HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:

CALIFORNIA LIVING AND ENERGY and DUCT TESTERS, INC. v. MASCO CORPORATION and ENERGY SENSE, INC. Docket No. 08-CRI-01

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

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345
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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PETERS SHORTHAND REPORTING CORPORATION  (916) 362-2345
PRESIDING MEMBER ROSENFELD: Good morning, everybody. I'm Art Rosenfeld; I'm Commissioner on --

MR. PENNINGTON: I think we want a record here, so is there any issue --

REPORTER: Oh, no, no, we're getting a record; I'm recording it all. It's just not being amplified.

PRESIDING MEMBER ROSENFELD: I'll just do introductions, try again.

Good morning, everybody; I'm Commissioner Art Rosenfeld. I'm the Chair of the Energy Efficiency Committee under which this matter comes.

To my left is Julia Levin. On her left is her Advisor, Jim Bartridge. On my right is my Advisor, Dave Hungerford. And on my extreme right is Dennis Beck, who is going to run most of the show today.

I guess we should start with introductions. I'm just going to go around the room starting with Bill, and ask you if you'll introduce yourself. Bill Pennington.
MR. PENNINGTON: I'm Bill Pennington. I'm the Manager of the High Performance Buildings and Standards Development Office.
And Eurlyne Geizler will be at my right, when she returns. She is the Supervisor in the office in charge of building standards, compliance and enforcement.

MR. LILLY: I'm Bill Lilly, President of California Living and Energy.

MR. DICKERSON: I'm Brett Dickerson of the law offices of Gianelli and Associates, here on behalf on complainants --

PRESIDING MEMBER ROSENFELD: I'm sorry, on the volume. I'm writing down Bill Lilly, and I just -- yell a little more.

MR. DICKERSON: Okay. Brett, B-r-e-t-t, Dickerson. I'm here on behalf of complainants.

PRESIDING MEMBER ROSENFELD: Good morning.

MR. FRANKEL: Good morning. Steve Frankel with the Sonnenschein firm on behalf of Masco Corporation and Energy Sense, Inc.

MR. CRAWFORD: Brett Crawford, also with Sonnenschein, representing Masco and Energy Sense.

PRESIDING MEMBER ROSENFELD: What was
your last name, again? Crawford?

MR. CRAWFORD: Crawford, yes.

MR. PADRON: Jaime Padron with Energy Sense.

PRESIDING MEMBER ROSENFELD: Say your name again, please.

MR. PADRON: It's Jaime, it's spelled J-a-i-m-e.

PRESIDING MEMBER ROSENFELD: J-a-i-m-e.

MR. PADRON: And the last name is P-a-d-r-o-n.

PRESIDING MEMBER ROSENFELD: P-a-d?

MR. PADRON: Um-hum.

PRESIDING MEMBER ROSENFELD: All right.

(Electronic sound interruption.)

MR. LILLY: I'm not asleep no more.

(Laughter.)

ASSOCIATE MEMBER LEVIN: Everybody awake now?

(Parties speaking simultaneously.)

PRESIDING MEMBER ROSENFELD: Let's try it.

MR. SPEAKER: Every dog in the country should --

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.
Thank you very much. I'll try not to abuse your confidence.

Dennis, are you ready to run this show?

MR. BECK: Yes. We're here today for the hearing on the complaint/request for investigation filed by the complainants California Living and Energy and Duct Testers, and they'll be known collectively as complainants for this hearing, against Masco Corporation and Energy Sense, who will be collectively known as respondents. The docket number is 08-CRI-01.

My name is Dennis Beck; I'm Senior Staff Counsel of the Chief Counsel's Office of the Energy Commission.

We have an agenda today which lays out the procedure. If you didn't get a copy of it, there are copies on the front table as you come into the room. The agenda lays out the steps in the proceeding which will be similar generally to that of a trial.

The rules of evidence that we'll be following are contained in section 1212, section 1212 of Title 20 of the California Code of Regulations. And I will go ahead and just read those into the record at this point.
The following rules of evidence shall apply to an adjudicatory proceeding of the Commission, and in such other proceedings as the Commission may determine by order.

a) the hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant, noncumulative evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

b) oral and written testimony offered by any party shall be under oath. And I believe the court reporter is the one who will administer the oath or affirmation.

c) subject to the exercise of the lawful discretion of the presiding committee member, as set forth in section 1203(c), 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 rebut evidence against any such party.

Questions of relevance shall be decided by the presiding committee member. Commissioner
Rosenfeld, as the Presiding Member, has delegated to me the authority to, as a threshold, rule on any objections that counsel may have during the proceeding, subject, of course, to final decision, if need be, by the Presiding Member.

And d), hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in and of itself, to support a finding unless it would be admissible over objections in civil actions.

The Presiding Member may establish such additional rules, as necessary, for the orderly conduct of the proceeding.

So, what that means is this is not obviously a trial, a civil trial. The technical rules of evidence do not apply. There may be some questions that are not strictly relevant or more likely, questions that call for some sort of hearsay. Those will generally be allowed. But as the rules state, an assertion that is hearsay shall not be the only factor that can be relied on when making a finding.

But I would ask counsel to keep these in mind, and that to keep the objections generally to a minimum. Again, the technical rules of
evidence, technical rules of hearsay are not applicable.

The Commissioners, staff, parties and witnesses have been provided with a binder which contains the record in this proceeding, which means all documents that have been filed to the docket up until this point. Those binders are in front of you and there's also one at the witness stand.

As such, there is no need to introduce documents into evidence that have already been submitted to the docket. You can simply refer to those items that have been submitted to the docket. And, as such, some of the more voluminous documents that are in the docket, such as the second submission by CHEERS, have been Bates stamped.

So when you are questioning a witness and you want, or making an assertion to the Commission during argument, if you would please refer to the binder sections and page numbers during the proceeding.

At the front of the binder there is a table of contents which lists what all 26 tabbed entries are in the binder.
As I said, my role in this hearing will be sort of as a de facto hearing officer.

The issues involved in this proceeding are relatively narrow, i.e., whether there is a conflict of interest on the part of the complainants in violation of the HERS regulations found in Article 8 of Title 20 of the California Code of Regulations, sections 1670 through 1675.

I have been asked by the Committee to insure that the evidence presented and arguments are confined to those relevant issues. And I have been asked to help guide the parties back to those issues if they begin to go afield.

So, again, please keep that mind that the issues that we're dealing with are fairly narrow. And even at this point, with the docket that we have, with the record that we have, perhaps even the factual issues in dispute have been narrowed to some degree.

I would note that the prehearing briefs submitted by both parties in the last few days have primarily focused on the legal issue of whether or not the structure of the way Energy Sense and Masco do business is or is not a violation of the conflict of interest rules.
Anyway, with that, we can have opening statements or comments by the parties. But, please keep in mind that we have read your prehearing briefs. So if you have anything to supplement, let us know.

Also, one last thing. To address the request for continuance that was made last week by the complainants. As we said, we are going to go forward with the hearing today. But, if, at the end of the hearing, at the end of the testimony, if either party believes that more evidence needs to be adduced, the parties can make their pitch at that time for additional hearing and for perhaps the additional subpoenas or requests for documents.

So, with that, Mr. Dickerson, do you have anything in introduction to say?

MR. DICKERSON: Well, just one preliminary matter. I've provided Mr. Frankel a booklet of our proposed exhibits. We may not use them all. He has reviewed them, I believe. At least for preliminary purposes, we have agreed that from a foundational standpoint they purport to be what they claim to be.

MR. BECK: Are those documents already
submitted to the docket, or are they in addition to?

MR. DICKERSON: They are in addition to the docket. These are our admissions, according to what I read admissibility of exhibits will be determined during this period of time. It can be done at the end of the hearing, if necessary.

So, he has a copy, or a set. I have a set. And then I have a third set for you or whoever may want to have it, so it's there for your reference.

MR. BECK: Okay.

MR. DICKERSON: So they're here. I don't know, do you want them?

MR. BECK: Yes.

MR. DICKERSON: As far as the opening statements go, I concur that briefs have been done and if Mr. Frankel is amenable to it, we can dispense with opening statements and just proceed.

MR. FRANKEL: I actually would like to make some remarks, if everybody's in agreement.

MR. DICKERSON: Well, if we're going to have opening remarks, I'll make a couple, myself, then. And then I guess we'll go forward.

MR. BECK: Just speak -- I'm sorry.
ASSOCIATE MEMBER LEVIN: I would just like to underscore, though, please, not to repeat things that are in your opening briefs. Because we really are trying to keep this as efficient as possible for everyone's sake.

MR. DICKERSON: Very well. What I will do is I will submit my opening brief as my opening statement for the purposes of levity, so we can get through this.

MR. FRANKEL: I just had just a few remarks on behalf of respondents. I actually agree with what Mr. Beck said at the commencement, that this is a very narrow issue. And I --

PRESIDING MEMBER ROSENFELD: Excuse me, I'm going to ask you to talk a little closer to the mike.

MR. FRANKEL: Oh, I'm sorry.

ASSOCIATE MEMBER LEVIN: It may not be on, either.

MR. FRANKEL: It appears the green light's on.

MR. BECK: Just make sure, for everyone's sake, that everybody can hear, to put your mouth as close as you feel comfortable doing, to the microphone.
MR. FRANKEL: Okay. I believe that this is a very narrow issue. And, in addition, with respect to where the parties are in terms of what is in dispute, I also agree it is very narrow.

I believe that this issue is a legal issue. When you look at the language in 1673 and the definitions in 1671, the question is whether Energy Sense raters can test under Title 20 and make field tests and verifications of work done by separate Masco subsidiaries. I believe that's what the language of Title 20 says.

And I also believe that whether we're looking at the raters employed by Energy Sense, or Energy Sense, itself, under the strict language of 1673 and the definitions in 1671, that neither Energy Sense's raters nor Energy Sense, itself, has a financial interest in the other Masco installing subsidiaries whose work is being tested.

In particular, they do not have a debt agreement, they do not have an ownership interest, and they're not employees or employers of the Energy Sense subsidiaries. And they also do not advocate or recommend the use of those services.

There's no evidence in the record, based
on the discovery that's taken place in this proceeding, that those facts are incorrect.

And --

MR. DICKERSON: Objection, he's arguing evidence in his opening statement.

MR. BECK: That's okay. You are, in a sense, reiterating what's already in here.

MR. FRANKEL: Well, I think that this proceeding may be expedited if there's an understanding of what's in dispute and what isn't in dispute, i.e., that the respondents admit that Energy Sense raters do Title 24 testing of work done by other Masco subsidiaries. That's not disputed.

The question is do those Energy Sense raters have a prohibited financial interest in the work that they're inspecting, or the companies whose work they're inspecting.

And, two, are they advocating or recommending the use of those installing companies, if you will, for purposes of gaining more business. There's nothing that supports that notion.

In addition, with respect to issues that I've seen raised in the briefs and in other
matters, that this dates back to 2002, this
dispute, it's --

MR. DICKERSON: Objection. This is not
what we're supposed to be doing in this opening
statement.

MR. BECK: Mr. Dickerson, he can go
ahead and continue. If you have something to
respond -- but, again, Mr. Frankel, you're
reiterating what's already in your brief and --

MR. FRANKEL: Well, I was really trying
to do it for purposes of trying to focus what was
going to be presented in this hearing. And if the
focus is going to be based on what I've seen in
the papers about the complainants' complaints to
CHEERS, the complainants' previous complaints to
the California Energy Commission about this
matter, I don't believe any of that is relevant.

The question is, does Energy Sense and
its raters operate in accord with the conflict of
interest provisions or do they not.

MR. BECK: I would agree. And, as I
said at the outset, that the relevant issue is
what is Masco and Energy Sense doing. And is that
that their corporate structure and the way that
they operate on the ground, so to speak, is that
or is that not a violation of the conflict of
interest provisions.

The prior contacts with CHEERS or the
Commission may be of some relevance. We'll just
have to see. But we don't want to prejudge that,
and I don't want to unnecessarily limit the scope
of what Mr. Dickerson plans to present.

So we'll deal with those issues as they
arise, but I think Mr. Dickerson does understand,
the complainants understand that the issue is
whether or not there's a conflict.

MR. DICKERSON: I would hope that we
have two things that we're going to try to resolve
here today. I would hope that what we're going to
resolve is, one, the issue as to whether there's a
conflict between Masco and Energy Sense.

Two, I hope that we're going to resolve
the steps that took us to this point six years
later, and that still has not been resolved, so
that this issue does not arise in the future. I
would hope that the CEC is interested in that.

MR. BECK: Well, it may be, and we are.

But the scope of this proceeding is the former and
not the latter. What the Commission did or didn't
do to try to resolve this issue up until the
point, is not of relevance.

If your concern is wanting to create a record that shows that the Commission should have done more to resolve this issue, or that CHEERS should have done more to resolve this issue, this is not the place for it.

We're here to -- the complaint that was filed was based on an allegation of conflict of interest. So, we are going to ask that you restrict your presentation of evidence and arguments to that narrow issue.

Again, there may be some aspects of prior investigations and prior contacts between the respondents and CHEERS and the respondents and the Energy Commission that may be relevant in terms of bringing to light the facts that would prove or disprove that there is a conflict of interest.

But if the presentation of evidence is to, again, show that the Commission should have done more or where the Commission may have made missteps or was less than diligent in trying to resolve the issue, that's not relevant for the purposes of this hearing.

MR. DICKERSON: How about information
that the Commission essentially made decisions on
this matter, at least tentatively, twice in the
last five years? Is that relevant?

     MR. BECK: There may be some relevance
to that if there are issues that were, but they're
factual issues. But, again, something, even if
the Commission had made some tentative or
threshold decision -- there was no decision.

     The fact that the Commission may have
expressed, or somebody in the Commission may have
expressed an opinion as to whether or not what
Masco and Energy Sense was doing was or was not a
violation of conflict of interest rules, that's
not particularly relevant, because this is the
proceeding. This adjudicatory proceeding is the
one that's going to decide whether or not there
was a conflict of interest.

     And the opinions expressed by individual
staff members of the Commission, I don't think
there's been any expression of opinion by the
Commission, as a whole, or the Efficiency
Committee.

     But, the individual opinions of
individual staff members of the Commission are not
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 ROSENFIELD: A little closer to the mike. Sorry.
MR. FRANKEL: I'm sorry. I'm prepared to stipulate that raters employed by Energy Sense do Title 24 testing and verification of installations which, in some instances, have been installed by other Masco subsidiaries.

And it only arises in one instance under Title 24. And that is when a HERS rater employed by Energy Sense tests the installation of high-quality insulation. That's the only Title 24 measure where Energy Sense raters are inspecting and testing the work of other Masco subsidiaries.

And --

MR. DICKERSON: Are they doing this by way of packaged bids where the cost of the HERS rating is done in conjunction, and on one big price, submitted by the installer or the contractor?

MR. FRANKEL: In connection with work done by Energy Sense's raters the installing Masco subsidiaries do submit bids to builders that include bid prices for installation services, and also prices for other things, as well as Title 24 HERS testing.

Those bid prices are prepared by the installing subsidiaries, not by Energy Sense. And
the builders have the right to select which
components of those bids they're going to accept.

They can accept installing services,
reject testing services. They can accept testing
services and reject installing services.

And in that circumstance, pursuant to
contract, if testing services are accepted by the
builder, Energy Sense is advised and its raters
schedule the testing, perform the testing, report
the results to the builder and to the provider
CHEERS.

And when the builder makes payment under
that bid, it is sent to the installing company
that had the contract. And the price of Energy
Sense's testing services are then sent to Energy
Sense on a pass-through basis without any
deductions or mark-ups.

MR. DICKERSON: I don't want to
improperly characterize anything Mr. Frankel has
said. I'll ask Mr. Beck, did you interpret that
as a stipulation that yes, in fact, they do sell
packaged deals that include the cost of both?

MR. BECK: We would only be prepared to
stipulate to what Mr. Frankel said, or a
stipulation that you two can agree on.
MR. DICKERSON: Is Masco/Energy Sense willing to stipulate that they refer business back and forth to one another?

