STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

Complaint / Request for Investigation	)	Docket Number 08-CRI-01
Regarding EnergySense / Masco	)	Order Number 09-603-31
	)	

DECISION AND ORDER OF THE CALIFORNIA ENERGY COMMISSION AFTER CONSIDERATION OF THE PROPOSED DECISION OF THE EFFICIENCY COMMITTEE

On June 3, 2009, the California Energy Commission held a public hearing, as part of its regularly scheduled business meeting, to consider the Proposed Decision issued by the Efficiency Committee in the above-captioned matter. Such consideration is required under Section 1236 of Title 20 of the California Code of Regulations within 21 days of the filing of the Proposed Decision.

In the Proposed Decision, dated May 26, 2009, the Efficiency Committee found that it is a violation of the conflict of interest provisions of the California Home Energy Rating System regulations ("HERS Regulations") – contained in Article 8, Sections 1670-1675 of the California Code of Regulations – when EnergySense, Inc., a wholly-owned subsidiary of Masco Corporation, performs HERS rating services on energy efficiency improvements installed by entities that are also wholly-owned subsidiaries of Masco Corporation.

After considering the Proposed Decision and comments received at the public hearing, the California Energy Commission hereby adopts the Proposed Decision, which is attached hereto and incorporated herein as Attachment 1.

Pursuant to California Government Code Section 11425.60, this decision is designated as a precedent decision.

Dated June 3, 2009

KAREN DOUGLAS
Chairman

ARTHUR H. ROSENFELD
Commissioner

JAMES D. BOYD
Vice Chair

JEFFREY D. BYRON
Commissioner

JULIA LEVIN
Commissioner

ATTACHMENT 1

STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

Complaint / Request for Investigation Regarding EnergySense / Masco	)	Docket Number 08-CRI-01

PROPOSED DECISION OF THE EFFICIENCY COMMITTEE

Summary

It is a violation of the conflict of interest provisions of the California Home Energy Rating System Program regulations ("HERS Regulations") when EnergySense, Inc. ("EnergySense"), a wholly-owned subsidiary of Masco Corporation ("Masco"), performs HERS rating services on energy efficiency improvements installed by entities that are also wholly-owned subsidiaries of Masco.

EnergySense should be prohibited from performing HERS rating services on improvements installed by Masco or Masco subsidiaries, but should be allowed to perform HERS rating services on improvements installed by other entities that are not sister subsidiary companies of Masco, and with which EnergySense does not have any other conflict of interest.

Procedural History

On July 9, 2008, California Living & Energy (a division of William Lilly & Associates, Inc.) and Duct Testers, Inc. (collectively, "Complainants") filed a complaint with the California Energy Commission ("Energy Commission") pursuant to Title 20, Section 1231 of the California Code of Regulations.[1]

The complaint alleges that EnergySense and Masco (collectively, "Respondents") are in violation of Section 1673, subdivision (i) (2), in that EnergySense provides HERS rating services for, but is not an independent entity from, the builder or

[1] Unless otherwise noted, all references to title numbers are to those found in the California Code of Regulations, and all references to article and section numbers are to those found in Title 20.

subcontractor installer of energy efficiency improvements field verified or diagnostically tested.

On March 17, 2009, a hearing was conducted, at which both oral and documentary evidence was received. Before and after the hearing, additional materials were received from both the Complainants and Respondents, as well as other entities. These materials were docketed by the Dockets Office of the Energy Commission and constitute the record in this matter.

Statement of Facts

1. The HERS Regulations.

The HERS Regulations are contained in Article 8, Sections 1670-1675. They were established pursuant to California Public Resources Code Section 25942, and include procedures for the training and certification of raters, and a certification program for home energy rating system organizations (referred to as "providers") and for home energy rating services. The HERS Regulations apply to field verification and diagnostic testing services of residential buildings pursuant to Chapter 7 of the Energy Commission's Low-Rise Residential Alternative Calculation Method Approval Manual ("ACM Manual") for demonstrating compliance with building energy performance standards under Title 24.[2]

A "provider" is an organization that administers a home energy rating system in compliance with the HERS Regulations. "Rating system" means the materials, analytical tools, diagnostic tools and procedures to produce home energy ratings and provide home energy rating and field verification and diagnostic testing services. A "rater" is a person, listed in a rater registry maintained by a provider, who performs the site inspection and data collection required to produce a home energy rating, or the field verification and diagnostic testing required for demonstrating compliance with Title 24 energy performance standards.[3]

Raters who are listed in a provider's rater registry must enter into agreements with that provider. Such agreements require, among other things, that raters comply with the conflict of interest provisions of the HERS Regulations.[4]

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[2] §§ 1670 and 1671.

