

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

<b>DOCKET</b>	
08-CRI-01	
DATE	MAR 17 2009
RECD.	MAR 24 2009

CALIFORNIA ENERGY COMMISSION  
1516 NINTH STREET  
HEARING ROOM A  
SACRAMENTO, CALIFORNIA

TUESDAY, MARCH 17, 2009

9:05 A.M.

**ORIGINAL**

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

COMMISSIONERS PRESENT

Arthur H. Rosenfeld, Commissioner  
Presiding Member, Efficiency Committee

Julia A. Levin, Commissioner  
Associate Member, Efficiency Committee

ADVISORS and STAFF PRESENT

David Hungerford, Advisor

James Bartridge, Advisor

Dennis Beck., Jr., Senior Staff Counsel

Bill Pennington

Eurlyne Geizler

ALSO PRESENT

Complainant

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

Kirk Dall  
AllStar Home Inspection Services

Bill Lilly, President  
California Living and Energy

Respondent

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

David Short

Jaime Padron, Energy Sense

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

9:05 a.m.

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.

1           MR. PENNINGTON: I'm Bill Pennington.  
2 I'm the Manager of the High Performance Buildings  
3 and Standards Development Office.

4           And Eurllyne Geizler will be at my right,  
5 when she returns. She is the Supervisor in the  
6 office in charge of building standards, compliance  
7 and enforcement.

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

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

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

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

18          PRESIDING MEMBER ROSENFELD: Good  
19 morning.

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

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

25          PRESIDING MEMBER ROSENFELD: What was

1       your last name, again? Crawford?

2               MR. CRAWFORD: Crawford, yes.

3               MR. PADRON: Jaime Padron with Energy  
4       Sense.

5               PRESIDING MEMBER ROSENFELD: Say your  
6       name again, please.

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

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

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

12              PRESIDING MEMBER ROSENFELD: P-a-d?

13              MR. PADRON: Um-hum.

14              PRESIDING MEMBER ROSENFELD: All right.  
15       (Electronic sound interruption.)

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

17       (Laughter.)

18              ASSOCIATE MEMBER LEVIN: Everybody awake  
19       now?

20       (Parties speaking simultaneously.)

21              PRESIDING MEMBER ROSENFELD: Let's try  
22       it.

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

25              PRESIDING MEMBER ROSENFELD: Testing,



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

3 MR. BECK: There it goes.

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

6 MR. SPEAKER: Yes.

7 PRESIDING MEMBER ROSENFELD: Good. All  
8 right.

9 MR. SPEAKER: Sorry about that,  
10 everybody.

11 PRESIDING MEMBER ROSENFELD: Eurllyne,  
12 you weren't here to introduce yourself.

13 MS. GEIZLER: Eurllyne Geizler, Building  
14 Standards Implementation Office.

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

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

24 (Laughter.)

25 PRESIDING MEMBER ROSENFELD: All right.

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

3 Dennis, are you ready to run this show?

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

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

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

21 The rules of evidence that we'll be  
22 following are contained in section 1212, section  
23 1212 of Title 20 of the California Code of  
24 Regulations. And I will go ahead and just read  
25 those into the record at this point.

1           The following rules of evidence shall  
2       apply to an adjudicatory proceeding of the  
3       Commission, and in such other proceedings as the  
4       Commission may determine by order.

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

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

16          c) subject to the exercise of the lawful  
17      discretion of the presiding committee member, as  
18      set forth in section 1203(c), each party shall  
19      have the right to call and examine witnesses, to  
20      introduce exhibits, to cross-examine opposing  
21      witnesses on any matters relevant to the issues in  
22      the proceeding, and rebut evidence against any  
23      such party.

24               Questions of relevance shall be decided  
25      by the presiding committee member. Commissioner

1       Rosenfeld, as the Presiding Member, has delegated  
2       to me the authority to, as a threshold, rule on  
3       any objections that counsel may have during the  
4       proceeding, subject, of course, to final decision,  
5       if need be, by the Presiding Member.

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

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

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

23             But I would ask counsel to keep these in  
24      mind, and that to keep the objections generally to  
25      a minimum. Again, the technical rules of

1 evidence, technical rules of hearsay are not  
2 applicable.

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

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

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

23 At the front of the binder there is a  
24 table of contents which lists what all 26 tabbed  
25 entries are in the binder.

1           As I said, my role in this hearing will  
2       be sort of as a de facto hearing officer.

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

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

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

20          I would note that the prehearing briefs  
21      submitted by both parties in the last few days  
22      have primarily focused on the legal issue of  
23      whether or not the structure of the way Energy  
24      Sense and Masco do business is or is not a  
25      violation of the conflict of interest rules.

1           Anyway, with that, we can have opening  
2       statements or comments by the parties. But,  
3       please keep in mind that we have read your  
4       prehearing briefs. So if you have anything to  
5       supplement, let us know.

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

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

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

25           MR. BECK: Are those documents already

1 submitted to the docket, or are they in addition  
2 to?

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

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

12 MR. BECK: Okay.

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

15 MR. BECK: Yes.

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

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

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

25 MR. BECK: Just speak -- I'm sorry.



1           ASSOCIATE MEMBER LEVIN: I would just  
2     like to underscore, though, please, not to repeat  
3     things that are in your opening briefs. Because  
4     we really are trying to keep this as efficient as  
5     possible for everyone's sake.

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

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

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

17          MR. FRANKEL: Oh, I'm sorry.

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

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

22          MR. BECK: Just make sure, for  
23     everyone's sake, that everybody can hear, to put  
24     your mouth as close as you feel comfortable doing,  
25     to the microphone.

1           MR. FRANKEL: Okay. I believe that this  
2           is a very narrow issue. And, in addition, with  
3           respect to where the parties are in terms of what  
4           is in dispute, I also agree it is very narrow.

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

12          And I also believe that whether we're  
13          looking at the raters employed by Energy Sense, or  
14          Energy Sense, itself, under the strict language of  
15          1673 and the definitions in 1671, that neither  
16          Energy Sense's raters nor Energy Sense, itself,  
17          has a financial interest in the other Masco  
18          installing subsidiaries whose work is being  
19          tested.

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

25          There's no evidence in the record, based

1 on the discovery that's taken place in this  
2 proceeding, that those facts are incorrect.

3 And --

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

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

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

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

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

24 In addition, with respect to issues that  
25 I've seen raised in the briefs and in other

1 matters, that this dates back to 2002, this  
2 dispute, it's --

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

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

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

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

21 MR. BECK: I would agree. And, as I  
22 said at the outset, that the relevant issue is  
23 what is Masco and Energy Sense doing. And is that  
24 that their corporate structure and the way that  
25 they operate on the ground, so to speak, is that

1 or is that not a violation of the conflict of  
2 interest provisions.

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

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

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

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

22 MR. BECK: Well, it may be, and we are.  
23 But the scope of this proceeding is the former and  
24 not the latter. What the Commission did or didn't  
25 do to try to resolve this issue up until the

1 point, is not of relevance.

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

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

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

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

25 MR. DICKERSON: How about information

1       that the Commission essentially made decisions on  
2       this matter, at least tentatively, twice in the  
3       last five years? Is that relevant?

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

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

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

23              But, the individual opinions of  
24       individual staff members of the Commission are not  
25       particularly relevant because they may not have

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

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

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

11              MR. DICKERSON: Okay, I'm sorry.

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

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

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

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

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



1           MR. FRANKEL: I'm sorry. I'm prepared  
2 to stipulate that raters employed by Energy Sense  
3 do Title 24 testing and verification of  
4 installations which, in some instances, have been  
5 installed by other Masco subsidiaries.

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

12           And --

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

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

24           Those bid prices are prepared by the  
25 installing subsidiaries, not by Energy Sense. And

1 the builders have the right to select which  
2 components of those bids they're going to accept.

3 They can accept installing services,  
4 reject testing services. They can accept testing  
5 services and reject installing services.

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

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

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

23 MR. BECK: We would only be prepared to  
24 stipulate to what Mr. Frankel said, or a  
25 stipulation that you two can agree on.

1           MR. DICKERSON: Is Masco/Energy Sense  
2 willing to stipulate that they refer business back  
3 and forth to one another?

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

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

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

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

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

18           MR. FRANKEL: I'm sorry.

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

22           MR. FRANKEL: Okay.

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

25           MR. FRANKEL: Well, the bid --

1           ASSOCIATE MEMBER LEVIN:   Joint with  
2       whom, precisely.

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

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

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

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

24          Energy Sense does no promotion or  
25      marketing of any other services, other than its

1 own testing services.

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

5 MR. FRANKEL: They are subsidiaries of  
6 Masco.

7 ASSOCIATE MEMBER LEVIN: Okay, thank  
8 you.

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

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

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

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

22 MR. FRANKEL: Yes.

23 MR. BECK: Okay.

24 MR. DICKERSON: We need somebody to give  
25 an oath or affirmation to Mr. Dall.

1 Whereupon,

2 KIRK DALL

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

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

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

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

15 MR. BECK: I will.

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

18 DIRECT EXAMINATION

19 BY MR. DICKERSON:

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

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

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

1 favor. Move that microphone, this one, up again.

2 Just so --

3 THE WITNESS: How's this.

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

6 THE WITNESS: Okay.

7 BY MR. DICKERSON:

8 Q Are you currently rated as HERS rater?

9 A Yes, I am.

10 Q Are there more than one level of HERS  
11 raters?

12 A Yes, there are.

13 Q What's the distinction between the  
14 various rater certifications?

15 A Well, it begins with training. The core  
16 program allows you to just do duct leakage  
17 testing. Further training allows you to do other  
18 things like quality installation services.

19 Q Which one of the ratings do you hold?

20 A I believe I have all the ratings, all  
21 the levels.

22 Q Okay. Can you give us and the  
23 Commission some, you know, just a sample of the  
24 energy saving measures that you test in  
25 conjunction with doing HERS ratings?

1           A     For example, duct leakage testing?

2           Q     Sure. Anything that would require HERS  
3 testing.

4           A     Well, the one that I do mostly is duct  
5 leakage testing. I also to a lot of QII. Those  
6 are probably 99 percent of the HERS rating that we  
7 do.

