

AUG 4 1989

ORIGINAL

Decision 89-08-041 August 3, 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking into)
the implementation of Public)
Utilities Code Sections 8281-8285)
relating to women and minority)
business enterprises.)

R.87-02-026
(Filed February 1, 1987)

OPINION MODIFYING DECISION 88-09-024Summary

This order modifies Decision (D.) 88-09-024 which adopted rules and guidelines for increasing participation of women-and minority-owned business enterprises (WMBE) in procurement of contracts from utilities.

Background

On April 27, 1988, the Commission issued D.88-04-057 which adopted General Order (GO) 156 to implement Assembly Bill 3678 (AB 3678) and Public Utilities (PU) Code §§ 8281-8285 regarding increasing WMBE participation in procurement of utility contracts. The Commission modified D.88-04-057 by D.88-09-024 dated September 14, 1988.

The Commission's WMBE Program Coordinator (WMBE Coordinator) and the Coalition of Bay Area Woman-Owned Business (Coalition) have filed petitions to modify D.88-09-024. We will consider each petition separately.

Petition by WMBE Coordinator

On February 24, 1989, WMBE Coordinator filed a petition requesting that the responsibilities assigned to the Director of the Commission Advisory and Compliance Division (CACD) in GO 156 be transferred to the Executive Director's Office. To achieve this Coordinator requests that the words "the Executive Director" in GO 156 be substituted for the words "the Director of CACD," and the

words "the Executive Director's Office" be substituted for the words "the Commission Advisory and Compliance Division" and "CACD."

WMBE Coordinator makes this request because the responsibility for administering the WMBE Program has been transferred from the CACD to the Executive Director's Office. The Executive Director has also transferred the staff assigned to work on the WMBE Program to his office.

Discussion

On December 14, 1988, the Executive Director has transferred the responsibility of administering the WMBE Program from the Director of CACD to his office. We agree with WMBE Coordinator that since the responsibility of administering the WMBE Program has been transferred, GO 156 should be modified to reflect the change. Accordingly, we will modify GO 156 by substituting the words "the Executive Director" for the words "the Director of CACD" the words "the Executive Director's Office" for the words "the Commission Advisory and Compliance Division" and "CACD."

Therefore, the following sections of GO 156 will be modified as shown:

"2.2

An interexchange telecommunications corporation may use its own internally-developed verification form if the use of such form is necessary to comply with an established nationwide or multi-state WMBE program or federally mandated WMBE requirements, provided it is approved by the Director of the Commission Advisory and Compliance Division ~~(CAED)~~ the Executive Director and contains the following information:"

"3.3

The Advisory Board responsible for operating the central clearinghouse shall consist of a non-voting representative of CAED the Executive Director's Office, and a voting representative from each of the following utilities and groups:"

"3.4

Each group identified in Section 3.3 shall select its own representative. If a group is unable to select its representative, it may petition the Director of CAEB the Executive Director to select a representative. Representatives shall serve for three year terms. Representatives may serve multiple terms if reselected by the group they represent."

"3.7

The Advisory Board shall file an annual report with the Director of CAEB Executive Director no later than March 1 of each year. The report shall include a detailed description of the activities of the clearinghouse during the previous year."

"7. ANNUAL REPORT

Utilities shall file with the Director of CAEB the Executive Director, by March 1 of each year, beginning in 1989, an Annual Report on their WMBE Program."

"8. ANNUAL PLAN

Utilities shall file with the Director of CAEB the Executive Director, by March 1 of each year, beginning in 1989, a detailed and verifiable plan for increasing women and minority business enterprise procurement in all categories."

"8.1.6 Plans for complying with the WMBE program guidelines established by the Commission as required by Public Utilities Section 8283 (c). The Commission's CAEB The Executive Director's Office will be responsible for developing, periodically refining, and recommending such guidelines for the Commission's adoption in an appropriate procedural forum."

In addition to the request for modifying GO 156, WMBE Coordinator also requests correction of a typographical error in § 8.1.1 of GO 156. § 8.1.1 presently reads as follows:

"Short, mid, and long term goals set as required by Section 5, supra;"

WMBE Coordinator correctly points out that reference to § 5 is incorrect, because it is § 6 rather than § 5 which specifies the goals. Accordingly, we will modify § 8.1.1 as follows:

"8.1.1 Short, mid, and long term goals set as required by Section 5 Section 6, supra;"

Petition by Coalition

On November 29, 1988, Coalition filed a petition requesting the deletion of "other groups," as defined by § 1.3.9 of GO 156, from the list of minority racial and ethnic groups adopted by GO 156. Coalition also requests that the Commission clarify whether "women-owned business," as specified in § 1.3.2 of GO 156, encompasses a business enterprise owned and controlled by women regardless of minority status, or whether it means only a business enterprise owned and controlled by non-minority women.

On March 3, 1989, WMBE Coordinator filed a response to Coalition's petition and motion to accept its late-filed pleading. Coalition has no objection to WMBE Coordinator's motion. Accordingly, we will accept WMBE Coordinator's response.

We will consider each of Coalition's requests separately.

Request to Delete Other Groups

GO 156 designates the following groups as minorities: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Other Groups. Coalition requests that the "other groups" category be deleted from the GO, because such a classification invites manipulation by unqualified businesses to take advantage of the WMBE program.

