here. There's what, in
18 fact, was filed with the Secretary of State, and
19 it would be helpful if you could produce that
20 since there does seem to be some discrepancy in
21 the public record.
22 And then there's the appearance of dual
23 positions, whether or not it was, in fact, legally
24 the positions he held. He certainly seems to have
25 held himself out, unless you're saying this letter

1 was not actually sent by him.
2 MR. FRANKEL: Well, no, I --
3 ASSOCIATE MEMBER LEVIN: There's a whole
4 'nother possible issue, if I may. But he has
5 signed this letter. Is there evidence in the
6 record, other than the web statement, that he also
7 held the title or purported to hold the title of
8 VP of Marketing for --
9 MR. DICKERSON: Yeah, VP of Marketing
10 for Masco --
11 ASSOCIATE MEMBER LEVIN: -- Masco.
12 MR. DICKERSON: -- Contractor Services.
13 No, we don't have anything with us today beyond
14 what we have --
15 ASSOCIATE MEMBER LEVIN: So that's based
16 only on the web statement.
17 MR. DICKERSON: Based on the web -- the
18 flyer that came off of the web.
19 MR. FRANKEL: Right. And just for the
20 record, I mean that was not a document that was
21 prepared by Masco; it was prepared by the workshop
22 that was putting on this seminar. And we will
23 present evidence that shows that Mr. Bell only
24 occupied the position as an officer of Energy
25 Sense, not of Masco Contractor Services.

1 ASSOCIATE MEMBER LEVIN: Okay, thank
2 you.
3 BY MR. DICKERSON:
4 Q What exhibit do you have there, Mr. --
5 A It's an exhibit, I guess, GA00.
6 Q -- this right here --
7 A Thirty.
8 MR. DICKERSON: Exhibit Number 30.
9 Yeah, if you could refer to exhibit 30, and I'm
10 sorry this exhibit is not located anywhere in the
11 docket information.
12 BY MR. DICKERSON:
13 Q Have you seen that document before?
14 A Yes.
15 Q What is it?
16 A It is online resources, it's stating
17 what online resources Masco Contractor Services
18 have.
19 Q Okay, is that the Masco website?
20 A Yes.
21 Q Do you see any links anywhere on the
22 Masco website? I'm sorry, the Energy Sense
23 website?
24 A Yes.
25 Q Okay, what's the very first link that

1 you see on the Energy Sense website?
2 A Masco. Masco.csc.com.
3 Q What's the name of the company that
4 they're referring to?
5 A Masco Contractor Services.
6 Q Okay, so on the Energy Sense website,
7 the first link that they have is to Masco
8 Contractor Services, correct?
9 A Yes.
10 Q Do you have any idea what type of work
11 Masco Contractor Services does?
12 A Yes, some idea.
13 Q Does Masco Contractor Services do work
14 in California that requires HERS 24 testing?
15 A Yes.
16 Q Go to what the Masco -- report.
17 MR. BECK: Mr. Dickerson, it's really
18 not necessary for the witness to identify,
19 describe every document that we've got here. The
20 Committee is going to review the record in its
21 entirety. And we will be able to draw the
22 conclusions and inferences from those documents.
23 It might be a better idea for, if you're
24 gong to -- it seems that you're going through your
25 binder and having Mr. Lilly identify the documents

1 and describe what's in the document. It's really
2 not necessary.
3 Perhaps it might be a good idea for, I
4 don't know how much you conferred with Mr. Frankel
5 about this, to decide on which of these are going
6 to be submitted into evidence.
7 Obviously the Committee can give the
8 weight it deems appropriate to certain documents
9 such as information contained on a webpage that
10 was obviously not produced by Energy Sense or
11 Masco, as opposed to something like this that
12 we've got that is apparently directly off of the
13 Energy Sense website.
14 MR. DICKERSON: Um-hum. Well, what I'll
15 do is I'll just try to expedite through here.
16 Some of these documents are somewhat voluminous.
17 And just for purposes of the recorded record I'd
18 just like to point out certain areas of them, but
19 I will not delve into them in any detail. And
20 I'll try to expedite --
21 MR. BECK: Even that might be too much,
22 because we really don't need to do that. We'll
23 look at them. And what might be a better idea is
24 for you and Mr. Frankel to decide what is going to
25 be entered into evidence at this proceeding from

1 your documents, your original documents that are
2 here today.
3 And we would appreciate that only the
4 documents that are not already in the docket be
5 entered to avoid duplications. The record is
6 already a pretty good size.
7 MR. DICKERSON: Can we take this thing
8 home?
9 MR. BECK: Yes. That's yours to keep.
10 What Mr. Dickerson's referring to, for the record,
11 is the docket that was -- or the binder that was
12 prepared for the parties.
13 And, Mr. Dickerson, you should also know
14 that all of the documents, and, Mr. Frankel, as
15 well, all of the documents that are contained in
16 this binder are on the Commission's website.
17 MR. DICKERSON: Oh, no question if
18 they're here in a binder marked docket, but --
19 MR. BECK: And --
20 MR. DICKERSON: -- to speed the process
21 up a little bit, clearly what's taken me the most
22 time so far is to try to go through and find, in
23 this particular publication, where certain things
24 are.
25 MR. BECK: Correct.

1 MR. DICKERSON: I mean this is taking a
2 long time.
3 MR. BECK: Yes.
4 MR. DICKERSON: And not being familiar
5 with your process here, I was not aware that this
6 document would not only be provided, but would
7 serve as the foundation for our exhibits.
8 MR. BECK: Well, it's the --
9 MR. DICKERSON: But it's taking --
10 MR. BECK: -- record.
11 MR. DICKERSON: Exactly. But it's
12 taking a long time.
13 MR. BECK: Yes.
14 MR. DICKERSON: Steve, I don't know what
15 you saw in there. You said you were willing to
16 stipulate to those things being authentic. What
17 do you see that you are not willing to stipulate
18 as being suitable for evidentiary consideration?
19 MR. FRANKEL: Well, I may have to take
20 -- I can't answer that question right off the fly.
21 I haven't looked through every document area.
22 MR. DICKERSON: I suggest we shut this
23 thing down for the day and we take these things
24 home and go through here --
25 MR. BECK: We're not going to stop for

1 the day. We have witnesses here that are prepared
2 to testify. And we even believe that perhaps we
3 can get this done today.
4 But what we could do --
5 MR. DICKERSON: Take a break?
6 MR. BECK: We could take a break or what
7 I suggest is that we move on with the actual
8 evidence, the presentation of witnesses that will
9 supplement the record as it exists, not simply
10 identify the documents that either already have
11 been submitted to the docket, or have been -- or
12 are in the list of documents -- the documents that
13 you have in your binder today.
14 We can get on with that, and when we
15 take our lunch break you and Mr. Frankel can
16 confer with one another. Come up with an
17 understanding of what is going -- what you agree
18 to allow to come into the record.
19 And, again, the technical rules of
20 evidence do not apply, including authentication,
21 including the foundation of a document. If
22 there's a particular document that the parties
23 feel they need to explain beyond that which is a
24 common understanding, then you could feel free to
25 do so.

1 But a number of these documents simply
2 speak for themselves. And it's a waste of time to
3 go through them one by one, identify them, and
4 have the witness or the attorneys tell us what
5 they are.
6 ASSOCIATE MEMBER LEVIN: Mr. Frankel,
7 Commissioner Rosenfeld and I would also find it
8 very helpful if you could produce -- I realize it
9 probably not be today, but the filings of the
10 Secretary of State in the relevant years who held
11 officer and director positions in each of the two
12 companies, that issue.
13 MR. FRANKEL: Certainly.
14 ASSOCIATE MEMBER LEVIN: That would be
15 very helpful, thank you.
16 MR. FRANKEL: Okay.
17 MR. DICKERSON: Well, I'll continue to
18 go through this again. I want to make sure that
19 we at least have a reference on the record to what
20 it is specifically we want to look at, and have
21 the Commission look at in a specific exhibit.
22 Like the one from Energy Sense, that
23 website where they have the link of Masco
24 Contractor Services. I can't run the risk that
25 that may be missed.

1 MR. BECK: Nothing will be missed.
2 Every single document that you submit to this
3 record will be looked at and will be considered.
4 If there's a concern that the Commission will not
5 emphasize it as much as you think, or that the
6 legal significance of it will be missed, then what
7 I think could be done, and what you gentlemen
8 probably are already thinking of, is that at the
9 end of this hearing there will probably be a
10 timeframe given for both of you to submit your
11 briefs, your closing or post-hearing briefs,
12 explaining to us what you believe evidence that
13 was presented in this hearing proves in terms of
14 whether or not there was a conflict of interest.
15 And in that brief you would refer to
16 specific parts of the record, and bring those
17 specifically to our attention.
18 But, again, it's an unnecessary waste of
19 time to go through documents that are already in
20 the docket, that are already basically in
21 evidence, and go into them.
22 So, Mr. Dickerson, do you have any
23 additional witnesses that you would be presenting
24 that would be supplementing the record that you
25 got?

1 MR. DICKERSON: I was going to be
2 bringing Mr. Pennington on because I wanted to
3 talk to him a little bit about some of the things
4 that took place --
5 PRESIDING MEMBER ROSENFELD: A little
6 closer to the mike.
7 MR. DICKERSON: Yeah, I was going to
8 talk to -- I was going to call Mr. Pennington to
9 discuss some things. I'm just really troubled by
10 the entire concept that we're essentially just
11 submitting exhibits on the record, and this is
12 what we're going to make a decision on.
13 MR. BECK: Well, we're not. We're also
14 here to have testimony, as well. Again, this is
15 not -- you're talking about a fairly sophisticated
16 group of people in terms of the Commissioners.
17 Commissioner Levin is an attorney. Commissioner
18 Rosenfeld has a Ph.D. I'm an attorney. The
19 people that we have here, the staff, Mr.
20 Pennington, Ms. Geizler, the Advisors, Mr.
21 Bartridge and Mr. Hungerford.
22 We're a fairly sophisticated group of
23 individuals, I think moreso than you would
24 typically find on a jury trial. So, you should
25 not have a concern that somehow we're just going

1 to gloss over some documents.
2 As I think I expressed at the prehearing
3 conference we hope that a lot of the record in
4 this matter, and a lot of what can be done can be
5 done on paper. Because it didn't appear that
6 there would be a great factual dispute as to what
7 is actually -- what the corporate structure of
8 Masco is and Energy Sense.
9 MR. DICKERSON: I think you know that
10 when I was saying that I need to point this stuff
11 out, I'm not in any way casting aspersions on the
12 intellectual acuity of anybody on the Board. I
13 recognize that they have the ability to recognize
14 these things.
15 But in a bench trial where we have no
16 jury we still have judges who are relatively
17 sophisticated and educated and experienced in the
18 law who are willing to listen to these things.
19 I recognize that we want to get this
20 thing done, but this is an extremely important
21 matter to my clients.
22 MR. BECK: Well, this is --
23 MR. DICKERSON: It wasn't until November
24 of last year that they knew that they were going
25 to be charged with the responsibility of having to

1 bear the burden of proof in this thing.
2 And they have gone through enormous
3 effort, enormous expense to try to put something
4 together. So, I'm just saying, they're a little
5 bit concerned that at this stage of the game we're
6 already one hour into something that, if it was a
7 trial, would take weeks. And we're saying we got
8 to speed this process up.
9 MR. BECK: It's not that we have to
10 speed it up. But, because it is -- this is not a
11 jury trial, because it is an informal
12 administrative adjudicatory hearing, and the
13 rules, technical rules of evidence do not apply,
14 then you can streamline some of it.
15 And the fact is that at a trial there is
16 no evidence given until the trial begins. But in
17 this case we have been accumulating evidence and
18 it's been sent to the docket since the time that
19 Mr. Lilly and Mr. Hagarty filed their complaints.
20 If the concern is somehow that the
21 Commission doesn't take this seriously, let me
22 assure you that they do. We would not have two
23 Commissioners sitting here listening to this and
24 giving their consideration to this issue unless it
25 were.

1 And also, the ruling of the Committee
2 will be -- and eventually the Commission, will be
3 appealable.
4 ASSOCIATE MEMBER LEVIN: Mr. Dickerson,
5 let me also reassure you, we've had a number of
6 staff briefings. Commissioner Rosenfeld and I
7 have had access to the written docket now for
8 quite some time. We've read a lot of the
9 background materials. Not all of them, I would be
10 not honest if I said we've read everything in the
11 binder.
12 But that's, I think, what we're
13 encouraging both parties to do in the course of
14 this hearing, is to point out those items already
15 in the document or any new evidence. Areas where
16 there's agreement, where you can stipulate to
17 facts or the validity of evidence. Areas where
18 there's disagreement. But in more of a summary
19 form.
20 And we're asking you to assume that
21 we've read what's already in the record, and just
22 to highlight particular items. Not to read them
23 verbatim. You don't need to establish the
24 foundation of the evidence. This isn't a
25 courtroom trial. I would say it's more analogous

1 to arbitration, where we can be more informal.
2 Where evidence is hearsay or other
3 evidence that might not be submitted in a
4 courtroom, we can still consider it for some
5 purposes.
6 So it's more a degree of formality and
7 efficiency sake. But, again, I want you to
8 understand we do take this very very seriously.
9 We have read most of what we have in front of us
10 already. And that's why we're trying to figure
11 out, when you -- whether or not it's something
12 we've already seen or something new. But if it's
13 something new, why haven't we already seen it.
14 So, it's not to try to gloss over
15 anything. It's not to minimize the importance of
16 this issue. We absolutely, as Mr. Beck said,
17 agree that it's very important. We appreciate all
18 the time that both parties have put into it, or
19 all the parties have put into it. But we don't
20 need to repeat everything or have you read
21 everything that's already in our binders.
22 MR. DICKERSON: I appreciate that, and I
23 appreciate those assurances. Again, it was just,
24 this is something that's very important to these
25 folks. And, you know, we want to try to put on

1 the best case that we possibly can, since we have
2 been charged with the responsibility of doing so.
3 So, I guess, if I'm going to err, I'm
4 going to err to the side of going a little bit too
5 far and maybe have somebody tell me maybe, Brett,
6 maybe you don't need that today, as opposed to
7 leaving something out.
8 So, if I do err to the side of maybe
9 kicking a little bit more information out there
10 than what you need, you let me give you my
11 preemptive apologies for that. But I will try to
12 speed the process up.
13 MR. BECK: And also in terms of some of
14 what Mr. Lilly's testimony has been, has been his
15 contacts with the Commission, his years of trying
16 to resolve this issue.
17 Let me also state that the Commission
18 understands that Mr. Lilly and Mr. Hagarty have
19 been trying for a number of years to bring this
20 matter to a head to get some final resolution.
21 And I think that we all understand that
22 perhaps things that could have come to resolution
23 earlier, that we all wish that the matters had
24 been fully and totally considered and resolved
25 prior to this day. And we understand.