8                     PRESIDING MEMBER ROSENFELD: I'm sorry,  
9 what's QII?

10                    THE WITNESS: Quality insulation --

11                    PRESIDING MEMBER ROSENFELD:  
12 Installation.

13                    THE WITNESS: Installation.

14                    MR. BECK: Was that quality insulation  
15 installation, is that correct?

16                    THE WITNESS: Yes.

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

19                    THE WITNESS: QII is easier to say.

20 BY MR. DICKERSON:

21           Q     Is the installation of windows ever  
22 subject to the HERS 24 testing?

23           A     No. Not at this time.

24           Q     Not at this time. Okay. Do you have  
25 any experience with bidding a project for Pulte



1 Homes a couple years ago?

2 A Yes, I do.

3 Q When was that?

4 A In 2006.

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

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

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

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

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

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

1 compensation.

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

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

8 Q Did you ever sign the contract?

9 A No, I did not.

10 Q Why did you not sign the contract?

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

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

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

22 Q Did you subsequently discover who it  
23 was?

24 A Yes, I did.

25 Q Who was the HERS rater that they were

1 using?

2 A It was Energy Sense.

3 Q Energy Sense was doing the work. Okay.

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

7 A Yes, I do.

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

10 A In some cases it does.

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

14 A Would you say that again?

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

17 A Absolutely.

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

20 A The builder does.

21 Q The contractor?

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

24 Q Okay. In the event that the HERS rating  
25 fails and it has to be reinspected, who has to pay

1 for the reinspection?

2 A Typically it's the contractor.

3 Q Who performed the inadequate  
4 installation?

5 A Correct.

6 Q Okay.

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

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

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

12 MR. FRANKEL: I'm sorry.

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

15 MR. FRANKEL: I will do my best.

16 MR. BECK: So, --

17 PRESIDING MEMBER ROSENFELD: The reason  
18 I have to keep nagging at you.

19 MR. FRANKEL: I will try.

20 MR. BECK: Sorry.

21 MR. FRANKEL: Sorry.

22 CROSS-EXAMINATION

23 BY MR. FRANKEL:

24 Q Mr. Dall, how long have you been a HERS  
25 rater?

1           A     Since early 2006.

2           Q     And am I correct that only individuals  
3     can be certified as HERS raters?

4           A     They are certified individually,  
5     correct. But many times companies pay for their  
6     training and put them through --

7           Q     That wasn't my question. Can a company,  
8     itself, become a HERS rater, as far as you know?

9           A     No.

10           MR. FRANKEL: I don't have anything  
11     further.

12                     REDIRECT EXAMINATION

13     BY MR. DICKERSON:

14           Q     Are you familiar with circumstances  
15     where companies have paid for their raters to be  
16     certified?

17           A     Oh, absolutely.

18           Q     So, it's the company, itself, that is  
19     really financing and sponsoring the raters to  
20     become raters?

21           A     And paying them --

22           MR. FRANKEL: Objection, calls for  
23     speculation.

24           MR. DICKERSON: Only on the basis of his  
25     knowledge.

1 MR. BECK: Go ahead and answer.

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

6 MR. DICKERSON: Okay, that's all I have.  
7 Thank you, Mr. Dall.

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

10 Whereupon,

11 BILL LILLY

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

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

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

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

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

24 PRESIDING MEMBER ROSENFELD: Yeah.

25 THE WITNESS: My name is Bill Lilly; I'm

1 the President of California Living and Energy.

2 And my name spelling is B-i-l-l L-i-l-l-y.

3 DIRECT EXAMINATION

4 BY MR. DICKERSON:

5 Q Mr. Lilly, what is your occupation?

6 A President of an energy inspection firm  
7 and engineering firm, California Living and  
8 Energy.

9 Q Okay. How long have you been employed  
10 in that business?

11 A Energy calculations, over 20 years.

12 Q Okay. What type of work do you do?

13 A We do engineering, mechanical layouts.  
14 We do HERS testing and we do solar testing. We do  
15 energy calculations here and other states.

16 Q Okay. How long have you done Title 24  
17 HERS testing?

18 A Over 20 years.

19 Q Are you the person who initiated the  
20 present complaint?

21 A Yes.

22 Q Why did you initiate this complaint?

23 A I saw on a case -- the reason why is  
24 that I saw the Energy Commission is a big part of  
25 my business, do a tremendous amount of work over

1 the years to make this, the integrity of the  
2 system.

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

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

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

14 A Yes.

15 Q Okay. Tell us about the initial  
16 conversation that you had with Mr. Pennington.

17 A In 2002 I called Bill and I asked him,  
18 hey, we got a situation here, I want to know what  
19 you think what the situation is. This is what I  
20 see out there in the field is happening.

21 And Bill said --

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

24 MR. BECK: Well, if it's being offered  
25 to as the effect on Mr. Lilly as what he was told



1 and what he did as a result of getting this  
2 information.

3 You can go ahead and answer.

4 MR. DICKERSON: Thank you.

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

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

13 BY MR. DICKERSON:

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

16 A Yes.

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

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

22 MR. DICKERSON: My stipulated, yeah.

23 MR. BECK: -- group of documents --

24 MR. DICKERSON: If I could be --

25 MR. BECK: -- not that prepared by the

1 Commission?

2 MR. DICKERSON: If I'm going to be going  
3 to the docket booklet, I'll notify you. So unless  
4 I tell you I'm going to the docket I'll be going  
5 to my own exhibits.

6 MR. BECK: Okay.

7 MR. DICKERSON: Okay.

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

11 MR. DICKERSON: This is not in the  
12 docket. Well, actually this may be in the docket  
13 because this is a copy of an email that was  
14 submitted as an exhibit with Mr. Lilly's original  
15 complaint. But it's just subsumed within there.

16 I have simply taken the liberty of  
17 moving it out individually so it's easy to get to  
18 and people can look at it.

19 PRESIDING MEMBER ROSENFELD: Thanks.

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

23 MR. DICKERSON: Okay, sure.

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

1 binders.

2 MR. DICKERSON: Okay. The date.

3 BY MR. DICKERSON:

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

6 A The date, there's two of them. June 26,  
7 2002 and October 6, 2002. And a third one,  
8 October 5, 2002.

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

13 BY MR. DICKERSON:

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

17 A Yes.

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

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

1 interest rules.

2 Q Okay. Did you ever receive any response  
3 from Mr. Pennington?

4 A Yes.

5 Q Okay. Was that in response to your  
6 follow-up email in October?

7 A Yes.

8 Q Okay. Can you tell us what Mr.  
9 Pennington said to you in that follow-up email  
10 dated October 6, 2002?

11 A Bill said: Independent third-party  
12 field verification is required for measures in the  
13 standards that require such verification. The  
14 Masco quality control process does not satisfy  
15 this requirement.

16 Q Did you have any further communication  
17 with anyone from the CEC on this matter?

18 A Not at that time.

19 Q Okay, when did you next have a  
20 discussion with the CEC on this issue?

21 A It happened again in 2005, about three  
22 years later.

23 Q And why did you reopen communications  
24 with them?

25 A I told Bill that, remember what you

1 wrote me about Masco, it's happening again. What  
2 are we going to do about it.

3 Q Okay. Did you receive any response?

4 A Yes.

5 Q What was the response that you received?

6 A I don't remember what the response was  
7 at that time. Generally it follows up most times,  
8 it's either that or the year later when Bill  
9 Pennington referred it to Tav Commins.

10 Q Did you have any communications with  
11 CHEERS during this period of time?

12 A Yes.

13 Q What was your communication with CHEERS?

14 A I emailed Tom Hamilton in 2002 about the  
15 same situation. I asked him just what he thought,  
16 realizing that he didn't hear absolutely  
17 everything. And I talked to Bill Pennington,  
18 people at the CEC. And what he thought.

19 Q Did you ever have any communications  
20 with Tav Commins from the CEC on this matter?

21 A Yes.

22 Q I'd like to refer you to -- let's go  
23 back to CHEERS and your discussions with CHEERS.

24 Were you aware that CHEERS was working  
25 with Masco regarding the Energy Sense matter at

1 the time you were speaking to them in 2006?

2 A Not at that time, no.

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

5 A Bill Pennington --

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

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

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

11 A He was the Executive Director of CHEERS.

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

16 A He never did.

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

19 Have you seen that document before?

20 A Yes.

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

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

25 Q Did it come from Masco or did it come

1 from CHEERS?

2 A CHEERS.

3 Q It came from CHEERS, so these are  
4 documents that were produced to us by CHEERS?

5 A Correct.

6 Q Do you recognize the name that this  
7 letter is addressed to?

8 A Some of them, yes. All of them.

9 Q Who are they?

10 A Brad Townsend, Dale Camany, Dave Bell,  
11 David Short, Rick Davenport.

12 Q Okay, and who is the email from?

13 A Tom Hamilton.

14 Q The names that it's addressed to, you  
15 said you recognize them. Do you know who those  
16 people work for?

17 A Masco.

18 Q So all the people there are Masco  
19 employees?

20 A Correct.

21 Q Okay.

22 MR. DICKERSON: For purposes of a clear  
23 record I'd like to have either Mr. Lilly or myself  
24 read what has been marked as exhibit 3 onto the  
25 record.

1           MR. BECK: I don't think it needs to be  
2 read into the record. We've got it. It's  
3 duplicative of what -- if we're going to receive  
4 these documents into the record, it's duplicative  
5 to have the witness read it into the record.

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

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

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

15          MR. FRANKEL: I have no objection.

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

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

22          PRESIDING MEMBER ROSENFELD: Louder.

23          MR. FRANKEL: I stipulated to their  
24 authenticity. I did not stipulate that they  
25 necessarily should be admitted into evidence. I



1 have no objection to this July 7, 2006 email  
2 that's behind tab 3 being admitted.

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

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

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

16 MR. BECK: Actually, --

17 MR. DICKERSON: Okay.

18 BY MR. DICKERSON:

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

21 A Okay.

22 Q Have you seen that document before?

23 A Yes.

24 Q Okay. Could you look to page 8 of 9,  
25 please. Actually, before you look at page 8 of 9,

1 could you just identify what that document is  
2 titled?