Coalition claims that many non-minority-owned business have already attempted to maneuver themselves into the "other groups" category so they can take advantage of a program designed to assist historically recognized socially and economically disadvantaged groups. Coalition believes that there is no need to expand this group to include some now unknown, but yet to be determined group or groups.

Coalition contends that inclusion of the "other groups" will leave a gaping hole in the protection of WMBEs, with its attendant invitation to manipulation.

In its response to Coalition, WMBE Coordinator contends that the Commission's inclusion of the "other groups" in the WMBE category was not contrary to PU Code § 8282(a) and that Coalition's petition fails to substantiate with sufficient evidence a justification for deleting the "other groups" from the definition of minority in GO 156.

Discussion

We do not agree that including "other groups" will harm the historically recognized socially and economically disadvantaged groups listed in PU Code § 8282 by diluting the focus of our WMBE program. We believe that the inclusion of "other groups" is fully consistent with both the language and the spirit of the law.

D.88-04-057 included "other groups" among its categories of "minorities" because the Commission wanted consistency between federal and state agencies in designating minority groups. In that decision, the Commission also expressed its concern that inconsistency between federal and state agencies in designating minority groups might contribute to confusion among WMBEs and those agencies applying incongruous standards. We still hold that view and believe that consistency between federal and state agencies in defining minority categories will not only aid the implementation of the WMBE Program but also provide disadvantaged groups not included in other minority categories an opportunity to benefit from the program.

Nothing in either the statute GO 156 implements or its legislative history suggests that utility WMBE programs should be limited to those minorities specifically referred to in Section 8282. PU Code § 8282(b) provides in relevant part "...The contracting utility shall presume that minority includes Black Americans, Hispanic Americans, Native Americans and Asian Pacific

Americans." The creation of a presumption that the term "minority" includes certain groups implies that the term may also include other groups. The legislature could have, but did not, limit the definition of "minority" to certain specific groups. Therefore, the Commission included other disadvantaged groups in its minority categories so that all minority groups, including those enumerated in the statute, may have an opportunity to participate. As will become clear below, the Commission's expansive definition of minorities should serve the legislature's purpose well.

By adopting PacBell's recommendation for consistency in federal and state minority definitions, we opened the door to groups which have been found by the SBA or the Commerce Department to be disadvantaged, whatever their racial or ethnic origin. Inclusion of these disadvantaged groups will increase competition in the utility procurement marketplace by increasing the number of potential suppliers, and will thus further a major purpose of the legislation. SBA and Commerce Department regulations concerning the type of groups eligible for socially and economically disadvantaged status and setting forth the procedures to be followed in obtaining such status reassure us that the inclusion of such groups in our WMBE program will not dilute the social impact of that program.¹ We believe that these regulations are sufficiently stringent to weed out groups who may be seeking special status out of greed rather than need. If the future reveals that this review is inadequate, we will revisit the issue.

¹ Small Business Administration regulations governing socially and economically disadvantaged groups are found at 13 Code of Federal Regulations (CFR), Part 124. Department of Commerce Minority Business Development Agency regulations are found at 15 CFR, Part 1400.

We are sensitive to Coalition's concern that inclusion of "other groups" will provide non-minority businesses the opportunity to take unfair advantage of our WMBE program. We do not, however, believe that mere allegations regarding potential abuses of the SBA and Commerce Department minority and disadvantaged business programs provide an adequate justification for eliminating the "other groups" category at this time. In the absence of specific examples of such abuse, we will retain the "other groups" category."

Clarification of Women-Owned Business

Coalition requests that the Commission confirm its definition of women-owned business (WBE) included in § 1.3.2 of GO 156 which states that:

"'Women-owned business' means a business enterprise that is at least 51% owned by a woman or women; or, in the case of any publicly owned business, at least 51% of the stock of which is owned by one or more women, and whose management and daily business operations are controlled by one or more women."

According to Coalition, the need for clarity in the definition of WBE stems from the efforts of the majority of the public utility members of the Clearinghouse Advisory Board to change the definition of a WBE in all Clearinghouse documents from the Commission's own definition, stated above, to one that limits that definition to non-minority women only. Coalition asserts that new wording found on page 36 of the Clearinghouse Operational Guidelines dated November 30, 1988 reads as follows²:

"Women-owned Business Enterprise (WBE),
A business enterprise that is at least 51% owned by a non-minority woman or women; or, in the case of any publicly owned business, at least 51% of the stock of which owned by one or

² Coalition has attached page 36 of the Clearinghouse Operational Guidelines to its petition.

more non-minority women, and whose management and daily business operations are controlled by one or more women."

Coalition contends that this change, if allowed to occur, will have a negative impact on the diligence the public utilities will use in their outreach programs to inform, encourage, recruit, and utilize all WBEs, regardless of their race, and will give them license to focus only on a portion of California's WBEs. Thus, putting minority women and women of mixed ethnicity at a disadvantage. Therefore, Coalition requests that the Commission confirm and clarify women-owned business is one that is owned, controlled, and operated by a woman or women regardless of race.

In its response to Coalition's petition, WMBE Coordinator contends that the definition of "women-owned business" as used in § 1.3.2 of GO 156 includes business owned by a woman or women, regardless of their minority status. WMBE staff proposes that in order to eliminate any confusion the Commission might consider designating businesses owned by non-minority women as NWBEs and those owned by minority women as MWBEs.

Discussion

PU Code § 8282(a) defines a "women-owned business to mean:

"a business enterprise that is at least 51 percent owned by a woman or women; or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more of those individuals."