1 So, I think that any testimony that we
2 understand in the record, I think, speaks for
3 itself. Mr. Hagarty and Mr. Lilly have had plenty
4 of communications with CHEERS, plenty of
5 communications with the Commission, with Mr.
6 Pennington, with Mr. Commins and the staff of my
7 office, and even myself, as is indicated in some
8 of the documents that the CEC provided.
9 So we understand and appreciate the fact
10 that Mr. Hagarty and Mr. Lilly have been trying to
11 get a resolution in this issue, and that they are
12 frustrated by the time it has taken to get to this
13 juncture.
14 MR. DICKERSON: I appreciate that
15 because I think that will, you know, lay the
16 foundation for why we feel it was so important to
17 come in here today and do something that was very
18 comprehensive.
19 When we received the documents from the
20 CEC which essentially reflected six years worth of
21 looking into this matter, if you took away what
22 Mr. Lilly had submitted in his complaint there was
23 virtually nothing there. There was virtually
24 nothing there. No documents.
25 So that, in all candor, created some

1 real concerns as to, you know, insuring that we
2 were going to be able to come in here and satisfy
3 our burden to the Committee.
4 I appreciate what has been said up to
5 this point very much. And I mean that sincerely.
6 And we'll press on and we'll do the best we can to
7 get through this thing as quickly as possible.
8 THE WITNESS: Can I say something?
9 MR. BECK: No, no. -- your counsel
10 does.
11 BY MR. DICKERSON:
12 Q Mr. Lilly, I'll direct your attention to
13 what's been marked as exhibit 25 -- I'm sorry, 35.
14 Again, this is not contained here.
15 MR. DICKERSON: Rather than ask him
16 questions, would it be easier for you if I just
17 made a brief little statement of what I believe
18 that that shows. And that way I don't have to go
19 through the questioning process. Would that
20 simplify things for you?
21 MR. BECK: That will be fine. But
22 honestly, it would --
23 MR. DICKERSON: See, I'm getting
24 conflicting -- your concern, I'm getting nods from
25 people on the Committee, so I don't know what to

1 do here.
2 MR. BECK: But a lot of this stuff can
3 also be in a -- if we have this entered into the
4 record you can, in closing brief, refer to it and
5 say, for example, this document says this, and we
6 believe it proves that.
7 MR. DICKERSON: Okay, so what we're
8 really going to do then is your preference is that
9 we just get an agreement, perhaps, between Mr.
10 Frankel and myself. And as we go through it I'll
11 see if it's okay, and agreement, if he is okay
12 with having that admitted into evidence. And will
13 essentially argue it during the course of a
14 closing brief, correct?
15 MR. BECK: Yes. I don't think there's
16 necessarily any reason to point it out and note
17 that it exists if it's going to be submitted into
18 evidence and it be docketed in this matter. So.
19 MR. DICKERSON: Okay. Mr. Frankel, do
20 you have any problem with anything you see in
21 exhibit 35?
22 I'll represent to you that the
23 information concerning the officers from Masco
24 came off the annual report issued by Masco in
25 2007. The second document that talks about the

1 officers in Energy Sense was produced by you in
2 your initial response to documents requested by
3 the Commission post-complaint.
4 MR. FRANKEL: Right, and I believe -- I
5 mean to the extent that the second page of the
6 exhibit is from the 2007 annual report of Masco
7 Corporation, I have no objection.
8 I believe that as of the date when we
9 responded to the request for information, I don't
10 have that date in mind, but I --
11 PRESIDING MEMBER ROSENFELD: Louder.
12 MR. FRANKEL: I don't have the date in
13 mind with respect to the first page that bears
14 MAS-025, but I believe that that was an accurate
15 listing of the officers and directors of Energy
16 Sense at the time it was prepared.
17 MR. DICKERSON: Okay. So, you're okay
18 with having that exhibit --
19 MR. FRANKEL: Yes.
20 MR. DICKERSON: Okay, very good.
21 PRESIDING MEMBER ROSENFELD: Quick
22 question. Ten minutes ago we were wondering about
23 Mr. Bell's -- both as a Masco officer and Energy
24 Sense. And I -- does your last discussion with
25 Mr. Frankel bear on that issue?

1 MR. DICKERSON: No. My last discussion
2 with Mr. Frankel bears on, I'm sorry, shared --
3 two documents that show the identity of officers
4 and directors of Energy Sense and Masco. I don't
5 believe that Mr. Bell shows up there as an officer
6 of Masco, itself, or director.
7 But this has to do with the officers and
8 directors of Masco the parent company, --
9 PRESIDING MEMBER ROSENFELD: Right.
10 MR. DICKERSON: -- and its subsidiary,
11 Energy Sense. That's what that has to do with.
12 PRESIDING MEMBER ROSENFELD: And Bell
13 appears as Energy Sense but not as a Masco
14 officer?
15 MR. DICKERSON: Not as he -- we never
16 showed him as being an officer or director of the
17 main Masco Company. He was shown as being the
18 Vice President of Marketing in a flyer --
19 PRESIDING MEMBER ROSENFELD: Only in a
20 flyer.
21 MR. DICKERSON: In a flyer. So either
22 that was a mistake or he possibly represented
23 himself as such, or somebody just made a mistake.
24 But, as I said, they'll give that whatever weight
25 they want to give it.

PRESIDING MEMBER ROSENFELD: Okay, thank you.

MR. DICKERSON: Okay? Thank you.

(Pause.)

MR. DICKERSON: Mr. Frankel, do you have any objection to the introduction of what has been marked as exhibit number 18 in my binder, which are the bylaws of Energy Sense?

MR. FRANKEL: No objection.

MR. DICKERSON: It also has Gale Industries, Schmid Insulation Contractors, Masco Contractor Services West.

MR. FRANKEL: I don't have any objection to those being admitted.

MR. DICKERSON: Thank you.

MR. BECK: All right. At this point, consult with the Commissioners. What we're going to do is take a break.

Mr. Frankel and Mr. Dickerson, I would like you to go over those documents and decide which ones you're willing to agree to put into evidence, and that we don't have to go through this on the record, one by one.

So, I would say half an hour, maybe. Do you think you can do that in that time?

1 MR. DICKERSON: I think so --
2 MR. FRANKEL: I think so.
3 MR. DICKERSON: Just go through them and
4 tell me which ones you have a problem with, and
5 we'll deal with it when we come back if we have a
6 problem.
7 MR. FRANKEL: Okay.
8 MR. DICKERSON: Okay.
9 MR. BECK: We'll --
10 MR. DICKERSON: Is that fair?
11 MR. BECK: We'll --
12 PRESIDING MEMBER ROSENFELD: Let's see,
13 half an hour would be very close to 11:00. Shall
14 we just say 11:00?
15 MR. BECK: Yes.
16 PRESIDING MEMBER ROSENFELD: Is that
17 okay with you?
18 MR. DICKERSON: 11:00 would be
19 wonderful, thank you, sir.
20 MR. FRANKEL: Thank you.
21 (Brief recess.)
22 MR. BECK: We're back on the record.
23 PRESIDING MEMBER ROSENFELD: And I will
24 note it's not 11:00, but 11:15. But I hope it was
25 a productive 45 minutes.

1 MR. BECK: The first issue is the
2 documents that counsel discussed. They are the
3 exhibits listed 1 through 37. What did we come to
4 a decision on that?
5 MR. FRANKEL: Yes. I don't have any
6 objections that they purport to be what they are.
7 I have concerns about the relevance to the issue,
8 the narrow issue presented here. And I'd like to
9 reserve my ability to argue that in a closing
10 brief, et cetera, as to why certain documents, to
11 the extent they are at all material here, are not
12 relevant.
13 But other than that, I have nothing to
14 add.
15 MR. BECK: Mr. Dickerson.
16 MR. DICKERSON: I concur with that as
17 being our understanding and --
18 PRESIDING MEMBER ROSENFELD: You guys --
19 are your mikes on?
20 MR. DICKERSON: I concur with Mr.
21 Frankel that that's the agreement that we reached,
22 and we're fine with that.
23 MR. BECK: Then that's fine. We will
24 receive the binder that is complainants' exhibit
25 list C, L and E-4, and it's got exhibits 1 through

1 -- tabbed exhibits 1 through 38. We will receive
2 that in evidence.
3 Mr. Dickerson, you had a few more
4 questions for Mr. Lilly?
5 MR. DICKERSON: Just a few more for Mr.
6 Lilly.
7 BY MR. DICKERSON:
8 Q Mr. Lilly, at any point in time did you
9 have discussions with Dave Bell concerning any
10 positions that he may have occupied with Masco
11 Contractor Services?
12 A Yes.
13 Q What did Mr. Bell tell you?
14 A He told me he went to work as some sort
15 of manager for Masco Services.
16 Q Okay. Did he say he was the president
17 or vice president, anything like that?
18 A Said vice president, manager, something
19 like that, yes.
20 Q Okay, I'd like to direct yours and the
21 Commission's attention to what is marked as Bates
22 stamp number 72 in tab number 1.
23 Again, that's tab number 1, Bates stamp
24 page number 72. Is everyone there?
25 Mr. Lilly, do you have that in front of

1 you?
2 A Yes.
3 Q Look at the bottom. Is that an email
4 that you received from Tav Commins on October 16,
5 2006?
6 A Yes.
7 Q And in that email does Mr. Commins
8 identify Dave Bell as the national sales manager
9 of Masco?
10 A Correct.
11 Q Okay, thank you.
12 MR. DICKERSON: That's all I have for
13 Mr. Lilly.
14 MR. FRANKEL: I just have a few
15 questions for Mr. Lilly.
16 ASSOCIATE MEMBER LEVIN: Would you
17 please turn your mike on, sir, or speak a little
18 closer.
19 MR. FRANKEL: I will, I will bring it
20 closer to me.
21 CROSS-EXAMINATION
22 BY MR. FRANKEL:
23 Q Mr. Lilly, do I have it right that
24 California Living and Energy is in the business,
25 at least in part, of doing Title 24 field

1 verification and testing?
2 A Yes.
3 Q Okay. And you have --
4 PRESIDING MEMBER ROSENFELD: I'm sorry,
5 would you just repeat that sentence?
6 MR. FRANKEL: Sure.
7 BY MR. FRANKEL:
8 Q Mr. Lilly, am I correct that California
9 Living and Energy is engaged in the business, at
10 least in part, of doing Title 24 testing and
11 verification work?
12 A Yes.
13 Q And you have employed by California
14 Living and Energy employees who are certified by a
15 provider as certified raters?
16 A Yes.
17 Q Am I correct, also, Mr. Lilly, to your
18 knowledge, that Energy Sense is engaged in that
19 same business?
20 A Yes.
21 Q And you would be a -- California Living
22 and Energy is a competitor Energy Sense?
23 A Yes.
24 Q Am I also correct, Mr. Lilly, that you
25 have no knowledge or information that any of the

1 raters that are employed by Energy Sense have an
2 ownership interest in any company that does
3 installation work that would be subject to Title
4 24 testing?
5 A I'm not aware of any ownership.
6 Q Are you aware of any debt agreements
7 that any of those raters employed by Energy Sense
8 have?
9 A I'm not aware of any debt agreement,
10 either.
11 Q And are you aware that any of the raters
12 that are employed by Energy Sense have an employee
13 or employer relationship with any company for
14 which they do Title 24 testing?
15 A They do have an employee relationship
16 and have in the past.
17 Q Well, I'm asking you specifically with
18 respect to the raters who do Title 24 testing.
19 Are you aware of whether they are employees of any
20 other company other than Energy Sense, Inc.?
21 A From the evidence they have been
22 employees, yes, of other companies at Masco --
23 Q No, I'm asking you -- that's not my
24 question. While they have been employees of
25 Energy Sense, Inc., for however long that has

1 been, are you aware that any rater employed by
2 Energy Sense occupied an employee position with
3 any other company?
4 A I'm not aware except for it went to the
5 same address of other companies, other Masco
6 companies, and they worked out of the same
7 address.
8 Q If you could just answer my question.
9 Are you aware, as you sit here --
10 MR. DICKERSON: I think he's answered
11 the question.
12 BY MR. FRANKEL:
13 Q As you sit here today are you aware of
14 any employee of Energy Sense, Inc. that is also
15 employed by any other company?
16 A Yes, they were employed.
17 Q By Energy Sense?
18 A By Coast Insulation, Sacramento
19 Insulation.
20 Q I'm asking you since they became
21 employees of Energy Sense. Are you aware of any
22 instance where a rater, employed by Energy Sense,
23 also occupied a position of employment with any
24 other company?
25 A I'm not aware of any other outside of

1 Masco --
2 MR. FRANKEL: Thank you, I have nothing
3 further.
4 MR. DICKERSON: I have nothing further.
5 I'd like to call Mr. Pennington for a
6 few minutes.
7 MR. BECK: This is -- you want to
8 question Mr. Pennington?
9 MR. DICKERSON: That's correct.
10 MR. BECK: Is it along the lines we
11 discussed previously?
12 MR. DICKERSON: Yes.
13 MR. BECK: Well, if there were -- if we
14 were to have a stipulation that after the
15 telephone conference call in August of 2007 that
16 involved Mr. Pennington, Mr. Commins, Mr. Staack
17 of the Commission, David Bell from Energy Sense,
18 and perhaps another individual from Energy Sense,
19 that subsequent to that no further information
20 regarding Masco or Energy Sense and their
21 corporate structure were received by the
22 Commission prior to the beginning of this
23 proceeding.
24 MR. DICKERSON: Yeah, okay. We could do
25 that. I do have some questions regarding this one

1 email that came from Tom Hamilton to various Masco
2 representatives, and Mr. Pennington's awareness
3 thereof.
4 I don't know if we can do a stipulation
5 on that. If he'd like --
6 MR. BECK: Is he cc'd on the email?
7 MR. DICKERSON: No, he was not. But it
8 references communications with Mr. Pennington.
9 I'd like to know whether or not he has a
10 recollection of the communications that are
11 referenced therein.
12 That would be marked as tab number 17,
13 document number 200.
14 One of the defenses that Masco has
15 raised here --
16 PRESIDING MEMBER ROSENFELD: Hold on
17 just a second till we find it.
18 MR. DICKERSON: I'm sorry.
19 (Pause.)
20 PRESIDING MEMBER ROSENFELD: Tab 17,
21 page 200?
22 MR. DICKERSON: Yes, sir.
23 PRESIDING MEMBER ROSENFELD: Subject,
24 conflict of interest CEC?
25 MR. DICKERSON: That is correct, yes,

1 sir.