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

5 Q What's the date of that document?

6 A The date is June 20, 2007.

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

10 A Yes.

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

13 PRESIDING MEMBER ROSENFELD: Sorry,  
14 trying to follow along. Is this in --

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

17 MR. DICKERSON: You have a copy of them?

18 MR. BECK: I have a copy.

19 MR. DICKERSON: Okay.

20 BY MR. DICKERSON:

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

23 A Yes.

24 Q What name is there?

25 A Masco Contractor Services Dave Bell,

1 Vice President of Marketing.

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

5 A Yes.

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

9 A Yes.

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

12 A President of Energy Sense.

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

17 A Yes.

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

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

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

1 exterior knowledge.

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

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

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

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

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

14 THE WITNESS: Yes.

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

17 THE WITNESS: President of Energy Sense.

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

24 MR. DICKERSON: But it does list Mr.  
25 Bell as being the Vice President of Marketing --

1                   MR. BECK: It lists Mr. Bell as Vice  
2                   President of Marketing for Masco Contractor  
3                   Services.

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

8                   MR. DICKERSON: That's fair.

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

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

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

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

23                  MR. BECK: -- and it just lists David  
24                  Bell as, in one part of this, under Masco  
25                  Contractor Services it says David Bell, Vice

1 President of Marketing. And has the Masco website  
2 name, and that's it.

3 PRESIDING MEMBER ROSENFELD: The role --

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

6 PRESIDING MEMBER ROSENFELD: Where does  
7 Energy Sense appear?

8 MR. BECK: It doesn't appear here.

9 PRESIDING MEMBER ROSENFELD: It does  
10 not?

11 MR. BECK: Does not.

12 BY MR. DICKERSON:

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

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

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

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

25 MR. DICKERSON: It does and I'm looking

1 for it now.

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

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

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

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

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

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

24 MR. BECK: Attachment B, numbers 1  
25 through 3.

1                   PRESIDING MEMBER ROSENFELD:   Okay, I'm  
2   at attachment 3, now where do I go?

3                   MR. BECK:   Now it's -- turn the page.  
4   And it's that letter.

5                   PRESIDING MEMBER ROSENFELD:   Dear Tav.

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

8                   MR. DICKERSON:   The "Dear Tav" letter.

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

11   BY MR. DICKERSON:

12                  Q    That particular document, have you seen  
13   that before?

14                  A    Yes.

15                  Q    The letterhead is who?

16                  A    Letterhead is Energy Sense.

17                  Q    Who's the signatory to that letter?

18                  A    David Bell, President, Energy Sense.

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

22                  A    Correct.

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

25                  PRESIDING MEMBER ROSENFELD:   I want to



1 make sure I get this straight. So we have  
2 evidence that Mr. Bell was both a VP of Masco and  
3 signed himself as President of Energy Sense?

4 THE WITNESS: Yes.

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

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

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

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

1 was not actually sent by him.

2 MR. FRANKEL: Well, no, I --

3 ASSOCIATE MEMBER LEVIN: There's a whole  
4 'nother possible issue, if I may. But he has  
5 signed this letter. Is there evidence in the  
6 record, other than the web statement, that he also  
7 held the title or purported to hold the title of  
8 VP of Marketing for --

9 MR. DICKERSON: Yeah, VP of Marketing  
10 for Masco --

11 ASSOCIATE MEMBER LEVIN: -- Masco.

12 MR. DICKERSON: -- Contractor Services.  
13 No, we don't have anything with us today beyond  
14 what we have --

15 ASSOCIATE MEMBER LEVIN: So that's based  
16 only on the web statement.

17 MR. DICKERSON: Based on the web -- the  
18 flyer that came off of the web.

19 MR. FRANKEL: Right. And just for the  
20 record, I mean that was not a document that was  
21 prepared by Masco; it was prepared by the workshop  
22 that was putting on this seminar. And we will  
23 present evidence that shows that Mr. Bell only  
24 occupied the position as an officer of Energy  
25 Sense, not of Masco Contractor Services.

1                   ASSOCIATE MEMBER LEVIN:   Okay, thank  
2   you.

3   BY MR. DICKERSON:

4           Q     What exhibit do you have there, Mr. --

5           A     It's an exhibit, I guess, GA00.

6           Q     -- this right here --

7           A     Thirty.

8           MR. DICKERSON:   Exhibit Number 30.

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

12 BY MR. DICKERSON:

13          Q     Have you seen that document before?

14          A     Yes.

15          Q     What is it?

16          A     It is online resources, it's stating  
17 what online resources Masco Contractor Services  
18 have.

19          Q     Okay, is that the Masco website?

20          A     Yes.

21          Q     Do you see any links anywhere on the  
22 Masco website?   I'm sorry, the Energy Sense  
23 website?

24          A     Yes.

25          Q     Okay, what's the very first link that

1       you see on the Energy Sense website?

2           A       Masco. Masco.csc.com.

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

5           A       Masco Contractor Services.

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

9           A       Yes.

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

12          A       Yes, some idea.

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

15          A       Yes.

16          Q       Go to what the Masco -- report.

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

23                 It might be a better idea for, if you're  
24       gong to -- it seems that you're going through your  
25       binder and having Mr. Lilly identify the documents

1 and describe what's in the document. It's really  
2 not necessary.

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

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

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

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

1       your documents, your original documents that are  
2       here today.

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

7               MR. DICKERSON: Can we take this thing  
8       home?

9               MR. BECK: Yes. That's yours to keep.  
10       What Mr. Dickerson's referring to, for the record,  
11       is the docket that was -- or the binder that was  
12       prepared for the parties.

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

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

19              MR. BECK: And --

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

25              MR. BECK: Correct.

1                   MR. DICKERSON: I mean this is taking a  
2 long time.

3                   MR. BECK: Yes.

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

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

9                   MR. DICKERSON: But it's taking --

10                  MR. BECK: -- record.

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

13                  MR. BECK: Yes.

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

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

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

25                  MR. BECK: We're not going to stop for

1 the day. We have witnesses here that are prepared  
2 to testify. And we even believe that perhaps we  
3 can get this done today.

4 But what we could do --

5 MR. DICKERSON: Take a break?

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

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

19 And, again, the technical rules of  
20 evidence do not apply, including authentication,  
21 including the foundation of a document. If  
22 there's a particular document that the parties  
23 feel they need to explain beyond that which is a  
24 common understanding, then you could feel free to  
25 do so.



1           But a number of these documents simply  
2       speak for themselves. And it's a waste of time to  
3       go through them one by one, identify them, and  
4       have the witness or the attorneys tell us what  
5       they are.

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

13       MR. FRANKEL: Certainly.

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

16       MR. FRANKEL: Okay.

17       MR. DICKERSON: Well, I'll continue to  
18      go through this again. I want to make sure that  
19      we at least have a reference on the record to what  
20      it is specifically we want to look at, and have  
21      the Commission look at in a specific exhibit.

22           Like the one from Energy Sense, that  
23      website where they have the link of Masco  
24      Contractor Services. I can't run the risk that  
25      that may be missed.

1                   MR. BECK:  Nothing will be missed.  
2       Every single document that you submit to this  
3       record will be looked at and will be considered.  
4       If there's a concern that the Commission will not  
5       emphasize it as much as you think, or that the  
6       legal significance of it will be missed, then what  
7       I think could be done, and what you gentlemen  
8       probably are already thinking of, is that at the  
9       end of this hearing there will probably be a  
10      timeframe given for both of you to submit your  
11      briefs, your closing or post-hearing briefs,  
12      explaining to us what you believe evidence that  
13      was presented in this hearing proves in terms of  
14      whether or not there was a conflict of interest.

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

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

22                   So, Mr. Dickerson, do you have any  
23      additional witnesses that you would be presenting  
24      that would be supplementing the record that you  
25      got?

1           MR. DICKERSON: I was going to be  
2 bringing Mr. Pennington on because I wanted to  
3 talk to him a little bit about some of the things  
4 that took place --

5           PRESIDING MEMBER ROSENFELD: A little  
6 closer to the mike.

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

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

22          We're a fairly sophisticated group of  
23 individuals, I think moreso than you would  
24 typically find on a jury trial. So, you should  
25 not have a concern that somehow we're just going

1 to gloss over some documents.

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

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

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

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

22 MR. BECK: Well, this is --

23 MR. DICKERSON: It wasn't until November  
24 of last year that they knew that they were going  
25 to be charged with the responsibility of having to

1       bear the burden of proof in this thing.

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

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

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

20              If the concern is somehow that the  
21       Commission doesn't take this seriously, let me  
22       assure you that they do. We would not have two  
23       Commissioners sitting here listening to this and  
24       giving their consideration to this issue unless it  
25       were.

1                   And also, the ruling of the Committee  
2                   will be -- and eventually the Commission, will be  
3                   appealable.

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

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

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

1 to arbitration, where we can be more informal.

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

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

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

22 MR. DICKERSON: I appreciate that, and I  
23 appreciate those assurances. Again, it was just,  
24 this is something that's very important to these  
25 folks. And, you know, we want to try to put on

1 the best case that we possibly can, since we have  
2 been charged with the responsibility of doing so.

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

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

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

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

21 And I think that we all understand that  
22 perhaps things that could have come to resolution  
23 earlier, that we all wish that the matters had  
24 been fully and totally considered and resolved  
25 prior to this day. And we understand.



1           So, I think that any testimony that we  
2   understand in the record, I think, speaks for  
3   itself. Mr. Hagarty and Mr. Lilly have had plenty  
4   of communications with CHEERS, plenty of  
5   communications with the Commission, with Mr.  
6   Pennington, with Mr. Commins and the staff of my  
7   office, and even myself, as is indicated in some  
8   of the documents that the CEC provided.

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

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

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

25           So that, in all candor, created some

1 real concerns as to, you know, insuring that we  
2 were going to be able to come in here and satisfy  
3 our burden to the Committee.

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

8 THE WITNESS: Can I say something?

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

11 BY MR. DICKERSON:

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

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

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

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

1 do here.

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

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

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

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

22 I'll represent to you that the  
23 information concerning the officers from Masco  
24 came off the annual report issued by Masco in  
25 2007. The second document that talks about the

1 officers in Energy Sense was produced by you in  
2 your initial response to documents requested by  
3 the Commission post-complaint.