From a plain reading of this statute, it appears that the Legislature did not use the words "woman" and "women" to apply only to non-minority woman or women. Rather the terms "woman" and "women" are used generically, without any qualification anywhere else in § 8282, or the other statutory provisions applicable to the WMBE Program. There is no indication that the Legislature intended

"women-owned business" to mean only those owned by non-minority women. Therefore, in adopting GO 156 the Commission used exactly the same words used in statute to define "women-owned business" and intended to include business owned by a woman or women, regardless of their minority status.

Having clarified that WBEs include businesses owned by women of all racial or ethnic groups, we must consider Coalition's concern regarding the modified definition of WBEs included in the Clearinghouse Operational Guidelines dated November 30, 1988. The modification limits the definition of WBEs to non-minority women only. We share Coalition's concern. However, we note that the November 30, 1988 Clearinghouse Operational Guidelines were only proposed guidelines and have not been adopted. We expect the Executive Director to approve Clearinghouse Operational Guidelines which exclude any reference to non-minority women. The definition of a WBE in the adopted guidelines should be identical to the definition included in § 1.3.2 of GO 156, which should address Coalition's concern.

We believe that since the definition of a WBE includes businesses owned by a woman or women of all minority or non-minority group, the "NWBE" and "MWBE" labels proposed by WMBE Coordinator are unnecessary. We do, however, agree with WMBE Coordinator that GO 156 § 6.3 could be re-written to clarify its intent.

Following the lead of Joint Commenters, GO 156 sets initial long term goals of 5% for women owned business enterprises and 15% for minority owned business enterprises, but does not set specific long term goal for minority women owned business enterprises. GO 156 also incorporates, in § 6.3, Joint Commenters' recommendation that we require utilities to establish overall goals for both minority owned business enterprises (MBEs) and non-minority women owned business enterprises.

As noted in D.88-09-024, "we believe that the GO 156 § 6.3 distinction between minority owned business enterprises and non-minority women owned business enterprises may focus attention on the potential for procurement contract disparity between minority women and non-minority women owned business enterprises and may encourage utilities to focus procurement efforts toward both minority and non-minority women owned businesses. We believe this distinction between minority and non-minority women owned business enterprises may assist minority women owned businesses to obtain more utility contracts."

The purpose of GO 156 § 6.3 was to focus attention on the potential for procurement contract disparity between minority women and non-minority women owned businesses, and to encourage utilities to focus procurement efforts toward both minority women owned businesses and non-minority women owned businesses. What § 6.3 succeeded in doing was creating confusion between § 6.2 and 6.3. As it reads at present, § 6.3 duplicates § 6.2 in so far as it requires overall goals for minority owned business enterprises. SDG&E, at least, interpreted § 6.3 to mean that the 5% goal for procurement from women owned business enterprises set forth in § 6.2 applied only to non-minority women owned business enterprises. This was not our intent.

Obviously, minority women are both minorities and women. Since the overall program goals name only minorities, without regard for gender, and women, without regard for minority or non-minority status, minority women fall into both categories. Without a specific goal for minority women, however, minority women could easily fall outside the focus of attention of programs addressing either category. Theoretically, the "minority" goal could be met entirely by minority men owned businesses, and the "women" goal could be met entirely by non-minority women owned businesses. This is not what we want. We certainly did not intend utilities to direct their procurement programs to non-minority women and

minority men owned business enterprises to the exclusion of minority women owned business enterprises.

What § 6.3 should have done was require goals for both minority women owned business enterprises and non-minority women owned business enterprises. This would have made our focus on avoiding disparities between minority women and non-minority women owned businesses clearer. We will take this opportunity to reaffirm our intent.

We will amend § 6.3 to read as follows:

6.3 Goals shall also be established for both minority women owned business enterprises and non-minority women owned business enterprises. These goals are to be a subset of the overall goal for WMBEs established by Section 6.2 (initially 20% for both women owned business enterprises and minority owned business enterprises). These goals are intended to ensure that utilities do not direct their WMBE procurement programs toward non-minority women and minority men owned business enterprises to the detriment or exclusion of minority women owned business enterprises.

Finally, we believe it is necessary to clear up any potential ambiguity regarding the recording of contracts with minority women owned business enterprises toward compliance with the goals set forth in GO 156 § 6.2. As we noted earlier, this section provides for initial long-term goals of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises, but does not specify a goal for minority women owned business enterprises. For the purposes of this section, contracts with minority women-owned business enterprises can be counted toward either the minority owned business goal or the women owned business goal, but not toward both.

We will amend GO 156 § 6.2 to read as follows:

6.2

Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises. For the purposes of this section, the term "major category" shall mean a category established in accord with Section 6. For the purposes of this section, contracts with minority women owned business enterprises can be counted toward either the minority owned business enterprise goal or the women owned business enterprise goal, but not toward both. The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281 (b) (1) (B) are awarding 30% or more of their contracts to WMBES.

Findings of Fact

1. On December 14, 1988, the Executive Director transferred responsibility of administering the WMBE program from the Director of CACD to his office.
2. The Executive Director has also transferred the staff assigned to work on the WMBE program to his office.
3. Petitioner, WMBE Coordinator requests modifications of GO 156 to reflect the transfer of responsibility of the WMBE program from the Director of CACD to the Executive Director's Office.
4. WMBE staff has discovered a typographical error in § 8.1.1 of GO 156 and requests its correction.
5. No party has filed a response to WMBE Coordinator's petition.