2 PRESIDING MEMBER ROSENFELD: Thank you.

3 MR. DICKERSON: If you could just review

4 that for a couple of moments, he doesn't even have

5 to move over to the table.

6 (Pause.)

7 EXAMINATION

8 BY MR. DICKERSON:

9 Q Had you seen that document before, sir?

10 MR. PENNINGTON: No, I don't think so.

11 MR. DICKERSON: Were you aware that

12 CHEERS was providing that level of guidance and

13 advice to Masco in pushing the Masco/Energy Sense

14 relationship through the CEC?

15 MR. PENNINGTON: No.

16 MR. DICKERSON: That's all I have.

17 MR. FRANKEL: I just want to add

18 something to the stipulation. It's my

19 understanding, on behalf of respondents, that

20 following the --

21 PRESIDING MEMBER ROSENFELD: I'm going

22 to nag at you again.

23 MR. FRANKEL: -- following the August

24 2007 conference with the CEC Staff, at the

25 conclusion of that conference the Commission Staff

said that if they needed more information from Masco or Energy Sense they would be asking for it.

They never did so. So, the notion that, or the implication that we were supposed to be providing additional information after that call, as far as I know, based on talking to the people who attended the conference on behalf of Masco and Energy Sense, is that the information that was provided was adequate. And if there was more that was necessary, the Commission Staff would have requested it.

MR. BECK: Well, no, I don't think that that's the case. That's not the information that I have that there was some indication given to Energy Sense that what they had been given -- what had already been given by them was or was not -- was satisfactory.

MR. FRANKEL: Well, all I can tell you is that I'm informed that the Commission Staff said that they would get back to Energy Sense and Masco if they needed additional information. That is my understanding.

MR. DICKERSON: I'm assuming that won't be characterized as testimony.

MR. BECK: That will not be

1 characterized, yes, correct.
2 ASSOCIATE MEMBER LEVIN: May I ask a
3 clarifying question, Mr. Frankel? I just would
4 like to confirm MCS is some sort of an
5 abbreviation for Masco?
6 MR. FRANKEL: Masco Contractor Services
7 is a name that refers to a group of Masco
8 companies. It is not a legal entity in and of
9 itself.
10 ASSOCIATE MEMBER LEVIN: So when this
11 letter refers to the MCS legal people. could you
12 clarify who those people are, and who they are
13 employed by?
14 MR. FRANKEL: Which letter?
15 ASSOCIATE MEMBER LEVIN: The same
16 exhibit that Mr. Dickerson was referring to, under
17 tab 17, page 200. The one that we were just
18 referring to.
19 (Pause.)
20 ASSOCIATE MEMBER LEVIN: It's the letter
21 from Tom Hamilton to Brad Townsend, Dale someone,
22 Dave Bell, David Short, et cetera.
23 MR. FRANKEL: Yes. And the question?
24 ASSOCIATE MEMBER LEVIN: So MCS legal
25 people, whose attorneys are those?

1 MR. FRANKEL: Well, I can't speak for
2 what Mr. Hamilton wrote in his email. I mean
3 there were representatives from the legal
4 department and Masco Corporation that were on that
5 telephone conference, as well as outside counsel
6 representing both Masco Corporation and Energy
7 Sense.
8 I can't -- I don't understand what Mr.
9 Hamilton may have meant by MCS legal people. The
10 only legal people who attended that call were
11 within the law department or outside counsel for
12 both Masco Corporation and Energy Sense, Inc.
13 ASSOCIATE MEMBER LEVIN: Okay. So they
14 shared attorneys?
15 MR. FRANKEL: Yes.
16 MR. BECK: That's all for you, Mr.
17 Dickerson?
18 MR. DICKERSON: That's all for me, Mr.
19 Beck.
20 MR. BECK: Mr. Frankel, do you have any
21 additional, or any witnesses to present?
22 MR. FRANKEL: Yes, I do.
23 MR. BECK: That's two, correct?
24 MR. FRANKEL: That's correct.
25 MR. BECK: Go ahead, call your first

1 witness.
2 MR. FRANKEL: I'd like to call David
3 Short.
4 Whereupon,
5 DAVID SHORT
6 was called as a witness herein, and after first
7 having been duly sworn, was examined and testified
8 as follows:
9 REPORTER: Please state and spell your
10 name for the record.
11 THE WITNESS: My name is David Short;
12 D-a-v-i-d S-h-o-r-t.
13 DIRECT EXAMINATION
14 BY MR. FRANKEL:
15 Q Mr. Short, good morning. What do you
16 currently do for a living?
17 A I'm a house-husband. Unemployed.
18 Q And had you been employed by any company
19 prior to your current situation?
20 A Yes, I was employed at Gallo Glass; laid
21 off.
22 Q And prior to that what position did you
23 hold?
24 A Prior to that I worked at Salas Brothers
25 Funeral Home. Prior to that I worked at Energy

1 Sense.
2 Q Okay, and with respect to your work at
3 Energy Sense, when did that work commence?
4 A It commenced end of 2005 to my
5 reflection.
6 Q Are you a certified HERS rater?
7 A I'm not at this time.
8 Q And were you --
9 PRESIDING MEMBER ROSENFELD: I'm sorry,
10 I didn't hear you.
11 THE WITNESS: I'm not at this time.
12 PRESIDING MEMBER ROSENFELD: You're not.
13 MR. FRANKEL: Okay.
14 PRESIDING MEMBER ROSENFELD: You were?
15 THE WITNESS: I was, correct.
16 PRESIDING MEMBER ROSENFELD: But you had
17 to renew it annually or something?
18 THE WITNESS: That's correct.
19 PRESIDING MEMBER ROSENFELD: Okay.
20 BY MR. FRANKEL:
21 Q And when did you first become a HERS
22 rater?
23 A Early 2000, 2001 I was employed as a
24 HERS rater for California Living Energy.
25 Q So you were a former employee of one of

1 the complainants here, California Living and
2 Energy?
3 A That is correct.
4 Q And you obtained your HERS certification
5 through which provider?
6 A Through CHEERS and CalCERTS.
7 Q And from 2000 through the time that you
8 worked with Energy Sense, did you maintain your
9 HERS certification?
10 A I did.
11 Q Now, with respect to your work with
12 Energy Sense, and your employment by Energy Sense,
13 could you tell me what your first position was
14 with either a Masco company or Energy Sense?
15 A My first position was in charge of the
16 HERS testing and Title 24, or not Title 24, just
17 the HERS testing in California.
18 Q And when were you brought onboard by
19 Masco or Energy Sense for that purpose?
20 A At my hiring.
21 Q And that was September of 2005?
22 A Correct.
23 Q And was there any change to what would
24 be subject to HERS testing and verification under
25 Title 24 that took effect shortly after you began

1 your employment?
2 A Yes, the high quality insulation
3 installation took place in October 2005, new --
4 change.
5 Q And when you began your employment with
6 Masco or Energy Sense, what company was it that
7 you started with in September of '05?
8 A Sacramento Building Products.
9 Q And Sacramento Building Products, you're
10 now a subsidiary of Masco Corporation?
11 A Yes.
12 Q And what business did Sacramento
13 Building Products engage in in the time you
14 started in September of 2005?
15 A Insulation installation.
16 Q Any other businesses?
17 A I believe they did paint, gutters,
18 various other household products for building
19 construction.
20 Q And did, at the time you started with
21 Sacramento Building Products, did Sacramento
22 Building Products have certified HERS raters on
23 its -- in its employ, to do Title 24 testing in
24 California?
25 A They did.

1 Q And prior to October 1 of 2005 when
2 there was a change to add high quality
3 installation of insulation, HQII, to the measures
4 that would be subject to testing, were HERS raters
5 at Sacramento Building Products doing Title 24
6 testing?
7 A They were.
8 Q And did any of the testing that
9 Sacramento Building Products did prior to the
10 October 1 2005 amendment, involve testing or
11 inspecting any work done by any other Masco
12 subsidiary?
13 A No.
14 Q And am I correct, Mr. Short, that the
15 other measures that were subject to testing and
16 verification under Title 24 prior to October 1,
17 2005, dealt with building envelope measures, air
18 conditioning, HVAC and duct work?
19 A That is correct.
20 Q And to your knowledge, did any Masco-
21 related company have anything to do with the
22 installation of HVAC, duct work or the building
23 envelope?
24 A Not to my knowledge.
25 Q Now, were you involved, Mr. Short, --

1 well, let me strike that.
2 What position did you hold with
3 Sacramento Building Products when you were first
4 hired?
5 A I don't know the name of my position,
6 actually.
7 Q Were you charged in particular with
8 doing anything with respect to Title 24 testing
9 upon your hire by Sacramento Building Products?
10 A Yea, I was in charge of insuring that
11 all HERS testing was being completed per the Title
12 24 code.
13 Q And with respect in particular to the
14 addition of high quality insulation installation,
15 were you involved in any discussions or steps
16 about what Sacramento Building Products and other
17 Masco installation subsidiaries were going to do
18 in connection with the addition of that measure to
19 Title 24 testing?
20 A Yes. I was in charge of the task of
21 educating and making sure that all the procedures
22 and products were done correct in accordance to
23 the Title 24 code; education of sales staffs;
24 training of individuals to insure that the job was
25 done correctly, basically throughout California to

1 make sure the job was done correctly to the Title
2 24 code.
3 Q And what, with respect to the high
4 quality insulation installation and the fact that
5 Sacramento Building Products actually installed
6 insulation, what steps were you involved in taking
7 to insure that if Sacramento Building Products or
8 any other Masco-related company was going to test
9 those installations, what steps were going to be
10 taken?
11 A A month after I took my position in
12 Masco I took over control of any of the HERS
13 raters that were currently in the company at the
14 time, so they would write their report to me,
15 rather than any division that would be installing
16 the product.
17 MR. DICKERSON: I'm going to object to
18 the testimony in that we seem to be getting into,
19 we may have been conflicted, but we really tried
20 to do a good job. And I'm not sure that's the
21 issue here as far as a conflict of interest goes.
22 If people are conflicted, it doesn't
23 matter if someone was well trained. We have a
24 stipulation already that Energy Sense performs
25 testing of installations performed by other Masco-

1 related entities. That's been stipulated to.
2 The fact that they may -- we have
3 testimony that they diligently go out and do a
4 good job doesn't affect the interest whether or
5 not there's a conflict of interest. That's not
6 relevant.
7 MR. FRANKEL: Well, I actually am going
8 with this witness to explain how we dealt with
9 complying with the conflict of interest provisions
10 based on the change in the standards as of October
11 1, 2005. And this is the gentleman who was
12 responsible for that effort.
13 MR. BECK: I think Mr. Dickerson's
14 statement is well taken that whatever steps they
15 may do to insure that a good job is being done or
16 that things were diligently followed up on, or
17 that some sort of quality assurance is tangential
18 to the inquiry that we have here, which is whether
19 or not the entities, as they exist and as they
20 operate, are in violation of the conflict of
21 interest rules.
22 MR. FRANKEL: Well, I will try to move
23 on, but I think I'm laying the foundation for
24 where I'm going here, and I will try to be as
25 brief as I can be.

1 MR. BECK: Okay.
2 ASSOCIATE MEMBER LEVIN: Mr. Frankel,
3 just a reminder, please, to stay close to your
4 mike.
5 MR. FRANKEL: Yes.
6 ASSOCIATE MEMBER LEVIN: And, again, you
7 don't need to lay the foundation the way that you
8 would in a courtroom.
9 MR. FRANKEL: I understand.
10 ASSOCIATE MEMBER LEVIN: Okay, thank
11 you.
12 BY MR. FRANKEL:
13 Q Mr. Short, did you take steps within
14 Sacramento Building Products and with other
15 installation companies that were owned by Masco to
16 form a separate corporation?
17 A We did.
18 Q Okay. And did you have discussions
19 about the establishment of a separate new
20 corporation to do Title 24 testing with any
21 representatives of CHEERS?
22 A Tom Hamilton.
23 Q Okay. And what do you recall -- first
24 of all, do you recall when those discussions took
25 place, roughly?