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

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

11 PRESIDING MEMBER ROSENFELD: Louder.

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

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

19 MR. FRANKEL: Yes.

20 MR. DICKERSON: Okay, very good.

21 PRESIDING MEMBER ROSENFELD: Quick  
22 question. Ten minutes ago we were wondering about  
23 Mr. Bell's -- both as a Masco officer and Energy  
24 Sense. And I -- does your last discussion with  
25 Mr. Frankel bear on that issue?

1           MR. DICKERSON: No. My last discussion  
2       with Mr. Frankel bears on, I'm sorry, shared --  
3       two documents that show the identity of officers  
4       and directors of Energy Sense and Masco. I don't  
5       believe that Mr. Bell shows up there as an officer  
6       of Masco, itself, or director.

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

9           PRESIDING MEMBER ROSENFELD: Right.

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

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

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

19          PRESIDING MEMBER ROSENFELD: Only in a  
20       flyer.

21          MR. DICKERSON: In a flyer. So either  
22       that was a mistake or he possibly represented  
23       himself as such, or somebody just made a mistake.  
24       But, as I said, they'll give that whatever weight  
25       they want to give it.

1                   PRESIDING MEMBER ROSENFELD:   Okay, thank  
2   you.

3                   MR. DICKERSON:   Okay?   Thank you.

4                   (Pause.)

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

9                   MR. FRANKEL:   No objection.

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

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

15                  MR. DICKERSON:   Thank you.

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

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

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

1 MR. DICKERSON: I think so --

2 MR. FRANKEL: I think so.

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

7 MR. FRANKEL: Okay.

8 MR. DICKERSON: Okay.

9 MR. BECK: We'll --

10 MR. DICKERSON: Is that fair?

11 MR. BECK: We'll --

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

15 MR. BECK: Yes.

16 PRESIDING MEMBER ROSENFELD: Is that  
17 okay with you?

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

20 MR. FRANKEL: Thank you.

21 (Brief recess.)

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

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

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

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

13           But other than that, I have nothing to  
14 add.

15           MR. BECK: Mr. Dickerson.

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

18           PRESIDING MEMBER ROSENFELD: You guys --  
19 are your mikes on?

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

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



1 -- tabbed exhibits 1 through 38. We will receive  
2 that in evidence.

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

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

7 BY MR. DICKERSON:

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

12 A Yes.

13 Q What did Mr. Bell tell you?

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

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

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

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

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

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

1       you?

2           A     Yes.

3           Q     Look at the bottom.  Is that an email  
4       that you received from Tav Commins on October 16,  
5       2006?

6           A     Yes.

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

10          A     Correct.

11          Q     Okay, thank you.

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

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

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

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

21                       CROSS-EXAMINATION

22       BY MR. FRANKEL:

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

1 verification and testing?

2 A Yes.

3 Q Okay. And you have --

4 PRESIDING MEMBER ROSENFELD: I'm sorry,  
5 would you just repeat that sentence?

6 MR. FRANKEL: Sure.

7 BY MR. FRANKEL:

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

12 A Yes.

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

16 A Yes.

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

20 A Yes.

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

23 A Yes.

24 Q Am I also correct, Mr. Lilly, that you  
25 have no knowledge or information that any of the

1       raters that are employed by Energy Sense have an  
2       ownership interest in any company that does  
3       installation work that would be subject to Title  
4       24 testing?

5           A     I'm not aware of any ownership.

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

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

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

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

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

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

23          Q     No, I'm asking you -- that's not my  
24      question. While they have been employees of  
25      Energy Sense, Inc., for however long that has

1       been, are you aware that any rater employed by  
2       Energy Sense occupied an employee position with  
3       any other company?

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

8           Q       If you could just answer my question.  
9       Are you aware, as you sit here --

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

12       BY MR. FRANKEL:

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

16           A       Yes, they were employed.

17           Q       By Energy Sense?

18           A       By Coast Insulation, Sacramento  
19       Insulation.

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

25           A       I'm not aware of any other outside of

1 Masco --

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

4 MR. DICKERSON: I have nothing further.

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

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

9 MR. DICKERSON: That's correct.

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

12 MR. DICKERSON: Yes.

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

24 MR. DICKERSON: Yeah, okay. We could do  
25 that. I do have some questions regarding this one

1 email that came from Tom Hamilton to various Masco  
2 representatives, and Mr. Pennington's awareness  
3 thereof.

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

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

7 MR. DICKERSON: No, he was not. But it  
8 references communications with Mr. Pennington.  
9 I'd like to know whether or not he has a  
10 recollection of the communications that are  
11 referenced therein.

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

14 One of the defenses that Masco has  
15 raised here --

16 PRESIDING MEMBER ROSENFELD: Hold on  
17 just a second till we find it.

18 MR. DICKERSON: I'm sorry.

19 (Pause.)

20 PRESIDING MEMBER ROSENFELD: Tab 17,  
21 page 200?

22 MR. DICKERSON: Yes, sir.

23 PRESIDING MEMBER ROSENFELD: Subject,  
24 conflict of interest CEC?

25 MR. DICKERSON: That is correct, yes,

1 sir.

2 PRESIDING MEMBER ROSENFELD: Thank you.

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

6 (Pause.)

7 EXAMINATION

8 BY MR. DICKERSON:

9 Q Had you seen that document before, sir?

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

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

15 MR. PENNINGTON: No.

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

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

21 PRESIDING MEMBER ROSENFELD: I'm going  
22 to nag at you again.

23 MR. FRANKEL: -- following the August  
24 2007 conference with the CEC Staff, at the  
25 conclusion of that conference the Commission Staff



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

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

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

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

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

25             MR. BECK:  That will not be

1       characterized, yes, correct.

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

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

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

14              MR. FRANKEL:  Which letter?

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

19              (Pause.)

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

23              MR. FRANKEL:  Yes.  And the question?

24              ASSOCIATE MEMBER LEVIN:  So MCS legal  
25       people, whose attorneys are those?

1           MR. FRANKEL: Well, I can't speak for  
2           what Mr. Hamilton wrote in his email. I mean  
3           there were representatives from the legal  
4           department and Masco Corporation that were on that  
5           telephone conference, as well as outside counsel  
6           representing both Masco Corporation and Energy  
7           Sense.

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

13          ASSOCIATE MEMBER LEVIN: Okay. So they  
14          shared attorneys?

15          MR. FRANKEL: Yes.

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

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

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

22          MR. FRANKEL: Yes, I do.

23          MR. BECK: That's two, correct?

24          MR. FRANKEL: That's correct.

25          MR. BECK: Go ahead, call your first

1 witness.

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

4 Whereupon,

5 DAVID SHORT

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

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

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

13 DIRECT EXAMINATION

14 BY MR. FRANKEL:

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

17 A I'm a house-husband. Unemployed.

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

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

22 Q And prior to that what position did you  
23 hold?

24 A Prior to that I worked at Salas Brothers  
25 Funeral Home. Prior to that I worked at Energy

1 Sense.

2 Q Okay, and with respect to your work at  
3 Energy Sense, when did that work commence?

4 A It commenced end of 2005 to my  
5 reflection.

6 Q Are you a certified HERS rater?

7 A I'm not at this time.

8 Q And were you --

9 PRESIDING MEMBER ROSENFELD: I'm sorry,  
10 I didn't hear you.

11 THE WITNESS: I'm not at this time.

12 PRESIDING MEMBER ROSENFELD: You're not.

13 MR. FRANKEL: Okay.

14 PRESIDING MEMBER ROSENFELD: You were?

15 THE WITNESS: I was, correct.

16 PRESIDING MEMBER ROSENFELD: But you had  
17 to renew it annually or something?

18 THE WITNESS: That's correct.

19 PRESIDING MEMBER ROSENFELD: Okay.

20 BY MR. FRANKEL:

21 Q And when did you first become a HERS  
22 rater?

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

25 Q So you were a former employee of one of

1 the complainants here, California Living and  
2 Energy?

3 A That is correct.

4 Q And you obtained your HERS certification  
5 through which provider?

6 A Through CHEERS and CalCERTS.

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

10 A I did.

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

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

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

20 A At my hiring.

21 Q And that was September of 2005?

22 A Correct.

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

1 your employment?

2 A Yes, the high quality insulation  
3 installation took place in October 2005, new --  
4 change.

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

8 A Sacramento Building Products.

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

11 A Yes.

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

15 A Insulation installation.

16 Q Any other businesses?

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

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

25 A They did.

1           Q     And prior to October 1 of 2005 when  
2     there was a change to add high quality  
3     installation of insulation, HQII, to the measures  
4     that would be subject to testing, were HERS raters  
5     at Sacramento Building Products doing Title 24  
6     testing?

7           A     They were.

8           Q     And did any of the testing that  
9     Sacramento Building Products did prior to the  
10    October 1 2005 amendment, involve testing or  
11    inspecting any work done by any other Masco  
12    subsidiary?

13          A     No.

14          Q     And am I correct, Mr. Short, that the  
15    other measures that were subject to testing and  
16    verification under Title 24 prior to October 1,  
17    2005, dealt with building envelope measures, air  
18    conditioning, HVAC and duct work?

19          A     That is correct.

20          Q     And to your knowledge, did any Masco-  
21    related company have anything to do with the  
22    installation of HVAC, duct work or the building  
23    envelope?

24          A     Not to my knowledge.

25          Q     Now, were you involved, Mr. Short, --



1 well, let me strike that.

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

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

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

10 A Yea, I was in charge of insuring that  
11 all HERS testing was being completed per the Title  
12 24 code.

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

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

1 make sure the job was done correctly to the Title  
2 24 code.

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

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

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

22 If people are conflicted, it doesn't  
23 matter if someone was well trained. We have a  
24 stipulation already that Energy Sense performs  
25 testing of installations performed by other Masco-

1 related entities. That's been stipulated to.

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

7 MR. FRANKEL: Well, I actually am going  
8 with this witness to explain how we dealt with  
9 complying with the conflict of interest provisions  
10 based on the change in the standards as of October  
11 1, 2005. And this is the gentleman who was  
12 responsible for that effort.