MR. FRANKEL: We are prepared to stipulate that --

PRESIDING MEMBER ROSENFELD: Mr. Frankel, I'm going to nag at you, sorry --

MR. FRANKEL: I'm sorry. We are prepared to stipulate that the Masco installing subsidiaries submit joint bids for testing services and for installing services to builders.

Energy Sense, itself, and its raters do not promote the services of the installing subsidiaries.

ASSOCIATE MEMBER LEVIN: I'm sorry, Mr. Frankel. A clarifying question. There was a lot of content in that, --

MR. FRANKEL: I'm sorry.

ASSOCIATE MEMBER LEVIN: -- albeit very brief statement. I appreciate your brevity, but it may not be too brief.

MR. FRANKEL: Okay.

ASSOCIATE MEMBER LEVIN: You said you submit joint bids --

MR. FRANKEL: Well, the bid --
ASSOCIATE MEMBER LEVIN: Joint with whom, precisely.

MR. FRANKEL: Well, the installing -- there are contracts that were entered into between Energy Sense and the installing subsidiaries at the time that Energy Sense was formed.

Pursuant to those contracts Energy Sense is a subcontractor to the installing companies and submits its prices for testing services to the installing companies. And end up to be bound by the terms of any builder contracts that the installing subsidiary and a builder might enter into for either installation services or testing services.

The installing company then presents that big for testing services and installation services to a builder. The builder is free to choose which services it wants, it elects to accept.

And in that circumstance it's the installing companies that are promoting both the installation services or the testing services. It's not Energy Sense.

Energy Sense does no promotion or marketing of any other services, other than its
own testing services.

ASSOCIATE MEMBER LEVIN: And those installing companies are also subsidiaries of Masco?

MR. FRANKEL: They are subsidiaries of Masco.

ASSOCIATE MEMBER LEVIN: Okay, thank you.

MR. DICKERSON: Well, I think we've gone as far as we're going to get with this. We're ready to roll.

MR. BECK: Okay. Go ahead, call your first witness.

MR. DICKERSON: I'd like to call Kirk Dall, please.

MR. BECK: First of all, before we start, just to formally say, Mr. Frankel, your statements that were made in response to Mr. Dickerson's questions, you are stipulating that that is true and correct on behalf of the respondents, correct?

MR. FRANKEL: Yes.

MR. BECK: Okay.

MR. DICKERSON: We need somebody to give an oath or affirmation to Mr. Dall.
Whereupon,

KIRK DALL

was called as a witness herein, and after first having been duly sworn, was examined and testified as follows:

REPORTER: Please state and spell your full name for the record.

THE WITNESS: Kirk Dall, K-i-r-k, last name Dall, D-a-l-l.

MR. DICKERSON: I'll attempt to keep this limited to what we've spoken of earlier, the scope of what we're talking about here. So if it looks like I'm straying afield, feel free to speak up.

MR. BECK: I will.

MR. DICKERSON: Okay. Or, Mr. Frankel, you, as well.

DIRECT EXAMINATION

BY MR. DICKERSON:

Q What's your current occupation, Mr. Dall?

A I'm a business owner of AllStar Home Inspection Services. We do HERS rating and Title 24 home inspection services.

MR. BECK: Mr. Dall, please do us a
favor. Move that microphone, this one, up again.

Just so --

THE WITNESS: How's this.

MR. BECK: Yes, again, as close to it as you feel comfortable.

THE WITNESS: Okay.

BY MR. DICKERSON:

Q Are you currently rated as HERS rater?
A Yes, I am.

Q Are there more than one level of HERS raters?
A Yes, there are.

Q What's the distinction between the various rater certifications?
A Well, it begins with training. The core program allows you to just do duct leakage testing. Further training allows you to do other things like quality installation services.

Q Which one of the ratings do you hold?
A I believe I have all the ratings, all the levels.

Q Okay. Can you give us and the Commission some, you know, just a sample of the energy saving measures that you test in conjunction with doing HERS ratings?
A For example, duct leakage testing?
Q Sure. Anything that would require HERS testing.
A Well, the one that I do mostly is duct leakage testing. I also to a lot of QII. Those are probably 99 percent of the HERS rating that we do.

PRESIDING MEMBER ROSENFIELD: I'm sorry, what's QII?
THE WITNESS: Quality insulation --

PRESIDING MEMBER ROSENFIELD:
Installation.

THE WITNESS: Installation.

MR. BECK: Was that quality insulation installation, is that correct?
THE WITNESS: Yes.

MR. DICKERSON: Yeah. That's a hard one.

THE WITNESS: QII is easier to say.

BY MR. DICKERSON:
Q Is the installation of windows ever subject to the HERS 24 testing?
A No. Not at this time.
Q Not at this time. Okay. Do you have any experience with bidding a project for Pulte
Homes a couple years ago?

A Yes, I do.

Q When was that?

A In 2006.

Q 2006. Can you tell us a little bit about that?

A It was a project in Manteca called Del Webb. The 55-and-older community that they were going to build, 1400 homes. And because of my relationship with the vice president of land acquisition of Pulte Homes, I was asked to contact the purchasing agent at Pulte Homes in Ripon.

And through that process was able to bid on the development for the duct leakage testing. And so put together a bid package for them.

Was told by their purchasing agent that I had won their bid, that I was half of the price of my competitor.

Q Did you have to take any steps, extra steps, in order to get approval to do that job?

A Yes, I did. I had to go out -- well, once I was told that I won the bid, I was told that the next step in the process was to obtain a million dollars worth of professional liability coverage, general liability and workmans
compensation.

And they gave me a -- well, it took me three weeks to put that package together. And submitted it back in to Pulte Homes.

And the next step in the process I was told that I was going to come in and sign the contract.

Q Did you ever sign the contract?

A No, I did not.

Q Why did you not sign the contract?

A Because, as that day approached they told me that -- the purchasing agent had told me that their hands were tied, that they had a national contract with my competitor. And even though he was twice the price that I was, that he was forced to use their HERS raters.

Q Was the HERS raters that they were forced to use, to your knowledge, from a Masco company?

A Well, I wasn't told at the time who it was, but --

Q Did you subsequently discover who it was?

A Yes, I did.

Q Who was the HERS rater that they were
using?

A  It was Energy Sense.

Q  Energy Sense was doing the work.  Okay.

Mr. Dall, do you have any knowledge of the time it
takes for work to be corrected once a HERS rating
has failed?

A  Yes, I do.

Q  Okay.  And does it take quite awhile for
that to be done?

A  In some cases it does.

Q  Okay, so is it beneficial to a company
to avoid having to come back in and redo work
after it has been rated unsatisfactory?

A  Would you say that again?

Q  Is it beneficial to an installer to not
have to come back in and redo work?

A  Absolutely.

Q  Okay, generally, who pays for the
original inspection for HERS ratings?

A  The builder does.

Q  The contractor?

A  The builder.  In my case it would have
been Pulte Homes paying me.

Q  Okay.  In the event that the HERS rating
fails and it has to be reinspected, who has to pay
for the reinspection?

A Typically it's the contractor.

Q Who performed the inadequate installation?

A Correct.

Q Okay.

MR. DICKERSON: That's all I have for Mr. Dall.

MR. FRANKEL: Just a few questions, Mr. Dall.

MR. BECK: And, Mr. Frankel, these --

MR. FRANKEL: I'm sorry.

MR. BECK: Sorry. I'm hard of hearing and I think Mr. Rosenfeld may be, too.

MR. FRANKEL: I will do my best.

MR. BECK: So, --

PRESIDING MEMBER ROSENFIELD: The reason I have to keep nagging at you.

MR. FRANKEL: I will try.

MR. BECK: Sorry.

MR. FRANKEL: Sorry.

CROSS-EXAMINATION

BY MR. FRANKEL:

Q Mr. Dall, how long have you been a HERS rater?
A Since early 2006.
Q And am I correct that only individuals can be certified as HERS raters?
A They are certified individually, correct. But many times companies pay for their training and put them through --
Q That wasn't my question. Can a company, itself, become a HERS rater, as far as you know?
A No.
MR. FRANKEL: I don't have anything further.

REDIRECT EXAMINATION
BY MR. DICKERSON:
Q Are you familiar with circumstances where companies have paid for their raters to be certified?
A Oh, absolutely.
Q So, it's the company, itself, that is really financing and sponsoring the raters to become raters?
A And paying them --
MR. FRANKEL: Objection, calls for speculation.
MR. DICKERSON: Only on the basis of his knowledge.
MR. BECK: Go ahead and answer.

THE WITNESS: Well, yes, I've met other raters in the training classes and know that their companies pay them to be, you know, at class, and also, you know, pay for the training.

MR. DICKERSON: Okay, that's all I have.

Thank you, Mr. Dall.

Okay, I'd like to call Mr. Bill Lilly, please.

Whereupon,

BILL LILLY was called as a witness herein, and after first having been duly sworn, was examined and testified as follows:

MR. LILLY: I affirm my testimony. Yes, I affirm.

REPORTER: Please state and spell your name for the record.

MR. DICKERSON: Bill, state and spell your name for the record.

THE WITNESS: My name is Bill Lilly. Everybody hear me okay? I don't want to get called on the carpet.

PRESIDING MEMBER ROSENFIELD: Yeah.

THE WITNESS: My name is Bill Lilly; I'm
the President of California Living and Energy.
And my name spelling is B-i-l-l L-i-l-l-y.

DIRECT EXAMINATION

BY MR. DICKERSON:

Q    Mr. Lilly, what is your occupation?
A    President of an energy inspection firm
     and engineering firm, California Living and
     Energy.
Q    Okay. How long have you been employed
     in that business?
A    Energy calculations, over 20 years.
Q    Okay. What type of work do you do?
A    We do engineering, mechanical layouts.
     We do HERS testing and we do solar testing. We do
     energy calculations here and other states.
Q    Okay. How long have you done Title 24
     HERS testing?
A    Over 20 years.
Q    Are you the person who initiated the
     present complaint?
A    Yes.
Q    Why did you initiate this complaint?
A    I saw on a case -- the reason why is
     that I saw the Energy Commission is a big part of
     my business, do a tremendous amount of work over
the years to make this, the integrity of the
system.

And in 2002 I saw, in my opinion that
all this work was going for nothing because that
we had a company called Masco, a billion-dollar
company coming in and, in that sense, were doing
jobs violating the third-party standard.

And all this work that the Energy
Commission's gone through to get all this
together, I didn't think it was right. So I
brought it up to Bill Pennington.

Q  Okay, so Mr. Pennington was the first
time you spoke to anybody from the CEC?
A  Yes.

Q  Okay. Tell us about the initial
correction that you had with Mr. Pennington.
A  In 2002 I called Bill and I asked him,
hey, we got a situation here, I want to know what
you think what the situation is. This is what I
see out there in the field is happening.

And Bill said --

MR. FRANKEL: I'm going to object. This
is hearsay.

MR. BECK: Well, if it's being offered
to as the effect on Mr. Lilly as what he was told
and what he did as a result of getting this
information.

You can go ahead and answer.

MR. DICKERSON: Thank you.

THE WITNESS: I saw that this
information that this Masco was testing out there
in the field, I believe, was a violation of the
standards.

And since all of us in California are
going through a lot the last 20, 30 years to put
this together, I didn't think it was right. So I
brought it up to Bill Pennington to look into it.

BY MR. DICKERSON:

Q  Did you have any email communications
with Mr. Pennington?

A  Yes.

Q  I'd like to refer you to what has been
marked as exhibit, shown as exhibit 36 -- I'm
sorry, 37.

MR. BECK: And you're referring to your
stipulated --

MR. DICKERSON: My stipulated, yeah.

MR. BECK: -- group of documents --

MR. DICKERSON: If I could be --

MR. BECK: -- not that prepared by the
MR. DICKERSON: If I'm going to be going to the docket booklet, I'll notify you. So unless I tell you I'm going to the docket I'll be going to my own exhibits.

MR. BECK: Okay.

MR. DICKERSON: Okay.

PRESIDING MEMBER ROSENFELD: Let me get it straight. This is new, this is not in the docket?

MR. DICKERSON: This is not in the docket. Well, actually this may be in the docket because this is a copy of an email that was submitted as an exhibit with Mr. Lilly's original complaint. But it's just subsumed within there. I have simply taken the liberty of moving it out individually so it's easy to get to and people can look at it.

PRESIDING MEMBER ROSENFELD: Thanks.

ASSOCIATE MEMBER LEVIN: Mr. Beck, if somehow you could reference the date of the email, that would help us --

MR. DICKERSON: Okay, sure.

ASSOCIATE MEMBER LEVIN: -- to find easily whether or not we have a copy in our

PETERS SHORTHAND REPORTING CORPORATION  (916) 362-2345
MR. DICKERSON: Okay. The date.

BY MR. DICKERSON:

Q If you could, give the date of that email.

A The date, there's two of them. June 26, 2002 and October 6, 2002. And a third one, October 5, 2002.

MR. DICKERSON: If you give me a moment I'll see -- okay. This is actually, so you can see it, this is under tab number 1 of the docket information, and it is Bates stamped number 51.

BY MR. DICKERSON:

Q Now, at the bottom of that email you have apparently requested some information from Mr. Pennington, correct?

A Yes.

Q Okay. What is his response to that request for information?

A On June 26th Bill Pennington sent me an email, Tom Hamilton of CHEERS, John Eash, Rob Hudler, EnergySoft and Bill Hughes of SMUD.org, he wrote: Commission Staff is waiting a letter from Masco explaining their process. When that arrives we will decide how it relates to the conflict of
interest rules.

Q  Okay. Did you ever receive any response from Mr. Pennington?
A  Yes.

Q  Okay. Was that in response to your follow-up email in October?
A  Yes.

Q  Okay. Can you tell us what Mr. Pennington said to you in that follow-up email dated October 6, 2002?
A  Bill said: Independent third-party field verification is required for measures in the standards that require such verification. The Masco quality control process does not satisfy this requirement.

Q  Did you have any further communication with anyone from the CEC on this matter?
A  Not at that time.

Q  Okay, when did you next have a discussion with the CEC on this issue?
A  It happened again in 2005, about three years later.

Q  And why did you reopen communications with them?
A  I told Bill that, remember what you
wrote me about Masco, it's happening again. What are we going to do about it.

Q  Okay. Did you receive any response?
A  Yes.

Q  What was the response that you received?
A  I don't remember what the response was at that time. Generally it follows up most times, it's either that or the year later when Bill Pennington referred it to Tav Commins.

Q  Did you have any communications with CHEERS during this period of time?
A  Yes.

Q  What was your communication with CHEERS?
A  I emailed Tom Hamilton in 2002 about the same situation. I asked him just what he thought, realizing that he didn't hear absolutely everything. And I talked to Bill Pennington, people at the CEC. And what he thought.

Q  Did you ever have any communications with Tav Commins from the CEC on this matter?
A  Yes.

Q  I'd like to refer you to -- let's go back to CHEERS and your discussions with CHEERS. Were you aware that CHEERS was working with Masco regarding the Energy Sense matter at
the time you were speaking to them in 2006?

A  Not at that time, no.

Q  Who were you speaking to at CHEERS at that point in time?

A  Bill Pennington --

Q  I'm sorry, not at the CEC, CHEERS.

A  CHEERS would be Tom Hamilton and one of the administrative assistants in 2005.

Q  What was Tom Hamilton's role with CHEERS at that time?

A  He was the Executive Director of CHEERS.

Q  Did you have any -- at any point in time did Mr. Hamilton -- I may have asked this -- did he advise you that he was in communication with Masco on the Energy Sense program?

A  He never did.

Q  I'd like to refer you to what has been marked as exhibit 3.

Have you seen that document before?

A  Yes.

Q  Where have you seen it? Where do you recognize it from?

A  This is a document that was sent to us within the group that came from Masco and CHEERS.