1 A Roughly, yes; during the IBC conference,
2 beginning of 2006, I believe.
3 Q And Mr. Hamilton, the Executive
4 Director, was present?
5 A That's correct.
6 Q Of CHEERS?
7 A Of CHEERS.
8 Q And did you have discussions with Mr.
9 Hamilton about what steps Sacramento Building
10 Products and other Masco subsidiaries were going
11 to take to conform and comply with the Title 20
12 conflict of interest regulations, in light of the
13 addition of high quality insulation installation?
14 A We did.
15 Q Okay. And what do you recall about
16 those discussions?
17 A He told us that the raters were
18 independent entities and they were not companies,
19 themselves. That they did meet with the third-
20 party requirements. That taking the extra step of
21 forming Energy Sense as a further company would be
22 further complying with the Title 20 code.
23 Q And did steps ultimately get taken, Mr.
24 Short, to have a separate corporation that was
25 formed and owned by Masco Corporation to do Title

1 24 testing in California?
2 A Yes, that's correct.
3 Q And what was the name of that company?
4 A Energy Sense.
5 Q And what position did you have with
6 Energy Sense when it was first established?
7 A Division manager.
8 Q And as division manager, what were your
9 responsibilities?
10 A Oversight of operations, Title 24
11 testing education, sales training, that
12 information.
13 Q And did you have any other employees
14 other than yourself that worked for Energy Sense
15 when it became established as a separate company?
16 A Yes.
17 Q How many?
18 A Eight.
19 Q And were the other eight employees, were
20 they all certified HERS raters?
21 A They were all certified HERS raters, and
22 we hired an administrative staff that was not a
23 HERS rater.
24 Q And were they all certified by CHEERS as
25 HERS raters?

1 A By CHEERS, correct.
2 Q Now, the eight people that were employed
3 by Energy Sense as HERS raters, were they employed
4 by anyone else other than Energy Sense?
5 A No.
6 Q Had they been employed previously?
7 A Yes.
8 Q Okay. Who had they been employed by?
9 A Various firms, Sacramento Building
10 Products, Code Building Products.
11 Q Now you had been employed by Sacramento
12 Building Products up until the time that you took
13 over as division manager of Energy Sense, correct?
14 A That's correct.
15 Q And what happened when your employment
16 changed from Sacramento Building Products to
17 Energy Sense?
18 A We were --
19 ASSOCIATE MEMBER LEVIN: Mr. Frankel, I
20 don't mean to be dense, but I really am not seeing
21 the connection here in a lot of these questions.
22 If you could try to thread the needle more
23 clearly, that would really be helpful --
24 MR. FRANKEL: Okay.
25 ASSOCIATE MEMBER LEVIN: -- to --

1 certainly to myself; possibly my fellow
2 Commissioner, in understanding what the relevance
3 of this is.
4 MR. FRANKEL: Okay, I will try to be.
5 BY MR. FRANKEL:
6 Q What happened with respect to your
7 Sacramento Building Products employment when you
8 became division manager of Energy Sense?
9 A I was terminated out of the Sacramento
10 Building Products, loss of benefits pay, vacation
11 time. And hired into Energy Sense. Had to
12 withstand a new probationary period in order to
13 maintain any new standing employment.
14 Q And throughout -- and how long did you
15 remain division manager of Energy Sense in
16 California?
17 A January of '08, I believe.
18 Q So you were the first division manager
19 of Energy Sense?
20 A That's correct.
21 Q And throughout the time period that you
22 were employed by Energy Sense, Mr. Short, did you
23 have any ownership interest in any installation
24 company whose work you were testing as a certified
25 HERS rater?

1 A No, I did not.
2 Q Did you have any debt agreements with
3 any installation company whose work you were
4 testing on behalf of HERS Title 24 purposes?
5 A No, I did not.
6 Q Did you have any employment relationship
7 with any other company other than Energy Sense
8 while you were its division manager?
9 A No, I did not.
10 Q During the course of your employment at
11 Energy Sense, Mr. Short, did you advocate or
12 recommend the products or services of any
13 installing company whose work was subject to your
14 Title 24 testing?
15 A No, I did not.
16 Q And with respect to your role as
17 division manager, did you instruct or advise the
18 other HERS raters who were employed by Energy
19 Sense during that period, from the time of Energy
20 Sense's establishment through the time of your
21 departure, about whether or not they could
22 recommend or advocate the products or services of
23 any other company whose work would be subject to
24 Title 24 testing?
25 A I did advise them to we needed to abide

1 by the rules and regulations of the HERS and Title
2 24, that we could not advocate for any other
3 services besides our own.
4 Q And to your knowledge, Mr. Short,
5 throughout the period that you were division
6 manager of Energy Sense, did you or any other HERS
7 rater who reported to you at Energy Sense advocate
8 or recommend the services of any other party,
9 installation company, or any other party for
10 purpose of trying to gain increased business?
11 A Not to my knowledge.
12 Q Now, Mr. Short, you're aware, are you
13 not, of Energy Sense's relationship to Masco
14 Corporation?
15 A Yes, I am.
16 Q Okay. And what is that relationship?
17 A They're a wholly owned subsidiary of
18 Masco.
19 Q And with respect to the installation
20 companies for which Title 24 testing would be done
21 in California, am I correct that Sacramento
22 Building Products is also a Masco subsidiary?
23 A That's correct.
24 Q And are there other Masco installation
25 subsidiaries in California other than Sacramento

1 Building Products?
2 A Yes, there are.
3 Q And based on your position as division
4 manager of Energy Sense, did Energy Sense have any
5 ownership interest in any of the Masco
6 installation subsidiaries for which testing work
7 was done?
8 A No, they did not.
9 Q To your knowledge did Energy Sense have
10 any debt agreements with any of those other
11 installation companies?
12 A No, they did not.
13 Q Did they have an employee/employer
14 relationship with any of those companies?
15 A No, they did not.
16 Q And Energy Sense, itself, did it ever
17 advocate or recommend that the services of the
18 installation companies, Masco-related installation
19 companies --
20 MR. DICKERSON: Objection, this ground
21 has been gone over. Energy Sense operates through
22 whoever its employees are. It's a corporation.
23 We're just going over the same stuff again.
24 I've endeavored to be brief with my
25 stuff, and we have just -- we're dragging on here.

1 MR. BECK: Well, I think that we --
2 also, it's speculative whether or not this witness
3 knows the entirety of whether anybody from Energy
4 Sense was making recommendations.
5 MR. FRANKEL: Well, he was the person in
6 charge, so he would have at least that knowledge.
7 BY MR. FRANKEL:
8 Q Well, let me ask you, Mr. Short, with
9 respect to the work that Energy Sense did with
10 respect to Title 24 testing while you were the
11 division manager, the person in charge of Energy
12 Sense, how it was that Energy Sense got its work.
13 A We got its work through the installing
14 divisions. We had a contract with them that they
15 would provide the sales staffs and they would
16 write the contracts, or to the builder, and we
17 would pass through. And they would assign us, it
18 was work we would do, the testing. Then we would
19 invoice the contractor, based on the contractor
20 which would invoice the builder. The builder then
21 would pay the contractor, then they would pay us.
22 Q All right. And are you aware that there
23 were contracts entered into between Energy Sense
24 and the Masco installing divisions concerning how
25 Energy Sense would conduct and deal with the

1 testing of work that was provided through this
2 contractual arrangement?
3 A I was aware of that, yes.
4 Q Now I may have incorrectly spoken
5 earlier about joint bids. I may have made that
6 statement.
7 Am I correct that Energy Sense, while
8 you were division manager, never made any joint
9 bids with any installing division?
10 A That's correct.
11 Q Okay. And just could you run through
12 the process by which Energy Sense would receive
13 its work from an installing company? What would
14 happen?
15 MR. DICKERSON: Objection, this is
16 requesting a narrative that isn't relevant to
17 anything we're talking about here today.
18 MR. FRANKEL: I think it's clearly
19 relevant to showing that there was no conflict of
20 interest here in terms of how this process worked,
21 and the steps that Masco and Energy Sense took in
22 order to insure that they were in compliance with
23 Title 20.
24 MR. BECK: Well, I don't think it's --
25 there's some relevance in terms of how the

business works on the ground. So, in terms of how Energy Sense gets its business, how the business comes to them, how it's referred to them. That, I think, is relevant.

So, as far as that issue, I think it would be instructive to the Commission to hear that portion of it.

MR. FRANKEL: And I do have, and this will, I think, speed along the process, I have some exhibits that are graphical in form that will help, I think, assist the Commission in understanding how the process works.

And I'd like to use those with Mr. Short, if there's no objection.

MR. BECK: Have you shown those to Mr. Dickerson?

MR. FRANKEL: I have not yet, no.

MR. BECK: Well, have him take a look at it.

MR. FRANKEL: They're for purely demonstrative purposes.

MR. DICKERSON: Thank you.

(Pause.)

MR. DICKERSON: Fire away.

MR. BECK: Do you have a copy for the

1 Commission, please?
2 MR. FRANKEL: Yes, I do.
3 MR. BECK: You could actually hand them
4 to Ms. Geizler, please.
5 (Pause.)
6 MR. PENNINGTON: You may need one more.
7 I took a copy. I don't know if you counted on
8 that.
9 BY MR. FRANKEL:
10 Q Before I use these demonstrative
11 exhibits, Mr. Short, if you would just turn to tab
12 number 6 of the binder that we were provided by
13 the Commission this morning, and look to what's
14 behind labeled tab 1. It bears Bates number MAS-
15 001. Near the end.
16 PRESIDING MEMBER ROSENFELD: MAS-001.
17 BY MR. FRANKEL:
18 Q And, I believe, Mr. Short, you'll see
19 that there are three agreements, and they're
20 behind that tab. One between Masco Contractor
21 Services of California, Inc., and Energy Sense,
22 Inc.
23 Another between Builders Services Group,
24 Inc. and its subsidiaries and Energy Sense, Inc.
25 And then a third agreement between

1 American National Services, Inc. and its
2 subsidiaries and Energy Sense, Inc.
3 You see those?
4 A Yes, I do.
5 Q Okay. And are those the contracts that
6 you referred to that Energy Sense and the
7 installing companies, or the companies that owned
8 the installing companies within the Masco
9 Enterprise entered into while you were division
10 manager of Energy Sense?
11 A Yes, to my knowledge.
12 Q And you were responsible, as division
13 manager, for implementing those contracts?
14 A That's correct.
15 Q Now, let me show you first the
16 demonstrative exhibit that's entitled Energy
17 Sense's three-party contracting.
18 MR. BECK: Why don't we have that, since
19 that's not labeled, we're going to label that as
20 respondent's A, as in apple.
21 MR. FRANKEL: Thank you.
22 MR. BECK: And please refer to it as
23 such.
24 BY MR. FRANKEL:
25 Q Now, Mr. Short, with respect to the

1 contracts that were entered into between Energy
2 Sense, Inc. and the Masco installation
3 subsidiaries in California, in connection with
4 Title 24 testing, what relationship, as far as you
5 understood it, was there between Energy Sense and
6 the installing subsidiaries under these contracts?
7 A We were a subcontractor.
8 Q Okay. And what about, were you
9 employees of the installing companies?
10 A No, we were not.
11 Q Were you independent contractors?
12 A Yes.
13 Q And under these contracts were they
14 exclusive or nonexclusive in terms of the testing
15 work that Energy Sense was allowed to do?
16 A They were exclusive.
17 Q They were --
18 A We worked through --
19 PRESIDING MEMBER ROSENFELD: I didn't
20 hear you. They were?
21 THE WITNESS: They were exclusive. We
22 worked through the building, the installing
23 company.
24 BY MR. FRANKEL:
25 Q Well, were you obligated for the --

1 A No we were not obligated to do the work
2 if the bid was not deemed acceptable. So we could
3 have -- we have leeway -- I could reject a bid, it
4 was no problem.
5 Q And what about were you obligated to
6 just perform testing services for Masco
7 installation subsidiaries?
8 A No, I was not.
9 Q Were you free to market your services
10 directly to other builders or other companies?
11 A Yes, I was.
12 Q And did you do so?
13 A Yes, I did.
14 Q With respect to the pricing for testing
15 services that Energy Sense undertook, who set
16 those prices?
17 A I did.
18 Q Okay. Did Masco Corporation or any
19 Masco installation subsidiaries ever instruct or
20 direct you as to what prices should be set for the
21 Title 24 testing services that Energy Sense
22 provided through its raters while you were
23 division manager?
24 A No, they did not.
25 Q With respect to the receipt of payment

1 for the testing services that were provided
2 pursuant to the contracts that you've identified,
3 did Energy Sense receive full payment for the
4 prices that it charged for those services without
5 any markup or deductions by the installing
6 companies?
7 A That is correct.
8 Q Now, with respect to your reporting
9 responsibilities under the terms of these
10 contracts, when you would do a Title 24 test, as a
11 HERS rater, first of all, who scheduled those
12 tests?
13 A The raters with the builder.
14 Q And where would the result of the
15 testing results report?
16 A To CHEERS.
17 Q And what about were they also reported
18 to the builder?
19 A To the builder, as well; and to any
20 building department that would request those.
21 Q Okay. Did you report the testing
22 results reports to the installing company, whether
23 it be a Masco company or a nonMasco company?
24 A Only in the sense in the field that we
25 would have to deal with any contractor, if they

1 deal with the product HVAC or duct testing, and
2 they failed their product, yes.
3 Oh, product would fail in the field, we
4 would notify the builder and the contractor there
5 onsite of the failure so they could come and
6 correct it, and so we could retest.
7 Q And with respect to the testing services
8 that you performed as a Title 24 rater, did you
9 use any different testing protocol, depending on
10 the identity of the installation company?
11 A None.
12 Q Now, with respect to the bids for
13 installation and testing services, who prepared
14 those bids?
15 A That would be the installing company.
16 Q And what role, if any, did Energy Sense
17 have in that bid process?
18 A None.
19 Q Did you simply provide the prices for
20 your testing services to the installing company?
21 A That's correct.
22 Q And the installing company would then
23 make a bid that would include testing services as
24 well as installation services to a builder?
25 A That's correct.