[3] §§ 1671 and 1673, subd. (c).

[4] § 1673, subd. (b) (3).

The HERS Regulations prohibit conflicts of interest between raters and other entities, and specifically require that "[p]roviders and raters shall be independent entities from the builder and from the subcontractor installer of energy efficiency improvements field verified and diagnostically tested" under the HERS Regulations.[5]

Under the HERS Regulations, "[i]ndependent entity means having no financial interest in, and not advocating or recommending the use of any product or service as a means of gaining increased business with, firms or persons specified in Section 1673(i)."[6]

The HERS Regulations state that, "[f]inancial [i]nterest means an ownership interest, debt agreement, or employer/employee relationship [but] does not include ownership of less than 5% of the outstanding equity securities of a publicly traded company."[7]

2. Masco, EnergySense, and the other Masco subsidiaries.

On August 11, 2006, Masco formed EnergySense as a wholly-owned subsidiary.[8] EnergySense's corporate bylaws were prepared by Masco's legal department at the time of the incorporation of EnergySense.[9] EnergySense currently employs three raters,[10] who verify and test energy efficiency improvements regulated by Title 24,

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[5] § 1673, subd. (i) (2).

[6] § 1671. The entities specified in Section 1673, subd. (i), are providers, raters, builders, and subcontractor installers.

[7] § 1671.

[8] Respondents Masco Corporation's and EnergySense, Inc.'s Responses to Complainants' Supplemental Interrogatories and Request for Production of Documents, dated March 11, 2009 ("Respondents' Supplemental Responses"), 3:13-15, 6:11-12, and Tab 1; Affidavit of Sharon Werner, ¶ 3 and Exhibit 2; Transcript of March 17, 2009, Hearing ("Hrg. Tr.") 101:12-18.

[9] Respondents Masco Corporation's and EnergySense, Inc.'s Responses to Requests for Production of Documents and Additional Information, dated October 31, 2008 ("Respondents' Responses"), 8:18-19.

[10] Affidavit of Jamie Padron, ¶ 13; Hrg. Tr., 139:20-23.

Part 6. The raters initially employed by EnergySense were former employees of other Masco subsidiaries, and quit or were terminated from those other companies in order to become employees of EnergySense.[11] The impetus for creating EnergySense was that in October of 2005, high-quality insulation installation (HQII) became subject to HERS field verification and testing under Title 24, and thus the conflict of interest provisions of the HERS Regulations became applicable to the installation and field verification and testing of such installation.[12]

Prior to the incorporation of EnergySense, Masco officials and legal counsel consulted with Tom Hamilton, then the Executive Director of the California Home Energy Rating Services ("CHEERS"), a HERS provider, regarding Masco's intention to form EnergySense as a subsidiary in light of the conflict of interest provisions in the HERS Regulations.[13] However, Masco did not provide Mr. Hamilton or CHEERS with the details regarding the specific structure or operation of EnergySense,[14] and neither Mr. Hamilton nor CHEERS ever gave any formal approval to EnergySense, its structure or operation.[15] Mr. Hamilton also discussed the formation of EnergySense with staff at the Energy Commission, who expressed concern about the potential conflict of interest.[16]

Since its incorporation, EnergySense has entered into contracts with other wholly-owned Masco subsidiaries, including Builder Services Group, Inc., American National Services, Inc., and Masco Contractor Services of California, Inc. (collectively, "Masco Administrative Subsidiaries"). Those contracts call for EnergySense to provide HERS rating services for builders of residential buildings

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[11] Hrg. Tr., 132:2-133:5.

[12] Deposition of Tom Hamilton of February 26, 2009 ("Hamilton Dep."), 44:25-45:11; Respondents' Supplemental Responses, 8:22-23; Affidavit of David Bell, ¶ 9; Affidavit of Robert A. Davenport, ¶ 5; Hrg. Tr., 89:23-97:4.

[13] Hamilton Dep., 26:10-27:21, 31:11-37:19, 42:25-44:7, 59:20-60:4, 61:8-62:16, 77:10-78:12; Affidavit of David Bell, ¶ 9; Affidavit of Robert A. Davenport, ¶ 5; Hrg. Tr., 95:13-96:22.

[14] Hamilton Dep., 33:16-22; 36:11-18; 38:13-40:13, 66:12-67:14.