6. Petitioner, Coalition requests deletion of "other groups," as defined by § 1.3.9 of GO 156, from the list of minority racial and ethnic groups.

7. Coalition contends that inclusion of "other groups" in the minority category provides non-minority-owned business an opportunity to take an unfair advantage of the WMBE program.

8. In its response to Coalition, WMBE Coordinator contends that the Commission's inclusion of the "other groups" in the WMBE category was not contrary to PU Code § 8282(a) and that Coalition's petition fails to substantiate with sufficient evidence a justification for deleting the "other groups" from the definition of minorities in GO 156.

9. "Other groups" category was included as part of the definition for "minorities" to achieve a consistency of classification of minorities between federal and state agencies.

10. Inconsistent federal and state designations of minority groups could contribute to confusion among WMBEs and utilities subject to such incongruous standards, and among agencies applying such standards.

11. The legislation that GO 156 implements does not limit its definition of minorities to only those minorities specifically named in the statute.

12. Inclusion of a minority category designated "other groups" which consists of groups whose members are found to be disadvantaged by the Small Business Administration pursuant to Section 8(d) of the Small Business Act as amended (15 U.S.C. 637(d), or the Secretary of Commerce pursuant to Section 5 of Executive Order 11625 furthers a a major purpose of the the legislation GO 156 implements by increasing the number of suppliers and the amount of competition within the utility procurement marketplace.

13. Small Business Administration and Commerce Department regulations defining the type of groups eligible for socially and

economically disadvantaged status and setting forth the procedures to be followed to obtain such status are stringent enough to ensure that the inclusion of such groups in our WMBE program will not dilute the social impact of that program on the historically socially and economically disadvantaged groups named in PU Code § 8282(a).

14. Coalition also requests that the Commission confirm and clarify its definition of WBEs included in § 1.3.2 of GO 156.

15. Coalition requests clarification of the definition of WBE because the Clearinghouse Operational Guidelines limit the definition of WBE to non-minority woman owned businesses only.

16. The Clearinghouse Operational Guidelines referred to by Coalition have not yet been approved.

17. PU Code § 8282(a), in defining WBE, does not differentiate between minority and non-minority women.

18. WMBE staff recommends that § 6.3 of GO 156 be modified to clarify the Commission's intent.

19. Minority women owned business enterprises are both women owned business enterprises and minority owned business enterprises, and thus fall within the scope of both the 5% overall goal for women owned business enterprises and the 15% overall goal for minority owned business enterprises.

20. The use of goals for minority women owned business enterprises and non-minority women owned business enterprises would ensure that utilities do not direct their WMBE procurement programs toward non-minority women owned business enterprises and minority

men owned business enterprises to the detriment or exclusion of minority women owned business enterprises.

Conclusions of Law

1. WMBE staff's petition to modify GO 156 to reflect the transfer of responsibility of administering the WMBE program from the Director of CACD to the Executive Director's Office should be granted by modifying §§ 2.2, 3.3, 3.4, 3.7, 7, 8, and 8.1.6 of GO 156.

2. § 8.1.1 of GO 156 should be modified to correct a typographical error.

3. Coalition's petition to delete § 1.3.9 of GO 156 should be denied.

4. The definition of WBE should include businesses owned by a woman or women, regardless of their race or ethnic group.

5. WMBE staff's recommendation that § 6.3 be rewritten to clarify the Commission's intent should be granted by modifying § 6.3. to require separate goals for minority women owned business enterprises and non-minority women owned business enterprises. These goals should be a subset of the overall goal for WMBEs established by § 6.2 (initially 20% for both women owned business enterprises and minority owned business enterprises).

6. § 6.2 of GO 156 should be modified to make clear that utility contracts with minority women owned businesses can be counted toward either the women owned business enterprise goal or the minority owned business enterprise goal, but not toward both.

ORDER

IT IS ORDERED that:

1. §§ 2.2, 3.3, 3.4, 3.7, 6.2, 6.3, 7, 8, and 8.1.6 of General Order (GO) shall be modified as follows:

"2.2

An interexchange telecommunications corporation may use its own internally-developed verification form if the use

of such form is necessary to comply with an established nationwide or multi-state WMBE program or federally mandated WMBE requirements, provided it is approved by the Executive Director and contains the following information:"

"3.3

The Advisory Board responsible for operating the central clearinghouse shall consist of a non-voting representative of the Executive Director's Office, and a voting representative from each of the following utilities and groups:"

"3.4

Each group identified in Section 3.3 shall select its own representative. If a group is unable to select its representative, it may petition the Executive Director to select a representative. Representatives shall serve for three year terms. Representatives may serve multiple terms if reselected by the group they represent."

"3.7

The Advisory Board shall file an annual report with the Executive Director no later than March 1 of each year. The report shall include a detailed description of the activities of the clearinghouse during the previous year."

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Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises. For the purposes of this section, the term "major category" shall mean a category established in accord with Section 6. For the purposes of this section, contracts with minority women owned business enterprises can be counted toward either the minority owned business

enterprise goal or the women owned business enterprise goal, but not toward both. The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281 (b) (1) (B) are awarding 30% or more of their contracts to WMBES."