1 Q And what was the builder obligated to do
2 when he got that bid, if you know?
3 A They could take and choose what they
4 would want out of the bid. So it was exclusive
5 deal, they did not have to take the testing.
6 Likewise, they did not have to take the
7 installation service. They could take either one.
8 Q And what happened after you perform your
9 Title 24 testing as a HERS rater, as the division
10 manager of Energy Sense, what would you do in
11 terms of trying to collect for the work that you
12 did?
13 A We would invoice the installing company.
14 Q And what is your understanding of what
15 the installing company would do?
16 A They would, in turn, invoice the
17 builder. Builder would make payment to the
18 installing company. And then make payment to
19 Energy Sense.
20 Q And do you know whether in connection
21 with the invoicing and collection there was any
22 markup of Energy Sense's testing services by the
23 installing company?
24 A No.
25 Q With respect to the failures, if you're

1 doing a Title 24 test in the field and you believe
2 that certain testing measures were not going to
3 pass Title 24 muster --
4 MR. DICKERSON: Objection. We're now
5 past the point of how they get their business.
6 We're back into they try to do a real good job
7 when they're out there, even inspecting their own
8 work. We've already gone over this.
9 BY MR. FRANKEL:
10 Q What would you do with respect to a
11 failure? How would you notify a builder of a
12 failure?
13 A We notify the builder onsite that a
14 failure and that a retesting would be required.
15 Q Now Mr. Short, if you'd turn to exhibit
16 B, respondent's B, which is the second
17 demonstrative exhibit before you. Do you have
18 that?
19 A No, sir.
20 Q Let me give you a copy.
21 A Thank you.
22 Q Now, exhibit B, am I correct, Mr. Short,
23 that this visually accurately illustrates the
24 contracting process that Energy Sense followed for
25 Title 24 testing services in connection with its

1 dealings with the Masco installation subsidiaries?
2 A That is correct.
3 Q Okay. And the first box at the top,
4 contracts negotiated for Energy Sense Testing
5 Services, does that refer to the agreements I
6 previously had you identify as MAS-001?
7 A It does.
8 Q Behind tab number 6 in the binder?
9 A It does.
10 Q And is there anything on this
11 demonstrative exhibit that fails to accurately
12 portray how the contracting process for field
13 verification and testing services work while you
14 were the division manager at Energy Sense?
15 A It is correct, appears to be correct.
16 Q Now, Mr. Short, with respect to in
17 particular some exhibits that were referenced by
18 the complainants this morning, I want to turn your
19 attention to one of those in the binder which I
20 will hand to you, once I find the appropriate
21 page.
22 It was exhibit number 30 in Mr.
23 Dickerson's binder. I'll put that before you.
24 Do you have exhibit 30 in front of you,
25 Mr. Short?

1 A Yes.
2 Q Okay. Have you ever seen that before,
3 other than having perhaps looked at it this
4 morning?
5 ASSOCIATE MEMBER LEVIN: Mr. Frankel,
6 could you identify where that is in the binder, or
7 is this a new exhibit?
8 MR. FRANKEL: Oh, no. This is one of
9 the exhibits in Mr. Dickerson's binder, exhibit
10 30 --
11 MR. DICKERSON: It's not in the
12 documents --
13 MR. FRANKEL: -- that was referenced
14 this morning. I'm sorry.
15 MR. BECK: This is the webpage from the
16 energysense.org website.
17 PRESIDING MEMBER ROSENFELD: We don't
18 have it.
19 MR. BECK: No, it's not in the big
20 binder.
21 BY MR. FRANKEL:
22 Q Do you have exhibit 30, which is a
23 website printout?
24 A I do.
25 Q Okay. Did Energy Sense, as division

1 manager of Energy Sense, did you ever have a
2 website that went by this address or name?
3 A No, we did not.
4 Q Okay. And was that true for the entire
5 time that you were as division manager of Energy
6 Sense up until January of 2008?
7 A That is correct.
8 Q Okay. And do you know, based on your
9 experience, where those webpages came from that
10 are part of exhibit 30?
11 A No, I do not know.
12 Q Okay. Let me refer you, if you would,
13 to the third or the second page. You see that
14 there's an address listed for contact information?
15 A I do see that.
16 Q And what does that say?
17 A 14655 Northwest Freeway Suite 102,
18 Houston, Texas 77040.
19 Q Did Energy Sense, the company of which
20 you were division manager, ever have any offices
21 in Houston, Texas?
22 A No.
23 Q Did Energy Sense ever operate in any
24 states, while you were division manager, other
25 than California and Nevada?

1 A No.
2 MR. BECK: I have some questions.
3 EXAMINATION
4 BY MR. BECK:
5 Q Sir, are you saying that this is not --
6 these documents that are in 30 are not from the
7 website of the Energy Sense that you worked for?
8 A That is correct; they're not.
9 Q Do you know whose website this is, if
10 it's not the Energy Sense you worked for?
11 A I don't have personal knowledge of that,
12 no, sir.
13 Q Okay.
14 ASSOCIATE MEMBER LEVIN: Do you think
15 that you're familiar with all of the subsidiaries
16 of Masco?
17 THE WITNESS: No.
18 ASSOCIATE MEMBER LEVIN: Therefore
19 you're not necessarily familiar with all of their
20 websites?
21 THE WITNESS: That would be correct.
22 MR. BECK: Well, what was the -- did the
23 Energy Sense you worked for have a website?
24 THE WITNESS: No, we did not.
25 MR. BECK: Not at all. But there are

1 Energy Sense -- I'm sorry, where else does it
2 operate besides California?
3 THE WITNESS: My division operated in
4 California, and we had some in Nevada.
5 MR. BECK: Okay. Is there another
6 subsidiary of Masco called Energy Sense that
7 you're not a part of?
8 THE WITNESS: I believe there's one in
9 Texas.
10 MR. BECK: Okay. So this could be one
11 in Texas, correct?
12 THE WITNESS: That is correct.
13 MR. BECK: But to your knowledge it's
14 still one of the subsidiaries of Masco?
15 THE WITNESS: My understanding, yes.
16 MR. BECK: Okay. Which is -- so it has
17 the same relationship; to Masco as the Energy
18 Sense that you worked for had?
19 THE WITNESS: I don't know. I have no
20 idea.
21 MR. BECK: But you were --
22 THE WITNESS: I don't know -- I don't
23 know if this Energy Sense is -- I don't know how,
24 I have no -- I have no knowledge of their
25 operations so I have no understanding of -- I had

1 no relation with that company.
2 MR. BECK: Okay. But you were aware
3 that there was an Energy Sense that was a
4 subsidiary of Masco that was operating in Texas,
5 which was separate from your --
6 THE WITNESS: Correct.
7 DIRECT EXAMINATION - Resumed
8 BY MR. FRANKEL:
9 Q Now, Mr. Short, during the time that you
10 were division manager of Energy Sense, up until
11 January of 2008, did you receive any direction in
12 terms of either the prices you charged or how you
13 would do your work from any installing subsidiary,
14 whether it be of Masco or any other company?
15 A No, I did not.
16 Q Did you receive any direction or
17 instruction about how you would go about
18 performing your work as a Title 24 tester and
19 certified rater from anyone at Masco Corporation?
20 A No, I did not.
21 Q Now when Energy Sense was established as
22 a separate company, did you have an office?
23 A Yes, I did.
24 Q Where was your office located?
25 A In Modesto.

1 Q Okay. And what was the address?
2 A It was on Coldwell Avenue. I don't,
3 sorry I don't remember the exact address.
4 Q And did any installing companies, whose
5 work you tested for Masco, office out of the same
6 location?
7 A No.
8 Q With respect to the equipment that was
9 used for testing, whether it be trucks,
10 automobiles, equipment, did Energy Sense have to
11 purchase that equipment?
12 A We did.
13 Q And did you purchase cars, a truck?
14 A No.
15 Q Did you -- what did you do?
16 A The raters used their own vehicles and
17 we had equipment purchase through Minneapolis
18 Blower Door Company for duct testers, various
19 other equipment through other companies that we
20 required for the HERS testing.
21 Q Did you have to enter into a lease
22 agreement for your office space?
23 A Yes.
24 Q And did Energy Sense, while you were
25 division manager, pay rent on the office space

1 that you leased?
2 A We did.
3 MR. DICKERSON: Running objection. Same
4 objection that I've voice thus far.
5 MR. BECK: I think that's true. I
6 think, Mr. Frankel, you could maybe even speed
7 this part up. Instead of asking him -- maybe ask
8 a more cumulative question in terms of, for
9 example, where office space is.
10 And we are getting a bit too far afield
11 in terms of the narrow issue of whether or not the
12 structure of the company presents a conflict of
13 interest.
14 I understand that how they operate is to
15 some degree indicative of the relationship, but it
16 needs to be sort of narrowly tailored to that
17 issue.
18 MR. FRANKEL: Okay, I will try to do so.
19 BY MR. FRANKEL:
20 Q During the course of your role as
21 division manager of Energy Sense, Inc., did you
22 receive any complaints from any party concerning
23 the performance of the work that Energy Sense
24 was --
25 MR. BECK: That's not relevant.

1 BY MR. FRANKEL:
2 Q Did you become aware at any point during
3 your role as division manager of any installing
4 company incorrectly utilizing the Energy Sense
5 name in connection with any bid for services that
6 it made?
7 MR. DICKERSON: I would say that's the
8 same question, just phrased differently.
9 Objection.
10 MR. BECK: Would you restate that? I'm
11 sorry. The question.
12 BY MR. FRANKEL:
13 Q Mr. Short, are you aware of any instance
14 where it came to your attention that an installing
15 company was utilizing Energy Sense's name in an
16 unauthorized fashion?
17 MR. BECK: Well, I think that that's --
18 it's a big vague and speculative. I don't even
19 know what that means exactly.
20 ASSOCIATE MEMBER LEVIN: Mr. Frankel,
21 would you mind if I ask much more general
22 questions that --
23 MR. FRANKEL: Sure. Please.
24 ASSOCIATE MEMBER LEVIN: I apologize if
25 they're in the documents, excuse me, but they're

1 not clear to me.
2 Sorry, I'm getting over a very long
3 cold, cough.
4 THE WITNESS: Same here.
5 ASSOCIATE MEMBER LEVIN: Sorry. Hope
6 yours recovers more quickly.
7 Mr. Short, when you were employed by
8 Energy Sense did you know that it was owned by
9 Masco?
10 THE WITNESS: Yes.
11 ASSOCIATE MEMBER LEVIN: Did you receive
12 an annual report from Masco? Or did your office,
13 at any time? Did you see one at any time?
14 THE WITNESS: Not to my recollection,
15 but it's been a couple years, so I -- I don't
16 understand what kind of report you're referring
17 to.
18 ASSOCIATE MEMBER LEVIN: A company has
19 an annual report, like a --
20 THE WITNESS: I'm sure I did.
21 ASSOCIATE MEMBER LEVIN: -- financial
22 report and other --
23 THE WITNESS: Yeah, I'm sure I did of
24 Masco Corporation, yeah.
25 ASSOCIATE MEMBER LEVIN: Do you know who

1 the owners of Masco were?
2 THE WITNESS: No, no, not of --
3 ASSOCIATE MEMBER LEVIN: Is it a
4 publicly owned company?
5 THE WITNESS: As far as I know, yes.
6 ASSOCIATE MEMBER LEVIN: Is it a
7 California corporation?
8 THE WITNESS: I have no idea.
9 ASSOCIATE MEMBER LEVIN: Did you have
10 any interaction with any employees of Masco?
11 THE WITNESS: The corporation? Masco
12 administrative services for my administrative
13 support. Dave Bell, VP, or president of Energy
14 Sense. That's my extent. Yes.
15 If that counts as yes, then yeah.
16 ASSOCIATE MEMBER LEVIN: Anyone else?
17 You said administrative report, VP or president --
18 THE WITNESS: Administrative services,
19 do my budget, Dave Bell, Dale Camany, I think the
20 people that have been named in some of these
21 reports. Yeah, I've had contact with them, yeah.
22 ASSOCIATE MEMBER LEVIN: How about the
23 attorneys for Masco who are referenced in one of
24 the letters that we have in our binder?
25 THE WITNESS: Yes, the letters from Tom

1 Hamilton, yes. I've had contact with various
2 lawyers.
3 ASSOCIATE MEMBER LEVIN: Thank you.
4 BY MR. FRANKEL:
5 Q Mr. Short, you left Energy Sense in
6 January of 2008?
7 A Yes.
8 Q Why did you leave?
9 A Just seeking a different career path.
10 Q And what career path are you seeking
11 today?
12 A California Highway Patrol.
13 PRESIDING MEMBER ROSENFELD: I'm sorry,
14 say that again?
15 THE WITNESS: The Highway Patrol, CHP.
16 MR. DICKERSON: Objection, relevance.
17 MR. BECK: It's not relevant, but --
18 MR. FRANKEL: Okay.
19 BY MR. FRANKEL:
20 Q I know you're no longer an Energy Sense
21 employee?
22 A That's correct.
23 Q And you're appearing here voluntarily
24 today?
25 A That's correct.