[15] Hamilton Dep., 42:20-24, 66:4-11, 80:16-20.

[16] Documents submitted by CHEERS in response to the Efficiency Committee Order Regarding Complainants' First Amended Subpoena to Produce Business Records from CHEERS ("CHEERS Documents"), dated March 4, 2009, page 200 (e-mail from Tom Hamilton to Brad Townsend, et al., dated Friday, July 7, 2006 8:03 a.m.).

who have entered into separate contacts with the Masco Administrative Subsidiaries for the provision of such services. Pursuant to those contracts, the Masco Administrative Subsidiaries are responsible for providing administrative services for EnergySense relating to the performance of HERS rating services, including providing sales staff; drafting of contracts with builders; scheduling of the rater for provision of services; and invoicing and collecting from the builders the monies owed for such services, with EnergySense being paid by the Masco Administrative Subsidiaries and not the builders.[17]

Pursuant to those contracts, EnergySense performs HERS rating services on insulation installed by other Masco subsidiaries, including: Western Insulation, L.P. (a wholly-owned subsidiary of Builder Services Group); Sacramento Insulation Contractors and Coast Insulation Contractors, Inc. (wholly-owned subsidiaries of American National Services); and Masco Contractor Services of California, Inc. (collectively, "Masco Installer Subsidiaries").[18]

The Masco Installer Subsidiaries offer a "comprehensive set of services to builders" by providing invoicing and payment collection services for EnergySense, and by submitting bids to builders that include prices for installation work performed by the Masco Installer Subsidiaries and for field verification and testing by EnergySense HERS raters, which allow the builders to pick and choose between the various service options.[19]

EnergySense raters are paid on a salaried-wage or hourly-wage basis by EnergySense.[20] EnergySense raters have rater agreements with CHEERS.[21]

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[17] Answer of Respondents Masco Corporation and EnergySense, Inc. to Complaint/Request for Investigation, undated ("Answer of Respondents"), 2:18-21; Respondents Responses, 3:8-11, 4:22-26, and Tab 1, MAS 001-023; Hrg. Tr., 103:8-21, 106:10-107:14.

[18] Respondents' Supplemental Responses, 9:13-15, 12:5-6, and 12:17-19; Affidavit of Sharon Werner, ¶¶ 5-8; Affidavits of Steven Heim, Jim Brewer, Steve Weber, and Richard Smith, ¶¶ 2, 3, 7-9.

[19] Affidavits of Steven Heim, Jim Brewer, Steve Weber, and Richard Smith, ¶¶ 7 and 8; Hrg. Tr., 20:18-21:5 and 22:8-11.

[20] Affidavit of Jamie Padron, ¶ 5; Affidavits of Israel Calleros and Timothy Williams, ¶ 4.

[21] CHEERS Documents, pages 219-295.

Invoices for the training and certification the EnergySense raters receive from CHEERS are sent to, and paid by, EnergySense.[22]

Masco is the sole shareholder or managing general partner of EnergySense and the Masco Installer Subsidiaries. Masco exercises the right to participate in the selection of officers and directors, and the appointment of members of the governing boards, for EnergySense and the Masco Installer Subsidiaries. Masco also exercises high-level oversight of the governance, performance, financial reports, and business plans of EnergySense and the Masco Installer Subsidiaries.[23] Masco pursues corporate value by encouraging its subsidiaries, including EnergySense, to develop business plans and strategic opportunities that add value to Masco.[24]

EnergySense shares several of its officers and directors with two of the four Masco Installer Subsidiaries, as well as Masco itself.[25] The contracts between EnergySense and the Masco Administrative Subsidiaries – who in turn wholly-own the Masco Installer Subsidiaries – are signed on behalf of EnergySense by persons who are also officers for Masco and/or Western Insulation, L.P., and Masco Contractor Services of California, Inc., and on behalf of two of the three Masco Administrative Installers by an officer of Masco, EnergySense, Western Insulation, L.P., and Masco Contractor Services of California, Inc.[26] EnergySense lists its principal place of business as the same address in the State of Florida as the principal executive office listed for Sacramento Insulation Contractors and Coast Insulation Contractors, Inc., which is also the same address listed for the President of EnergySense and the Chief Executive Officers of Sacramento Insulation Contractors, Coast Insulation Contractors, Inc., and Masco Contractor Services of California, Inc.[27]

The financial performance of EnergySense and the Masco Installer Subsidiaries is included in Masco's consolidated financial statements, which are included in

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[22] CHEERS Documents, pages 307-316 and 326-327.