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Goals shall also be established for both minority women owned business enterprises and non-minority women owned business enterprises. These goals are to be a subset of the overall goal for WMBES established by Section 6.2 (initially 20% for both women owned business enterprises and minority owned business enterprises). These goals are intended to ensure that utilities do not direct their WMBE procurement programs toward non-minority women and minority men owned business enterprises to the detriment or exclusion of minority women owned business enterprises."

"7. ANNUAL REPORT

Utilities shall file with the Executive Director, by March 1 of each year, beginning in 1989, an Annual Report on their WMBE Program."

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Utilities shall file with the Executive Director, by March 1 of each year, beginning in 1989, a detailed and verifiable plan for increasing women and minority business enterprise procurement in all categories."

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periodically refining, and recommending such guidelines for the Commission's adoption in an appropriate procedural forum."

2. § 8.1.1 of GO 156 shall be modified as follows:

"8.1.1 Short, mid, and long term goals set as required by Section 6, supra;"

3. Coalition of Bay Area Women-Owned Business' request to delete § 1.3.9 of GO 156 is denied.

4. The definition of "women-owned businesses" in the Clearinghouse Operational Guidelines shall be identical to the definition included in § 1.3.2 of GO 156.

This order is effective today.

Dated August 3, 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

Commissioner Stanley W. Hulett,
being necessarily absent, did not
participate.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.

Victor Weiss

Victor Weiss, Executive Director

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H-7a

Decision 89 08 041 AUG 3 1989**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking into
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Request to Delete Other Groups

GO 156 designates the following groups as minorities: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Other Groups. Coalition requests that the "other groups" category be deleted from the GO, because such a classification invites manipulation by unqualified businesses to take advantage of the WMBE program.

Coalition claims that many non-minority-owned business have already attempted to maneuver themselves into the "other groups" category so they can take advantage of a program designed to assist historically recognized socially and economically disadvantaged groups. Coalition believes that there is no need to expand this group to include some now unknown, but yet to be determined group or groups.

Coalition contends that inclusion of the "other groups" will leave a gaping hole in the protection of WMBEs, with its attendant invitation to manipulation.

In its response to Coalition, WMBE Coordinator contends that the Commission's inclusion of the "other groups" in the WMBE category was not contrary to PU Code § 8282(a) and that Coalition's petition fails to substantiate with sufficient evidence a justification for deleting the "other groups" from the definition of minority in GO 156.

Discussion

We do not agree that including "other groups" will harm the historically recognized socially and economically disadvantaged groups listed in PU Code § 8282 by diluting the focus of our WMBE program. We believe that the inclusion of "other groups" is fully consistent with both the language and the spirit of the law.

D-88-04-057 included "other groups" among its categories of "minorities" because the Commission wanted consistency between federal and state agencies in designating minority groups. In that decision, the Commission also expressed its concern that inconsistency between federal and state agencies in designating minority groups might contribute to confusion among WMBEs and those agencies applying incongruous standards. We still hold that view and believe that consistency between federal and state agencies in defining minority categories will not only aid the implementation of the WMBE Program but also provide disadvantaged groups not included in other minority categories an opportunity to benefit from the program.

Nothing in either the statute GO 156 implements or its legislative history suggests that utility WMBE programs should be limited to those minorities specifically referred to in Section 8282. PU Code § 8282(b) provides in relevant part "...The contracting utility shall presume that minority includes Black Americans, Hispanic Americans, Native Americans and Asian Pacific

Americans." The creation of a presumption that the term "minority" includes certain groups implies that the term may also include other groups. The legislature could have, but did not, limit the definition of "minority" to certain specific groups. Therefore, the Commission included other disadvantaged groups in its minority categories so that all minority groups, including those enumerated in the statute, may have an opportunity to participate. As will become clear below, the Commission's expansive definition of minorities should serve the legislature's purpose well.

By adopting PacBell's recommendation for consistency in federal and state minority definitions, we opened the door to groups which have been found by the SBA or the Commerce Department to be disadvantaged, whatever their racial or ethnic origin. Inclusion of these disadvantaged groups will increase competition in the utility procurement marketplace by increasing the number of potential suppliers, and will thus further a major purpose of the legislation. SBA and Commerce Department regulations concerning the type of groups eligible for socially and economically disadvantaged status and setting forth the procedures to be followed in obtaining such status reassure us that the inclusion of such groups in our WMBE program will not dilute the social impact of that program.¹ We believe that these regulations are sufficiently stringent to weed out groups who may be seeking special status out of greed rather than need. If the future reveals that this review is inadequate, we will revisit the issue.

¹ Small Business Administration regulations governing socially and economically disadvantaged groups are found at 13 Code of Federal Regulations (CFR), Part 124. Department of Commerce Minority Business Development Agency regulations are found at 15 CFR, Part 1400.

We are sensitive to Coalition's concern that inclusion of "other groups" will provide non-minority businesses the opportunity to take unfair advantage of our WMBE program. We do not, however, believe that mere allegations regarding potential abuses of the SBA and Commerce Department minority and disadvantaged business programs provide an adequate justification for eliminating the "other groups" category at this time. In the absence of specific examples of such abuse, we will retain the "other groups" category."

Clarification of Women-Owned Business

Coalition requests that the Commission confirm its definition of women-owned business (WBE) included in § 1.3.2 of GO 156 which states that:

"'Women-owned business' means a business enterprise that is at least 51% owned by a woman or women; or, in the case of any publicly owned business, at least 51% of the stock of which is owned by one or more women, and whose management and daily business operations are controlled by one or more women."