1 MR. FRANKEL: I have nothing further.
2 MR. BECK: I have a question. Did
3 Energy Sense provide HERS rating for any other
4 company other than Masco or Masco-related company,
5 or Masco's --
6 THE WITNESS: You mean as via three-
7 party contracts that we operated?
8 MR. BECK: Yes.
9 THE WITNESS: We did testing through
10 Pulte and different various builders that needed
11 the services. So, yes. Lennar, Centex, Standard
12 Pacific, Florsheim.
13 MR. PENNINGTON: I don't think you
14 understood the question.
15 MR. BECK: Pull the microphone up, Bill.
16 MR. PENNINGTON: Sorry. This is as far
17 as we get.
18 Did you, independently of Masco, provide
19 services directly to a builder?
20 THE WITNESS: Via our three-party
21 contract, I think it was laid out here, that --
22 MR. PENNINGTON: So this is not a
23 question about your three-party contract. This is
24 a --
25 THE WITNESS: No, I'm trying to explain

1 to you, we had a contract with the installing
2 companies to provide those services. And that's
3 how we did that.
4 So if I would negotiate a contract with
5 a builder, then I would contact the sales
6 representative and they would write up the
7 contract for a bid. And that would be the only
8 thing on it. That was the only thing that I
9 negotiate with them, yes.
10 MR. PENNINGTON: So that contract would
11 go back through the installing --
12 PRESIDING MEMBER ROSENFELD: You have to
13 talk a little louder, too.
14 MR. PENNINGTON: The contract would go
15 back through the installing contractor as if they
16 had made the contact with the builder?
17 THE WITNESS: That's correct.
18 MR. BECK: Go ahead, Mr. Dickerson.
19 CROSS-EXAMINATION
20 BY MR. DICKERSON:
21 Q I'd like to refer your attention back to
22 tab number 18, document number 33. That one
23 there, tab number 18. Document 33.
24 Now, I think you identified David Bell.
25 You know David Bell?

1 A That's correct.
2 Q Who's David Bell?
3 A President of Operations for Energy
4 Sense.
5 Q He's your boss?
6 A That's correct.
7 Q Which -- where was this document number
8 33, tab 18. You see that letter is addressed to?
9 A Yes, sir.
10 Q President, Energy Sense?
11 A Yes, sir.
12 Q It's addressed to David Bell?
13 A Correct.
14 Q What city is he in?
15 A Address would be on Houston, Texas.
16 Q Thank you. Going back to the first
17 document under tab 1, I think it's -- I'm sorry,
18 tab 6, and it's 001. It's about two pages, I
19 don't know, five, six pages in. I think you were
20 looking at it.
21 MR. BECK: Is there a number there?
22 Which tab is this, again?
23 MR. DICKERSON: I'm sorry, tab 6.
24 MR. BECK: Okay.
25 BY MR. DICKERSON:

1 Q And it is marked MAS-01.
2 A 001, right?
3 Q 001, that's correct. Have you seen that
4 agreement before?
5 A Yes.
6 Q If you go to page 005 you see that it is
7 signed on behalf of Energy Sense by John, are you
8 familiar with that name?
9 A The name John?
10 Q Yeah, John who signed on behalf of
11 Energy Sense, John Sznewajs?
12 MR. DICKERSON: Anybody help me with
13 that pronunciation?
14 THE WITNESS: Point of clarification,
15 this agreement is January 1, 2008. I was not
16 at --
17 BY MR. DICKERSON:
18 Q Okay, that's fine.
19 A You know, that's right around the time
20 of my --
21 Q That's fine, I just want to direct your
22 attention to the signatory to that contract.
23 A As I said, January 1, 2008 was -- I was
24 no longer employed, so I would have -- I don't
25 know.

1 Q Okay, I'm just asking. I'm just
2 directing your attention to the name of the person
3 who signed the document. Do you see --
4 A I don't know John G. Sznewajs.
5 Q Okay. You see he's listed as the vice
6 president, treasurer and assistant secretary of
7 Energy Sense?
8 A I see that.
9 Q Okay. If you go on to the document that
10 has been marked MAS-024. This was provided by
11 Masco at the initial document presentation. Do
12 you see this shows Masco Corporation officers and
13 directors, not Energy Sense, Masco.
14 Do you see that name anywhere on there?
15 A Yeah, it's right there, yes. There's
16 three officers.
17 Q Yeah, he occupies three positions with
18 Masco Corporation, correct?
19 A As it would appear.
20 Q What are the three operations, or
21 officers and positions that he holds with Masco in
22 addition to holding those positions with Energy
23 Sense?
24 A There's chief financial officer, vice
25 president, corporate development and treasurer.

1 Q Okay. Thank you. During the time that
2 you had conversations with Mr. Hamilton, did Mr.
3 Hamilton ever tell you if you do this, this and
4 this your setup is good?
5 In other words, did he ever give you the
6 blessing to go forward with the Masco/Energy Sense
7 setup?
8 A Yes.
9 Q Did anybody from the CEC ever give you
10 written okay to go forward with the program?
11 A Not to my knowledge.
12 Q Okay. You said you had discussions with
13 Mr. Hamilton regarding setting this up. Did you
14 have any discussions regarding interlocking
15 directorships?
16 A No, not to my knowledge.
17 Q Okay. Anything regarding commingling of
18 funds?
19 A Not to my knowledge.
20 Q Okay. Nothing regarding any -- are you
21 familiar with the concept of corporate alter ego?
22 A No.
23 Q Okay. So you didn't have any
24 discussions on what constitutes a corporate alter
25 ego?

A No. Those were not in my purview.

Q Okay. I think you mentioned that there were eight people who came to work for Energy Sense once Energy Sense was formed with raters?

A That's correct.

Q You said they had worked for other companies?

A That's correct.

Q How many of those eight had worked for Masco-related companies before they came to work for Energy Sense?

A Oh, all the HERS raters.

Q All of those raters quit working for the Masco company and immediately came to work for Energy Sense?

A Not immediately, no.

Q Okay, but they ultimately came to work for Energy Sense?

A That's correct.

Q Okay. How long did it take all eight of them to show up?

A Most of them were -- they were terminated from one company on one day, hired the next day.

Q Okay.

1 A The majority.
2 Q So they left one Masco-related entity
3 one day and came to work for Energy Sense the
4 next?
5 A That's correct.
6 Q Okay. Looking at what's been marked as
7 respondent's A, Energy Sense is paid by the
8 installing company, correct?
9 A That is correct.
10 Q Okay. And if the installing company is
11 Coast Insulation, that's another Masco company,
12 correct?
13 A That is correct.
14 Q Okay, so Energy Sense is being paid by a
15 company that is ultimately owned by Masco,
16 correct?
17 A Through the builder -- builder, yes.
18 Q But the money's coming from -- it's a
19 Coast Insulation check, right?
20 A I don't know.
21 Q Okay. And both -- in that scenario,
22 both Coast Insulation and Energy Sense both report
23 financially back to Masco?
24 A I would assume.
25 Q Okay.

1 MR. DICKERSON: That's all I have.
2 MR. BECK: Okay. Bill?
3 (Pause.)
4 EXAMINATION
5 BY MR. PENNINGTON:
6 Q So, I'd like to draw your attention to
7 tab 23.
8 MR. BECK: And this is in our binder?
9 MR. PENNINGTON: Yeah.
10 BY MR. PENNINGTON:
11 Q And I'm looking at a few pages in where
12 there's a copy of the Blueprint, a newsletter of
13 the Energy Commission.
14 PRESIDING MEMBER ROSENFELD: Do we have
15 a page number, Bill?
16 MR. PENNINGTON: It does not have a page
17 number. It's about two-thirds of the way in on
18 that tab. It looks like this in black and white.
19 PRESIDING MEMBER ROSENFELD: Got it.
20 BY MR. PENNINGTON:
21 Q So, this is guidance in the newsletter
22 that the Energy Commission provides to building
23 officials and anyone in the building industry that
24 requests. I think at the time of this issue there
25 were about 3500 people that were on our mailing

1 list.
2 I wanted to draw your attention to the
3 second paragraph of this. This is a question and
4 answer that gets to three-party contracts.
5 And in the second paragraph it says:
6 The Commission expects HERS raters to enter into a
7 contract with the builder, not with
8 subcontractors, to provide independent, third-
9 party diagnostic testing and field verification.
10 Were you aware of that provision?
11 Actually, there is a repeat of this identical
12 language in the 2005 compliance manual that the
13 Energy Commission adopted for the 2005 building
14 standards, which are actually the next couple of
15 pages under this tab, are the excerpts of
16 essentially the same thing.
17 So, I'm wondering if you were aware of
18 the expectation that raters contract directly with
19 builders and not with subcontractor.
20 A I was also aware of paragraph three in
21 that same statement.
22 MR. BECK: Well, answer the first
23 question. Were you aware of that one part that
24 Mr. Pennington referred to?
25 THE WITNESS: Correct, with the

1 stipulation of the continued, that explanation
2 throughout the paragraph, yes.
3 BY MR. PENNINGTON:
4 Q So the idea of a three-party contract
5 was that all three parties to the transaction
6 would be part of the same contract, and that the
7 roles would be spelled out directly by -- for each
8 party. And the builder would sign that and the
9 rater would sign that and the installing
10 contractor would sign that.
11 So, were you aware of that?
12 A From my understanding, I don't know the
13 legal reason, I'm sorry for my ignorance in
14 that -- from my understanding we were operating
15 correctly.
16 MR. BECK: Anything else?
17 MR. PENNINGTON: No.
18 MR. FRANKEL: I just have a couple of
19 followup questions, Mr. Short.
20 ASSOCIATE MEMBER LEVIN: Can you speak
21 into the mike, please.
22 REDIRECT EXAMINATION
23 BY MR. FRANKEL:
24 Q Mr. Short, am I correct that under the
25 contracts that were entered into between Energy

1 Sense and the Masco installation companies that
2 you were bound by the terms and conditions of any
3 builder contract that the installing company would
4 enter into with a builder?
5 A Bound by the contract -- say that again,
6 please.
7 Q Bound by the builder's contract.
8 A Yes, we were bound by the builder's
9 contract, correct.
10 MR. FRANKEL: Thank you.
11 MR. BECK: Do you have anything more,
12 Mr. Dickerson? Mr. Frankel, you've one more
13 witness, correct?
14 MR. FRANKEL: Yes, I do.
15 MR. BECK: How long do you think that
16 will take?
17 MR. FRANKEL: I don't think it should
18 take very long.
19 MR. BECK: Not as long as this witness?
20 MR. FRANKEL: I don't believe so.
21 MR. BECK: Okay. I think the Commission
22 would, if -- I believe that's the only witness?
23 That's the last witness?
24 MR. DICKERSON: That will be the last
25 witness, that is correct.

1 MR. BECK: And is it the Commission's
2 desire to power through, as they say, through this
3 last witness and wrap up the hearing? Or does the
4 Commission want to take a lunch break?
5 PRESIDING MEMBER ROSENFELD: I'm ready
6 to keep on going.
7 ASSOCIATE MEMBER LEVIN: I think we're
8 ready to power through as long as the parties and
9 the witnesses can --
10 MR. DICKERSON: No, we're ready --
11 ASSOCIATE MEMBER LEVIN: -- can stand
12 up. We don't want to --
13 MR. DICKERSON: I hope it doesn't go an
14 hour.
15 ASSOCIATE MEMBER LEVIN: We don't want
16 to abuse anyone.
17 MR. FRANKEL: I'd like to call Jaime
18 Padron.
19 Whereupon,
20 JAIME PADRON
21 was called as a witness herein, and after first
22 having been duly sworn, was examined and testified
23 as follows:
24 REPORTER: Please state and spell your
25 name for the record.

1 THE WITNESS: It's Jaime Padron,
2 J-a-i-m-e P-a-d-r-o-n.
3 DIRECT EXAMINATION
4 BY MR. FRANKEL:
5 Q Mr. Padron, what do you currently do for
6 a living?
7 A I'm employed by Energy Sense.
8 Q In what capacity?
9 A Division Manager.
10 Q And how long have you been Division
11 Manager?
12 A Since March of '08.
13 Q And who -- did you succeed Mr. Short as
14 division manager?
15 A I did.
16 Q And as Division Manager, what are your
17 duties and responsibilities?
18 A The operational functions of Energy
19 Sense, day-to-day operations.
20 Q And currently how many people are
21 employed by Energy Sense?
22 A There are three raters and one admin
23 person.
24 Q And are you a certified HERS rater?
25 A I am.

1 Q And you've held your certification for
2 how long?
3 A 2002.
4 Q Now, as Division Manager of Energy
5 Sense, are you responsible for managing the
6 operations and testing work of the testing and
7 verification work that Energy Sense conducts?
8 A I do.
9 Q And are you responsible for directing
10 the other HERS raters who are in your employ in
11 that regard?
12 A Yes.
13 Q Do you receive direction from anyone
14 else at Masco Corporation or any Masco
15 installation company with respect to how you
16 conduct your work?
17 A No.
18 Q With respect to budgeting or hiring
19 decisions, are those decisions that you make,
20 yourself?
21 A That's correct.
22 Q With respect to the raters that have
23 been employed by Energy Sense since the time you
24 became Division Manager in 2008 succeeding Mr.
25 Short, have you or anyone else at Energy Sense

1 advocated or recommended the use of products or
2 services that were conducted or performed by any
3 company whose work you were testing?
4 A No, I did not.
5 Q And to your knowledge has anyone on your
6 staff done so?
7 A No.
8 Q Have you expressly directed them not to
9 do so?
10 A That's correct.
11 Q And on how many occasions?
12 MR. DICKERSON: Objection. We're back
13 to telling him to do a good job.
14 MR. BECK: We are getting back into
15 that. We'd established with the previous witness
16 generally how Energy Sense gets their business.
17 We've established, I think, that they're not
18 receiving direct orders or direction from anybody
19 else outside of Energy Sense.
20 So, if it goes -- if it's largely the
21 same testimony as the previous witness, which I
22 think in terms of how they operate on a day-to-day
23 basis, it was fairly uncontroverted. That I don't
24 think it's -- I think it's --
25 MR. FRANKEL: Well, I'm trying to deal

1 with the plain language of the statute that's at
2 issue here. And I thought that the question was
3 relevant. But let me move on.
4 BY MR. FRANKEL:
5 Q Mr. Padron, are you employed by any
6 other company other than Energy Sense?
7 A No.
8 Q And throughout the entire time period
9 that you've been Division Manager have you been
10 employed by any other company?
11 A I have not.
12 Q Okay. And with respect to the HERS
13 raters who are currently employed, or were
14 employed in the past, with respect to doing Title
15 24 testing work for Energy Sense, were they
16 exclusively employees of Energy Sense, or were
17 they employed by anybody else?
18 A They're employees of Energy Sense.
19 Q And with respect to the testing work
20 that you've performed under Title 24, and that the
21 HERS raters who are working under your direction
22 and supervision performed, did they have any
23 ownership interest in any installing company for
24 whom you did Title 24 testing?
25 A They do not.