Q  Did it come from Masco or did it come
from CHEERS?
A CHEERS.
Q It came from CHEERS, so these are
documents that were produced to us by CHEERS?
A Correct.
Q Do you recognize the name that this
letter is addressed to?
A Some of them, yes. All of them.
Q Who are they?
A Brad Townsend, Dale Camany, Dave Bell,
David Short, Rick Davenport.
Q Okay, and who is the email from?
A Tom Hamilton.
Q The names that it's addressed to, you
said you recognize them. Do you know who those
people work for?
A Masco.
Q So all the people there are Masco
employees?
A Correct.
Q Okay.

MR. DICKERSON: For purposes of a clear
record I'd like to have either Mr. Lilly or myself
read what has been marked as exhibit 3 onto the
record.
MR. BECK: I don't think it needs to be read into the record. We've got it. It's duplicative of what -- if we're going to receive these documents into the record, it's duplicative to have the witness read it into the record.

MR. DICKERSON: Okay. I just want to insure that this particular document is read by the Committee. Okay.

MR. BECK: All the documents that will be submitted and that have been submitted will be read and considered.

MR. DICKERSON: Mr. Frankel, do you have any objection to that document being admitted as an exhibit?

MR. FRANKEL: I have no objection.

MR. BECK: My understanding was that all of the documents that are contained in the binder that was submitted today were going to be stipulated to, is that correct?

MR. FRANKEL: I stipulated to their authenticity. I didn't stipulate to the --

PRESIDING MEMBER ROSEN Feld: Louder.

MR. FRANKEL: I stipulated to their authenticity. I did not stipulate that they necessarily should be admitted into evidence. I
have no objection to this July 7, 2006 email
that's behind tab 3 being admitted.

ASSOCIATE MEMBER LEVIN: Gentlemen, I
just want to remind you we're not in court. And
so to the extent that we can avoid some of these
formalities, they're not all required, we will be
able to move through this more effectively and
really focus on the issues at heart here.

So I don't think that we need to
stipulate to every piece of evidence, as Mr. Beck
said. And I think we should not make this more
formal or more cumbersome than it needs to be.

MR. DICKERSON: Okay. I just want to
insure that there's no objections from Mr. Frankel
before I submit a piece of evidence as an exhibit.

MR. BECK: Actually, --

MR. DICKERSON: Okay.

BY MR. DICKERSON:

Q Mr. Lilly, could you take a look at
what's been marked as exhibit 29, please.

A Okay.

Q Have you seen that document before?

A Yes.

Q Okay. Could you look to page 8 of 9,
please. Actually, before you look at page 8 of 9,
could you just identify what that document is titled?

A It's from AHC Group, Inc., experts in corporate strategy and social response.

Q What's the date of that document?

A The date is June 20, 2007.

Q Are there some certain speakers and such that are identified on there that are going to make presentations at this --

A Yes.

Q Okay. If you could move to page 8 of 9, please.

PRESIDING MEMBER ROSENFIELD: Sorry, trying to follow along. Is this in --

MR. BECK: No, this is the documents that were submitted.

MR. DICKERSON: You have a copy of them?

MR. BECK: I have a copy.

MR. DICKERSON: Okay.

BY MR. DICKERSON:

Q In looking at page 8 of 9, do you see the Masco logo anywhere?

A Yes.

Q What name is there?

A Masco Contractor Services Dave Bell,
Vice President of Marketing.

Q So David Bell is listed as the Vice President of Marketing of Masco Contracting Services?

A Yes.

Q Are you aware if during 2007 Mr. Bell occupied any other companies with any Masco-related entities, or any other positions?

A Yes.

Q What position are you aware that Mr. Bell occupied?

A President of Energy Sense.

Q So in 2007 Mr. Bell was not only the President of Energy Sense, he was the Vice President of Marketing of Masco Contracting Services?

A Yes.

MR. FRANKEL: Objection. He can only testify as to what the document states. I mean he doesn't know what positions Mr. Bell had.

MR. BECK: Unless he has some other independent knowledge.

THE WITNESS: I've known David Bell probably about ten years and we've talked at different meetings, residences, so I do have some
exterior knowledge.

ASSOCIATE MEMBER LEVIN: Mr. Frankel, is it your position that he did not hold both positions at the same time?

MR. FRANKEL: That is correct. This is in error. And this is not a Masco document.

MR. DICKERSON: Well, that particular document came off the internet.

PRESIDING MEMBER ROSENFELD: I'd like to get the two titles straight, too. You say one document said that Mr. Bell was the VP of Masco?

MR. DICKERSON: The Vice President of Marketing of Masco.

THE WITNESS: Yes.

PRESIDING MEMBER ROSENFELD: VP Marketing. And the other title was?

THE WITNESS: President of Energy Sense.

MR. BECK: And it is true that in looking at this document it is something that was pulled off of the internet, but there are a number of different companies listed here. It does not appear to be a Masco- or Energy Sense-generated document.

MR. DICKERSON: But it does list Mr. Bell as being the Vice President of Marketing --
MR. BECK: It lists Mr. Bell as Vice President of Marketing for Masco Contractor Services.

It'll be given the weight due, considering that it's not a document from Masco; it's something that was on an internet website, even if it is by the companies.

MR. DICKERSON: That's fair.

PRESIDING MEMBER ROSENFELD: Let's see. I'm puzzled. There is something from the web?

MR. BECK: There's just a -- and really, these documents should be -- I wish that you had, if you're going to refer to them, then we would all have a copy of them, so the Commissioners could refer to them.

But what we have is several web pages from a conference in 2007 regarding -- well, let's see, it doesn't really say, but it has a number of different companies --

THE WITNESS: It's a workshop on corporate strategy, to strategize, I think it is, Mr. Beck.

MR. BECK: -- and it just lists David Bell as, in one part of this, under Masco Contractor Services it says David Bell, Vice
President of Marketing. And has the Masco website name, and that's it.

PRESIDING MEMBER ROSENFELD: The role --

MR. BECK: It has the Masco Contractor Services logo.

PRESIDING MEMBER ROSENFELD: Where does Energy Sense appear?

MR. BECK: It doesn't appear here.

PRESIDING MEMBER ROSENFELD: It does not?

MR. BECK: Does not.

BY MR. DICKERSON:

Q Just to clarify. Referring your attention to what's been marked as exhibit 9 --

ASSOCIATE MEMBER LEVIN: Mr. Dickerson, could you refer to Bates stamp numbers, please. Because it's not clear to us, as the Commissioners, when something is in our binder already, or whether it is not.

MR. DICKERSON: Well, if all I say is it's a certain exhibit number, it doesn't appear in this number.

MR. BECK: It does. That particular letter, it does appear --

MR. DICKERSON: It does and I'm looking
for it now.

MR. BECK: -- so please make all
references that you can to the docket and to the
record that we all --

THE WITNESS: Would that -- in my
ignorance, does that mean that this number, the
lower right-hand corner, would be the --

MR. BECK: Well, that is what we have to
do. We have to -- actually, that letter is the
one from David Bell to Tav Commins. And that is
actually contained in its entirety, I believe, in
the section 18, response to complainant's first
amended subpoena from California Energy
Commission. I believe it is attachment B, b as in
boy.

PRESIDING MEMBER ROSENFELD: I'm sorry,
I'm at tab 18, now what do I --

MR. BECK: Tab 18, and let me find the
Bates stamp number. The Bates stamp number would
be -- well, it's under --

MR. BARTRIDGE: -- 150, well, it's
attachment B, which would be page number 158 if
you go by the other numbers.

MR. BECK: Attachment B, numbers 1
through 3.
PRESIDING MEMBER ROSENFELD: Okay, I'm at attachment 3, now where do I go?

MR. BECK: Now it's -- turn the page.

And it's that letter.

PRESIDING MEMBER ROSENFELD: Dear Tav.

MR. BECK: Yes. And there's no date on this letter.

MR. DICKERSON: The "Dear Tav" letter.

THE WITNESS: Yeah, the "Dear Tav" letter.

BY MR. DICKERSON:

Q That particular document, have you seen that before?

A Yes.

Q The letterhead is who?

A Letterhead is Energy Sense.

Q Who's the signatory to that letter?

A David Bell, President, Energy Sense.

Q Okay, so whenever that letter was written apparently Mr. Bell was, in fact, the President of Energy Sense?

A Correct.

MR. BECK: Well, the document will speak for itself.

PRESIDING MEMBER ROSENFELD: I want to
make sure I get this straight. So we have
evidence that Mr. Bell was both a VP of Masco and
signed himself as President of Energy Sense?

THE WITNESS: Yes.

MR. BECK: We have documents that -- we
have the internet webpage that has him listed as
that. But it is not a Masco document. It is done
by -- compiled by a different person, by a
different entity, so --

MR. FRANKEL: And we will be able to
show that that was an error. The only position as
an officer of any Masco company that Mr. Bell
occupied at this time was President of Energy
Sense, Inc. He did not hold a position as an
officer of any other Masco company.

ASSOCIATE MEMBER LEVIN: Mr. Frankel, I
think there are two issues here. There's what, in
fact, was filed with the Secretary of State, and
it would be helpful if you could produce that
since there does seem to be some discrepancy in
the public record.

And then there's the appearance of dual
positions, whether or not it was, in fact, legally
the positions he held. He certainly seems to have
held himself out, unless you're saying this letter
was not actually sent by him.

MR. FRANKEL: Well, no, I --

ASSOCIATE MEMBER LEVIN: There's a whole

'another possible issue, if I may. But he has

signed this letter. Is there evidence in the

record, other than the web statement, that he also

held the title or purported to hold the title of

VP of Marketing for --

MR. DICKERSON: Yeah, VP of Marketing

for Masco --

ASSOCIATE MEMBER LEVIN: -- Masco.

MR. DICKERSON: -- Contractor Services.

No, we don't have anything with us today beyond

what we have --

ASSOCIATE MEMBER LEVIN: So that's based

only on the web statement.

MR. DICKERSON: Based on the web -- the

flyer that came off of the web.

MR. FRANKEL: Right. And just for the

record, I mean that was not a document that was

prepared by Masco; it was prepared by the workshop

that was putting on this seminar. And we will

present evidence that shows that Mr. Bell only

occupied the position as an officer of Energy

Sense, not of Masco Contractor Services.
ASSOCIATE MEMBER LEVIN: Okay, thank you.

BY MR. DICKERSON:

Q    What exhibit do you have there, Mr. --
A    It's an exhibit, I guess, GA00.
Q    -- this right here --
A    Thirty.

MR. DICKERSON: Exhibit Number 30.

Yeah, if you could refer to exhibit 30, and I'm sorry this exhibit is not located anywhere in the docket information.

BY MR. DICKERSON:

Q    Have you seen that document before?
A    Yes.
Q    What is it?
A    It is online resources, it's stating what online resources Masco Contractor Services have.
Q    Okay, is that the Masco website?
A    Yes.
Q    Do you see any links anywhere on the Masco website? I'm sorry, the Energy Sense website?
A    Yes.
Q    Okay, what's the very first link that
you see on the Energy Sense website?


Q What's the name of the company that they're referring to?

A Masco Contractor Services.

Q Okay, so on the Energy Sense website, the first link that they have is to Masco Contractor Services, correct?

A Yes.

Q Do you have any idea what type of work Masco Contractor Services does?

A Yes, some idea.

Q Does Masco Contractor Services do work in California that requires HERS 24 testing?

A Yes.

Q Go to what the Masco -- report.

MR. BECK: Mr. Dickerson, it's really not necessary for the witness to identify, describe every document that we've got here. The Committee is going to review the record in its entirety. And we will be able to draw the conclusions and inferences from those documents.

It might be a better idea for, if you're gong to -- it seems that you're going through your binder and having Mr. Lilly identify the documents
and describe what's in the document. It's really not necessary.

Perhaps it might be a good idea for, I don't know how much you conferred with Mr. Frankel about this, to decide on which of these are going to be submitted into evidence.

Obviously the Committee can give the weight it deems appropriate to certain documents such as information contained on a webpage that was obviously not produced by Energy Sense or Masco, as opposed to something like this that we've got that is apparently directly off of the Energy Sense website.

MR. DICKERSON: Um-hum. Well, what I'll do is I'll just try to expedite through here. Some of these documents are somewhat voluminous. And just for purposes of the recorded record I'd just like to point out certain areas of them, but I will not delve into them in any detail. And I'll try to expedite --

MR. BECK: Even that might be too much, because we really don't need to do that. We'll look at them. And what might be a better idea is for you and Mr. Frankel to decide what is going to be entered into evidence at this proceeding from
your documents, your original documents that are here today.

And we would appreciate that only the documents that are not already in the docket be entered to avoid duplications. The record is already a pretty good size.

MR. DICKERSON: Can we take this thing home?

MR. BECK: Yes. That's yours to keep.

What Mr. Dickerson's referring to, for the record, is the docket that was -- or the binder that was prepared for the parties.

And, Mr. Dickerson, you should also know that all of the documents, and, Mr. Frankel, as well, all of the documents that are contained in this binder are on the Commission's website.

MR. DICKERSON: Oh, no question if they're here in a binder marked docket, but --

MR. BECK: And --

MR. DICKERSON: -- to speed the process up a little bit, clearly what's taken me the most time so far is to try to go through and find, in this particular publication, where certain things are.

MR. BECK: Correct.
MR. DICKERSON: I mean this is taking a long time.

MR. BECK: Yes.

MR. DICKERSON: And not being familiar with your process here, I was not aware that this document would not only be provided, but would serve as the foundation for our exhibits.

MR. BECK: Well, it's the --

MR. DICKERSON: But it's taking --

MR. BECK: -- record.

MR. DICKERSON: Exactly. But it's taking a long time.

MR. BECK: Yes.

MR. DICKERSON: Steve, I don't know what you saw in there. You said you were willing to stipulate to those things being authentic. What do you see that you are not willing to stipulate as being suitable for evidentiary consideration?

MR. FRANKEL: Well, I may have to take -- I can't answer that question right off the fly. I haven't looked through every document area.

MR. DICKERSON: I suggest we shut this thing down for the day and we take these things home and go through here --

MR. BECK: We're not going to stop for
the day. We have witnesses here that are prepared
to testify. And we even believe that perhaps we
can get this done today.

But what we could do --

MR. DICKERSON: Take a break?

MR. BECK: We could take a break or what
I suggest is that we move on with the actual
evidence, the presentation of witnesses that will
supplement the record as it exists, not simply
identify the documents that either already have
been submitted to the docket, or have been -- or
are in the list of documents -- the documents that
you have in your binder today.

We can get on with that, and when we
take our lunch break you and Mr. Frankel can
confer with one another. Come up with an
understanding of what is going -- what you agree
to allow to come into the record.

And, again, the technical rules of
evidence do not apply, including authentication,
including the foundation of a document. If
there's a particular document that the parties
feel they need to explain beyond that which is a
common understanding, then you could feel free to
do so.
But a number of these documents simply speak for themselves. And it's a waste of time to go through them one by one, identify them, and have the witness or the attorneys tell us what they are.

ASSOCIATE MEMBER LEVIN: Mr. Frankel, Commissioner Rosenfeld and I would also find it very helpful if you could produce -- I realize it probably not be today, but the filings of the Secretary of State in the relevant years who held officer and director positions in each of the two companies, that issue.

MR. FRANKEL: Certainly.

ASSOCIATE MEMBER LEVIN: That would be very helpful, thank you.

MR. FRANKEL: Okay.

MR. DICKERSON: Well, I'll continue to go through this again. I want to make sure that we at least have a reference on the record to what it is specifically we want to look at, and have the Commission look at in a specific exhibit. Like the one from Energy Sense, that website where they have the link of Masco Contractor Services. I can't run the risk that that may be missed.
MR. BECK: Nothing will be missed. Every single document that you submit to this record will be looked at and will be considered. If there's a concern that the Commission will not emphasize it as much as you think, or that the legal significance of it will be missed, then what I think could be done, and what you gentlemen probably are already thinking of, is that at the end of this hearing there will probably be a timeframe given for both of you to submit your briefs, your closing or post-hearing briefs, explaining to us what you believe evidence that was presented in this hearing proves in terms of whether or not there was a conflict of interest.