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

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

1 MR. BECK: Okay.

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

5 MR. FRANKEL: Yes.

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

9 MR. FRANKEL: I understand.

10 ASSOCIATE MEMBER LEVIN: Okay, thank  
11 you.

12 BY MR. FRANKEL:

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

17 A We did.

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

22 A Tom Hamilton.

23 Q Okay. And what do you recall -- first  
24 of all, do you recall when those discussions took  
25 place, roughly?

1           A     Roughly, yes; during the IBC conference,  
2     beginning of 2006, I believe.

3           Q     And Mr. Hamilton, the Executive  
4     Director, was present?

5           A     That's correct.

6           Q     Of CHEERS?

7           A     Of CHEERS.

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

14          A     We did.

15          Q     Okay. And what do you recall about  
16    those discussions?

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

23          Q     And did steps ultimately get taken, Mr.  
24    Short, to have a separate corporation that was  
25    formed and owned by Masco Corporation to do Title

1       24 testing in California?

2           A     Yes, that's correct.

3           Q     And what was the name of that company?

4           A     Energy Sense.

5           Q     And what position did you have with

6       Energy Sense when it was first established?

7           A     Division manager.

8           Q     And as division manager, what were your  
9       responsibilities?

10          A     Oversight of operations, Title 24  
11       testing education, sales training, that  
12       information.

13          Q     And did you have any other employees  
14       other than yourself that worked for Energy Sense  
15       when it became established as a separate company?

16          A     Yes.

17          Q     How many?

18          A     Eight.

19          Q     And were the other eight employees, were  
20       they all certified HERS raters?

21          A     They were all certified HERS raters, and  
22       we hired an administrative staff that was not a  
23       HERS rater.

24          Q     And were they all certified by CHEERS as  
25       HERS raters?

1           A     By CHEERS, correct.

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

5           A     No.

6           Q     Had they been employed previously?

7           A     Yes.

8           Q     Okay. Who had they been employed by?

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

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

14          A     That's correct.

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

18          A     We were --

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

24                MR. FRANKEL: Okay.

25                ASSOCIATE MEMBER LEVIN: -- to --

1 certainly to myself; possibly my fellow  
2 Commissioner, in understanding what the relevance  
3 of this is.

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

5 BY MR. FRANKEL:

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

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

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

17 A January of '08, I believe.

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

20 A That's correct.

21 Q And throughout the time period that you  
22 were employed by Energy Sense, Mr. Short, did you  
23 have any ownership interest in any installation  
24 company whose work you were testing as a certified  
25 HERS rater?



1           A     No, I did not.

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

5           A     No, I did not.

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

9           A     No, I did not.

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

15          A     No, I did not.

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

25          A     I did advise them to we needed to abide

1 by the rules and regulations of the HERS and Title  
2 24, that we could not advocate for any other  
3 services besides our own.

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

11 A Not to my knowledge.

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

15 A Yes, I am.

16 Q Okay. And what is that relationship?

17 A They're a wholly owned subsidiary of  
18 Masco.

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

23 A That's correct.

24 Q And are there other Masco installation  
25 subsidiaries in California other than Sacramento

1 Building Products?

2 A Yes, there are.

3 Q And based on your position as division  
4 manager of Energy Sense, did Energy Sense have any  
5 ownership interest in any of the Masco  
6 installation subsidiaries for which testing work  
7 was done?

8 A No, they did not.

9 Q To your knowledge did Energy Sense have  
10 any debt agreements with any of those other  
11 installation companies?

12 A No, they did not.

13 Q Did they have an employee/employer  
14 relationship with any of those companies?

15 A No, they did not.

16 Q And Energy Sense, itself, did it ever  
17 advocate or recommend that the services of the  
18 installation companies, Masco-related installation  
19 companies --

20 MR. DICKERSON: Objection, this ground  
21 has been gone over. Energy Sense operates through  
22 whoever its employees are. It's a corporation.  
23 We're just going over the same stuff again.

24 I've endeavored to be brief with my  
25 stuff, and we have just -- we're dragging on here.

1           MR. BECK: Well, I think that we --  
2       also, it's speculative whether or not this witness  
3       knows the entirety of whether anybody from Energy  
4       Sense was making recommendations.

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

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

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

22          Q     All right. And are you aware that there  
23      were contracts entered into between Energy Sense  
24      and the Masco installing divisions concerning how  
25      Energy Sense would conduct and deal with the

1 testing of work that was provided through this  
2 contractual arrangement?

3 A I was aware of that, yes.

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

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

10 A That's correct.

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

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

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

24 MR. BECK: Well, I don't think it's --  
25 there's some relevance in terms of how the

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

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

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

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

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

17 MR. FRANKEL: I have not yet, no.

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

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

22 MR. DICKERSON: Thank you.

23 (Pause.)

24 MR. DICKERSON: Fire away.

25 MR. BECK: Do you have a copy for the

1 Commission, please?

2 MR. FRANKEL: Yes, I do.

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

5 (Pause.)

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

9 BY MR. FRANKEL:

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

16 PRESIDING MEMBER ROSENFELD: MAS-001.

17 BY MR. FRANKEL:

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

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

25 And then a third agreement between

1 American National Services, Inc. and its  
2 subsidiaries and Energy Sense, Inc.

3 You see those?

4 A Yes, I do.

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

11 A Yes, to my knowledge.

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

14 A That's correct.

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

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

21 MR. FRANKEL: Thank you.

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

24 BY MR. FRANKEL:

25 Q Now, Mr. Short, with respect to the



1 contracts that were entered into between Energy  
2 Sense, Inc. and the Masco installation  
3 subsidiaries in California, in connection with  
4 Title 24 testing, what relationship, as far as you  
5 understood it, was there between Energy Sense and  
6 the installing subsidiaries under these contracts?

7 A We were a subcontractor.

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

10 A No, we were not.

11 Q Were you independent contractors?

12 A Yes.

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

16 A They were exclusive.

17 Q They were --

18 A We worked through --

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

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

24 BY MR. FRANKEL:

25 Q Well, were you obligated for the --

1           A     No we were not obligated to do the work  
2     if the bid was not deemed acceptable.  So we could  
3     have -- we have leeway -- I could reject a bid, it  
4     was no problem.

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

8           A     No, I was not.

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

11          A     Yes, I was.

12          Q     And did you do so?

13          A     Yes, I did.

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

17          A     I did.

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

24          A     No, they did not.

25          Q     With respect to the receipt of payment

1 for the testing services that were provided  
2 pursuant to the contracts that you've identified,  
3 did Energy Sense receive full payment for the  
4 prices that it charged for those services without  
5 any markup or deductions by the installing  
6 companies?

7 A That is correct.

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

13 A The raters with the builder.

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

16 A To CHEERS.

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

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

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

24 A Only in the sense in the field that we  
25 would have to deal with any contractor, if they

1 deal with the product HVAC or duct testing, and  
2 they failed their product, yes.

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

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

11 A None.

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

15 A That would be the installing company.

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

18 A None.

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

21 A That's correct.

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

25 A That's correct.

1           Q     And what was the builder obligated to do  
2 when he got that bid, if you know?

3           A     They could take and choose what they  
4 would want out of the bid. So it was exclusive  
5 deal, they did not have to take the testing.  
6 Likewise, they did not have to take the  
7 installation service. They could take either one.

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

13          A     We would invoice the installing company.

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

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

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

24          A     No.

25          Q     With respect to the failures, if you're

1 doing a Title 24 test in the field and you believe  
2 that certain testing measures were not going to  
3 pass Title 24 muster --

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

9 BY MR. FRANKEL:

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

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

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

19 A No, sir.

20 Q Let me give you a copy.

21 A Thank you.

22 Q Now, exhibit B, am I correct, Mr. Short,  
23 that this visually accurately illustrates the  
24 contracting process that Energy Sense followed for  
25 Title 24 testing services in connection with its

1 dealings with the Masco installation subsidiaries?

2 A That is correct.

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

7 A It does.

8 Q Behind tab number 6 in the binder?

9 A It does.

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

15 A It is correct, appears to be correct.

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

22 It was exhibit number 30 in Mr.

23 Dickerson's binder. I'll put that before you.

24 Do you have exhibit 30 in front of you,  
25 Mr. Short?

1           A     Yes.

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

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

8           MR. FRANKEL:  Oh, no.  This is one of  
9     the exhibits in Mr. Dickerson's binder, exhibit  
10    30 --

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

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

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

17          PRESIDING MEMBER ROSENFELD:  We don't  
18    have it.

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

21    BY MR. FRANKEL:

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

24          A     I do.

25          Q     Okay.  Did Energy Sense, as division



1 manager of Energy Sense, did you ever have a  
2 website that went by this address or name?

3 A No, we did not.

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

7 A That is correct.

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

11 A No, I do not know.

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

15 A I do see that.

16 Q And what does that say?

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

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

22 A No.

23 Q Did Energy Sense ever operate in any  
24 states, while you were division manager, other  
25 than California and Nevada?

1           A     No.

2                     MR. BECK:  I have some questions.

3                             EXAMINATION

4     BY MR. BECK:

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

8           A     That is correct; they're not.

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

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

13          Q     Okay.

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

17                     THE WITNESS:  No.

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

21                     THE WITNESS:  That would be correct.

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

24                     THE WITNESS:  No, we did not.

25                     MR. BECK:  Not at all.  But there are

1       Energy Sense -- I'm sorry, where else does it  
2       operate besides California?

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

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

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

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

12              THE WITNESS: That is correct.

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

15              THE WITNESS: My understanding, yes.

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

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

21              MR. BECK: But you were --

22              THE WITNESS: I don't know -- I don't  
23      know if this Energy Sense is -- I don't know how,  
24      I have no -- I have no knowledge of their  
25      operations so I have no understanding of -- I had

1 no relation with that company.

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

6 THE WITNESS: Correct.

7 DIRECT EXAMINATION - Resumed

8 BY MR. FRANKEL:

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

15 A No, I did not.

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

20 A No, I did not.

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

23 A Yes, I did.

24 Q Where was your office located?

25 A In Modesto.

1 Q Okay. And what was the address?

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

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

7 A No.

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

12 A We did.

13 Q And did you purchase cars, a truck?

14 A No.

15 Q Did you -- what did you do?

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

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

23 A Yes.

24 Q And did Energy Sense, while you were  
25 division manager, pay rent on the office space

1       that you leased?

2             A       We did.

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

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

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

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

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

19       BY MR. FRANKEL:

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

25            MR. BECK:   That's not relevant.

1 BY MR. FRANKEL:

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

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

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

12 BY MR. FRANKEL:

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

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

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

23 MR. FRANKEL: Sure. Please.

24 ASSOCIATE MEMBER LEVIN: I apologize if  
25 they're in the documents, excuse me, but they're

1 not clear to me.