[23] Deposition of Sharon Werner, ¶ 12; Respondents' Responses, 8:1-2.

[24] Respondents' Responses, 7:2-4.

[25] Affidavit of Sharon Werner, ¶ 13 and Exhibit 11; Respondents' Responses, 5:21-6:5 and Tab 2 and 3, MAS 024 and 025.

[26] Respondents' Responses, Tabs 1, 2 and 3, MAS 005, 014, 021, 024, and 025.

[27] Affidavit of Sharon Werner, Exhibits 4, 6, 7, and 8.

Masco's publicly available Annual Reports and Form 10-Ks on file with the Securities and Exchange Commission. Such financial performance includes net sales; operating profit; income before taxes; net income; depreciation and amortization; working capital; assets; liabilities; and shareholder equity.[28]

3. Inquiries by the Energy Commission and CHEERS regarding alleged conflict of interest.

In a letter from Energy Commission Senior Staff Counsel William Staack to David Bell, President of EnergySense, dated May 15, 2007, Mr. Bell was informed that, "[w]ithout supplementary documentation provided to the contrary, it appears that a violation of the conflict of interest provisions under the HERS regulations could exist between EnergySense and various entities under the Masco Corporation structure because of" the parent-subsidiary relationship between Masco and EnergySense and the corporate control exercised by the former over the latter. EnergySense was asked to provide specific information regarding the corporate structure that existed between EnergySense and Masco.[29] There is no record of the Energy Commission receiving any documentation in response to this request until after the filing of the complaint in this matter.

In letters dated July 25, 2008, Robert A. Scott, the current Executive Director of CHEERS, informed seven then-EnergySense raters of complaints filed with CHEERS alleging that EnergySense was in violation of the conflict of interest provisions of the HERS Regulations. The letters noted that it had been alleged that EnergySense is a subsidiary of Masco and that some of the work performed by EnergySense raters is thus a violation of those provisions. The letters stated that if such a relationship existed between EnergySense and Masco or one of the Masco subsidiaries, then the right of any EnergySense rater to perform HERS rating services under CHEERS' authority to certify raters might be in question. Finally, the letters required that the raters respond within ten days of receipt of the letter to avoid suspension.[30]

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[28] Respondents' Supplemental Responses, 3:18-24 and 7:23-28; Affidavit of Dan Carlton, ¶¶ 3 and 4.

[29] Response to the Complainants' First Amended Subpoena to Produce Business Records from the California Energy Commission, dated March 4, 2009, Attachment B, pages 4-7.

[30] CHEERS Documents, pages 166-186; Affidavits of Jamie Padron, Israel Calleros, and Timothy Williams, Exhibit 1.

In a letter dated September 5, 2008, EnergySense responded to Mr. Scott regarding the July 25 letters. The letter was written by Kenneth G. Cole, indentified in the letter as "Associate Corporate Counsel & Counsel – Installation & Other Services" for Masco. Mr. Cole noted that he was "writing on behalf of EnergySense, Inc., to respond to letters" sent to the EnergySense raters.[31]

On September 11, 2008, Mr. Scott informed the complaining party in the CHEERS matter, who is also one of the Complainants, that CHEERS was awaiting the decision of the Energy Commission in this matter before taking action regarding the alleged conflict of interest, and that once the Energy Commission came to a final decision, CHEERS would act in accordance with that decision.[32]

Analysis

We must decide whether it is a violation of Section 1673, subdivision (i) (2), when EnergySense performs HERS rating services on work done by the Masco Installer Subsidiaries or any other wholly-owned Masco subsidiary. To do this, we must look at the relationship between EnergySense and the raters it employees, and then the relationship between EnergySense and the Masco Installer Subsidiaries.

1. Law regarding agency interpretation of its own regulations.

An agency's interpretation of a regulation it is charged with enforcing is entitled to great weight unless it is clearly erroneous or unauthorized.[33] When the meaning of regulatory language is ambiguous, the interpretation of the agency is controlling as long as it is reasonable, i.e., the interpretation sensibly conforms to the purpose and wording of the regulations.[34] Mere failure to act does not constitute an administrative construction of law.[35]

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[31] CHEERS Documents, pages 188-191. There are other portions of the record that indicate that Masco provided legal services, or made their attorney's available, to EnergySense and their employees. Hrg. Tr. 85:10-86:15 and 124:22-125:2.

[32] CHEERS Documents, page 141 (e-mail from Robert Scott to Dave Hegarty).