And in that brief you would refer to specific parts of the record, and bring those specifically to our attention.

But, again, it's an unnecessary waste of time to go through documents that are already in the docket, that are already basically in evidence, and go into them.

So, Mr. Dickerson, do you have any additional witnesses that you would be presenting that would be supplementing the record that you got?
MR. DICKERSON: I was going to be bringing Mr. Pennington on because I wanted to talk to him a little bit about some of the things that took place --

PRESIDING MEMBER ROSENFIELD: A little closer to the mike.

MR. DICKERSON: Yeah, I was going to talk to -- I was going to call Mr. Pennington to discuss some things. I'm just really troubled by the entire concept that we're essentially just submitting exhibits on the record, and this is what we're going to make a decision on.

MR. BECK: Well, we're not. We're also here to have testimony, as well. Again, this is not -- you're talking about a fairly sophisticated group of people in terms of the Commissioners. Commissioner Levin is an attorney. Commissioner Rosenfeld has a Ph.D. I'm an attorney. The people that we have here, the staff, Mr. Pennington, Ms. Geizler, the Advisors, Mr. Bartridge and Mr. Hungerford.

We're a fairly sophisticated group of individuals, I think moreso than you would typically find on a jury trial. So, you should not have a concern that somehow we're just going
to gloss over some documents.

As I think I expressed at the prehearing conference we hope that a lot of the record in this matter, and a lot of what can be done can be done on paper. Because it didn't appear that there would be a great factual dispute as to what is actually -- what the corporate structure of Masco is and Energy Sense.

MR. DICKERSON: I think you know that when I was saying that I need to point this stuff out, I'm not in any way casting aspersions on the intellectual acuity of anybody on the Board. I recognize that they have the ability to recognize these things.

But in a bench trial where we have no jury we still have judges who are relatively sophisticated and educated and experienced in the law who are willing to listen to these things.

I recognize that we want to get this thing done, but this is an extremely important matter to my clients.

MR. BECK: Well, this is --

MR. DICKERSON: It wasn't until November of last year that they knew that they were going to be charged with the responsibility of having to
bear the burden of proof in this thing.

And they have gone through enormous effort, enormous expense to try to put something together. So, I'm just saying, they're a little bit concerned that at this stage of the game we're already one hour into something that, if it was a trial, would take weeks. And we're saying we got to speed this process up.

MR. BECK: It's not that we have to speed it up. But, because it is -- this is not a jury trial, because it is an informal administrative adjudicatory hearing, and the rules, technical rules of evidence do not apply, then you can streamline some of it.

And the fact is that at a trial there is no evidence given until the trial begins. But in this case we have been accumulating evidence and it's been sent to the docket since the time that Mr. Lilly and Mr. Hagarty filed their complaints.

If the concern is somehow that the Commission doesn't take this seriously, let me assure you that they do. We would not have two Commissioners sitting here listening to this and giving their consideration to this issue unless it were.
And also, the ruling of the Committee will be -- and eventually the Commission, will be appealable.

ASSOCIATE MEMBER LEVIN: Mr. Dickerson, let me also reassure you, we've had a number of staff briefings. Commissioner Rosenfeld and I have had access to the written docket now for quite some time. We've read a lot of the background materials. Not all of them, I would be not honest if I said we've read everything in the binder.

But that's, I think, what we're encouraging both parties to do in the course of this hearing, is to point out those items already in the document or any new evidence. Areas where there's agreement, where you can stipulate to facts or the validity of evidence. Areas where there's disagreement. But in more of a summary form.

And we're asking you to assume that we've read what's already in the record, and just to highlight particular items. Not to read them verbatim. You don't need to establish the foundation of the evidence. This isn't a courtroom trial. I would say it's more analogous
to arbitration, where we can be more informal.

Where evidence is hearsay or other
evidence that might not be submitted in a
courtroom, we can still consider it for some
purposes.

So it's more a degree of formality and
efficiency sake. But, again, I want you to
understand we do take this very very seriously.
We have read most of what we have in front of us
already. And that's why we're trying to figure
out, when you -- whether or not it's something
we've already seen or something new. But if it's
something new, why haven't we already seen it.

So, it's not to try to gloss over
anything. It's not to minimize the importance of
this issue. We absolutely, as Mr. Beck said,
agree that it's very important. We appreciate all
the time that both parties have put into it, or
all the parties have put into it. But we don't
need to repeat everything or have you read
everything that's already in our binders.

MR. DICKERSON: I appreciate that, and I
appreciate those assurances. Again, it was just,
this is something that's very important to these
folks. And, you know, we want to try to put on
the best case that we possibly can, since we have
been charged with the responsibility of doing so.

So, I guess, if I'm going to err, I'm
going to err to the side of going a little bit too
far and maybe have somebody tell me maybe, Brett,
maybe you don't need that today, as opposed to
leaving something out.

So, if I do err to the side of maybe
kicking a little bit more information out there
than what you need, you let me give you my
preemptive apologies for that. But I will try to
speed the process up.

MR. BECK: And also in terms of some of
what Mr. Lilly's testimony has been, has been his
contacts with the Commission, his years of trying
to resolve this issue.

Let me also state that the Commission
understands that Mr. Lilly and Mr. Hagarty have
been trying for a number of years to bring this
matter to a head to get some final resolution.

And I think that we all understand that
perhaps things that could have come to resolution
earlier, that we all wish that the matters had
been fully and totally considered and resolved
prior to this day. And we understand.
So, I think that any testimony that we understand in the record, I think, speaks for itself. Mr. Hagarty and Mr. Lilly have had plenty of communications with CHEERS, plenty of communications with the Commission, with Mr. Pennington, with Mr. Commins and the staff of my office, and even myself, as is indicated in some of the documents that the CEC provided.

So we understand and appreciate the fact that Mr. Hagarty and Mr. Lilly have been trying to get a resolution in this issue, and that they are frustrated by the time it has taken to get to this juncture.

MR. DICKERSON: I appreciate that because I think that will, you know, lay the foundation for why we feel it was so important to come in here today and do something that was very comprehensive.

When we received the documents from the CEC which essentially reflected six years worth of looking into this matter, if you took away what Mr. Lilly had submitted in his complaint there was virtually nothing there. There was virtually nothing there. No documents.

So that, in all candor, created some
real concerns as to, you know, insuring that we were going to be able to come in here and satisfy our burden to the Committee.

I appreciate what has been said up to this point very much. And I mean that sincerely. And we'll press on and we'll do the best we can to get through this thing as quickly as possible.

THE WITNESS: Can I say something?

MR. BECK: No, no. -- your counsel does.

BY MR. DICKERSON:

Q Mr. Lilly, I'll direct your attention to what's been marked as exhibit 25 -- I'm sorry, 35. Again, this is not contained here.

MR. DICKERSON: Rather than ask him questions, would it be easier for you if I just made a brief little statement of what I believe that that shows. And that way I don't have to go through the questioning process. Would that simplify things for you?

MR. BECK: That will be fine. But honestly, it would --

MR. DICKERSON: See, I'm getting conflicting -- your concern, I'm getting nods from people on the Committee, so I don't know what to
do here.

MR. BECK: But a lot of this stuff can also be in a -- if we have this entered into the record you can, in closing brief, refer to it and say, for example, this document says this, and we believe it proves that.

MR. DICKERSON: Okay, so what we're really going to do then is your preference is that we just get an agreement, perhaps, between Mr. Frankel and myself. And as we go through it I'll see if it's okay, and agreement, if he is okay with having that admitted into evidence. And will essentially argue it during the course of a closing brief, correct?

MR. BECK: Yes. I don't think there's necessarily any reason to point it out and note that it exists if it's going to be submitted into evidence and it be docketed in this matter. So.

MR. DICKERSON: Okay. Mr. Frankel, do you have any problem with anything you see in exhibit 35?

I'll represent to you that the information concerning the officers from Masco came off the annual report issued by Masco in 2007. The second document that talks about the
officers in Energy Sense was produced by you in your initial response to documents requested by the Commission post-complaint.

MR. FRANKEL: Right, and I believe -- I mean to the extent that the second page of the exhibit is from the 2007 annual report of Masco Corporation, I have no objection.

I believe that as of the date when we responded to the request for information, I don't have that date in mind, but I --

PRESIDING MEMBER ROSENFELD: Louder.

MR. FRANKEL: I don't have the date in mind with respect to the first page that bears MAS-025, but I believe that that was an accurate listing of the officers and directors of Energy Sense at the time it was prepared.

MR. DICKERSON: Okay. So, you're okay with having that exhibit --

MR. FRANKEL: Yes.

MR. DICKERSON: Okay, very good.

PRESIDING MEMBER ROSENFELD: Quick question. Ten minutes ago we were wondering about Mr. Bell's -- both as a Masco officer and Energy Sense. And I -- does your last discussion with Mr. Frankel bear on that issue?
MR. DICKERSON: No. My last discussion with Mr. Frankel bears on, I'm sorry, shared --

two documents that show the identity of officers and directors of Energy Sense and Masco. I don't believe that Mr. Bell shows up there as an officer of Masco, itself, or director.

But this has to do with the officers and directors of Masco the parent company, --

PRESIDING MEMBER ROSENFELD: Right.

MR. DICKERSON: -- and its subsidiary, Energy Sense. That's what that has to do with.

PRESIDING MEMBER ROSENFELD: And Bell appears as Energy Sense but not as a Masco officer?

MR. DICKERSON: Not as he -- we never showed him as being an officer or director of the main Masco Company. He was shown as being the Vice President of Marketing in a flyer --

PRESIDING MEMBER ROSENFELD: Only in a flyer.

MR. DICKERSON: In a flyer. So either that was a mistake or he possibly represented himself as such, or somebody just made a mistake. But, as I said, they'll give that whatever weight 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?
MR. DICKERSON: I think so --

MR. FRANKEL: I think so.

MR. DICKERSON: Just go through them and tell me which ones you have a problem with, and we'll deal with it when we come back if we have a problem.

MR. FRANKEL: Okay.

MR. DICKERSON: Okay.

MR. BECK: We'll --

MR. DICKERSON: Is that fair?

MR. BECK: We'll --

PRESIDING MEMBER ROSENFELD: Let's see, half an hour would be very close to 11:00. Shall we just say 11:00?

MR. BECK: Yes.

PRESIDING MEMBER ROSENFELD: Is that okay with you?

MR. DICKERSON: 11:00 would be wonderful, thank you, sir.

MR. FRANKEL: Thank you.

(Brief recess.)

MR. BECK: We're back on the record.

PRESIDING MEMBER ROSENFELD: And I will note it's not 11:00, but 11:15. But I hope it was a productive 45 minutes.

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MR. BECK: The first issue is the documents that counsel discussed. They are the exhibits listed 1 through 37. What did we come to a decision on that?

MR. FRANKEL: Yes. I don't have any objections that they purport to be what they are. I have concerns about the relevance to the issue, the narrow issue presented here. And I'd like to reserve my ability to argue that in a closing brief, et cetera, as to why certain documents, to the extent they are at all material here, are not relevant.

But other than that, I have nothing to add.

MR. BECK: Mr. Dickerson.

MR. DICKERSON: I concur with that as being our understanding and --

PRESIDING MEMBER ROSENFIELD: You guys -- are your mikes on?

MR. DICKERSON: I concur with Mr. Frankel that that's the agreement that we reached, and we're fine with that.

MR. BECK: Then that's fine. We will receive the binder that is complainants' exhibit list C, L and E-4, and it's got exhibits 1 through
-- tabbed exhibits 1 through 38. We will receive that in evidence.

Mr. Dickerson, you had a few more questions for Mr. Lilly?

MR. DICKERSON: Just a few more for Mr. Lilly.

BY MR. DICKERSON:

Q Mr. Lilly, at any point in time did you have discussions with Dave Bell concerning any positions that he may have occupied with Masco Contractor Services?

A Yes.

Q What did Mr. Bell tell you?

A He told me he went to work as some sort of manager for Masco Services.

Q Okay. Did he say he was the president or vice president, anything like that?

A Said vice president, manager, something like that, yes.

Q Okay, I'd like to direct yours and the Commission's attention to what is marked as Bates stamp number 72 in tab number 1.

Again, that's tab number 1, Bates stamp page number 72. Is everyone there?

Mr. Lilly, do you have that in front of
you?

A  Yes.

Q  Look at the bottom. Is that an email that you received from Tav Commins on October 16, 2006?

A  Yes.

Q  And in that email does Mr. Commins identify Dave Bell as the national sales manager of Masco?

A  Correct.

Q  Okay, thank you.

MR. DICKERSON: That's all I have for Mr. Lilly.

MR. FRANKEL: I just have a few questions for Mr. Lilly.

ASSOCIATE MEMBER LEVIN: Would you please turn your mike on, sir, or speak a little closer.

MR. FRANKEL: I will, I will bring it closer to me.

CROSS-EXAMINATION

BY MR. FRANKEL:

Q  Mr. Lilly, do I have it right that California Living and Energy is in the business, at least in part, of doing Title 24 field

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verification and testing?

A Yes.

Q Okay. And you have --

PRESIDING MEMBER ROSENFIELD: I'm sorry, would you just repeat that sentence?

MR. FRANKEL: Sure.

BY MR. FRANKEL:

Q Mr. Lilly, am I correct that California Living and Energy is engaged in the business, at least in part, of doing Title 24 testing and verification work?

A Yes.

Q And you have employed by California Living and Energy employees who are certified by a provider as certified raters?

A Yes.

Q Am I correct, also, Mr. Lilly, to your knowledge, that Energy Sense is engaged in that same business?

A Yes.

Q And you would be a -- California Living and Energy is a competitor Energy Sense?

A Yes.

Q Am I also correct, Mr. Lilly, that you have no knowledge or information that any of the
raters that are employed by Energy Sense have an ownership interest in any company that does installation work that would be subject to Title 24 testing?

A I'm not aware of any ownership.

Q Are you aware of any debt agreements that any of those raters employed by Energy Sense have?

A I'm not aware of any debt agreement, either.

Q And are you aware that any of the raters that are employed by Energy Sense have an employee or employer relationship with any company for which they do Title 24 testing?

A They do have an employee relationship and have in the past.

Q Well, I'm asking you specifically with respect to the raters who do Title 24 testing. Are you aware of whether they are employees of any other company other than Energy Sense, Inc.?

A From the evidence they have been employees, yes, of other companies at Masco --

Q No, I'm asking you -- that's not my question. While they have been employees of Energy Sense, Inc., for however long that has
been, are you aware that any rater employed by
Energy Sense occupied an employee position with
any other company?

A    I'm not aware except for it went to the
same address of other companies, other Masco
companies, and they worked out of the same
address.

Q    If you could just answer my question.

Are you aware, as you sit here --

MR. DICKERSON: I think he's answered
the question.

BY MR. FRANKEL:

Q    As you sit here today are you aware of
any employee of Energy Sense, Inc. that is also
employed by any other company?

A    Yes, they were employed.

Q    By Energy Sense?

A    By Coast Insulation, Sacramento

Insulation.

Q    I'm asking you since they became
employees of Energy Sense. Are you aware of any
instance where a rater, employed by Energy Sense,
also occupied a position of employment with any
other company?

A    I'm not aware of any other outside of
Masco --

MR. FRANKEL: Thank you, I have nothing further.

MR. DICKERSON: I have nothing further.

I'd like to call Mr. Pennington for a few minutes.

MR. BECK: This is -- you want to question Mr. Pennington?

MR. DICKERSON: That's correct.

MR. BECK: Is it along the lines we discussed previously?

MR. DICKERSON: Yes.

MR. BECK: Well, if there were -- if we were to have a stipulation that after the telephone conference call in August of 2007 that involved Mr. Pennington, Mr. Commins, Mr. Staack of the Commission, David Bell from Energy Sense, and perhaps another individual from Energy Sense, that subsequent to that no further information regarding Masco or Energy Sense and their corporate structure were received by the Commission prior to the beginning of this proceeding.