1 Q Did they have any debt agreements with
2 any of those parties?
3 A They do not.
4 Q Now, Mr. Padron, are you aware that
5 there are other companies within the Masco
6 enterprise that operate under the name of Energy
7 Sense?
8 A I do now.
9 Q Did you know that before?
10 A No.
11 Q Okay. I want to direct your attention
12 to the same exhibit that Mr. Short looked at,
13 which was this webpage, which is exhibit 30.
14 And --
15 MR. DICKERSON: Objection, we've already
16 established what was going on with exhibit 30.
17 MR. BECK: It's a bit duplicative.
18 Again, I think we can --
19 MR. FRANKEL: Well, it may be -- I mean
20 if people are prepared to stipulate I don't have
21 any problem with this. But Mr. Short left in
22 January of 08. I was just trying to show that
23 this was not a website that was used from January
24 08 to the present when Mr. Padron was General
25 Manager. That really is the point here.

1 MR. DICKERSON: Yeah, but the date on
2 the website establishes when it was pulled off of
3 the website. We now know that David Bell, who
4 they've acknowledged is their boss, works for
5 Energy Sense in Houston, Texas. That's their base
6 of operations.
7 MR. FRANKEL: We do that --
8 MR. BECK: We know that there's a -- but
9 getting back to this one particular issue, maybe
10 perhaps you could ask Mr. Padron if he listened to
11 Mr. Short's testimony and if the policies,
12 procedures and practices that Mr. Short testified
13 to in regards to the employees of Energy Sense are
14 the same that have ensued since Mr. Short's
15 departure and Mr. Padron's promotion.
16 If you're going to ask -- what I'm
17 saying is if you're going to ask Mr. Short
18 basically the same questions -- or, I'm sorry, Mr.
19 Padron the same questions you asked Mr. Short,
20 perhaps that's a short way of doing it. Because I
21 don't think that that evidence was in controversy.
22 MR. FRANKEL: Well, let me just ask one
23 question, then I will try to move on.
24 BY MR. FRANKEL:
25 Q Mr. Padron, --

1 PRESIDING MEMBER ROSENFELD: Can we get
2 you to put the mike between you and Mr. Padron, so
3 you --
4 MR. FRANKEL: Yes.
5 PRESIDING MEMBER ROSENFELD: -- so you
6 look at it.
7 MR. FRANKEL: Okay.
8 PRESIDING MEMBER ROSENFELD: Thank you.
9 BY MR. FRANKEL:
10 Q Mr. Padron, did Energy Sense ever
11 operate a website during the time that you have
12 been Division Manager?
13 A No.
14 Q Did Energy Sense, Inc., the company of
15 which you're Division Manager, have any offices or
16 operations in Texas?
17 A No.
18 Q Are its operations exclusively limited
19 to California?
20 MR. DICKERSON: I hate to keep
21 objecting, but this is just the same stuff. It's
22 the same stuff.
23 MR. BECK: It is a bit, because you -- I
24 mean, you could ask Mr. Padron if, to his
25 knowledge, as of today, that the policies and

1 procedures of Energy Sense are as Mr. Short
2 testified, and as far as his knowledge of any
3 websites by Energy Sense, that he also agrees with
4 Mr. Short's testimony. Rather than asking him the
5 exact same questions.
6 MR. FRANKEL: That's fine, I'm prepared
7 to do it in that form.
8 BY MR. FRANKEL:
9 Q Did you listen to Mr. Short's testimony
10 with respect to the website and exhibit 30?
11 A I did.
12 Q And did you concur with his testimony?
13 A Yes.
14 Q Did you also listen and understand Mr.
15 Short's testimony with respect to how three-party
16 contracting between Energy Sense, the installing
17 subsidiaries, and builders operate?
18 A I did.
19 Q And was that accurate and correct as far
20 as you know during the time that you've been
21 Division Manager?
22 A It is.
23 Q And with respect also to the contracting
24 process for field verification and testing
25 services that Mr. Short went through on

1 respondent's exhibit B, was that true and accurate
2 as far as you're concerned in terms of how the
3 contracting process for Energy Sense operates
4 while you've been Division Manager from March of
5 '08 to the present?
6 A It is.
7 Q Okay. Now, with respect to work that
8 Energy Sense obtains, does Energy Sense, itself,
9 market its own products and services?
10 A Yes, we do.
11 Q And are --
12 MR. DICKERSON: Objection. I think we
13 can do the same thing. This is the same line of
14 questioning that he had with Mr. Short.
15 MR. FRANKEL: No, it's not -- it's not
16 the same. Let me try to clarify.
17 BY MR. FRANKEL:
18 Q And to whom do you market your services
19 to?
20 A We -- to anybody that can hire us.
21 Anybody that we consider a customer we'll try to
22 get work from.
23 Q So, to builders or owners --
24 A Builders or custom homes or --
25 Q And the other work that Energy Sense

1 receives comes through via the contracts that Mr.
2 Short described that were entered into either
3 while he was division manager, or at least when
4 you became division manager?
5 A That's correct.
6 Q And you're familiar with those
7 contracts?
8 A Yes, I am.
9 Q Now, I believe --
10 ASSOCIATE MEMBER LEVIN: Speak into your
11 mike, please.
12 MR. FRANKEL: Sorry.
13 BY MR. FRANKEL:
14 Q I believe during the proceedings this
15 morning there was reference to a national contract
16 with Pulte Homes. Are you aware of any such
17 contract, Mr. Padron?
18 A No, there's not.
19 Q Are you certain that there is no
20 national contract between Energy Sense, or between
21 any Masco company and Pulte Homes?
22 A The reason I say there is not, because I
23 have lost work. I don't have 100 percent work of
24 Pulte Homes. So, no, there is no -- they don't
25 have to hire Energy Sense.

1 Q Okay. And you have done work as a Title
2 24 tester, rater for Pulte Homes?
3 A I have.
4 Q Okay. And are you aware that California
5 Living and Energy has also done Title 24 testing
6 for Pulte Homes?
7 A They do.
8 MR. BECK: Mr. Padron, do you know David
9 Bell?
10 THE WITNESS: Yes.
11 MR. BECK: Where is his office?
12 THE WITNESS: I don't know.
13 MR. BECK: You don't know?
14 THE WITNESS: I don't know where his
15 office is.
16 MR. BECK: Do you know if it's in the
17 state of California?
18 THE WITNESS: Well, he works -- okay, I
19 take that --
20 MR. BECK: Well, not like not the street
21 address, but at least the city. Do you know what
22 city his office is in?
23 THE WITNESS: I want to say it's in
24 Florida.
25 MR. BECK: It's in Florida?

1 THE WITNESS: Yes.
2 MR. BECK: Okay, thank you.
3 BY MR. FRANKEL:
4 Q Mr. Padron, with respect to --
5 ASSOCIATE MEMBER LEVIN: Mr. Frankel,
6 please use the microphone.
7 BY MR. FRANKEL:
8 Q Mr. Padron, while you've been Division
9 Manager and a certified HERS tester, when Energy
10 Sense or yourself conduct a Title 24 test and
11 there is a failure, there has to be a retest, who
12 is it that has to pay for the retest of the work?
13 A The builder.
14 Q And has that always been the case while
15 you've been a HERS tester?
16 A Yes.
17 ASSOCIATE MEMBER LEVIN: Mr. Frankel, do
18 you mind if I interrupt with --
19 MR. FRANKEL: No. Please.
20 ASSOCIATE MEMBER LEVIN: -- a question
21 or two.
22 Mr. Padron, earlier you stated that you
23 had -- I don't know exactly the language you used,
24 but something to the effect that you had
25 instructed all of the testers in your division

about the conflict of interest issue, is that correct?

THE WITNESS: We have, yeah, we've discussed it.

ASSOCIATE MEMBER LEVIN: Can you summarize what you said to them?

THE WITNESS: We --

ASSOCIATE MEMBER LEVIN: Or what that issue is in your understanding?

THE WITNESS: We clarified with them that -- of course, we want them, when they are doing QII specifically, because this is where there could be, we want them to go directly at anytime there is an issue onsite to be talking to the builders only. Regardless of who's doing QII.

And that's the standard; that's what CHEERS trains us to do. We go over that quite often. We don't want them talking to any installers whatsoever. And that should be a practice that any HERS rater does all the time.

So, we go over those -- we go over that quite a bit.

ASSOCIATE MEMBER LEVIN: And who told you that that was the correct procedure or standard?

1 THE WITNESS: I've been through the
2 CHEERS training, as well.
3 ASSOCIATE MEMBER LEVIN: When you were
4 hired did you understand that Energy Sense was a
5 wholly owned subsidiary of -- blanking on the
6 name --
7 MR. FRANKEL: Masco?
8 ASSOCIATE MEMBER LEVIN: Masco, thank
9 you. I want to say Macro.
10 THE WITNESS: Yes, I did.
11 ASSOCIATE MEMBER LEVIN: You did at the
12 time you were hired?
13 THE WITNESS: Right.
14 ASSOCIATE MEMBER LEVIN: And did anyone
15 from Masco go over the conflict of interest rules
16 with you at the time?
17 THE WITNESS: No. We are trained by
18 CHEERS, so we know the -- that's where we get our
19 training from.
20 ASSOCIATE MEMBER LEVIN: So no one from
21 Energy Sense went over that with you, either?
22 Your only training for understanding of
23 the conflict of interest comes from CHEERS?
24 THE WITNESS: Right.
25 ASSOCIATE MEMBER LEVIN: Okay. Thank

1 you.
2 BY MR. FRANKEL:
3 Q And based on the training and
4 understanding that you obtained from CHEERS, did
5 you believe, as Division Manager of Energy Sense
6 that you were in any way violating the conflict of
7 interest rules?
8 MR. BECK: That's a legal conclusion.
9 And that's something that's beyond his scope.
10 MR. FRANKEL: I have nothing further,
11 then, at this point.
12 CROSS-EXAMINATION
13 BY MR. DICKERSON:
14 Q Mr. Padron, you said that you don't
15 really answer to anybody when it comes to the
16 hiring and firing. I assume you must have some
17 supervisor or boss, don't you?
18 A Locally, no.
19 Q Okay. How about at a higher level in
20 Energy Sense?
21 A Well, we have our officers, but --
22 Q Okay. I'd like to refer you to the
23 document that I was showing the previous witness.
24 It's number 6, document MAS-005, tab number 6,
25 005.

1 A I'm in tab 6. Where?
2 Q MAS-005. It's several pages in. It's
3 the back page of one of the contracts.
4 A Okay.
5 Q Okay, do you recognize the name of the
6 vice president of Energy Sense?
7 A No.
8 Q You don't recognize his name? Okay.
9 I'd like to direct your attention to what's been
10 marked as MAS-025.
11 A Where's it at?
12 Q Just towards the back, tab 6. Do you
13 have that there?
14 A Um-hum.
15 Q These are the officers and directors of
16 Energy Sense. Do you see that?
17 A Yes.
18 Q Would you expect that the vice president
19 of Energy Sense would have authority over your
20 employment relationship? That would be your
21 supervisor, wouldn't it?
22 A I don't know him, so I wouldn't consider
23 him my supervisor.
24 Q Okay, but he's higher up on the
25 corporate ladder than you are, correct?

1 A He is.
2 Q Within Energy Sense. And his name's
3 Lawrence F. Leaman? Do you see that? Do you see
4 the name Lawrence F. Leaman --
5 A Yes, I see that.
6 Q -- as a vice president?
7 A Right.
8 Q Okay. Someone who is higher up the
9 corporate chain of Energy Sense than you are,
10 correct?
11 A That's correct.
12 Q Okay, if you go back to MAS-005.
13 A Okay.
14 Q Do you notice that Lawrence Leaman is
15 the vice president of Masco Contractor Services of
16 California?
17 A That's what it says here.
18 MR. DICKERSON: Okay, that's all I have.
19 MR. BECK: Mr. Pennington, do you have
20 questions?
21 MR. PENNINGTON: Yeah, I had a couple of
22 questions.
23 EXAMINATION
24 BY MR. PENNINGTON:
25 Q Mr. Short said that all of the -- let me

1 ask it this way. Do you agree with Mr. Short's
2 conclusion that all of the work that Energy Sense
3 does is processed through a contract with the
4 installing contractor? So basically the
5 transaction with the builder is always done
6 through the contract with the installing
7 contractor?
8 A That's not always going to be the case.
9 We can go directly and contract with the builder
10 or the homeowner, whoever is our customer.
11 Q Could you estimate, in a rough sense,
12 what portion of the work --
13 A Well, okay. The majority of our work is
14 that way.
15 Q So you had said in your testimony
16 that --
17 PRESIDING MEMBER ROSENFELD: I'm sorry,
18 the majority of the work was which way?
19 THE WITNESS: Through the contract
20 arrangements that we have, that we discussed
21 earlier. The third-party contract with the
22 installing companies.
23 PRESIDING MEMBER ROSENFELD: So that
24 with the installer?
25 //

1 BY MR. PENNINGTON:
2 Q So the installer contractor, it's
3 according to this sheet --
4 MR. BECK: That's respondent's A --
5 THE WITNESS: Well, I don't want to say
6 that because there's a lot of our jobs that we
7 have a -- they're not the installing contractor.
8 They're just handling the contract.
9 So it's up to the builder whether -- I
10 can't tell you that all the contracts with Pulte
11 -- and we have a contract to do HERS testing with,
12 that whoever signed the contract is installing the
13 installation. That's not always the case.
14 BY MR. PENNINGTON:
15 Q So whom else might it be?
16 A They could be whoever that builder
17 decides to hire. But the contract is ran through
18 what we discussed.
19 Q So you don't contract directly with the
20 builder? Or rarely, I guess?
21 A Okay.
22 Q Is that correct?
23 A Yes.
24 Q All right, a different question. Are
25 you familiar with Environments for Living?