[33] *Overaa Construction v. California Occupational Safety and Health Appeals Board* (2007) 147 Cal.App.4th 235, 244-245.

[34] *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008).

[35] *In re Madison's Estate* (1945) 26 Cal.2nd 453, 463.

2. Relationship between EnergySense and its raters.

The raters working for EnergySense are not independent contractors, but rather employees of EnergySense. They are paid their wages by, and receive their work from, EnergySense. The training and certification they receive from CHEERS, necessary to their continued employment as HERS Raters, is paid for by EnergySense. It is EnergySense, and not the individual raters, that contracted with the three Masco Administrative Subsidiaries to provide HERS rating services. In those contracts it states that the Masco Administrative Subsidiaries will "engage EnergySense to provide, through its Raters," HERS rating services. When the raters perform HERS rating services on behalf of EnergySense under those contracts, it is solely within the scope of their employment with EnergySense. In order to promote the interests of the corporation, a corporation can only act through its agents,[36] including its employees.[37]

As such, for the purposes of the conflict of interest provisions in the HERS Regulations, there is no distinction between EnergySense and the raters it employs, thus any conflict of interest on the part of EnergySense is imputed to its rater employees.

3. Relationship between EnergySense, Masco, and the Masco Administrative and Installer Subsidiaries.

It is undisputed that Masco is the sole owner of EnergySense, the Masco Administrative Subsidiaries, and the Masco Installer Subsidiaries. Although there is not a direct ownership interest by EnergySense in the Masco Installer Subsidiaries, and by the Masco Installer Subsidiaries in EnergySense, there is an obvious and crucial indirect ownership link between them via the corporate structure of Masco and the Masco Administrative Subsidiaries. This indirect ownership interest is sufficient to establish a conflict of interest under the HERS Regulations when EnergySense performs HERS rating services on installation work done by the Masco Installer Subsidiaries.

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[36] *Moore v. Phillips* (1959) 176 Cal.App.2d 702, 709.

[37] *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 77.

One method of evaluating conflicts of interest is use of the alter ego doctrine.[38] Under the alter ego, or "single enterprise," doctrine, a court may disregard the corporate identity of one company to hold the ownership of the corporation liable for the actions of the company. When the corporate form is used, among other things, to accomplish an inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the organization actually controlling the corporation – usually the owner of the corporation.[39]

Two conditions must be met to invoke the alter ego doctrine: 1) there must be such a unity of ownership and interest between the corporation and its owner that that the separate personalities of the corporation and owner do not really exist; and 2) there must be an inequitable result if the activities in question are treated as those of the corporation alone.[40]

Alter ego liability is not limited to the parent-subsidiary relationship, and the single-enterprise rule can be applied to sister and affiliated companies.[41] It is employed when, for sufficient reason, it is determined that though there are two or more personalities there is but one enterprise.[42]

Among the factors to be considered in applying the doctrine are identical ownership in the two entities; identical directors and officers; the use of one entity as a shell, instrumentality or conduit for a single venture, or for the business or affairs, of another; use of the same office or business location; use of the same attorney; failure to maintain arm's length relationships among entities; and use of the corporate entity to procure labor, services or merchandise for another person or entity.[43] The conditions under which the doctrine will be invoked necessarily vary according to

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[38] *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court (Parsons Corp.)* (1997) 60 Cal.App.4th 248, 258.

[39] *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1341.

[40] *Id.*

[41] *Id.*; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249.

[42] *Las Palmas Associates, supra*, at 1249-1250.

[43] *Troyk, supra*, at 1342; *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft, LLP* (1999) 69 Cal.App.4th 223, 250.

the circumstances in each case.[44] No single characteristic governs, but all of the circumstances must be looked at in determining whether to apply the doctrine.[45]

The alter ego doctrine is a theory of liability developed primarily for the protection of creditors.[46] In some corporate conflict of interest situations – such as conflicts of interest for attorneys representing corporations with a parent-subsidiary relationship – something less than an alter ego finding may justify the treatment of corporate affiliates as one entity for conflict purposes.[47] The conflict of interest provisions in the HERS Regulations are prophylactic rules intended to ensure accurate ratings and to protect consumers – as mandated by California Public Resources Code Section 25942, subdivision (a) (3) – and are not intended to create or assign liability. As such, while we employ the alter ego doctrine here and find that the requirements for the invocation of the doctrine have been met, we focus on those elements of the doctrine we believe are of particular importance for an evaluation of a conflict of interest under the HERS Regulations.