MR. DICKERSON: Yeah, okay. We could do that. I do have some questions regarding this one
email that came from Tom Hamilton to various Masco representatives, and Mr. Pennington's awareness thereof.

I don't know if we can do a stipulation on that. If he'd like --

MR. BECK: Is he cc'd on the email?

MR. DICKERSON: No, he was not. But it references communications with Mr. Pennington.

I'd like to know whether or not he has a recollection of the communications that are referenced therein.

That would be marked as tab number 17, document number 200.

One of the defenses that Masco has raised here --

PRESIDING MEMBER ROSENFIELD: Hold on just a second till we find it.

MR. DICKERSON: I'm sorry.

(Pause.)

PRESIDING MEMBER ROSENFIELD: Tab 17, page 200?

MR. DICKERSON: Yes, sir.

PRESIDING MEMBER ROSENFIELD: Subject, conflict of interest CEC?

MR. DICKERSON: That is correct, yes,
sir.

PRESIDING MEMBER ROSENFIELD: Thank you.

MR. DICKERSON: If you could just review that for a couple of moments, he doesn't even have to move over to the table.

(Pause.)

EXAMINATION

BY MR. DICKERSON:

Q Had you seen that document before, sir?

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

MR. DICKERSON: Were you aware that CHEERS was providing that level of guidance and advice to Masco in pushing the Masco/Energy Sense relationship through the CEC?

MR. PENNINGTON: No.

MR. DICKERSON: That's all I have.

MR. FRANKEL: I just want to add something to the stipulation. It's my understanding, on behalf of respondents, that following the --

PRESIDING MEMBER ROSENFIELD: I'm going to nag at you again.

MR. FRANKEL: -- following the August 2007 conference with the CEC Staff, at the 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
characterized, yes, correct.

ASSOCIATE MEMBER LEVIN: May I ask a clarifying question, Mr. Frankel? I just would like to confirm MCS is some sort of an abbreviation for Masco?

MR. FRANKEL: Masco Contractor Services is a name that refers to a group of Masco companies. It is not a legal entity in and of itself.

ASSOCIATE MEMBER LEVIN: So when this letter refers to the MCS legal people. could you clarify who those people are, and who they are employed by?

MR. FRANKEL: Which letter?

ASSOCIATE MEMBER LEVIN: The same exhibit that Mr. Dickerson was referring to, under tab 17, page 200. The one that we were just referring to.

(Pause.)

ASSOCIATE MEMBER LEVIN: It's the letter from Tom Hamilton to Brad Townsend, Dale someone, Dave Bell, David Short, et cetera.

MR. FRANKEL: Yes. And the question?

ASSOCIATE MEMBER LEVIN: So MCS legal people, whose attorneys are those?
MR. FRANKEL: Well, I can't speak for what Mr. Hamilton wrote in his email. I mean there were representatives from the legal department and Masco Corporation that were on that telephone conference, as well as outside counsel representing both Masco Corporation and Energy Sense.

I can't -- I don't understand what Mr. Hamilton may have meant by MCS legal people. The only legal people who attended that call were within the law department or outside counsel for both Masco Corporation and Energy Sense, Inc.

ASSOCIATE MEMBER LEVIN: Okay. So they shared attorneys?

MR. FRANKEL: Yes.

MR. BECK: That's all for you, Mr. Dickerson?

MR. DICKERSON: That's all for me, Mr. Beck.

MR. BECK: Mr. Frankel, do you have any additional, or any witnesses to present?

MR. FRANKEL: Yes, I do.

MR. BECK: That's two, correct?

MR. FRANKEL: That's correct.

MR. BECK: Go ahead, call your first
witness.

MR. FRANKEL: I'd like to call David Short.

Whereupon,

DAVID SHORT

was called as a witness herein, and after first having been duly sworn, was examined and testified as follows:

REPORTER: Please state and spell your name for the record.

THE WITNESS: My name is David Short; D-a-v-i-d S-h-o-r-t.

DIRECT EXAMINATION

BY MR. FRANKEL:

Q Mr. Short, good morning. What do you currently do for a living?

A I'm a house-husband. Unemployed.

Q And had you been employed by any company prior to your current situation?

A Yes, I was employed at Gallo Glass; laid off.

Q And prior to that what position did you hold?

A Prior to that I worked at Salas Brothers Funeral Home. Prior to that I worked at Energy
Okay, and with respect to your work at Energy Sense, when did that work commence?

It commenced end of 2005 to my reflection.

Are you a certified HERS rater?

I'm not at this time.

And were you --

I'm sorry, I didn't hear you.

The witness: I'm not at this time.

You're not.

Okay.

You were?

I was, correct.

But you had to renew it annually or something?

That's correct.

Okay.

And when did you first become a HERS rater?

Early 2000, 2001 I was employed as a HERS rater for California Living Energy.

So you were a former employee of one of
the complainants here, California Living and
Energy?

A    That is correct.

Q    And you obtained your HERS certification through which provider?

A    Through CHEERS and CalCERTS.

Q    And from 2000 through the time that you worked with Energy Sense, did you maintain your HERS certification?

A    I did.

Q    Now, with respect to your work with Energy Sense, and your employment by Energy Sense, could you tell me what your first position was with either a Masco company or Energy Sense?

A    My first position was in charge of the HERS testing and Title 24, or not Title 24, just the HERS testing in California.

Q    And when were you brought onboard by Masco or Energy Sense for that purpose?

A    At my hiring.

Q    And that was September of 2005?

A    Correct.

Q    And was there any change to what would be subject to HERS testing and verification under Title 24 that took effect shortly after you began
your employment?

A Yes, the high quality insulation installation took place in October 2005, new --

change.

Q And when you began your employment with Masco or Energy Sense, what company was it that you started with in September of '05?

A Sacramento Building Products.

Q And Sacramento Building Products, you're now a subsidiary of Masco Corporation?

A Yes.

Q And what business did Sacramento Building Products engage in in the time you started in September of 2005?

A Insulation installation.

Q Any other businesses?

A I believe they did paint, gutters, various other household products for building construction.

Q And did, at the time you started with Sacramento Building Products, did Sacramento Building Products have certified HERS raters on its -- in its employ, to do Title 24 testing in California?

A They did.
Q  And prior to October 1 of 2005 when there was a change to add high quality installation of insulation, HQII, to the measures that would be subject to testing, were HERS raters at Sacramento Building Products doing Title 24 testing?
A  They were.
Q  And did any of the testing that Sacramento Building Products did prior to the October 1 2005 amendment, involve testing or inspecting any work done by any other Masco subsidiary?
A  No.
Q  And am I correct, Mr. Short, that the other measures that were subject to testing and verification under Title 24 prior to October 1, 2005, dealt with building envelope measures, air conditioning, HVAC and duct work?
A  That is correct.
Q  And to your knowledge, did any Masco-related company have anything to do with the installation of HVAC, duct work or the building envelope?
A  Not to my knowledge.
Q  Now, were you involved, Mr. Short, --
well, let me strike that.

What position did you hold with
Sacramento Building Products when you were first
hired?

A I don't know the name of my position,
actually.

Q Were you charged in particular with
doing anything with respect to Title 24 testing
upon your hire by Sacramento Building Products?

A Yea, I was in charge of insuring that
all HERS testing was being completed per the Title
24 code.

Q And with respect in particular to the
addition of high quality insulation installation,
were you involved in any discussions or steps
about what Sacramento Building Products and other
Masco installation subsidiaries were going to do
in connection with the addition of that measure to
Title 24 testing?

A Yes. I was in charge of the task of
educating and making sure that all the procedures
and products were done correct in accordance to
the Title 24 code; education of sales staffs;
training of individuals to insure that the job was
done correctly, basically throughout California to
make sure the job was done correctly to the Title
24 code.

Q  And what, with respect to the high
quality insulation installation and the fact that
Sacramento Building Products actually installed
insulation, what steps were you involved in taking
to insure that if Sacramento Building Products or
any other Masco-related company was going to test
those installations, what steps were going to be
taken?

A  A month after I took my position in
Masco I took over control of any of the HERS
raters that were currently in the company at the
time, so they would write their report to me,
rather than any division that would be installing
the product.

MR. DICKERSON: I'm going to object to
the testimony in that we seem to be getting into,
we may have been conflicted, but we really tried
to do a good job. And I'm not sure that's the
issue here as far as a conflict of interest goes.

If people are conflicted, it doesn't
matter if someone was well trained. We have a
stipulation already that Energy Sense performs
testing of installations performed by other Masco-
related entities. That's been stipulated to.

The fact that they may -- we have
testimony that they diligently go out and do a
good job doesn't affect the interest whether or
not there's a conflict of interest. That's not
relevant.

MR. FRANKEL: Well, I actually am going
with this witness to explain how we dealt with
complying with the conflict of interest provisions
based on the change in the standards as of October
1, 2005. And this is the gentleman who was
responsible for that effort.

MR. BECK: I think Mr. Dickerson's
statement is well taken that whatever steps they
may do to insure that a good job is being done or
that things were diligently followed up on, or
that some sort of quality assurance is tangential
to the inquiry that we have here, which is whether
or not the entities, as they exist and as they
operate, are in violation of the conflict of
interest rules.

MR. FRANKEL: Well, I will try to move
on, but I think I'm laying the foundation for
where I'm going here, and I will try to be as
brief as I can be.
MR. BECK: Okay.

ASSOCIATE MEMBER LEVIN: Mr. Frankel, just a reminder, please, to stay close to your mike.

MR. FRANKEL: Yes.

ASSOCIATE MEMBER LEVIN: And, again, you don't need to lay the foundation the way that you would in a courtroom.

MR. FRANKEL: I understand.

ASSOCIATE MEMBER LEVIN: Okay, thank you.

BY MR. FRANKEL:

Q  Mr. Short, did you take steps within Sacramento Building Products and with other installation companies that were owned by Masco to form a separate corporation?

A  We did.

Q  Okay. And did you have discussions about the establishment of a separate new corporation to do Title 24 testing with any representatives of CHEERS?

A  Tom Hamilton.

Q  Okay. And what do you recall -- first of all, do you recall when those discussions took place, roughly?
Roughly, yes; during the IBC conference, beginning of 2006, I believe.

And Mr. Hamilton, the Executive Director, was present?

That's correct.

Of CHEERS?

Of CHEERS.

And did you have discussions with Mr. Hamilton about what steps Sacramento Building Products and other Masco subsidiaries were going to take to conform and comply with the Title 20 conflict of interest regulations, in light of the addition of high quality insulation installation?

We did.

Okay. And what do you recall about those discussions?

He told us that the raters were independent entities and they were not companies, themselves. That they did meet with the third-party requirements. That taking the extra step of forming Energy Sense as a further company would be further complying with the Title 20 code.

And did steps ultimately get taken, Mr. Short, to have a separate corporation that was formed and owned by Masco Corporation to do Title
A  Yes, that's correct.
Q  And what was the name of that company?
A  Energy Sense.
Q  And what position did you have with Energy Sense when it was first established?
A  Division manager.
Q  And as division manager, what were your responsibilities?
A  Oversight of operations, Title 24 testing education, sales training, that information.
Q  And did you have any other employees other than yourself that worked for Energy Sense when it became established as a separate company?
A  Yes.
Q  How many?
A  Eight.
Q  And were the other eight employees, were they all certified HERS raters?
A  They were all certified HERS raters, and we hired an administrative staff that was not a HERS rater.
Q  And were they all certified by CHEERS as HERS raters?
A By CHEERS, correct.

Q Now, the eight people that were employed by Energy Sense as HERS raters, were they employed by anyone else other than Energy Sense?

A No.

Q Had they been employed previously?

A Yes.

Q Okay. Who had they been employed by?

A Various firms, Sacramento Building Products, Code Building Products.

Q Now you had been employed by Sacramento Building Products up until the time that you took over as division manager of Energy Sense, correct?

A That's correct.

Q And what happened when your employment changed from Sacramento Building Products to Energy Sense?

A We were --

ASSOCIATE MEMBER LEVIN: Mr. Frankel, I don't mean to be dense, but I really am not seeing the connection here in a lot of these questions. If you could try to thread the needle more clearly, that would really be helpful --

MR. FRANKEL: Okay.

ASSOCIATE MEMBER LEVIN: -- to --
certainly to myself; possibly my fellow Commissioner, in understanding what the relevance of this is.

MR. FRANKEL: Okay, I will try to be.

BY MR. FRANKEL:

Q    What happened with respect to your Sacramento Building Products employment when you became division manager of Energy Sense?

A    I was terminated out of the Sacramento Building Products, loss of benefits pay, vacation time. And hired into Energy Sense. Had to withstand a new probationary period in order to maintain any new standing employment.

Q    And throughout -- and how long did you remain division manager of Energy Sense in California?

A    January of '08, I believe.

Q    So you were the first division manager of Energy Sense?

A    That's correct.

Q    And throughout the time period that you were employed by Energy Sense, Mr. Short, did you have any ownership interest in any installation company whose work you were testing as a certified HERS rater?
A No, I did not.

Q Did you have any debt agreements with any installation company whose work you were testing on behalf of HERS Title 24 purposes?

A No, I did not.

Q Did you have any employment relationship with any other company other than Energy Sense while you were its division manager?

A No, I did not.

Q During the course of your employment at Energy Sense, Mr. Short, did you advocate or recommend the products or services of any installing company whose work was subject to your Title 24 testing?

A No, I did not.

Q And with respect to your role as division manager, did you instruct or advise the other HERS raters who were employed by Energy Sense during that period, from the time of Energy Sense's establishment through the time of your departure, about whether or not they could recommend or advocate the products or services of any other company whose work would be subject to Title 24 testing?

A I did advise them to we needed to abide
by the rules and regulations of the HERS and Title
24, that we could not advocate for any other
services besides our own.

Q    And to your knowledge, Mr. Short,
throughout the period that you were division
manager of Energy Sense, did you or any other HERS
rater who reported to you at Energy Sense advocate
or recommend the services of any other party,
installation company, or any other party for
purpose of trying to gain increased business?

A    Not to my knowledge.

Q    Now, Mr. Short, you're aware, are you
not, of Energy Sense's relationship to Masco
Corporation?

A    Yes, I am.

Q    Okay. And what is that relationship?

A    They're a wholly owned subsidiary of
Masco.

Q    And with respect to the installation
companies for which Title 24 testing would be done
in California, am I correct that Sacramento
Building Products is also a Masco subsidiary?

A    That's correct.

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

MR. FRANKEL: Well, he was the person in
charge, so he would have at least that knowledge.

BY MR. FRANKEL:

Q    Well, let me ask you, Mr. Short, with
respect to the work that Energy Sense did with
respect to Title 24 testing while you were the
division manager, the person in charge of Energy
Sense, how it was that Energy Sense got its work.

A    We got its work through the installing
divisions. We had a contract with them that they
would provide the sales staffs and they would
write the contracts, or to the builder, and we
would pass through. And they would assign us, it
was work we would do, the testing. Then we would
invoice the contractor, based on the contractor
which would invoice the builder. The builder then
would pay the contractor, then they would pay us.

Q    All right. And are you aware that there
were contracts entered into between Energy Sense
and the Masco installing divisions concerning how
Energy Sense would conduct and deal with the
testing of work that was provided through this contractual arrangement?

A    I was aware of that, yes.

Q    Now I may have incorrectly spoken earlier about joint bids. I may have made that statement.

Am I correct that Energy Sense, while you were division manager, never made any joint bids with any installing division?

A    That's correct.

Q    Okay. And just could you run through the process by which Energy Sense would receive its work from an installing company? What would happen?

MR. DICKERSON: Objection, this is requesting a narrative that isn't relevant to anything we're talking about here today.

MR. FRANKEL: I think it's clearly relevant to showing that there was no conflict of interest here in terms of how this process worked, and the steps that Masco and Energy Sense took in order to insure that they were in compliance with Title 20.

MR. BECK: Well, I don't think it's -- 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
Commission, please?