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

4 THE WITNESS: Same here.

5 ASSOCIATE MEMBER LEVIN: Sorry. Hope  
6 yours recovers more quickly.

7 Mr. Short, when you were employed by  
8 Energy Sense did you know that it was owned by  
9 Masco?

10 THE WITNESS: Yes.

11 ASSOCIATE MEMBER LEVIN: Did you receive  
12 an annual report from Masco? Or did your office,  
13 at any time? Did you see one at any time?

14 THE WITNESS: Not to my recollection,  
15 but it's been a couple years, so I -- I don't  
16 understand what kind of report you're referring  
17 to.

18 ASSOCIATE MEMBER LEVIN: A company has  
19 an annual report, like a --

20 THE WITNESS: I'm sure I did.

21 ASSOCIATE MEMBER LEVIN: -- financial  
22 report and other --

23 THE WITNESS: Yeah, I'm sure I did of  
24 Masco Corporation, yeah.

25 ASSOCIATE MEMBER LEVIN: Do you know who



1 the owners of Masco were?

2 THE WITNESS: No, no, not of --

3 ASSOCIATE MEMBER LEVIN: Is it a  
4 publicly owned company?

5 THE WITNESS: As far as I know, yes.

6 ASSOCIATE MEMBER LEVIN: Is it a  
7 California corporation?

8 THE WITNESS: I have no idea.

9 ASSOCIATE MEMBER LEVIN: Did you have  
10 any interaction with any employees of Masco?

11 THE WITNESS: The corporation? Masco  
12 administrative services for my administrative  
13 support. Dave Bell, VP, or president of Energy  
14 Sense. That's my extent. Yes.

15 If that counts as yes, then yeah.

16 ASSOCIATE MEMBER LEVIN: Anyone else?  
17 You said administrative report, VP or president --

18 THE WITNESS: Administrative services,  
19 do my budget, Dave Bell, Dale Camany, I think the  
20 people that have been named in some of these  
21 reports. Yeah, I've had contact with them, yeah.

22 ASSOCIATE MEMBER LEVIN: How about the  
23 attorneys for Masco who are referenced in one of  
24 the letters that we have in our binder?

25 THE WITNESS: Yes, the letters from Tom

1 Hamilton, yes. I've had contact with various  
2 lawyers.

3 ASSOCIATE MEMBER LEVIN: Thank you.

4 BY MR. FRANKEL:

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

7 A Yes.

8 Q Why did you leave?

9 A Just seeking a different career path.

10 Q And what career path are you seeking  
11 today?

12 A California Highway Patrol.

13 PRESIDING MEMBER ROSENFELD: I'm sorry,  
14 say that again?

15 THE WITNESS: The Highway Patrol, CHP.

16 MR. DICKERSON: Objection, relevance.

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

18 MR. FRANKEL: Okay.

19 BY MR. FRANKEL:

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

22 A That's correct.

23 Q And you're appearing here voluntarily  
24 today?

25 A That's correct.

1 MR. FRANKEL: I have nothing further.

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

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

8 MR. BECK: Yes.

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

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

15 MR. BECK: Pull the microphone up, Bill.

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

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

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

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

25 THE WITNESS: No, I'm trying to explain

1 to you, we had a contract with the installing  
2 companies to provide those services. And that's  
3 how we did that.

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

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

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

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

17 THE WITNESS: That's correct.

18 MR. BECK: Go ahead, Mr. Dickerson.

19 CROSS-EXAMINATION

20 BY MR. DICKERSON:

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

24 Now, I think you identified David Bell.  
25 You know David Bell?

1 A That's correct.

2 Q Who's David Bell?

3 A President of Operations for Energy  
4 Sense.

5 Q He's your boss?

6 A That's correct.

7 Q Which -- where was this document number  
8 33, tab 18. You see that letter is addressed to?

9 A Yes, sir.

10 Q President, Energy Sense?

11 A Yes, sir.

12 Q It's addressed to David Bell?

13 A Correct.

14 Q What city is he in?

15 A Address would be on Houston, Texas.

16 Q Thank you. Going back to the first  
17 document under tab 1, I think it's -- I'm sorry,  
18 tab 6, and it's 001. It's about two pages, I  
19 don't know, five, six pages in. I think you were  
20 looking at it.

21 MR. BECK: Is there a number there?

22 Which tab is this, again?

23 MR. DICKERSON: I'm sorry, tab 6.

24 MR. BECK: Okay.

25 BY MR. DICKERSON:

1 Q And it is marked MAS-01.

2 A 001, right?

3 Q 001, that's correct. Have you seen that  
4 agreement before?

5 A Yes.

6 Q If you go to page 005 you see that it is  
7 signed on behalf of Energy Sense by John, are you  
8 familiar with that name?

9 A The name John?

10 Q Yeah, John who signed on behalf of  
11 Energy Sense, John Sznewajs?

12 MR. DICKERSON: Anybody help me with  
13 that pronunciation?

14 THE WITNESS: Point of clarification,  
15 this agreement is January 1, 2008. I was not  
16 at --

17 BY MR. DICKERSON:

18 Q Okay, that's fine.

19 A You know, that's right around the time  
20 of my --

21 Q That's fine, I just want to direct your  
22 attention to the signatory to that contract.

23 A As I said, January 1, 2008 was -- I was  
24 no longer employed, so I would have -- I don't  
25 know.

1 Q Okay, I'm just asking. I'm just  
2 directing your attention to the name of the person  
3 who signed the document. Do you see --

4 A I don't know John G. Sznewajs.

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

8 A I see that.

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

14 Do you see that name anywhere on there?

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

17 Q Yeah, he occupies three positions with  
18 Masco Corporation, correct?

19 A As it would appear.

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

24 A There's chief financial officer, vice  
25 president, corporate development and treasurer.

1           Q     Okay. Thank you. During the time that  
2     you had conversations with Mr. Hamilton, did Mr.  
3     Hamilton ever tell you if you do this, this and  
4     this your setup is good?

5                     In other words, did he ever give you the  
6     blessing to go forward with the Masco/Energy Sense  
7     setup?

8           A     Yes.

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

11          A     Not to my knowledge.

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

16          A     No, not to my knowledge.

17          Q     Okay. Anything regarding commingling of  
18    funds?

19          A     Not to my knowledge.

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

22          A     No.

23          Q     Okay. So you didn't have any  
24    discussions on what constitutes a corporate alter  
25    ego?



1           A     No.  Those were not in my purview.

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

5           A     That's correct.

6           Q     You said they had worked for other  
7     companies?

8           A     That's correct.

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

12          A     Oh, all the HERS raters.

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

16          A     Not immediately, no.

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

19          A     That's correct.

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

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

25          Q     Okay.

1           A     The majority.

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

5           A     That's correct.

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

9           A     That is correct.

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

13          A     That is correct.

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

17          A     Through the builder -- builder, yes.

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

20          A     I don't know.

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

24          A     I would assume.

25          Q     Okay.

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

2 MR. BECK: Okay. Bill?

3 (Pause.)

4 EXAMINATION

5 BY MR. PENNINGTON:

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

8 MR. BECK: And this is in our binder?

9 MR. PENNINGTON: Yeah.

10 BY MR. PENNINGTON:

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

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

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

19 PRESIDING MEMBER ROSENFELD: Got it.

20 BY MR. PENNINGTON:

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

1 list.

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

5 And in the second paragraph it says:  
6 The Commission expects HERS raters to enter into a  
7 contract with the builder, not with  
8 subcontractors, to provide independent, third-  
9 party diagnostic testing and field verification.

10 Were you aware of that provision?  
11 Actually, there is a repeat of this identical  
12 language in the 2005 compliance manual that the  
13 Energy Commission adopted for the 2005 building  
14 standards, which are actually the next couple of  
15 pages under this tab, are the excerpts of  
16 essentially the same thing.

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

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

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

25 THE WITNESS: Correct, with the

1 stipulation of the continued, that explanation  
2 throughout the paragraph, yes.

3 BY MR. PENNINGTON:

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

11 So, were you aware of that?

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

16 MR. BECK: Anything else?

17 MR. PENNINGTON: No.

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

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

22 REDIRECT EXAMINATION

23 BY MR. FRANKEL:

24 Q Mr. Short, am I correct that under the  
25 contracts that were entered into between Energy

1 Sense and the Masco installation companies that  
2 you were bound by the terms and conditions of any  
3 builder contract that the installing company would  
4 enter into with a builder?

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

7 Q Bound by the builder's contract.

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

10 MR. FRANKEL: Thank you.

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

14 MR. FRANKEL: Yes, I do.

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

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

19 MR. BECK: Not as long as this witness?

20 MR. FRANKEL: I don't believe so.

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

24 MR. DICKERSON: That will be the last  
25 witness, that is correct.

1           MR. BECK: And is it the Commission's  
2           desire to power through, as they say, through this  
3           last witness and wrap up the hearing? Or does the  
4           Commission want to take a lunch break?

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

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

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

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

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

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

17          MR. FRANKEL: I'd like to call Jaime  
18          Padron.  
19          Whereupon,

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

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

1                   THE WITNESS:  It's Jaime Padron,  
2           J-a-i-m-e P-a-d-r-o-n.

3                   DIRECT EXAMINATION

4           BY MR. FRANKEL:

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

7           A     I'm employed by Energy Sense.

8           Q     In what capacity?

9           A     Division Manager.

10          Q     And how long have you been Division  
11          Manager?

12          A     Since March of '08.

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

15          A     I did.

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

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

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

22          A     There are three raters and one admin  
23          person.

24          Q     And are you a certified HERS rater?

25          A     I am.



1           Q     And you've held your certification for  
2     how long?

3           A     2002.

4           Q     Now, as Division Manager of Energy  
5     Sense, are you responsible for managing the  
6     operations and testing work of the testing and  
7     verification work that Energy Sense conducts?

8           A     I do.

9           Q     And are you responsible for directing  
10    the other HERS raters who are in your employ in  
11    that regard?

12          A     Yes.

13          Q     Do you receive direction from anyone  
14    else at Masco Corporation or any Masco  
15    installation company with respect to how you  
16    conduct your work?

