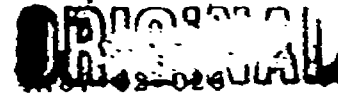


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Decision 90-11-053 November 21, 1990

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.)



(Filed February 11, 1987)

OPINION MODIFYING DECISION 88-09-024

Summary

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. In the order, we clarify the General Order (GO) 156 definitions of women-owned and minority-owned businesses.

Background

On April 27, 1988, the Commission issued D.88-04-057 which adopted 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 and by D.89-08-041 dated August 3, 1989.

On March 29, 1990, the Commission's WMBE program manager filed a petition to modify GO 156 to abolish the fuel exclusion granted in D.88-09-024. In the annual generic WMBE OII proceeding, Order Instituting Investigation (OII or I.) 90-02-044, the staff's report recommended consolidation of that petition to modify with the OII. By ruling dated September 13, 1990, Administrative Law Judge (ALJ) Ann Watson denied that request. That petition to modify remains pending before ALJ Garde and is not an issue in this decision.

On June 13, 1990, San Diego Gas & Electric Company (San Diego) filed its Petition to Modify Decision 88-04-057 (Petition) and requested changes in the GO 156 definitions of "minority-owned" and "women-owned" businesses. AT&T Communications of California, Inc. (AT&T) filed the only response to the Petition on July 13, 1990 (Response). Although AT&T opposed some but not all of San Diego's changes to GO 156's §§ 1.3.2 and 1.3.3, AT&T proposed its own revisions. All interested parties in Order Instituting Rulemaking 87-02-026 were served with the Petition and Response. No hearings were requested.

Discussion

GO 156 defines women-owned and minority-owned businesses as follows:

- *1.3.2 '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.

- *1.3.3 'Minority-owned business' means a business enterprise that is at least 51% owned by a minority individual or group; or, in the case of any publicly owned business, at least 51% of the stock of which is owned by one or more minority groups, and whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes, but is not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Americans, and other groups."

This GO language is substantially similar to that in the WMBE enabling legislation which contains the following definitions:

- *(a) 'Women-owned business' means 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.

"(b) 'Minority-owned business' means a business enterprise that is at least 51 percent owned by a minority group or groups; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more minority groups, and whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans."

PU Code § 8282. The underlined language is different than that found in GO 156, while the carets indicate the presence of language in the GO which is not found in § 8282(b). The language differences form the basis for the arguments of San Diego and AT&T that modifications to GO 156 §§ 1.3.2 and 1.3.3 are necessary.

San Diego asserts that §§ 1.3.2 and 1.3.3 suggest for public businesses that the women who operate a women-owned business (WBE) can be different than the women who own at least 51% of its stock, but for minority-owned businesses (MBE), the same individuals who own the business must operate the business. San Diego also contends that the definitions do not require private businesses in either category to be operated by women or minorities.

Finally, San Diego claims that uncertainty exists over how to classify businesses owned by women and operated by minorities and vice versa. It contends the present definitions suggest that ownership determines the classification of a business.

For these reasons San Diego suggests revisions to GO 156's §§ 1.3.2 and 1.3.3 to read as follows:

"'Women-owned business' means a business enterprise that is at least 51% owned by one or more women, and whose management and daily business operations are controlled by one or more women or minority individuals; 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 or minority individuals.

'Minority-owned business' means a business enterprise that is at least 51% owned by one or more minority individuals, and whose management and daily business operations are controlled by one or more minority individuals 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 minority individuals, and whose management and daily business operations are controlled by one or more minority individuals or women."

The underlining indicates changes from the current GO language of these sections. No change was requested in the last sentence of § 1.3.3.

AT&T in its Response states that it agrees a woman-owned business should not be permitted to be controlled by women other than its owners while requiring ownership and control in the same individuals as to a minority-owned business. But AT&T does not believe the individuals owning and controlling must be the same, as long as they are in the appropriate classification. AT&T does agree with San Diego's contention that both public and private WMBEs should be both owned and controlled by women or minorities, respectively. AT&T objects to San Diego's proposed changes to §§ 1.3.2 and 1.3.3 to permit either type of WMBE to be controlled by minorities or women. It asserts such changes would unnecessarily complicate the definitions and make them ambiguous.