MR. FRANKEL: Yes, I do.

MR. BECK: You could actually hand them
to Ms. Geizler, please.

(Pause.)

MR. PENNINGTON: You may need one more.
I took a copy. I don't know if you counted on
that.

BY MR. FRANKEL:

Q Before I use these demonstrative
exhibits, Mr. Short, if you would just turn to tab
number 6 of the binder that we were provided by
the Commission this morning, and look to what's
behind labeled tab 1. It bears Bates number MAS-
001. Near the end.

PRESIDING MEMBER ROSENFIELD: MAS-001.

BY MR. FRANKEL:

Q And, I believe, Mr. Short, you'll see
that there are three agreements, and they're
behind that tab. One between Masco Contractor
Services of California, Inc., and Energy Sense,
Inc.

Another between Builders Services Group,
Inc. and its subsidiaries and Energy Sense, Inc.

And then a third agreement between
American National Services, Inc. and its subsidiaries and Energy Sense, Inc.

You see those?

A Yes, I do.

Q Okay. And are those the contracts that you referred to that Energy Sense and the installing companies, or the companies that owned the installing companies within the Masco Enterprise entered into while you were division manager of Energy Sense?

A Yes, to my knowledge.

Q And you were responsible, as division manager, for implementing those contracts?

A That's correct.

Q Now, let me show you first the demonstrative exhibit that's entitled Energy Sense's three-party contracting.

MR. BECK: Why don't we have that, since that's not labeled, we're going to label that as respondent's A, as in apple.

MR. FRANKEL: Thank you.

MR. BECK: And please refer to it as such.

BY MR. FRANKEL:

Q Now, Mr. Short, with respect to the
contracts that were entered into between Energy Sense, Inc. and the Masco installation subsidiaries in California, in connection with Title 24 testing, what relationship, as far as you understood it, was there between Energy Sense and the installing subsidiaries under these contracts?

A  We were a subcontractor.

Q  Okay. And what about, were you employees of the installing companies?

A  No, we were not.

Q  Were you independent contractors?

A  Yes.

Q  And under these contracts were they exclusive or nonexclusive in terms of the testing work that Energy Sense was allowed to do?

A  They were exclusive.

Q  They were --

A  We worked through --

PRESIDING MEMBER ROSENFELD: I didn't hear you. They were?

THE WITNESS: They were exclusive. We worked through the building, the installing company.

BY MR. FRANKEL:

Q  Well, were you obligated for the --
A No we were not obligated to do the work if the bid was not deemed acceptable. So we could have -- we have leeway -- I could reject a bid, it was no problem.

Q And what about were you obligated to just perform testing services for Masco installation subsidiaries?

A No, I was not.

Q Were you free to market your services directly to other builders or other companies?

A Yes, I was.

Q And did you do so?

A Yes, I did.

Q With respect to the pricing for testing services that Energy Sense undertook, who set those prices?

A I did.

Q Okay. Did Masco Corporation or any Masco installation subsidiaries ever instruct or direct you as to what prices should be set for the Title 24 testing services that Energy Sense provided through its raters while you were division manager?

A No, they did not.

Q With respect to the receipt of payment
for the testing services that were provided pursuant to the contracts that you've identified, did Energy Sense receive full payment for the prices that it charged for those services without any markup or deductions by the installing companies?

A    That is correct.

Q    Now, with respect to your reporting responsibilities under the terms of these contracts, when you would do a Title 24 test, as a HERS rater, first of all, who scheduled those tests?

A    The raters with the builder.

Q    And where would the result of the testing results report?

A    To CHEERS.

Q    And what about were they also reported to the builder?

A    To the builder, as well; and to any building department that would request those.

Q    Okay. Did you report the testing results reports to the installing company, whether it be a Masco company or a nonMasco company?

A    Only in the sense in the field that we would have to deal with any contractor, if they
deal with the product HVAC or duct testing, and they failed their product, yes.

Oh, product would fail in the field, we would notify the builder and the contractor there onsite of the failure so they could come and correct it, and so we could retest.

Q    And with respect to the testing services that you performed as a Title 24 rater, did you use any different testing protocol, depending on the identity of the installation company?

A    None.

Q    Now, with respect to the bids for installation and testing services, who prepared those bids?

A    That would be the installing company.

Q    And what role, if any, did Energy Sense have in that bid process?

A    None.

Q    Did you simply provide the prices for your testing services to the installing company?

A    That's correct.

Q    And the installing company would then make a bid that would include testing services as well as installation services to a builder?

A    That's correct.
Q And what was the builder obligated to do when he got that bid, if you know?

A They could take and choose what they would want out of the bid. So it was exclusive deal, they did not have to take the testing.

Likewise, they did not have to take the installation service. They could take either one.

Q And what happened after you perform your Title 24 testing as a HERS rater, as the division manager of Energy Sense, what would you do in terms of trying to collect for the work that you did?

A We would invoice the installing company.

Q And what is your understanding of what the installing company would do?

A They would, in turn, invoice the builder. Builder would make payment to the installing company. And then make payment to Energy Sense.

Q And do you know whether in connection with the invoicing and collection there was any markup of Energy Sense's testing services by the installing company?

A No.

Q With respect to the failures, if you're
doing a Title 24 test in the field and you believe
that certain testing measures were not going to
pass Title 24 muster --

MR. DICKERSON: Objection. We're now
past the point of how they get their business.
We're back into they try to do a real good job
when they're out there, even inspecting their own
work. We've already gone over this.

BY MR. FRANKEL:

Q       What would you do with respect to a
failure? How would you notify a builder of a
failure?

A       We notify the builder onsite that a
failure and that a retesting would be required.

Q       Now Mr. Short, if you'd turn to exhibit
B, respondent's B, which is the second
demonstrative exhibit before you. Do you have
that?

A       No, sir.

Q       Let me give you a copy.

A       Thank you.

Q       Now, exhibit B, am I correct, Mr. Short,
that this visually accurately illustrates the
contracting process that Energy Sense followed for
Title 24 testing services in connection with its
dealing with the Masco installation subsidiaries?

A    That is correct.

Q    Okay. And the first box at the top, contracts negotiated for Energy Sense Testing Services, does that refer to the agreements I previously had you identify as MAS-001?

A    It does.

Q    Behind tab number 6 in the binder?

A    It does.

Q    And is there anything on this demonstrative exhibit that fails to accurately portray how the contracting process for field verification and testing services work while you were the division manager at Energy Sense?

A    It is correct, appears to be correct.

Q    Now, Mr. Short, with respect to in particular some exhibits that were referenced by the complainants this morning, I want to turn your attention to one of those in the binder which I will hand to you, once I find the appropriate page.

It was exhibit number 30 in Mr. Dickerson's binder. I'll put that before you.

Do you have exhibit 30 in front of you, Mr. Short?
A    Yes.

Q    Okay. Have you ever seen that before, other than having perhaps looked at it this morning?

ASSOCIATE MEMBER LEVIN: Mr. Frankel, could you identify where that is in the binder, or is this a new exhibit?

MR. FRANKEL: Oh, no. This is one of the exhibits in Mr. Dickerson's binder, exhibit 30 --

MR. DICKERSON: It's not in the documents --

MR. FRANKEL: -- that was referenced this morning. I'm sorry.

MR. BECK: This is the webpage from the energysense.org website.

PRESIDING MEMBER ROSENFIELD: We don't have it.

MR. BECK: No, it's not in the big binder.

BY MR. FRANKEL:

Q    Do you have exhibit 30, which is a website printout?

A    I do.

Q    Okay. Did Energy Sense, as division
manager of Energy Sense, did you ever have a
website that went by this address or name?

A No, we did not.

Q Okay. And was that true for the entire
time that you were as division manager of Energy
Sense up until January of 2008?

A That is correct.

Q Okay. And do you know, based on your
experience, where those webpages came from that
are part of exhibit 30?

A No, I do not know.

Q Okay. Let me refer you, if you would,
to the third or the second page. You see that
there's an address listed for contact information?

A I do see that.

Q And what does that say?

A 14655 Northwest Freeway Suite 102,
Houston, Texas 77040.

Q Did Energy Sense, the company of which
you were division manager, ever have any offices
in Houston, Texas?

A No.

Q Did Energy Sense ever operate in any
states, while you were division manager, other
than California and Nevada?
MR. BECK: I have some questions.

EXAMINATION

BY MR. BECK:

Q Sir, are you saying that this is not -- these documents that are in 30 are not from the website of the Energy Sense that you worked for?

A That is correct; they're not.

Q Do you know whose website this is, if it's not the Energy Sense you worked for?

A I don't have personal knowledge of that, no, sir.

Q Okay.

ASSOCIATE MEMBER LEVIN: Do you think that you're familiar with all of the subsidiaries of Masco?

THE WITNESS: No.

ASSOCIATE MEMBER LEVIN: Therefore you're not necessarily familiar with all of their websites?

THE WITNESS: That would be correct.

MR. BECK: Well, what was the -- did the Energy Sense you worked for have a website?

THE WITNESS: No, we did not.

MR. BECK: Not at all. But there are...
Energy Sense -- I'm sorry, where else does it operate besides California?

THE WITNESS: My division operated in California, and we had some in Nevada.

MR. BECK: Okay. Is there another subsidiary of Masco called Energy Sense that you're not a part of?

THE WITNESS: I believe there's one in Texas.

MR. BECK: Okay. So this could be one in Texas, correct?

THE WITNESS: That is correct.

MR. BECK: But to your knowledge it's still one of the subsidiaries of Masco?

THE WITNESS: My understanding, yes.

MR. BECK: Okay. Which is -- so it has the same relationship; to Masco as the Energy Sense that you worked for had?

THE WITNESS: I don't know. I have no idea.

MR. BECK: But you were --

THE WITNESS: I don't know -- I don't know if this Energy Sense is -- I don't know how, I have no -- I have no knowledge of their operations so I have no understanding of -- I had
no relation with that company.

MR. BECK: Okay. But you were aware
that there was an Energy Sense that was a
subsidiary of Masco that was operating in Texas,
which was separate from your --

THE WITNESS: Correct.

DIRECT EXAMINATION - Resumed

BY MR. FRANKEL:

Q Now, Mr. Short, during the time that you
were division manager of Energy Sense, up until
January of 2008, did you receive any direction in
terms of either the prices you charged or how you
would do your work from any installing subsidiary,
whether it be of Masco or any other company?

A No, I did not.

Q Did you receive any direction or
instruction about how you would go about
performing your work as a Title 24 tester and
certified rater from anyone at Masco Corporation?

A No, I did not.

Q Now when Energy Sense was established as
a separate company, did you have an office?

A Yes, I did.

Q Where was your office located?

A In Modesto.
Okay. And what was the address?

It was on Coldwell Avenue. I don't, sorry I don't remember the exact address.

And did any installing companies, whose work you tested for Masco, office out of the same location?

No.

With respect to the equipment that was used for testing, whether it be trucks, automobiles, equipment, did Energy Sense have to purchase that equipment?

We did.

And did you purchase cars, a truck?

No.

Did you -- what did you do?

The raters used their own vehicles and we had equipment purchase through Minneapolis Blower Door Company for duct testers, various other equipment through other companies that we required for the HERS testing.

Did you have to enter into a lease agreement for your office space?

Yes.

And did Energy Sense, while you were division manager, pay rent on the office space
that you leased?

A We did.

MR. DICKERSON: Running objection. Same objection that I've voice thus far.

MR. BECK: I think that's true. I think, Mr. Frankel, you could maybe even speed this part up. Instead of asking him -- maybe ask a more cumulative question in terms of, for example, where office space is.

And we are getting a bit too far afield in terms of the narrow issue of whether or not the structure of the company presents a conflict of interest.

I understand that how they operate is to some degree indicative of the relationship, but it needs to be sort of narrowly tailored to that issue.

MR. FRANKEL: Okay, I will try to do so.

BY MR. FRANKEL:

Q During the course of your role as division manager of Energy Sense, Inc., did you receive any complaints from any party concerning the performance of the work that Energy Sense was --

MR. BECK: That's not relevant.
BY MR. FRANKEL:

Q    Did you become aware at any point during
your role as division manager of any installing
company incorrectly utilizing the Energy Sense
name in connection with any bid for services that
it made?

MR. DICKERSON: I would say that's the
same question, just phrased differently.

Objection.

MR. BECK: Would you restate that? I'm
sorry. The question.

BY MR. FRANKEL:

Q    Mr. Short, are you aware of any instance
where it came to your attention that an installing
company was utilizing Energy Sense's name in an
unauthorized fashion?

MR. BECK: Well, I think that that's --
it's a big vague and speculative. I don't even
know what that means exactly.

ASSOCIATE MEMBER LEVIN: Mr. Frankel,
would you mind if I ask much more general
questions that --

MR. FRANKEL: Sure. Please.

ASSOCIATE MEMBER LEVIN: I apologize if
they're in the documents, excuse me, but they're
not clear to me.

Sorry, I'm getting over a very long
cold, cough.

THE WITNESS: Same here.

ASSOCIATE MEMBER LEVIN: Sorry. Hope

yours recovers more quickly.

Mr. Short, when you were employed by

Energy Sense did you know that it was owned by

Masco?

THE WITNESS: Yes.

ASSOCIATE MEMBER LEVIN: Did you receive

an annual report from Masco? Or did your office,
at any time? Did you see one at any time?

THE WITNESS: Not to my recollection,

but it's been a couple years, so I -- I don't

understand what kind of report you're referring
to.

ASSOCIATE MEMBER LEVIN: A company has

an annual report, like a --

THE WITNESS: I'm sure I did.

ASSOCIATE MEMBER LEVIN: -- financial

report and other --

THE WITNESS: Yeah, I'm sure I did of

Masco Corporation, yeah.

ASSOCIATE MEMBER LEVIN: Do you know who
the owners of Masco were?

THE WITNESS: No, no, not of --

ASSOCIATE MEMBER LEVIN: Is it a

publicly owned company?

THE WITNESS: As far as I know, yes.

ASSOCIATE MEMBER LEVIN: Is it a

California corporation?

THE WITNESS: I have no idea.

ASSOCIATE MEMBER LEVIN: Did you have

any interaction with any employees of Masco?

THE WITNESS: The corporation? Masco

administrative services for my administrative

support. Dave Bell, VP, or president of Energy

Sense. That's my extent. Yes.

If that counts as yes, then yeah.

ASSOCIATE MEMBER LEVIN: Anyone else?

You said administrative report, VP or president --

THE WITNESS: Administrative services,
do my budget, Dave Bell, Dale Camany, I think the

people that have been named in some of these

reports. Yeah, I've had contact with them, yeah.

ASSOCIATE MEMBER LEVIN: How about the

attorneys for Masco who are referenced in one of

the letters that we have in our binder?

THE WITNESS: Yes, the letters from Tom
Hamilton, yes. I've had contact with various lawyers.

ASSOCIATE MEMBER LEVIN: Thank you.

BY MR. FRANKEL:

Q Mr. Short, you left Energy Sense in January of 2008?

A Yes.

Q Why did you leave?

A Just seeking a different career path.

Q And what career path are you seeking today?

A California Highway Patrol.

PRESIDING MEMBER ROSENFIELD: I'm sorry, say that again?

THE WITNESS: The Highway Patrol, CHP.

MR. DICKERSON: Objection, relevance.

MR. BECK: It's not relevant, but --

MR. FRANKEL: Okay.

BY MR. FRANKEL:

Q I know you're no longer an Energy Sense employee?

A That's correct.

Q And you're appearing here voluntarily today?

A That's correct.
MR. FRANKEL: I have nothing further.

MR. BECK: I have a question. Did Energy Sense provide HERS rating for any other company other than Masco or Masco-related company, or Masco's --

THE WITNESS: You mean as via three-party contracts that we operated?

MR. BECK: Yes.

THE WITNESS: We did testing through Pulte and different various builders that needed the services. So, yes. Lennar, Centex, Standard Pacific, Florsheim.

MR. PENNINGTON: I don't think you understood the question.