According to Coalition, the need for clarity in the definition of WBE stems from the efforts of the majority of the public utility members of the Clearinghouse Advisory Board to change the definition of a WBE in all Clearinghouse documents from the Commission's own definition, stated above, to one that limits that definition to non-minority women only. Coalition asserts that new wording found on page 36 of the Clearinghouse Operational Guidelines dated November 30, 1988 reads as follows²:

"Women-owned Business Enterprise (WBE),
A business enterprise that is at least 51% owned by a non-minority woman or women; or, in the case of any publicly owned business, at least 51% of the stock of which owned by one or

² Coalition has attached page 36 of the Clearinghouse Operational Guidelines to its petition.

more non-minority women, and whose management and daily business operations are controlled by one or more women."

Coalition contends that this change, if allowed to occur, will have a negative impact on the diligence the public utilities will use in their outreach programs to inform, encourage, recruit, and utilize all WBEs, regardless of their race, and will give them license to focus only on a portion of California's WBEs. Thus, putting minority women and women of mixed ethnicity at a disadvantage. Therefore, Coalition requests that the Commission confirm and clarify women-owned business is one that is owned, controlled, and operated by a woman or women regardless of race.

In its response to Coalition's petition, WMBE Coordinator contends that the definition of "women-owned business" as used in § 1.3.2 of GO 156 includes business owned by a woman or women, regardless of their minority status. WMBE staff proposes that in order to eliminate any confusion the Commission might consider designating businesses owned by non-minority women as NWBEs and those owned by minority women as MWBEs.

Discussion

PU Code § 8282(a) defines a "women-owned business to mean:

"a business enterprise that is at least 51 percent owned by a woman or women; or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more of those individuals."

From a plain reading of this statute, it appears that the Legislature did not use the words "woman" and "women" to apply only to non-minority woman or women. Rather the terms "woman" and "women" are used generically, without any qualification anywhere else in § 8282, or the other statutory provisions applicable to the WMBE Program. There is no indication that the Legislature intended

"women-owned business" to mean only those owned by non-minority women. Therefore, in adopting GO 156 the Commission used exactly the same words used in statute to define "women-owned business" and intended to include business owned by a woman or women, regardless of their minority status.

Having clarified that WBEs include businesses owned by women of all racial or ethnic groups, we must consider Coalition's concern regarding the modified definition of WBEs included in the Clearinghouse Operational Guidelines dated November 30, 1988. The modification limits the definition of WBEs to non-minority women only. We share Coalition's concern. However, we note that the November 30, 1988 Clearinghouse Operational Guidelines were only proposed guidelines and have not been adopted. We expect the Executive Director to approve Clearinghouse Operational Guidelines which exclude any reference to non-minority women. The definition of a WBE in the adopted guidelines should be identical to the definition included in § 1.3.2 of GO 156, which should address Coalition's concern.

We believe that since the definition of a WBE includes businesses owned by a woman or women of all minority or non-minority group, the "NWBE" and "MWBE" labels proposed by WMBE Coordinator are unnecessary. We do, however, agree with WMBE Coordinator that GO 156 § 6.3 could be re-written to clarify its intent.

Following the lead of Joint Commenters, GO 156 sets initial long term goals of 5% for women owned business enterprises and 15% for minority owned business enterprises, but does not set specific long term goal for minority women owned business enterprises. GO 156 also incorporates, in § 6.3, Joint Commenters' recommendation that we require utilities to establish overall goals for both minority owned business enterprises (MBEs) and non-minority women owned business enterprises.

As noted in D.88-09-024, "we believe that the GO 156 § 6.3 distinction between minority owned business enterprises and non-minority women owned business enterprises may focus attention on the potential for procurement contract disparity between minority women and non-minority women owned business enterprises and may encourage utilities to focus procurement efforts toward both minority and non-minority women owned businesses. We believe this distinction between minority and non-minority women owned business enterprises may assist minority women owned businesses to obtain more utility contracts."

The purpose of GO 156 § 6.3 was to focus attention on the potential for procurement contract disparity between minority women and non-minority women owned businesses, and to encourage utilities to focus procurement efforts toward both minority women owned businesses and non-minority women owned businesses. What § 6.3 succeeded in doing was creating confusion between § 6.2 and 6.3. As it reads at present, § 6.3 duplicates § 6.2 in so far as it requires overall goals for minority owned business enterprises. SDG&E, at least, interpreted § 6.3 to mean that the 5% goal for procurement from women owned business enterprises set forth in § 6.2 applied only to non-minority women owned business enterprises. This was not our intent.

Obviously, minority women are both minorities and women. Since the overall program goals name only minorities, without regard for gender, and women, without regard for minority or non-minority status, minority women fall into both categories. Without a specific goal for minority women, however, minority women could easily fall outside the focus of attention of programs addressing either category. Theoretically, the "minority" goal could be met entirely by minority men owned businesses, and the "women" goal could be met entirely by non-minority women owned businesses. This is not what we want. We certainly did not intend utilities to direct their procurement programs to non-minority women and

minority men owned business enterprises to the exclusion of minority women owned business enterprises.

What § 6.3 should have done was require goals for both minority women owned business enterprises and non-minority women owned business enterprises. This would have made our focus on avoiding disparities between minority women and non-minority women owned businesses clearer. We will take this opportunity to reaffirm our intent.