AT&T proposes its own changes to the two definitions to read as follows:

"'Women-owned business' means a business enterprise that is at least 51% owned by one or more women, and whose management and daily business operations are controlled by one or more 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.

'Minority-owned business' means a business enterprise that is a(t) least 51% owned by one or more minority individuals or groups, and whose management and daily business operations are controlled by one or more minority individuals or groups; or in the case of any publicly owned business, at least 51% of the stock of which is owned by one or more minority individuals or groups, and whose management and daily business operations are controlled by one or more minority individuals or groups. The contracting utility shall presume that minority includes, but is not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Americans, and other groups."

The underlining indicates changes from the current GO language.

The issue raised as to ownership and control of women-owned businesses has been resolved by this Commission in D.89-08-041, in which we considered objections to a proposed Clearinghouse rule to define women-owned business as a business owned by nonminority women. This Commission also considered the WMBE staff's proposal that WBE be bifurcated into nonminority women business enterprises and minority women business enterprises. We found, from the plain meaning of the PU Code § 8282(a) definition of women-owned business, that "the Legislature did not use the words 'woman' and 'women' to apply only to nonminority women or women." Thus, we declared that GO 156's definition of WBE reflected that of § 8282 and was intended to include businesses owned by a woman or women regardless of their minority status. After deciding WBEs included businesses owned by women of all racial and ethnic groups, the Commission found that the

Clearinghouse Operational Guidelines as to WBEs should be identical to the GO 156 definition. This previous Commission decision disposes of San Diego's arguments that GO §§ 1.3.2 and 1.3.3 should be altered to permit WBEs and MBES to be cross-owned or operated. The legislative scheme of PU Code § 8282 and its reflection in GO 156 contemplate the present separation of WBEs and MBES according to ownership classifications. The same rationale which we applied as to WBEs is equally applicable to MBES, which must be minority-owned and operated, regardless of the status of women as to their ownership and control.

However, we do agree that San Diego's other arguments have merit and warrant changes in the GO 156 language to clarify and reflect the legislative intent behind § 8282.

We find the plain meaning of PU Code § 8282(a) and (b) is to require both 51% ownership and control by the requisite women or minorities, regardless of whether the business is public or private. The language of the statute is disjunctive, so whether a WBE or MBE is private or public, it must be controlled by the requisite individuals. The control clause is not meant only to apply to the phrase to which it is closest. Although such an interpretation does not itself require the GO 156 rules be amended, since we also find other bases for an amendment of §§ 1.3.2 and 1.3.3., we will also clarify this interpretation by amendment.

We also declare that the GO 156 language should track closely the statutory languages since an existing small variance between the two is the cause of confusion. While § 8282(a) requires a WBE to be owned at least 51% by women, it states that control must be in one or more of such owners. GO 156 § 1.3.2 instead requires control to be in one or more women, making it appear that nonowner females can operate the business and still have it qualify as a WBE. Section 1.3.3, as to MBES, more closely reflects the statute and requires control to reside in the minority owner or owners. We find that § 1.3.2 should be amended to correct

this disparity and reflect the statutory intent. For this reason, we reject AT&T's argument that individuals owning and controlling a WBE or MBE need not be the same.

Finally, though not raised by any parties, we observe that the last sentence of § 1.3.3 does not properly reference Asian Pacific Americans as specified by § 8282(b) and the GO 156 § 1.3.8 definition thereof. Instead, it speaks of Asian Americans. Thus, the omission should be corrected in this amendment to § 1.3.3.

We will amend GO 156 §§ 1.3.2 and 1.3.3 to read as follows:

1.3.2 "Women-owned business" means (1) a business enterprise (a) that is at least 51% owned by a woman or women, or (b) if a publicly owned business, at least 51% of the stock of which is owned by one or more women; and (2) whose management and daily business operations are controlled by one or more of those individuals.