17          A     No.

18          Q     With respect to budgeting or hiring  
19    decisions, are those decisions that you make,  
20    yourself?

21          A     That's correct.

22          Q     With respect to the raters that have  
23    been employed by Energy Sense since the time you  
24    became Division Manager in 2008 succeeding Mr.  
25    Short, have you or anyone else at Energy Sense

1       advocated or recommended the use of products or  
2       services that were conducted or performed by any  
3       company whose work you were testing?

4           A     No, I did not.

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

7           A     No.

8           Q     Have you expressly directed them not to  
9       do so?

10          A     That's correct.

11          Q     And on how many occasions?

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

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

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

25               MR. FRANKEL:  Well, I'm trying to deal

1 with the plain language of the statute that's at  
2 issue here. And I thought that the question was  
3 relevant. But let me move on.

4 BY MR. FRANKEL:

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

7 A No.

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

11 A I have not.

12 Q Okay. And with respect to the HERS  
13 raters who are currently employed, or were  
14 employed in the past, with respect to doing Title  
15 24 testing work for Energy Sense, were they  
16 exclusively employees of Energy Sense, or were  
17 they employed by anybody else?

18 A They're employees of Energy Sense.

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

25 A They do not.

1 Q Did they have any debt agreements with  
2 any of those parties?

3 A They do not.

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

8 A I do now.

9 Q Did you know that before?

10 A No.

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

14 And --

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

17 MR. BECK: It's a bit duplicative.

18 Again, I think we can --

19 MR. FRANKEL: Well, it may be -- I mean  
20 if people are prepared to stipulate I don't have  
21 any problem with this. But Mr. Short left in  
22 January of 08. I was just trying to show that  
23 this was not a website that was used from January  
24 08 to the present when Mr. Padron was General  
25 Manager. That really is the point here.

1           MR. DICKERSON: Yeah, but the date on  
2           the website establishes when it was pulled off of  
3           the website. We now know that David Bell, who  
4           they've acknowledged is their boss, works for  
5           Energy Sense in Houston, Texas. That's their base  
6           of operations.

7           MR. FRANKEL: We do that --

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

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

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

24          BY MR. FRANKEL:

25          Q     Mr. Padron, --

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

4                   MR. FRANKEL: Yes.

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

7                   MR. FRANKEL: Okay.

8                   PRESIDING MEMBER ROSENFELD: Thank you.

9                   BY MR. FRANKEL:

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

13                  A     No.

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

17                  A     No.

18                  Q     Are its operations exclusively limited  
19                  to California?

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

23                  MR. BECK: It is a bit, because you -- I  
24                  mean, you could ask Mr. Padron if, to his  
25                  knowledge, as of today, that the policies and

1 procedures of Energy Sense are as Mr. Short  
2 testified, and as far as his knowledge of any  
3 websites by Energy Sense, that he also agrees with  
4 Mr. Short's testimony. Rather than asking him the  
5 exact same questions.

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

8 BY MR. FRANKEL:

9 Q Did you listen to Mr. Short's testimony  
10 with respect to the website and exhibit 30?

11 A I did.

12 Q And did you concur with his testimony?

13 A Yes.

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

18 A I did.

19 Q And was that accurate and correct as far  
20 as you know during the time that you've been  
21 Division Manager?

22 A It is.

23 Q And with respect also to the contracting  
24 process for field verification and testing  
25 services that Mr. Short went through on

1 respondent's exhibit B, was that true and accurate  
2 as far as you're concerned in terms of how the  
3 contracting process for Energy Sense operates  
4 while you've been Division Manager from March of  
5 '08 to the present?

6 A It is.

7 Q Okay. Now, with respect to work that  
8 Energy Sense obtains, does Energy Sense, itself,  
9 market its own products and services?

10 A Yes, we do.

11 Q And are --

12 MR. DICKERSON: Objection. I think we  
13 can do the same thing. This is the same line of  
14 questioning that he had with Mr. Short.

15 MR. FRANKEL: No, it's not -- it's not  
16 the same. Let me try to clarify.

17 BY MR. FRANKEL:

18 Q And to whom do you market your services  
19 to?

20 A We -- to anybody that can hire us.  
21 Anybody that we consider a customer we'll try to  
22 get work from.

23 Q So, to builders or owners --

24 A Builders or custom homes or --

25 Q And the other work that Energy Sense



1 receives comes through via the contracts that Mr.  
2 Short described that were entered into either  
3 while he was division manager, or at least when  
4 you became division manager?

5 A That's correct.

6 Q And you're familiar with those  
7 contracts?

8 A Yes, I am.

9 Q Now, I believe --

10 ASSOCIATE MEMBER LEVIN: Speak into your  
11 mike, please.

12 MR. FRANKEL: Sorry.

13 BY MR. FRANKEL:

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

18 A No, there's not.

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

22 A The reason I say there is not, because I  
23 have lost work. I don't have 100 percent work of  
24 Pulte Homes. So, no, there is no -- they don't  
25 have to hire Energy Sense.

1           Q     Okay.  And you have done work as a Title  
2     24 tester, rater for Pulte Homes?

3           A     I have.

4           Q     Okay.  And are you aware that California  
5     Living and Energy has also done Title 24 testing  
6     for Pulte Homes?

7           A     They do.

8           MR. BECK:  Mr. Padron, do you know David  
9     Bell?

10          THE WITNESS:  Yes.

11          MR. BECK:  Where is his office?

12          THE WITNESS:  I don't know.

13          MR. BECK:  You don't know?

14          THE WITNESS:  I don't know where his  
15     office is.

16          MR. BECK:  Do you know if it's in the  
17     state of California?

18          THE WITNESS:  Well, he works -- okay, I  
19     take that --

20          MR. BECK:  Well, not like not the street  
21     address, but at least the city.  Do you know what  
22     city his office is in?

23          THE WITNESS:  I want to say it's in  
24     Florida.

25          MR. BECK:  It's in Florida?

1 THE WITNESS: Yes.

2 MR. BECK: Okay, thank you.

3 BY MR. FRANKEL:

4 Q Mr. Padron, with respect to --

5 ASSOCIATE MEMBER LEVIN: Mr. Frankel,  
6 please use the microphone.

7 BY MR. FRANKEL:

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

13 A The builder.

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

16 A Yes.

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

19 MR. FRANKEL: No. Please.

20 ASSOCIATE MEMBER LEVIN: -- a question  
21 or two.

22 Mr. Padron, earlier you stated that you  
23 had -- I don't know exactly the language you used,  
24 but something to the effect that you had  
25 instructed all of the testers in your division

1       about the conflict of interest issue, is that  
2       correct?

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

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

7               THE WITNESS:  We --

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

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

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

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

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

1 THE WITNESS: I've been through the  
2 CHEERS training, as well.

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

7 MR. FRANKEL: Masco?

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

10 THE WITNESS: Yes, I did.

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

13 THE WITNESS: Right.

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

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

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

22 Your only training for understanding of  
23 the conflict of interest comes from CHEERS?

24 THE WITNESS: Right.

25 ASSOCIATE MEMBER LEVIN: Okay. Thank

1       you.

2       BY MR. FRANKEL:

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

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

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

12                              CROSS-EXAMINATION

13       BY MR. DICKERSON:

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

18              A     Locally, no.

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

21              A     Well, we have our officers, but --

22              Q     Okay.   I'd like to refer you to the  
23     document that I was showing the previous witness.  
24     It's number 6, document MAS-005, tab number 6,  
25     005.

1           A     I'm in tab 6.  Where?

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

4           A     Okay.

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

7           A     No.

8           Q     You don't recognize his name?  Okay.  
9     I'd like to direct your attention to what's been  
10    marked as MAS-025.

11          A     Where's it at?

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

14          A     Um-hum.

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

17          A     Yes.

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

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

24          Q     Okay, but he's higher up on the  
25    corporate ladder than you are, correct?

1 A He is.

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

5 A Yes, I see that.

6 Q -- as a vice president?

7 A Right.

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

11 A That's correct.

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

13 A Okay.

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

17 A That's what it says here.

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

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

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

23 EXAMINATION

24 BY MR. PENNINGTON:

25 Q Mr. Short said that all of the -- let me



1 ask it this way. Do you agree with Mr. Short's  
2 conclusion that all of the work that Energy Sense  
3 does is processed through a contract with the  
4 installing contractor? So basically the  
5 transaction with the builder is always done  
6 through the contract with the installing  
7 contractor?

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

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

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

15 Q So you had said in your testimony  
16 that --

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

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

23 PRESIDING MEMBER ROSENFELD: So that  
24 with the installer?

25 //

1 BY MR. PENNINGTON:

2 Q So the installer contractor, it's  
3 according to this sheet --

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

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

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

14 BY MR. PENNINGTON:

15 Q So whom else might it be?

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

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

21 A Okay.

22 Q Is that correct?

23 A Yes.

24 Q All right, a different question. Are  
25 you familiar with Environments for Living?

1           A     I am.

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

4           A     We can do their verifications for them.

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

13                Does that make sense to you?

14          A     Not at all.

15          Q     So why do you say that?

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

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

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

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

1           Q     And this particular job site that was  
2 referred --

3           A     I couldn't tell you right now.

4           Q     Okay, thanks.

5           MR. BECK:   Further questions?

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

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

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

13          MR. DICKERSON:  None.

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

22          MR. DICKERSON:  I don't know if I recall  
23 saying that evidence would be taken by affidavit.  
24 I have serious concerns regarding any information  
25 that is being provided by way of affidavit from

1 someone who is not subjected to cross-examination.

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

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

11 MR. BECK: The Commission can take  
12 testimony that is -- can take it, as it says in  
13 1212(b) of Title 20 of California Code of  
14 Regulations, oral or written testimony offered by  
15 parties shall be under oath. And then we can,  
16 indeed, accept that.

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

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

22 ASSOCIATE MEMBER LEVIN: May I make a  
23 suggestion?

24 MR. FRANKEL: Yes.

25 ASSOCIATE MEMBER LEVIN: We were going

1 to propose a timeline for closing briefs. And I  
2 think in fairness to the complainant, since they  
3 won't have seen this, that we'll need to figure  
4 out some sort of revised process so that you are  
5 entitled to submit that under our rules. But that  
6 the complainant has an opportunity to respond, if  
7 they choose.