MR. BECK: Pull the microphone up, Bill.

MR. PENNINGTON: Sorry. This is as far as we get.

Did you, independently of Masco, provide services directly to a builder?

THE WITNESS: Via our three-party contract, I think it was laid out here, that --

MR. PENNINGTON: So this is not a question about your three-party contract. This is a --

THE WITNESS: No, I'm trying to explain
to you, we had a contract with the installing
companies to provide those services. And that's
how we did that.

So if I would negotiate a contract with
a builder, then I would contact the sales
representative and they would write up the
contract for a bid. And that would be the only
thing on it. That was the only thing that I
negotiate with them, yes.

MR. PENNINGTON: So that contract would
go back through the installing --

PRESIDING MEMBER ROSENFELD: You have to
talk a little louder, too.

MR. PENNINGTON: The contract would go
back through the installing contractor as if they
had made the contact with the builder?

THE WITNESS: That's correct.

MR. BECK: Go ahead, Mr. Dickerson.

CROSS-EXAMINATION

BY MR. DICKERSON:

Q  I'd like to refer your attention back to
tab number 18, document number 33. That one
there, tab number 18. Document 33.

Now, I think you identified David Bell.

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

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345
Q    And it is marked MAS-01.
A    001, right?
Q    001, that's correct. Have you seen that agreement before?
A    Yes.
Q    If you go to page 005 you see that it is signed on behalf of Energy Sense by John, are you familiar with that name?
A    The name John?
Q    Yeah, John who signed on behalf of Energy Sense, John Sznewajs?
MR. DICKERSON: Anybody help me with that pronunciation?
THE WITNESS: Point of clarification, this agreement is January 1, 2008. I was not at --
BY MR. DICKERSON:
Q    Okay, that's fine.
A    You know, that's right around the time of my --
Q    That's fine, I just want to direct your attention to the signatory to that contract.
A    As I said, January 1, 2008 was -- I was no longer employed, so I would have -- I don't know.
Okay, I'm just asking. I'm just directing your attention to the name of the person who signed the document. Do you see --

I don't know John G. Sznewajs.

Okay. You see he's listed as the vice president, treasurer and assistant secretary of Energy Sense?

I see that.

Okay. If you go on to the document that has been marked MAS-024. This was provided by Masco at the initial document presentation. Do you see this shows Masco Corporation officers and directors, not Energy Sense, Masco.

Do you see that name anywhere on there?

Yeah, it's right there, yes. There's three officers.

Yeah, he occupies three positions with Masco Corporation, correct?

As it would appear.

What are the three operations, or officers and positions that he holds with Masco in addition to holding those positions with Energy Sense?

There's chief financial officer, vice president, corporate development and treasurer.
Okay. Thank you. During the time that you had conversations with Mr. Hamilton, did Mr. Hamilton ever tell you if you do this, this and this your setup is good? In other words, did he ever give you the blessing to go forward with the Masco/Energy Sense setup?

A Yes.

Q Did anybody from the CEC ever give you written okay to go forward with the program?

A Not to my knowledge.

Q Okay. You said you had discussions with Mr. Hamilton regarding setting this up. Did you have any discussions regarding interlocking directorships?

A No, not to my knowledge.

Q Okay. Anything regarding commingling of funds?

A Not to my knowledge.

Q Okay. Nothing regarding any -- are you familiar with the concept of corporate alter ego?

A No.

Q Okay. So you didn't have any discussions on what constitutes a corporate alter 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.
A The majority.

Q So they left one Masco-related entity one day and came to work for Energy Sense the next?

A That's correct.

Q Okay. Looking at what's been marked as respondent's A, Energy Sense is paid by the installing company, correct?

A That is correct.

Q Okay. And if the installing company is Coast Insulation, that's another Masco company, correct?

A That is correct.

Q Okay, so Energy Sense is being paid by a company that is ultimately owned by Masco, correct?

A Through the builder -- builder, yes.

Q But the money's coming from -- it's a Coast Insulation check, right?

A I don't know.

Q Okay. And both -- in that scenario, both Coast Insulation and Energy Sense both report financially back to Masco?

A I would assume.

Q Okay.
MR. DICKERSON: That's all I have.

MR. BECK: Okay. Bill?

(Pause.)

EXAMINATION

BY MR. PENNINGTON:

Q So, I'd like to draw your attention to tab 23.

MR. BECK: And this is in our binder?

MR. PENNINGTON: Yeah.

BY MR. PENNINGTON:

Q And I'm looking at a few pages in where there's a copy of the Blueprint, a newsletter of the Energy Commission.

PRESIDING MEMBER ROSENFELD: Do we have a page number, Bill?

MR. PENNINGTON: It does not have a page number. It's about two-thirds of the way in on that tab. It looks like this in black and white.

PRESIDING MEMBER ROSENFELD: Got it.

BY MR. PENNINGTON:

Q So, this is guidance in the newsletter that the Energy Commission provides to building officials and anyone in the building industry that requests. I think at the time of this issue there were about 3500 people that were on our mailing
list.

I wanted to draw your attention to the second paragraph of this. This is a question and answer that gets to three-party contracts.

And in the second paragraph it says:

The Commission expects HERS raters to enter into a contract with the builder, not with subcontractors, to provide independent, third-party diagnostic testing and field verification.

Were you aware of that provision?

Actually, there is a repeat of this identical language in the 2005 compliance manual that the Energy Commission adopted for the 2005 building standards, which are actually the next couple of pages under this tab, are the excerpts of essentially the same thing.

So, I'm wondering if you were aware of the expectation that raters contract directly with builders and not with subcontractor.

A I was also aware of paragraph three in that same statement.

MR. BECK: Well, answer the first question. Were you aware of that one part that Mr. Pennington referred to?

THE WITNESS: Correct, with the
The stipulation of the continued, that explanation throughout the paragraph, yes.

BY MR. PENNINGTON:

Q So the idea of a three-party contract was that all three parties to the transaction would be part of the same contract, and that the roles would be spelled out directly by -- for each party. And the builder would sign that and the rater would sign that and the installing contractor would sign that.

So, were you aware of that?

A From my understanding, I don't know the legal reason, I'm sorry for my ignorance in that -- from my understanding we were operating correctly.

MR. BECK: Anything else?

MR. PENNINGTON: No.

MR. FRANKEL: I just have a couple of followup questions, Mr. Short.

ASSOCIATE MEMBER LEVIN: Can you speak into the mike, please.

REDIRECT EXAMINATION

BY MR. FRANKEL:

Q Mr. Short, am I correct that under the contracts that were entered into between Energy...
Sense and the Masco installation companies that
you were bound by the terms and conditions of any
builder contract that the installing company would
enter into with a builder?

A Bound by the contract -- say that again, please.

Q Bound by the builder's contract.

A Yes, we were bound by the builder's
contract, correct.

MR. FRANKEL: Thank you.

MR. BECK: Do you have anything more, Mr. Dickerson? Mr. Frankel, you've one more
witness, correct?

MR. FRANKEL: Yes, I do.

MR. BECK: How long do you think that
will take?

MR. FRANKEL: I don't think it should
take very long.

MR. BECK: Not as long as this witness?

MR. FRANKEL: I don't believe so.

MR. BECK: Okay. I think the Commission
would, if -- I believe that's the only witness?

That's the last witness?

MR. DICKERSON: That will be the last
witness, that is correct.
MR. BECK: And is it the Commission's
desire to power through, as they say, through this
last witness and wrap up the hearing? Or does the
Commission want to take a lunch break?

PRESIDING MEMBER ROSENFELD: I'm ready
to keep on going.

ASSOCIATE MEMBER LEVIN: I think we're
ready to power through as long as the parties and
the witnesses can --

MR. DICKERSON: No, we're ready --

ASSOCIATE MEMBER LEVIN: -- can stand
up. We don't want to --

MR. DICKERSON: I hope it doesn't go an
hour.

ASSOCIATE MEMBER LEVIN: We don't want
to abuse anyone.

MR. FRANKEL: I'd like to call Jaime
Padron.

Whereupon,

JAIME PADRON
was called as a witness herein, and after first
having been duly sworn, was examined and testified
as follows:

REPORTER: Please state and spell your
name for the record.
THE WITNESS: It's Jaime Padron, J-a-i-m-e P-a-d-r-o-n.

DIRECT EXAMINATION

BY MR. FRANKEL:

Q Mr. Padron, what do you currently do for a living?

A I'm employed by Energy Sense.

Q In what capacity?

A Division Manager.

Q And how long have you been Division Manager?

A Since March of '08.

Q And who -- did you succeed Mr. Short as division manager?

A I did.

Q And as Division Manager, what are your duties and responsibilities?

A The operational functions of Energy Sense, day-to-day operations.

Q And currently how many people are employed by Energy Sense?

A There are three raters and one admin person.

Q And are you a certified HERS rater?

A I am.
Q And you've held your certification for how long?
A 2002.
Q Now, as Division Manager of Energy Sense, are you responsible for managing the operations and testing work of the testing and verification work that Energy Sense conducts?
A I do.
Q And are you responsible for directing the other HERS raters who are in your employ in that regard?
A Yes.
Q Do you receive direction from anyone else at Masco Corporation or any Masco installation company with respect to how you conduct your work?
A No.
Q With respect to budgeting or hiring decisions, are those decisions that you make, yourself?
A That's correct.
Q With respect to the raters that have been employed by Energy Sense since the time you became Division Manager in 2008 succeeding Mr. Short, have you or anyone else at Energy Sense
advocated or recommended the use of products or
services that were conducted or performed by any
company whose work you were testing?

A No, I did not.

Q And to your knowledge has anyone on your
staff done so?

A No.

Q Have you expressly directed them not to
do so?

A That's correct.

Q And on how many occasions?

MR. DICKERSON: Objection. We're back
to telling him to do a good job.

MR. BECK: We are getting back into
that. We'd established with the previous witness
generally how Energy Sense gets their business.
We've established, I think, that they're not
receiving direct orders or direction from anybody
else outside of Energy Sense.

So, if it goes -- if it's largely the
same testimony as the previous witness, which I
think in terms of how they operate on a day-to-day
basis, it was fairly uncontroverted. That I don't
think it's -- I think it's --

MR. FRANKEL: Well, I'm trying to deal
with the plain language of the statute that's at issue here. And I thought that the question was relevant. But let me move on.

BY MR. FRANKEL:

Q Mr. Padron, are you employed by any other company other than Energy Sense?

A No.

Q And throughout the entire time period that you've been Division Manager have you been employed by any other company?

A I have not.

Q Okay. And with respect to the HERS raters who are currently employed, or were employed in the past, with respect to doing Title 24 testing work for Energy Sense, were they exclusively employees of Energy Sense, or were they employed by anybody else?

A They're employees of Energy Sense.

Q And with respect to the testing work that you've performed under Title 24, and that the HERS raters who are working under your direction and supervision performed, did they have any ownership interest in any installing company for whom you did Title 24 testing?

A They do not.
Q  Did they have any debt agreements with
any of those parties?

A  They do not.

Q  Now, Mr. Padron, are you aware that
there are other companies within the Masco
enterprise that operate under the name of Energy
Sense?

A  I do now.

Q  Did you know that before?

A  No.

Q  Okay. I want to direct your attention
to the same exhibit that Mr. Short looked at,
which was this webpage, which is exhibit 30.

And --

MR. DICKERSON: Objection, we've already
established what was going on with exhibit 30.

MR. BECK: It's a bit duplicative.

Again, I think we can --

MR. FRANKEL: Well, it may be -- I mean
if people are prepared to stipulate I don't have
any problem with this. But Mr. Short left in
January of 08. I was just trying to show that
this was not a website that was used from January
08 to the present when Mr. Padron was General
Manager. That really is the point here.
MR. DICKERSON: Yeah, but the date on
the website establishes when it was pulled off of
the website. We now know that David Bell, who
they've acknowledged is their boss, works for
Energy Sense in Houston, Texas. That's their base
of operations.

MR. FRANKEL: We do that --

MR. BECK: We know that there's a -- but
getting back to this one particular issue, maybe
perhaps you could ask Mr. Padron if he listened to
Mr. Short's testimony and if the policies,
procedures and practices that Mr. Short testified
to in regards to the employees of Energy Sense are
the same that have ensued since Mr. Short's
departure and Mr. Padron's promotion.

If you're going to ask -- what I'm
saying is if you're going to ask Mr. Short
basically the same questions -- or, I'm sorry, Mr.
Padron the same questions you asked Mr. Short,
perhaps that's a short way of doing it. Because I
don't think that that evidence was in controversy.

MR. FRANKEL: Well, let me just ask one
question, then I will try to move on.

BY MR. FRANKEL:

Q Mr. Padron, --
PRESIDING MEMBER ROSENFELD: Can we get you to put the mike between you and Mr. Padron, so you --

MR. FRANKEL: Yes.

PRESIDING MEMBER ROSENFELD: -- so you look at it.

MR. FRANKEL: Okay.

PRESIDING MEMBER ROSENFELD: Thank you.

BY MR. FRANKEL:

Q Mr. Padron, did Energy Sense ever operate a website during the time that you have been Division Manager?

A No.

Q Did Energy Sense, Inc., the company of which you're Division Manager, have any offices or operations in Texas?

A No.

Q Are its operations exclusively limited to California?

MR. DICKERSON: I hate to keep objecting, but this is just the same stuff. It's the same stuff.

MR. BECK: It is a bit, because you -- I mean, you could ask Mr. Padron if, to his knowledge, as of today, that the policies and
procedures of Energy Sense are as Mr. Short
tested, and as far as his knowledge of any
websites by Energy Sense, that he also agrees with
Mr. Short's testimony. Rather than asking him the
exact same questions.

MR. FRANKEL: That's fine, I'm prepared
to do it in that form.

BY MR. FRANKEL:

Q Did you listen to Mr. Short's testimony
with respect to the website and exhibit 30?
A I did.

Q And did you concur with his testimony?
A Yes.

Q Did you also listen and understand Mr.
Short's testimony with respect to how three-party
contracting between Energy Sense, the installing
subsidiaries, and builders operate?
A I did.

Q And was that accurate and correct as far
as you know during the time that you've been
Division Manager?
A It is.

Q And with respect also to the contracting
process for field verification and testing
services that Mr. Short went through on
respondent's exhibit B, was that true and accurate
as far as you're concerned in terms of how the
contracting process for Energy Sense operates
while you've been Division Manager from March of
'08 to the present?
A It is.
Q Okay. Now, with respect to work that
Energy Sense obtains, does Energy Sense, itself,
market its own products and services?
A Yes, we do.
Q And are --
MR. DICKERSON: Objection. I think we
can do the same thing. This is the same line of
questioning that he had with Mr. Short.
MR. FRANKEL: No, it's not -- it's not
the same. Let me try to clarify.
BY MR. FRANKEL:
Q And to whom do you market your services
to?
A We -- to anybody that can hire us.
Anybody that we consider a customer we'll try to
get work from.
Q So, to builders or owners --
A Builders or custom homes or --
Q And the other work that Energy Sense
receives comes through via the contracts that Mr. Short described that were entered into either while he was division manager, or at least when you became division manager?

A That's correct.

Q And you're familiar with those contracts?

A Yes, I am.

Q Now, I believe --

ASSOCIATE MEMBER LEVIN: Speak into your mike, please.

MR. FRANKEL: Sorry.

BY MR. FRANKEL:

Q I believe during the proceedings this morning there was reference to a national contract with Pulte Homes. Are you aware of any such contract, Mr. Padron?

A No, there's not.

Q Are you certain that there is no national contract between Energy Sense, or between any Masco company and Pulte Homes?

A The reason I say there is not, because I have lost work. I don't have 100 percent work of Pulte Homes. So, no, there is no -- they don't have to hire Energy Sense.
Q Okay. And you have done work as a Title 24 tester, rater for Pulte Homes?
A I have.
Q Okay. And are you aware that California Living and Energy has also done Title 24 testing for Pulte Homes?
A They do.