1.3.3 "Minority-owned business" means (1) a business enterprise (a) that is at least 51% owned by a minority individual or group(s), or (b) if a publicly owned business, at least 51% of the stock of which is owned by one or more minority groups; and (2) whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes, but is not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other groups, as defined herein.

The Clearinghouse should be instructed to reform the Clearinghouse Operational Guidelines to reflect these changes, including, but not limited to, Appendix I: Definitions at pages 35 and 38 and Appendix II, GO 156 Summary at pages 1 and 2.

Findings of Fact

1. San Diego and AT&T have requested changes in GO 156 definitions of WBEs and MBES.
2. All interested parties were served.
3. No other parties have responded to the requests for changes. No requests for hearings were made.
4. The operation and control standards should be the same for WBEs as for MBES under GO 156 definitions.
5. The operation and control standards apply equally to public and private businesses wishing to qualify as WBEs or MBES.
6. Permitting cross-ownership and operation of WBEs and MBES between minority and women's groups would unnecessarily confuse the definitional standards and does not comport with the legislative intent behind the WBE program.
7. One or more of the same individuals who own a WBE or MBE should also control its operations.
8. The reference to Asian Americans in GO 156 § 1.3.3 should be to Asian Pacific Americans.
9. The Clearinghouse Operational Guidelines' definitions of WBEs and MBES should be identical to definitions found in GO 156.

Conclusions of Law

1. San Diego's petition to modify GO 156 to make consistent the ownership and control requirements as to women-owned businesses and minority-owned businesses should be granted by modifying §§ 1.3.2 and 1.3.3 of GO 156 as stated herein to reflect the legislative intent of PU Code § 8282.
2. San Diego's petition to modify GO 156 to cross-classify businesses owned by women and operated by minorities or owned by minorities and operated by women should be denied.
3. AT&T's proposal to modify GO 156 to delete the requirement that one of the same individuals owning a WBE or MBE also must control its operations should be rejected.

4. Section 1.3.3 of GO 156 should also be modified to conform its reference to Asian Americans to the term Asian Pacific Americans as found in PU Code § 8282(b) and GO 156 § 1.3.8.

O R D E R

IT IS ORDERED that:

1. Sections 1.3.2 and 1.3.3 of General Order (GO) 156 is modified as follows:

1.3.2 "Women-owned business" means (1) a business enterprise (a) that is at least 51% owned by a woman or women or (b) if a publicly owned business, at least 51% of the stock of which is owned by one or more women; and (2) whose management and daily business operations are controlled by one or more of those individuals.

1.3.3 "Minority-owned business" means (1) a business enterprise (a) that is at least 51% owned by a minority individual or group(s) or (b) if a publicly owned business, at least 51% of the stock of which is owned by one or more minority groups; and (2) whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes, but is not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other groups, as defined herein.

2. The requests of San Diego Gas & Electric Company and AT&T Communications of California, Inc. for other changes in GO 156 §§ 1.3.2 and 1.3.3 are denied.

3. The definitions of "women-owned business" and "minority-owned business" in the Clearinghouse Operational Guidelines shall be identical to GO 156 §§ 1.3.2 and 1.3.3 as amended hereby.

4. The Executive Director shall serve a copy of this decision upon the Clearinghouse within 10 days of its effective date.

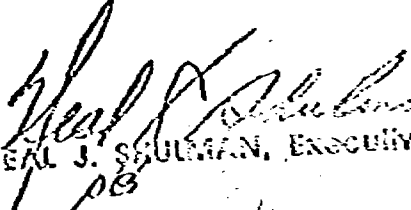
This order is effective today.

Dated November 21, 1990, at San Francisco, California.

G. MITCHELL WILK
President
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

Commissioner Frederick R. Duda,
being necessarily absent, did not
participate.

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


NEAL J. SHULMAN, Executive Director