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

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

14 MR. DICKERSON: Well, so long as I can  
15 provide -- well, without having seen them I don't  
16 know. I would like to provide affidavits  
17 obviously in rebuttal, but if affidavits are going  
18 to be presented I have some people that I could  
19 have some affidavits for you within the next four  
20 or five days. And also get them to him and submit  
21 them in here.

22 Hopefully at that point everybody has  
23 had an opportunity to present the type of  
24 information and the type of evidence that they  
25 want.

1 I probably have two or three that I  
2 would submit. That would be all.

3 MR. BECK: Okay. Well, -- raise the  
4 issue whether we need to come back for a  
5 subsequent hearing to resolve any problems with  
6 these affidavits.

7 I don't know if -- how many -- how  
8 voluminous are the affidavits?

9 MR. FRANKEL: They're not voluminous.  
10 They deal with, I think, issues that go squarely  
11 to what's presented by the statute here.

12 We have declarations from the people who  
13 are responsible for the installing divisions who  
14 will attest to certain facts to show that they are  
15 complying with, that there is no violation of the  
16 conflict of interest rules and substance.

17 We have declarations from the current  
18 HERS raters who are employed by Energy Sense  
19 stating that they don't have an ownership  
20 interest, debt agreement with, or employee/  
21 employer relationship with anyone other than  
22 Energy Sense, itself.

23 And we have declarations on some of the  
24 corporate structure and formality issues in terms  
25 of when Energy Sense was incorporated, and how it

1 doesn't have any connection to Energy Sense in  
2 Texas, for example. Where that question was  
3 raised on that exhibit.

4 So there are some fundamental issues  
5 that these deal with that go to those questions.

6 ASSOCIATE MEMBER LEVIN: If I may, I'd  
7 just ask why weren't these submitted previously  
8 then?

9 MR. FRANKEL: I did --

10 ASSOCIATE MEMBER LEVIN: Because they go  
11 to fundamental issues.

12 MR. FRANKEL: I didn't understand that I  
13 was supposed to submit them in advance of the  
14 hearing. No one ever indicated that that was the  
15 case. I thought we were going to be at this  
16 hearing, from what I understood, and present our  
17 evidence, whether it was in oral form or in  
18 written form.

19 MR. BECK: It's true that we did not  
20 set, and in hindsight, we should have set a  
21 deadline for submission of written documents to  
22 the docket in advance of the hearing.

23 But it would have been nice to at least  
24 have those reviewed by Mr. Dickerson in advance of  
25 the hearing so he could prepare whatever rebuttal



1 to them that he might want to.

2 That being the case, what we could do is  
3 set a -- first, let me ask you gentlemen, would  
4 you be satisfied with in terms of an argument,  
5 closing argument, putting that into brief form,  
6 rather than having to reconvene and give an oral  
7 -- because I assume both of you will be wanting to  
8 submit post-hearing briefs, citing to excerpts  
9 from the record that support your positions, the  
10 testimony, et cetera.

11 I'm not sure what the timeline is for  
12 getting the transcript from the hearings. A  
13 matter of a few days, right?

14 REPORTER: Ten to a couple weeks.

15 MR. BECK: Okay. And you might want to  
16 do that, as well. And what we might want to do is  
17 have a deadline of perhaps ten days for the  
18 submission of any additional affidavits or  
19 documents. Does that sound --

20 MR. DICKERSON: That sounds very fair.  
21 I would appreciate that opportunity. Thank you.

22 MR. BECK: And then another ten days  
23 after that for the submission of closing briefs?  
24 And another 21 days, Commissioners, talking about  
25 another 21 days after that for a decision.

1 Under the regulations, specifically  
2 under the complaint, request for investigation  
3 process, the time for the Committee to issue the  
4 decision is 21 days following the close of  
5 hearings pursuant to Title 34. And what we could  
6 do is we could designate the close of the hearing  
7 to be the date that the briefs, the final briefs,  
8 are supposed to be submitted. We'd designate that  
9 as the close of the hearing.

10 And then we would issue the decision  
11 within 21 days. The Presiding Member also has the  
12 ability to lengthen or shorten any timeframes in  
13 the regulations. So, if the Committee wants more  
14 time beyond the 21 days to draft and issue the  
15 decision, we could consider that and you can do  
16 that here.

17 MR. DICKERSON: I assume that, just for  
18 clarification, we say ten days and ten days, are  
19 we talking calendar or business days?

20 MR. BECK: We're talking calendar days.

21 MR. DICKERSON: Calendar days, okay.

22 ASSOCIATE MEMBER LEVIN: I think we  
23 would also ask both of the parties, upon review of  
24 any additional evidence submitted, if you will  
25 waive the final hearing, or if you agree that the

1 final submission of documents constitutes the  
2 final hearing?

3 MR. DICKERSON: Well, at this stage I  
4 have no objection to using the final closing  
5 briefs as the essentially in lieu of reconvening  
6 and doing a closing argument. I don't feel a need  
7 to come back and --

8 ASSOCIATE MEMBER LEVIN: I would, for  
9 legal reasons potentially later, feel more  
10 comfortable if in your final closing briefs you  
11 actually state that. So then it isn't a question  
12 later --

13 MR. DICKERSON: That we're waiving --

14 ASSOCIATE MEMBER LEVIN: -- that we  
15 somehow violated your rights --

16 MR. DICKERSON: Okay.

17 ASSOCIATE MEMBER LEVIN: -- to a final  
18 hearing.

19 MR. BECK: And what we should do,  
20 actually, is have the Presiding Member, as it is  
21 the authority of the Presiding Member to shorten  
22 or lengthen the timeframes, that if the decision  
23 comes from the Presiding Member that those are  
24 going to be the timeframes for the submission of  
25 documents for the briefs, and for the decision.

1 Then that will be conclusive.

2 PRESIDING MEMBER ROSENFELD: They seem  
3 reasonable to me.

4 MR. FRANKEL: Can we just set out what  
5 those dates are, so that we --

6 MR. BECK: Right, --

7 MR. FRANKEL: -- so it's clear.

8 MR. BECK: -- I'm consulting my calendar  
9 here, as we speak.

10 ASSOCIATE MEMBER LEVIN: While he does  
11 that, can I also just encourage the attorneys, as  
12 you did during the break, to talk to each other as  
13 much as possible. If there are affidavits that  
14 you could stipulate to the truth of, or some  
15 aspect of, the more that you two can talk to each  
16 other, I think the likelier it is that we will be  
17 able to reach the right decision in the timeframe  
18 that we're all hoping.

19 (Pause.)

20 MR. BECK: By my calculations March  
21 27th, Friday, March 27th, is ten days from today.  
22 We could make that a date for submission of any  
23 additional evidence, affidavits.

24 Ten days from that would be Monday,  
25 April 6th. And that would be the day for

1 submission of parties' closing briefs.

2 And 21 days from that would be Monday,  
3 April 27th, and we could establish that as the  
4 date for the Committee's decision in this matter.

5 Is that agreeable with you gentlemen?

6 MR. DICKERSON: That's fine.

7 MR. FRANKEL: Fine with us.

8 MR. BECK: Okay. Commissioners, that's  
9 what --

10 PRESIDING MEMBER ROSENFELD: Wrote it  
11 down.

12 MR. BECK: Okay. So, again, March 27th  
13 for additional documents; April 6th for the  
14 parties' briefs; and April 27th for the  
15 Committee's decision.

16 And that's basically are waiving oral  
17 closing arguments in lieu of the written briefs.

18 (Pause.)

19 ASSOCIATE MEMBER LEVIN: So, gentlemen,  
20 since you are all men around the table, we did  
21 also just want to point out again that we  
22 understand there are other issues besides the  
23 conflict of interest issue, including our own  
24 internal process.

25 And we will pursue those separately from

1       this proceeding. This proceeding is limited to  
2       the conflict of interest issue, itself. But we  
3       take those other issues seriously and we will  
4       pursue them separately.

5               MR. BECK: And one other note. In your  
6       briefs, gentlemen, please also address what  
7       possible remedies could be made. This is assuming  
8       if there were a violation to be found. What the  
9       potential remedies might be.

10              Mr. Frankel might not feel entirely  
11       comfortable doing that, thinking that you would be  
12       conceding something. But Mr. Dickerson has, in  
13       his brief, hearing brief, had a paragraph  
14       regarding what the remedies should be.

15              And that should probably -- if you want  
16       to weigh in on that, then that would probably be  
17       the time. Now that may be is -- if you're a bit  
18       conflicted over that, considering that obviously  
19       your position is there is no conflict of interest.

20              But that is one of the things that we  
21       did not discuss at this hearing, what the possible  
22       remedy would be for any potential conflict of  
23       interest.

24              But, Mr. Dickerson, certainly you can  
25       elaborate on that on what you think the remedy

1       should be. Because we want to get anything from  
2       the parties on that should a violation be found.

3               ASSOCIATE MEMBER LEVIN: Mr. Frankel,  
4       similarly from your side, without admitting to any  
5       conflict of interest, if there are additional  
6       procedures, training steps that could be taken to  
7       insure there's no conflict of interest, that would  
8       also be welcome from you.

9               MR. FRANKEL: Thank you.

10              MR. BECK: And that would also be part  
11      of what I would think the remedies would be, could  
12      be that, as well.

13              If we have nothing further, then we will  
14      adjourn. And we will hear back from you gentlemen  
15      in the required time limits.

16              What I will do is I will -- the  
17      documents that were submitted, what I will do,  
18      since there is no objection to them, is I will  
19      submit them to the docket as well as our -- are we  
20      off the record? Oh, we are on the record, so  
21      good.

22              I will submit those to the docket and  
23      they'll be docketed. Also, respondent's A and B  
24      are also all received into evidence.

25              You don't have any -- I take it from

1 your earlier comment, Mr. Dickerson, you had no  
2 objection to them being received.

3 MR. DICKERSON: No.

4 MR. BECK: They will also be docketed.  
5 And we will try to docket them in a way that makes  
6 is clear that when you refer to them you can refer  
7 to them as 1, 2, et cetera, and also A and B for  
8 respondents.

9 I think with that we're off the record.

10 (Whereupon, at 1:03 p.m., the hearing  
11 was adjourned.)

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## CERTIFICATE OF REPORTER

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

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

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



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PETER PETTY