In this matter, there is a unity of ownership and interest between EnergySense and the Masco Installer Subsidiaries. All of those entities are owned by Masco, and their interest is in being a profitable subsidiary for, and adding value to, Masco. Further, EnergySense and some of the Masco Installer Subsidiaries share officers and directors, as well as the same principal business or office location.

Masco and EnergySense share attorneys. This is evident from the fact that the Masco legal department drafted the bylaws for EnergySense, and that a Masco attorney from the "Installation & Other Services" department, group, or unit interceded on behalf of EnergySense and its employees, and specifically noted that he was doing so on behalf of EnergySense. It also appears from the record that Masco attorneys are made available to EnergySense and its employees for legal advice and services. It is reasonable to infer from this pattern of representation that Masco attorneys also provide the same legal representation, advice, and services to the other Masco subsidiaries, including the Masco Installer Subsidiaries.

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[44] *Morrison, supra,* at 250.

[45] *Troyk, supra*, at 1342.

[46] *Morrison, supra*, at 251.

[47] *Id.*, at 252.

EnergySense was created specifically to conduct HERS rating services for the Masco Installer Subsidiaries. By way of the contract structure between EnergySense and the Masco Administrative Subsidiaries, the latter entity, through its own subsidiaries – the Masco Installer Subsidiaries – procures business for the former. The Masco Installer Subsidiaries submit single bids to builders that include both their installation services and HERS rating services from EnergySense. Although the builders are allowed to pick and choose from the offered services, it makes no sense to select HQII but not the HERS rating services required for such installation. EnergySense is then in essence serving as a conduit for the HERS rating affairs of the Masco Installer Subsidiaries, due to the inability of those entities to perform such HERS rating services themselves once HQII became regulated under Title 24. This is not an arms-length relationship.

Therefore, the separate personalities of EnergySense and the Masco Installer Subsidiaries do not truly exist. In essence, the Masco Administrative Subsidiaries, the Masco Installer Subsidiaries, and EnergySense operate as a single enterprise on behalf of their shared corporate parent, Masco.

An inequitable result would occur if EnergySense, as a wholly-owned subsidiary of Masco, were allowed to continue to perform HERS rating services for those energy efficiency improvement installers that are also wholly-owned (directly or indirectly) subsidiaries of Masco. Such continued operation would violate the conflict of interest provisions of the HERS regulations, which exist in order to carry-out the legislative mandate to adopt quality assurance procedures to promote accurate ratings and to protect consumers.

Based on the above, it is established that an alter ego relationship exists between EnergySense (including its raters) and the Masco Installer Subsidiaries. As such, there is an ownership interest, and thus a financial interest as defined in Section 1671, between those entities. This constitutes a conflict of interest under Section 1673, subdivision (i) (2).

Decision

It is a violation of the conflict of interest provisions of the HERS Regulations when EnergySense performs HERS rating services on energy efficiency improvements installed by entities that are also wholly-owned (directly or indirectly) subsidiaries of Masco, including the Masco Installer Subsidiaries. EnergySense should not be allowed to perform HERS rating services on improvements installed by such Masco subsidiaries, but should be allowed to perform HERS rating services for other

entities with which EnergySense has no other conflict of interest.

Under the HERS Regulations, it is the direct responsibility of the providers to administer and oversee the raters working within their home energy rating system. This decision should be used as clarification and guidance to the providers – particularly CHEERS, as it is the provider for EnergySense. The providers are expected to administer their respective rating systems in accordance with this decision and to ensure that violations of the conflict of interest rules, including those of the kind detailed in this decision, do not occur.

Pursuant to California Government Code Section 11425.60, this decision is designated as a precedent decision, and thus may be expressly relied on as precedent.

Dated: May 26, 2009

Art Rosenfeld

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

Julia A. Levin

JULIA LEVIN
Commissioner
California Energy Commission
Associate Member,
Efficiency Committee

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

Complaint / Request for Investigation
REGARDING ENERGY SENSE / MASCO

DOCKET NO. 08-CRI-01
PROOF OF SERVICE LIST

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

CALIFORNIA ENERGY COMMISSION
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DECLARATION OF SERVICE

I, Scott McDonald, deposited copies of the attached DECISION AND ORDER OF THE CALIFORNIA ENERGY COMMISSION AFTER CONSIDERATION OF THE PROPOSED DECISION OF THE EFFICIENCY COMMITTEE in the United States mail, on June 10, 2009, at Sacramento, CA with CERTIFIED MAIL postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

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

Scott McDonald