We will amend § 6.3 to read as follows:

6.3 Goals shall also be established for both minority women owned business enterprises and non-minority women owned business enterprises. These goals are to be a subset of the overall goal for WMBEs established by Section 6.2 (initially 20% for both women owned business enterprises and minority owned business enterprises). These goals are intended to ensure that utilities do not direct their WMBE procurement programs toward non-minority women and minority men owned business enterprises to the detriment or exclusion of minority women owned business enterprises.

Finally, we believe it is necessary to clear up any potential ambiguity regarding the recording of contracts with minority women owned business enterprises toward compliance with the goals set forth in GO 156 § 6.2. As we noted earlier, this section provides for initial long-term goals of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises, but does not specify a goal for minority women owned business enterprises. For the purposes of this section, contracts with minority women-owned business enterprises can be counted toward either the minority owned

business goal or the women owned business goal, but not toward both.

We will amend GO 156 § 6.2 to read as follows:

6.2 Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises. For the purposes of this section, the term "major category" shall mean a category established in accord with Section 6. For the purposes of this section, contracts with minority women owned business enterprises can be counted toward either the minority owned business enterprise goal or the women owned business enterprise goal, but not toward both. The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281 (b)(1)(B) are awarding 30% or more of their contracts to WMBES."

Findings of Fact

1. On December 14, 1988, the Executive Director transferred responsibility of administering the WMBE program from the Director of CACD to his office.

2. The Executive Director has also transferred the staff assigned to work on the WMBE program to his office.

3. Petitioner, WMBE Coordinator requests modifications of GO 156 to reflect the transfer of responsibility of the WMBE

program from the Director of CACD to the Executive Director's Office.

4. WMBE staff has discovered a typographical error in § 8.1.1 of GO 156 and requests its correction.

5. No party has filed a response WMBE Coordinator's petition.

6. Petitioner, Coalition requests deletion of "other groups," as defined by § 1.3.9 of GO 156, from the list of minority racial and ethnic groups.

7. Coalition contends that inclusion of "other groups" in the minority category provides non-minority-owned business an opportunity to take an unfair advantage of the WMBE program.

8. In its response to Coalition, WMBE Coordinator contends that the Commission's inclusion of the "other groups" in the WMBE category was not contrary to PU Code § 8282(a) and that Coalition's petition fails to substantiate with sufficient evidence a justification for deleting the "other groups" from the definition of minorities in GO 156.

9. "Other groups" category was included as part of the definition for "minorities" to achieve a consistency of classification of minorities between federal and state agencies.

10. Inconsistent federal and state designations of minority groups could contribute to confusion among WMBEs and utilities subject to such incongruous standards, and among agencies applying such standards.

11. The legislation that GO 156 implements does not limit its definition of minorities to only those minorities specifically named in the statute.

12. Inclusion of a minority category designated "other groups" which consists of groups whose members are found to be disadvantaged by the Small Business Administration pursuant to Section 8(d) of the Small Business Act as amended (15 U.S.C. 637(d), or the Secretary of Commerce pursuant to Section 5 of

Executive Order 11625 furthers a a major purpose of the the legislation GO 156 implements by increasing the number of suppliers and the amount of competition within the utility procurement marketplace.

13. Small Business Administration and Commerce Department regulations defining the type of groups eligible for socially and economically disadvantaged status and setting forth the procedures to be followed to obtain such status are stringent enough to ensure that the inclusion of such groups in our WMBE program will not dilute the social impact of that program on the historically socially and economically disadvantaged groups named in PU Code § 8282(a).

14. Coalition also requests that the Commission confirm and clarify its definition of WBEs included in § 1.3.2 of GO 156.

15. Coalition requests clarification of the definition of WBE because the Clearinghouse Operational Guidelines limit the definition of WBE to non-minority woman owned businesses only.

16. The Clearinghouse Operational Guidelines referred to by Coalition have not yet been approved.

17. PU Code § 8282(a), in defining WBE, does not differentiate between minority and non-minority women.

18. WMBE staff recommends that § 6.3 of GO 156 be modified to clarify the Commission's intent.

19. Minority women owned business enterprises are both women owned business enterprises and minority owned business enterprises, and thus fall within the scope of both the 5% overall goal for women owned business enterprises and the 15% overall goal for minority owned business enterprises.

20. The use of goals for minority women owned business enterprises and non-minority women owned business enterprises would ensure that utilities do not direct their WMBE procurement programs toward non-minority women owned business enterprises and minority

men owned business enterprises to the detriment or exclusion of minority women owned business enterprises.

Conclusions of Law

1. WMBE staff's petition to modify GO 156 to reflect the transfer of responsibility of administering the WMBE program from the Director of CACD to the Executive Director's Office should be granted by modifying §§ 2.2, 3.3, 3.4, 7, 8, and 8.1.6 of GO 156.

2. § 8.1.1 of GO 156 should be modified to correct a typographical error.

3. Coalition's petition to delete § 1.3.9 of GO 156 should be denied.

4. The definition of WBE should include businesses owned by a woman or women, regardless of their race or ethnic group.

5. WMBE staff's recommendation that § 6.3 be rewritten to clarify the Commission's intent should be granted by modifying § 6.3. to require separate goals for minority women owned business enterprises and non-minority women owned business enterprises. These goals should be a subset of the overall goal for WMBEs established by § 6.2 (initially 20% for both women owned business enterprises and minority owned business enterprises).