A I am.

Q And what role does Energy Sense have in Environments for Living?

A We can do their verifications for them.

Q What I suspect is the case, based on the previous witness that the complainants called, was the national contract that he was referring to was a commitment for involvement in Environments for Living. And that the builder had a commitment to participate in that program. And that's what disallowed the other HERS rater from being involved.

Does that make sense to you?

A Not at all.

Q So why do you say that?

A The builder can hire any HERS rater he wants to hire for his job. He's not obligated to -- where Environments for Living and HERS rating comes into play, it has no bearing.

The builder can choose any HERS rater he wants to do the HERS rating on his job site.

Q Do you know if Pulte Homes is a participant in Environments for Living?

A In some cases some of their job sites they have been.

1 Q And this particular job site that was
2 referred --
3 A I couldn't tell you right now.
4 Q Okay, thanks.
5 MR. BECK: Further questions?
6 MR. BARTRIDGE: Mr. Padron, did you have
7 a standard list of contractors that you typically
8 team with when you --
9 THE WITNESS: No, they're all my
10 customers, I hope.
11 MR. BECK: Any questions, Mr. Frankel,
12 Mr. Dickerson?
13 MR. DICKERSON: None.
14 MR. FRANKEL: I have some written
15 testimony that we'd like to submit that I think
16 will clarify some of the technical issues with
17 respect to some of the questions that have been
18 raised earlier, that are in affidavit form, from
19 representatives of the installing subsidiaries, or
20 Masco-related companies, that I'd like to submit
21 for the record.
22 MR. DICKERSON: I don't know if I recall
23 saying that evidence would be taken by affidavit.
24 I have serious concerns regarding any information
25 that is being provided by way of affidavit from

1 someone who is not subjected to cross-examination.
2 MR. FRANKEL: Well, I'm just going based
3 on my understanding of the Commission rules, and
4 to expedite the proceedings.
5 My understanding, under the rules, is
6 that the Commission takes testimony in written
7 form as well as live testimony. And on that basis
8 I had declarations prepared to deal with various,
9 I think, uncontroversial and foundational matters
10 that may not be in the record.
11 MR. BECK: The Commission can take
12 testimony that is -- can take it, as it says in
13 1212(b) of Title 20 of California Code of
14 Regulations, oral or written testimony offered by
15 parties shall be under oath. And then we can,
16 indeed, accept that.
17 But I would like Mr. Dickerson to -- how
18 much do you have?
19 MR. FRANKEL: I have several affidavits.
20 I think there are probably eight or nine
21 affidavits.
22 ASSOCIATE MEMBER LEVIN: May I make a
23 suggestion?
24 MR. FRANKEL: Yes.
25 ASSOCIATE MEMBER LEVIN: We were going

1 to propose a timeline for closing briefs. And I
2 think in fairness to the complainant, since they
3 won't have seen this, that we'll need to figure
4 out some sort of revised process so that you are
5 entitled to submit that under our rules. But that
6 the complainant has an opportunity to respond, if
7 they choose.
8 MR. DICKERSON: And I would like the
9 opportunity to submit my own affidavits if we can
10 establish that with the timeline, as well.
11 MR. BECK: Correct. Well, do you
12 anticipate having -- are you talking about
13 affidavits that are in response to these?
14 MR. DICKERSON: Well, so long as I can
15 provide -- well, without having seen them I don't
16 know. I would like to provide affidavits
17 obviously in rebuttal, but if affidavits are going
18 to be presented I have some people that I could
19 have some affidavits for you within the next four
20 or five days. And also get them to him and submit
21 them in here.
22 Hopefully at that point everybody has
23 had an opportunity to present the type of
24 information and the type of evidence that they
25 want.

1 I probably have two or three that I
2 would submit. That would be all.
3 MR. BECK: Okay. Well, -- raise the
4 issue whether we need to come back for a
5 subsequent hearing to resolve any problems with
6 these affidavits.
7 I don't know if -- how many -- how
8 voluminous are the affidavits?
9 MR. FRANKEL: They're not voluminous.
10 They deal with, I think, issues that go squarely
11 to what's presented by the statute here.
12 We have declarations from the people who
13 are responsible for the installing divisions who
14 will attest to certain facts to show that they are
15 complying with, that there is no violation of the
16 conflict of interest rules and substance.
17 We have declarations from the current
18 HERS raters who are employed by Energy Sense
19 stating that they don't have an ownership
20 interest, debt agreement with, or employee/
21 employer relationship with anyone other than
22 Energy Sense, itself.
23 And we have declarations on some of the
24 corporate structure and formality issues in terms
25 of when Energy Sense was incorporated, and how it

1 doesn't have any connection to Energy Sense in
2 Texas, for example. Where that question was
3 raised on that exhibit.
4 So there are some fundamental issues
5 that these deal with that go to those questions.
6 ASSOCIATE MEMBER LEVIN: If I may, I'd
7 just ask why weren't these submitted previously
8 then?
9 MR. FRANKEL: I did --
10 ASSOCIATE MEMBER LEVIN: Because they go
11 to fundamental issues.
12 MR. FRANKEL: I didn't understand that I
13 was supposed to submit them in advance of the
14 hearing. No one ever indicated that that was the
15 case. I thought we were going to be at this
16 hearing, from what I understood, and present our
17 evidence, whether it was in oral form or in
18 written form.
19 MR. BECK: It's true that we did not
20 set, and in hindsight, we should have set a
21 deadline for submission of written documents to
22 the docket in advance of the hearing.
23 But it would have been nice to at least
24 have those reviewed by Mr. Dickerson in advance of
25 the hearing so he could prepare whatever rebuttal

1 to them that he might want to.
2 That being the case, what we could do is
3 set a -- first, let me ask you gentlemen, would
4 you be satisfied with in terms of an argument,
5 closing argument, putting that into brief form,
6 rather than having to reconvene and give an oral
7 -- because I assume both of you will be wanting to
8 submit post-hearing briefs, citing to excerpts
9 from the record that support your positions, the
10 testimony, et cetera.
11 I'm not sure what the timeline is for
12 getting the transcript from the hearings. A
13 matter of a few days, right?
14 REPORTER: Ten to a couple weeks.
15 MR. BECK: Okay. And you might want to
16 do that, as well. And what we might want to do is
17 have a deadline of perhaps ten days for the
18 submission of any additional affidavits or
19 documents. Does that sound --
20 MR. DICKERSON: That sounds very fair.
21 I would appreciate that opportunity. Thank you.
22 MR. BECK: And then another ten days
23 after that for the submission of closing briefs?
24 And another 21 days, Commissioners, talking about
25 another 21 days after that for a decision.

1 Under the regulations, specifically
2 under the complaint, request for investigation
3 process, the time for the Committee to issue the
4 decision is 21 days following the close of
5 hearings pursuant to Title 34. And what we could
6 do is we could designate the close of the hearing
7 to be the date that the briefs, the final briefs,
8 are supposed to be submitted. We'd designate that
9 as the close of the hearing.
10 And then we would issue the decision
11 within 21 days. The Presiding Member also has the
12 ability to lengthen or shorten any timeframes in
13 the regulations. So, if the Committee wants more
14 time beyond the 21 days to draft and issue the
15 decision, we could consider that and you can do
16 that here.
17 MR. DICKERSON: I assume that, just for
18 clarification, we say ten days and ten days, are
19 we talking calendar or business days?
20 MR. BECK: We're talking calendar days.
21 MR. DICKERSON: Calendar days, okay.
22 ASSOCIATE MEMBER LEVIN: I think we
23 would also ask both of the parties, upon review of
24 any additional evidence submitted, if you will
25 waive the final hearing, or if you agree that the

1 final submission of documents constitutes the
2 final hearing?
3 MR. DICKERSON: Well, at this stage I
4 have no objection to using the final closing
5 briefs as the essentially in lieu of reconvening
6 and doing a closing argument. I don't feel a need
7 to come back and --
8 ASSOCIATE MEMBER LEVIN: I would, for
9 legal reasons potentially later, feel more
10 comfortable if in your final closing briefs you
11 actually state that. So then it isn't a question
12 later --
13 MR. DICKERSON: That we're waiving --
14 ASSOCIATE MEMBER LEVIN: -- that we
15 somehow violated your rights --
16 MR. DICKERSON: Okay.
17 ASSOCIATE MEMBER LEVIN: -- to a final
18 hearing.
19 MR. BECK: And what we should do,
20 actually, is have the Presiding Member, as it is
21 the authority of the Presiding Member to shorten
22 or lengthen the timeframes, that if the decision
23 comes from the Presiding Member that those are
24 going to be the timeframes for the submission of
25 documents for the briefs, and for the decision.

1 Then that will be conclusive.
2 PRESIDING MEMBER ROSENFELD: They seem
3 reasonable to me.
4 MR. FRANKEL: Can we just set out what
5 those dates are, so that we --
6 MR. BECK: Right, --
7 MR. FRANKEL: -- so it's clear.
8 MR. BECK: -- I'm consulting my calendar
9 here, as we speak.
10 ASSOCIATE MEMBER LEVIN: While he does
11 that, can I also just encourage the attorneys, as
12 you did during the break, to talk to each other as
13 much as possible. If there are affidavits that
14 you could stipulate to the truth of, or some
15 aspect of, the more that you two can talk to each
16 other, I think the likelier it is that we will be
17 able to reach the right decision in the timeframe
18 that we're all hoping.
19 (Pause.)
20 MR. BECK: By my calculations March
21 27th, Friday, March 27th, is ten days from today.
22 We could make that a date for submission of any
23 additional evidence, affidavits.
24 Ten days from that would be Monday,
25 April 6th. And that would be the day for

1 submission of parties' closing briefs.
2 And 21 days from that would be Monday,
3 April 27th, and we could establish that as the
4 date for the Committee's decision in this matter.
5 Is that agreeable with you gentlemen?
6 MR. DICKERSON: That's fine.
7 MR. FRANKEL: Fine with us.
8 MR. BECK: Okay. Commissioners, that's
9 what --
10 PRESIDING MEMBER ROSENFELD: Wrote it
11 down.
12 MR. BECK: Okay. So, again, March 27th
13 for additional documents; April 6th for the
14 parties' briefs; and April 27th for the
15 Committee's decision.
16 And that's basically are waiving oral
17 closing arguments in lieu of the written briefs.
18 (Pause.)
19 ASSOCIATE MEMBER LEVIN: So, gentlemen,
20 since you are all men around the table, we did
21 also just want to point out again that we
22 understand there are other issues besides the
23 conflict of interest issue, including our own
24 internal process.
25 And we will pursue those separately from

1 this proceeding. This proceeding is limited to
2 the conflict of interest issue, itself. But we
3 take those other issues seriously and we will
4 pursue them separately.
5 MR. BECK: And one other note. In your
6 briefs, gentlemen, please also address what
7 possible remedies could be made. This is assuming
8 if there were a violation to be found. What the
9 potential remedies might be.
10 Mr. Frankel might not feel entirely
11 comfortable doing that, thinking that you would be
12 conceding something. But Mr. Dickerson has, in
13 his brief, hearing brief, had a paragraph
14 regarding what the remedies should be.
15 And that should probably -- if you want
16 to weigh in on that, then that would probably be
17 the time. Now that may be is -- if you're a bit
18 conflicted over that, considering that obviously
19 your position is there is no conflict of interest.
20 But that is one of the things that we
21 did not discuss at this hearing, what the possible
22 remedy would be for any potential conflict of
23 interest.
24 But, Mr. Dickerson, certainly you can
25 elaborate on that on what you think the remedy

1 should be. Because we want to get anything from
2 the parties on that should a violation be found.
3 ASSOCIATE MEMBER LEVIN: Mr. Frankel,
4 similarly from your side, without admitting to any
5 conflict of interest, if there are additional
6 procedures, training steps that could be taken to
7 insure there's no conflict of interest, that would
8 also be welcome from you.
9 MR. FRANKEL: Thank you.
10 MR. BECK: And that would also be part
11 of what I would think the remedies would be, could
12 be that, as well.
13 If we have nothing further, then we will
14 adjourn. And we will hear back from you gentlemen
15 in the required time limits.
16 What I will do is I will -- the
17 documents that were submitted, what I will do,
18 since there is no objection to them, is I will
19 submit them to the docket as well as our -- are we
20 off the record? Oh, we are on the record, so
21 good.
22 I will submit those to the docket and
23 they'll be docketed. Also, respondent's A and B
24 are also all received into evidence.
25 You don't have any -- I take it from

1 your earlier comment, Mr. Dickerson, you had no
2 objection to them being received.
3 MR. DICKERSON: No.
4 MR. BECK: They will also be docketed.
5 And we will try to docket them in a way that makes
6 is clear that when you refer to them you can refer
7 to them as 1, 2, et cetera, and also A and B for
8 respondents.
9 I think with that we're off the record.
10 (Whereupon, at 1:03 p.m., the hearing
11 was adjourned.)
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CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Hearing; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of March, 2009.