MR. BECK: Mr. Padron, do you know David Bell?
THE WITNESS: Yes.
MR. BECK: Where is his office?
THE WITNESS: I don't know.
MR. BECK: You don't know?
THE WITNESS: I don't know where his office is.
MR. BECK: Do you know if it's in the state of California?
THE WITNESS: Well, he works -- okay, I take that --
MR. BECK: Well, not like not the street address, but at least the city. Do you know what city his office is in?
THE WITNESS: I want to say it's in Florida.
MR. BECK: It's in Florida?
THE WITNESS: Yes.

MR. BECK: Okay, thank you.

BY MR. FRANKEL:

Q Mr. Padron, with respect to --

ASSOCIATE MEMBER LEVIN: Mr. Frankel,

please use the microphone.

BY MR. FRANKEL:

Q Mr. Padron, while you've been Division Manager and a certified HERS tester, when Energy Sense or yourself conduct a Title 24 test and there is a failure, there has to be a retest, who is it that has to pay for the retest of the work?

A The builder.

Q And has that always been the case while you've been a HERS tester?

A Yes.

ASSOCIATE MEMBER LEVIN: Mr. Frankel, do you mind if I interrupt with --

MR. FRANKEL: No. Please.

ASSOCIATE MEMBER LEVIN: -- a question or two.

Mr. Padron, earlier you stated that you had -- I don't know exactly the language you used, but something to the effect that you had 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?
THE WITNESS: I've been through the CHEERS training, as well.

ASSOCIATE MEMBER LEVIN: When you were hired did you understand that Energy Sense was a wholly owned subsidiary of -- blanking on the name --

MR. FRANKEL: Masco?

ASSOCIATE MEMBER LEVIN: Masco, thank you. I want to say Macro.

THE WITNESS: Yes, I did.

ASSOCIATE MEMBER LEVIN: You did at the time you were hired?

THE WITNESS: Right.

ASSOCIATE MEMBER LEVIN: And did anyone from Masco go over the conflict of interest rules with you at the time?

THE WITNESS: No. We are trained by CHEERS, so we know the -- that's where we get our training from.

ASSOCIATE MEMBER LEVIN: So no one from Energy Sense went over that with you, either?

THE WITNESS: Right.

ASSOCIATE MEMBER LEVIN: Okay. Thank
BY MR. FRANKEL:

Q    And based on the training and understanding that you obtained from CHEERS, did you believe, as Division Manager of Energy Sense that you were in any way violating the conflict of interest rules?

MR. BECK: That's a legal conclusion. And that's something that's beyond his scope.

MR. FRANKEL: I have nothing further, then, at this point.

CROSS-EXAMINATION

BY MR. DICKERSON:

Q    Mr. Padron, you said that you don't really answer to anybody when it comes to the hiring and firing. I assume you must have some supervisor or boss, don't you?

A    Locally, no.

Q    Okay. How about at a higher level in Energy Sense?

A    Well, we have our officers, but --

Q    Okay. I'd like to refer you to the document that I was showing the previous witness. It's number 6, document MAS-005, tab number 6, 005.
I'm in tab 6. Where?

MAS-005. It's several pages in. It's the back page of one of the contracts.

Okay.

Okay, do you recognize the name of the vice president of Energy Sense?

No.

You don't recognize his name? Okay.

I'd like to direct your attention to what's been marked as MAS-025.

Where's it at?

Just towards the back, tab 6. Do you have that there?

Um-hum.

These are the officers and directors of Energy Sense. Do you see that?

Yes.

Would you expect that the vice president of Energy Sense would have authority over your employment relationship? That would be your supervisor, wouldn't it?

I don't know him, so I wouldn't consider him my supervisor.

Okay, but he's higher up on the corporate ladder than you are, correct?
A  He is.

Q  Within Energy Sense. And his name's Lawrence F. Leaman? Do you see that? Do you see the name Lawrence F. Leaman --

A  Yes, I see that.

Q  -- as a vice president?

A  Right.

Q  Okay. Someone who is higher up the corporate chain of Energy Sense than you are, correct?

A  That's correct.

Q  Okay, if you go back to MAS-005.

A  Okay.

Q  Do you notice that Lawrence Leaman is the vice president of Masco Contractor Services of California?

A  That's what it says here.

MR. DICKERSON:  Okay, that's all I have.

MR. BECK:  Mr. Pennington, do you have questions?

MR. PENNINGTON:  Yeah, I had a couple of questions.

EXAMINATION

BY MR. PENNINGTON:

Q  Mr. Short said that all of the -- let me
ask it this way. Do you agree with Mr. Short's conclusion that all of the work that Energy Sense does is processed through a contract with the installing contractor? So basically the transaction with the builder is always done through the contract with the installing contractor?

A That's not always going to be the case. We can go directly and contract with the builder or the homeowner, whoever is our customer.

Q Could you estimate, in a rough sense, what portion of the work --

A Well, okay. The majority of our work is that way.

Q So you had said in your testimony that --

PRESIDING MEMBER ROSENFIELD: I'm sorry, the majority of the work was which way?

THE WITNESS: Through the contract arrangements that we have, that we discussed earlier. The third-party contract with the installing companies.

PRESIDING MEMBER ROSENFIELD: So that with the installer?

//
BY MR. PENNINGTON:

Q So the installer contractor; it's according to this sheet --

MR. BECK: That's respondent's A --

THE WITNESS: Well, I don't want to say that because there's a lot of our jobs that we have a -- they're not the installing contractor. They're just handling the contract.

So it's up to the builder whether -- I can't tell you that all the contracts with Pulte -- and we have a contract to do HERS testing with, that whoever signed the contract is installing the installation. That's not always the case.

BY MR. PENNINGTON:

Q So whom else might it be?

A They could be whoever that builder decides to hire. But the contract is ran through what we discussed.

Q So you don't contract directly with the builder? Or rarely, I guess?

A Okay.

Q Is that correct?

A Yes.

Q All right, a different question. Are 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.
Q. And this particular job site that was referred --
A. I couldn't tell you right now.
Q. Okay, thanks.

MR. BECK: Further questions?

MR. BARTRIDGE: Mr. Padron, did you have a standard list of contractors that you typically team with when you --

THE WITNESS: No, they're all my customers, I hope.

MR. BECK: Any questions, Mr. Frankel, Mr. Dickerson?

MR. DICKERSON: None.

MR. FRANKEL: I have some written testimony that we'd like to submit that I think will clarify some of the technical issues with respect to some of the questions that have been raised earlier, that are in affidavit form, from representatives of the installing subsidiaries, or Masco-related companies, that I'd like to submit for the record.

MR. DICKERSON: I don't know if I recall saying that evidence would be taken by affidavit. I have serious concerns regarding any information that is being provided by way of affidavit from
someone who is not subjected to cross-examination.

MR. FRANKEL: Well, I'm just going based on my understanding of the Commission rules, and to expedite the proceedings.

My understanding, under the rules, is that the Commission takes testimony in written form as well as live testimony. And on that basis I had declarations prepared to deal with various, I think, uncontroversial and foundational matters that may not be in the record.

MR. BECK: The Commission can take testimony that is -- can take it, as it says in 1212(b) of Title 20 of California Code of Regulations, oral or written testimony offered by parties shall be under oath. And then we can, indeed, accept that.

But I would like Mr. Dickerson to -- how much do you have?

MR. FRANKEL: I have several affidavits. I think there are probably eight or nine affidavits.

ASSOCIATE MEMBER LEVIN: May I make a suggestion?

MR. FRANKEL: Yes.

ASSOCIATE MEMBER LEVIN: We were going
to propose a timeline for closing briefs. And I think in fairness to the complainant, since they won't have seen this, that we'll need to figure out some sort of revised process so that you are entitled to submit that under our rules. But that the complainant has an opportunity to respond, if they choose.

MR. DICKERSON: And I would like the opportunity to submit my own affidavits if we can establish that with the timeline, as well.

MR. BECK: Correct. Well, do you anticipate having -- are you talking about affidavits that are in response to these?

MR. DICKERSON: Well, so long as I can provide -- well, without having seen them I don't know. I would like to provide affidavits obviously in rebuttal, but if affidavits are going to be presented I have some people that I could have some affidavits for you within the next four or five days. And also get them to him and submit them in here.

Hopefully at that point everybody has had an opportunity to present the type of information and the type of evidence that they want.
I probably have two or three that I would submit. That would be all.

MR. BECK: Okay. Well, -- raise the issue whether we need to come back for a subsequent hearing to resolve any problems with these affidavits.

I don't know if -- how many -- how voluminous are the affidavits?

MR. FRANKEL: They're not voluminous. They deal with, I think, issues that go squarely to what's presented by the statute here.

We have declarations from the people who are responsible for the installing divisions who will attest to certain facts to show that they are complying with, that there is no violation of the conflict of interest rules and substance.

We have declarations from the current HERS raters who are employed by Energy Sense stating that they don't have an ownership interest, debt agreement with, or employee/employer relationship with anyone other than Energy Sense, itself.

And we have declarations on some of the corporate structure and formality issues in terms of when Energy Sense was incorporated, and how it
doesn't have any connection to Energy Sense in Texas, for example. Where that question was raised on that exhibit.

So there are some fundamental issues that these deal with that go to those questions.

ASSOCIATE MEMBER LEVIN: If I may, I'd just ask why weren't these submitted previously then?

MR. FRANKEL: I did --

ASSOCIATE MEMBER LEVIN: Because they go to fundamental issues.

MR. FRANKEL: I didn't understand that I was supposed to submit them in advance of the hearing. No one ever indicated that that was the case. I thought we were going to be at this hearing, from what I understood, and present our evidence, whether it was in oral form or in written form.

MR. BECK: It's true that we did not set, and in hindsight, we should have set a deadline for submission of written documents to the docket in advance of the hearing.

But it would have been nice to at least have those reviewed by Mr. Dickerson in advance of the hearing so he could prepare whatever rebuttal
to them that he might want to.

That being the case, what we could do is set a -- first, let me ask you gentlemen, would you be satisfied with in terms of an argument, closing argument, putting that into brief form, rather than having to reconvene and give an oral -- because I assume both of you will be wanting to submit post-hearing briefs, citing to excerpts from the record that support your positions, the testimony, et cetera.

I'm not sure what the timeline is for getting the transcript from the hearings. A matter of a few days, right?

REPORTER: Ten to a couple weeks.

MR. BECK: Okay. And you might want to do that, as well. And what we might want to do is have a deadline of perhaps ten days for the submission of any additional affidavits or documents. Does that sound --

MR. DICKERSON: That sounds very fair. I would appreciate that opportunity. Thank you.

MR. BECK: And then another ten days after that for the submission of closing briefs? And another 21 days, Commissioners, talking about another 21 days after that for a decision.
Under the regulations, specifically under the complaint, request for investigation process, the time for the Committee to issue the decision is 21 days following the close of hearings pursuant to Title 34. And what we could do is we could designate the close of the hearing to be the date that the briefs, the final briefs, are supposed to be submitted. We'd designate that as the close of the hearing.

And then we would issue the decision within 21 days. The Presiding Member also has the ability to lengthen or shorten any timeframes in the regulations. So, if the Committee wants more time beyond the 21 days to draft and issue the decision, we could consider that and you can do that here.

MR. DICKERSON: I assume that, just for clarification, we say ten days and ten days, are we talking calendar or business days?

MR. BECK: We're talking calendar days.

MR. DICKERSON: Calendar days, okay.

ASSOCIATE MEMBER LEVIN: I think we would also ask both of the parties, upon review of any additional evidence submitted, if you will waive the final hearing, or if you agree that the
final submission of documents constitutes the final hearing?

MR. DICKERSON: Well, at this stage I have no objection to using the final closing briefs as the essentially in lieu of reconvening and doing a closing argument. I don't feel a need to come back and --

ASSOCIATE MEMBER LEVIN: I would, for legal reasons potentially later, feel more comfortable if in your final closing briefs you actually state that. So then it isn't a question later --

MR. DICKERSON: That we're waiving --

ASSOCIATE MEMBER LEVIN: -- that we somehow violated your rights --

MR. DICKERSON: Okay.

ASSOCIATE MEMBER LEVIN: -- to a final hearing.

MR. BECK: And what we should do, actually, is have the Presiding Member, as it is the authority of the Presiding Member to shorten or lengthen the timeframes, that if the decision comes from the Presiding Member that those are going to be the timeframes for the submission of documents for the briefs, and for the decision.
Then that will be conclusive.

PRESIDING MEMBER ROSEN Feld: They seem reasonable to me.

MR. FRANKEL: Can we just set out what those dates are, so that we --

MR. BECK: Right, --

MR. FRANKEL: -- so it's clear.

MR. BECK: -- I'm consulting my calendar here, as we speak.

ASSOCIATE MEMBER LEVIN: While he does that, can I also just encourage the attorneys, as you did during the break, to talk to each other as much as possible. If there are affidavits that you could stipulate to the truth of, or some aspect of, the more that you two can talk to each other, I think the likelier it is that we will be able to reach the right decision in the timeframe that we're all hoping.

(Pause.)

MR. BECK: By my calculations March 27th, Friday, March 27th, is ten days from today. We could make that a date for submission of any additional evidence, affidavits.

Ten days from that would be Monday, April 6th. And that would be the day for
submission of parties' closing briefs.

And 21 days from that would be Monday, April 27th, and we could establish that as the date for the Committee's decision in this matter.

Is that agreeable with you gentlemen?

MR. DICKERSON: That's fine.

MR. FRANKEL: Fine with us.

MR. BECK: Okay. Commissioners, that's what --

PRESIDING MEMBER ROSENFELD: Wrote it down.

MR. BECK: Okay. So, again, March 27th for additional documents; April 6th for the parties' briefs; and April 27th for the Committee's decision.

And that's basically are waiving oral closing arguments in lieu of the written briefs.

(Pause.)

ASSOCIATE MEMBER LEVIN: So, gentlemen, since you are all men around the table, we did also just want to point out again that we understand there are other issues besides the conflict of interest issue, including our own internal process.

And we will pursue those separately from
this proceeding. This proceeding is limited to
the conflict of interest issue, itself. But we
take those other issues seriously and we will
pursue them separately.

MR. BECK: And one other note. In your
briefs, gentlemen, please also address what
possible remedies could be made. This is assuming
if there were a violation to be found. What the
potential remedies might be.

Mr. Frankel might not feel entirely
comfortable doing that, thinking that you would be
conceding something. But Mr. Dickerson has, in
his brief, hearing brief, had a paragraph
regarding what the remedies should be.

And that should probably -- if you want
to weigh in on that, then that would probably be
the time. Now that may be is -- if you're a bit
conflicted over that, considering that obviously
your position is there is no conflict of interest.

But that is one of the things that we
did not discuss at this hearing, what the possible
remedy would be for any potential conflict of
interest.

But, Mr. Dickerson, certainly you can
elaborate on that on what you think the remedy
should be. Because we want to get anything from the parties on that should a violation be found.

ASSOCIATE MEMBER LEVIN: Mr. Frankel, similarly from your side, without admitting to any conflict of interest, if there are additional procedures, training steps that could be taken to insure there's no conflict of interest, that would also be welcome from you.

MR. FRANKEL: Thank you.

MR. BECK: And that would also be part of what I would think the remedies would be, could be that, as well.

If we have nothing further, then we will adjourn. And we will hear back from you gentlemen in the required time limits.

What I will do is I will -- the documents that were submitted, what I will do, since there is no objection to them, is I will submit them to the docket as well as our -- are we off the record? Oh, we are on the record, so good.

I will submit those to the docket and they'll be docketed. Also, respondent's A and B are also all received into evidence.

You don't have any -- I take it from
your earlier comment, Mr. Dickerson, you had no
objection to them being received.

MR. DICKERSON: No.

MR. BECK: They will also be docketed.

And we will try to docket them in a way that makes
is clear that when you refer to them you can refer
to them as 1, 2, et cetera, and also A and B for
respondents.

I think with that we're off the record.

(Whereupon, at 1:03 p.m., the hearing
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.

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