STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

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

Complainants,

vs.

MASCO CORPORATION and ENERGYSENSE, INC.,

Respondents.

Docket Number 08-CRI-01

RESPONDENTS’ APPLICATION FOR SUBPOENA TO TAKE THE VIDEOTAPE DEPOSITION OF TOM HAMILTON

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

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

I. Background

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

RESPONDENTS’ APPLICATION FOR SUBPOENA TO TAKE THE VIDEOTAPE DEPOSITION OF TOM HAMILTON
20 and 24 of the California Code of Regulations. In sum, the Complaint alleges that EnergySense, a Mascro subsidiary, has received contracts to perform independent third-party inspections ("Title 24 inspections") of HERS-related installations performed by other Mascro subsidiaries, thereby violating the conflict of interest provisions.

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

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

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1 Titles 20 and 24 create a regulatory scheme whereby persons conducting home inspections for compliance with the California Home Energy Rating System ("HERS") Program (called "raters") must be independent from entities engaged in the installation of HERS-related products. In particular, a rater is required to be an "independent entity" from the builder or contractor on a home construction project. Cal. Code Regs. tit. 20, § 1673(i). An "independent entity" is defined as "having no financial interest in, and not advocating or recommending the use of any product or service as a means of gaining increased business with," a builder or subcontract installer. Cal. Code Regs. tit. 20, § 1671. A "financial interest" is defined as "an ownership interest, debt agreement, or employer/employee relationship . . . ." Cal. Code Regs. tit. 20, § 1671.
testify. Instead, he told Mr. Samson that Complainant California Living & Energy had, within the last week, hired his consulting firm, ICF International. As a result, Mr. Hamilton said that there was a relationship “conflict of interest” such that he could no longer voluntarily agree to testify in this matter. (Samson Decl’l at ¶ 4.)

II. Legal Standard for Issuing Subpoenas

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

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

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

The testimony of Tom Hamilton is vitally important to this proceeding for a variety of reasons. Mr. Hamilton was Executive Director of CHEERS when Masco first explored the
possibility of offering Title 24 inspections through EnergySense as a subsidiary company.

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

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

In addition to the CEC's power to issue subpoenas, Title 20 provisions on the rules of
evidence and use of testimony illustrate the Efficiency Committee's obligation to hear all
evidence relevant to the issues in this proceeding. See Cal. Code Regs. tit. 20, §§ 1212(c),
1224(b). Not only do the regulations give each party the right to examine witnesses with relevant
information, but they authorize the Committee to hear any relevant testimony, whether written or
oral, sworn or unsworn. See id. The expansive scope of these regulations indicates that the Committee has broad authority to elicit Mr. Hamilton’s testimony.

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

IV. Conclusion

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

Dated: November 5, 2008

SONNENSCHIN NATH & ROSENTHAL LLP

By

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Attorneys for Respondents
MASCÔ CORPORATION and
ENERGYSENSE, INC.
BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA

Complaint / Request for Investigation
Regarding EnergySense / MASCO

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

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

<table>
<thead>
<tr>
<th>California Energy Commission</th>
<th>Duct Testers, Inc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attn: DOCKET NO. 08-CRI-01</td>
<td>Attn: Dave Hegarty</td>
</tr>
<tr>
<td>1516 Ninth Street, MS-4</td>
<td>P.O. Box 266</td>
</tr>
<tr>
<td>Sacramento, CA 95814-5512</td>
<td>Ripon, CA 95366</td>
</tr>
<tr>
<td><a href="mailto:docket@energy.state.ca.us">docket@energy.state.ca.us</a></td>
<td></td>
</tr>
</tbody>
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| California Living & Energy  | Energy Inspectors   |
| Attn: Bill Lilly, President | Attn: Galo LeBron, CEO |
| 3015 Dale Court             | 1036 Commerce Street, Suite B |
| Ceres, CA 95307             | San Marco, CA 92078 |
|                            |

| Carol A. Davis              | ConSol              |
| CHEERS Legal Counsel        | Attn: Mike Hodgson   |
| 3009 Palos Verdes Drive West| 7407 Tam O'Shanter Drive |
| Palos Verdes Estates, CA 90274| Stockton, CA 95210-3370 |

| Certified Energy Consulting | California Certified Energy Rating & Testing Services (CalCERTS) |
| John Richau, HERS Rater    | Attn: Mike Bachand |
| 4782 N. Fruit Avenue       | 31 Natoma Street, Suite 120 |
| Fresno, CA 93705           | Folsom, CA 95630 |

| California Home Energy Efficiency Rating System (CHEERS) | California Building Performance Contractors Association (CBPCA) |
| Attn: Robert Scott          | Attn: Randel Riedel   |
| 20422 Beach Boulevard, Suite 235 | 1000 Broadway, Suite 410 |
| Huntington Beach, CA 92648  | Oakland, CA 94607 |

PROOF OF SERVICE
DECLARATION OF SERVICE

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

OR

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

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

Nancy E. Jordan
NANCY E. JORDAN