6. § 6.2 of GO 156 should be modified to make clear that utility contracts with minority women owned businesses can be counted toward either the women owned business enterprise goal or the minority owned business enterprise goal, but not toward both.

ORDER

IT IS ORDERED that:

1. §§ 2.2, 3.3, 3.4, 6.2, 6.3, 7, 8, and 8.1.6 of General Order (GO) shall be modified as follows:

"2.2

An interexchange telecommunications corporation may use its own internally-developed verification form if the use of such form is necessary to comply with an established nationwide or multi-state WMBE program or federally

men owned business enterprises to the detriment or exclusion of minority women owned business enterprises.

Conclusions of Law

1. WMBE staff's petition to modify GO 156 to reflect the transfer of responsibility of administering the WMBE program from the Director of CACD to the Executive Director's Office should be granted by modifying §§ 2.2, 3.3, 3.4, 3.7, 7, 8, and 8.1.6 of GO 156.

2. § 8.1.1 of GO 156 should be modified to correct a typographical error.

3. Coalition's petition to delete § 1.3.9 of GO 156 should be denied.

4. The definition of WBE should include businesses owned by a woman or women, regardless of their race or ethnic group.

5. WMBE staff's recommendation that § 6.3 be rewritten to clarify the Commission's intent should be granted by modifying § 6.3. to require separate goals for minority women owned business enterprises and non-minority women owned business enterprises. These goals should be a subset of the overall goal for WMBEs established by § 6.2 (initially 20% for both women owned business enterprises and minority owned business enterprises).

6. § 6.2 of GO 156 should be modified to make clear that utility contracts with minority women owned businesses can be counted toward either the women owned business enterprise goal or the minority owned business enterprise goal, but not toward both.

ORDER

IT IS ORDERED that:

1. §§ 2.2, 3.3, 3.4, 3.7, 6.2, 6.3, 7, 8, and 8.1.6 of General Order (GO) shall be modified as follows:

"2.2

An interexchange telecommunications corporation may use its own internally-developed verification form if the use of such form is necessary to comply with an established nationwide or

mandated WMBE requirements, provided it is approved by the Executive Director and contains the following information:"

"3.3

The Advisory Board responsible for operating the central clearinghouse shall consist of a non-voting representative of the Executive Director's Office, and a voting representative from each of the following utilities and groups:"

"3.4

Each group identified in Section 3.3 shall select its own representative. If a group is unable to select its representative, it may petition the Executive Director to select a representative. Representatives shall serve for three year terms. Representatives may serve multiple terms if reselected by the group they represent."

"6.2

Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises. For the purposes of this section, the term "major category" shall mean a category established in accord with Section 6. For the purposes of this section, contracts with minority women owned business enterprises can be counted toward either the minority owned business enterprise goal or the women owned business enterprise goal, but not toward both. The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281 (b)(1)(B) are awarding 30% or more of their contracts to WMBES."

multi-state WMBE program or federally mandated WMBE requirements, provided it is approved by the Executive Director and contains the following information:

- "3.3 The Advisory Board responsible for operating the central clearinghouse shall consist of a non-voting representative of the Executive Director's Office, and a voting representative from each of the following utilities and groups:"
- "3.4 Each group identified in Section 3.3 shall select its own representative. If a group is unable to select its representative, it may petition the Executive Director to select a representative. Representatives shall serve for three year terms. Representatives may serve multiple terms if reselected by the group they represent."
- "3.7 The Advisory Board shall file an annual report with the Executive Director no later than March 1 of each year. The report shall include a detailed description of the activities of the clearinghouse during the previous year."
- "6.2 Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises. For the purposes of this section, the term "major category" shall mean a category established in accord with Section 6. For the purposes of this section, contracts with minority women owned business enterprises can be counted toward either the minority owned business enterprise goal or the women owned business enterprise goal, but not

toward both. The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281 (b)(1)(B) are awarding 30% or more of their contracts to WMBES."

"6.3

Goals shall also be established for both minority women owned business enterprises and non-minority women owned business enterprises. These goals are to be a subset of the overall goal for WMBEs established by Section 6.2 (initially 20% for both women owned business enterprises and minority owned business enterprises). These goals are intended to ensure that utilities do not direct their WMBE procurement programs toward non-minority women and minority men owned business enterprises to the detriment or exclusion of minority women owned business enterprises."

"7. ANNUAL REPORT

Utilities shall file with the Executive Director, by March 1 of each year, beginning in 1989, an Annual Report on their WMBE Program."

"8. ANNUAL PLAN

Utilities shall file with the Executive Director, by March 1 of each year, beginning in 1989, a detailed and verifiable plan for increasing women and minority business enterprise procurement in all categories."

"8.1.6 Plans for complying with the WMBE program guidelines established by the Commission as required by Public Utilities Section 8283(c). The Executive Director's Office will be responsible for developing, periodically refining, and recommending such guidelines for the Commission's adoption in an appropriate procedural forum."

2. § 8.1.1 of GO 156 shall be modified as follows:

"8.1.1 Short, mid, and long term goals set as required by Section 6, supra:"

3. Coalition of Bay Area Women-Owned Business request to delete § 1.3.9 of GO 156 is denied.

4. The definition of "women-owned businesses" in the Clearinghouse Operational Guidelines shall be identical to the definition included in § 1.3.2 of GO 156.

This order is effective today.

Dated AUG 3 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

Commissioner Stanley W. Hulett,
being necessarily absent, did not
participate.