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Decision 91-12-058 December 18, 1991

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Scott Engineering, Inc.,

Complainant,

vs.

Cordoba Corporation (Administrators
of WMBE Clearinghouse),

Defendant.

ORIGINAL

Case 90-06-055
(Filed June 21, 1990)

Jacqueline L. Scott, for Scott Engineering,
Inc., complainant.
Riordan & McKinzie, by Anthony N. R.
Zamora, Attorney at Law, for WMBE
Clearinghouse, defendant.

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O P I N I O N

1. Introduction

This proceeding involves a complaint filed by Scott Engineering, Inc. (complainant), 20540 Walnut Drive, Walnut, California, against Cordoba Corporation (defendant) (Administrators of Women/Minority Business Enterprise (WMBE) Clearinghouse), 617 South Olive Street, Los Angeles, California, seeking a review of a determination made by the defendant denying complainant WMBE status. Further, complainant requests this Commission to conduct a de novo review of the evidence and verify¹ complainant as a WMBE.

A Motion to Intervene (Motion) and file a brief has been made on behalf of the Commission's WMBE program manager. Good cause having been shown, the Motion is granted and the brief heretofore filed on behalf of this intervenor is accepted.

A Joint Motion to Intervene and file a brief has been made on behalf of the following utilities (Indicated Utilities): AT&T Communications of California, Inc., Citizens Utilities Company of California, Contel of California, Inc., GTE California Incorporated, MCI Communications Corporation, Pacific Bell, Pacific Gas and Electric Company, Pacific Power and Light Company, Roseville Telephone Company, San Diego Gas & Electric Company, Sierra Pacific Power Company, Southern California Edison Company, Southern California Gas Company, Southwest Gas Corporation, and U.S. Sprint Communications Company, Limited Partnership. Good cause having been shown, the Joint Motion to Intervene is granted

1 The term "verify" and derivations thereof is a term of art utilized in connection with the WMBE program to indicate the process of certifying that a particular entity meets or has met the standards set forth in General Order (GO) 156 for designation as a WMBE.

and the brief heretofore filed on behalf of these intervenors is accepted.

2. Affirmative Defenses

In its Answer to the Complaint herein, defendant, in addition to general and specific denials to the allegations of the complaint, interposed five (5) "separate defenses" which we consider to be in the nature of affirmative defenses. We will discuss each of these defenses individually:

1. In its first separate defense, defendant alleges, in general terms, that Commission GO 156 and the WMBE Clearinghouse (CHS) contract imbues defendant with broad discretion in determining whether a company should be verified as a WMBE, and that in the exercise of this discretion, defendant determined that Jacqueline L. Scott does not control the management, policies or daily business operations of the company that provides sufficient and proper grounds for defendant's denial of WMBE status to complainant.

While defendant indeed possesses broad discretion in exercising the powers conferred upon it, and while we respect that discretion and have no desire to substitute our judgment for that of the defendant in the exercise of that discretion, that does not mean that the defendant is above review. The authority of the defendant flows directly from this Commission and ultimately resides in the Commission. We retain general oversight authority over the defendant and specific review authority over its verification determinations to insure that it does not exceed or abuse its granted jurisdiction. In connection with defendant's WMBE status determinations, we will review those determinations to insure that the applicant has been afforded due process, and that the decision of the defendant is supported by substantial evidence.

2. In its second separate defense, defendant alleges that the complaint fails to state a claim upon which relief may be granted. We reject this assertion. Under both the statute (Public

Utilities (PU) Code §§ 8281 through 8285) and GO 156, if complainant meets the established criteria, it is entitled to verification as a WMBE. This is a substantial right. The complaint clearly alleges an error by the defendant in its evaluation of the evidence submitted by the complainant in support of its application for WMBE status and requests corrective action by this Commission. If review indicates that defendant did, in fact, commit an error, the result is that it impermissibly removed a substantial benefit from the complainant's reach, and it is the obligation of this Commission, in the exercise of its review authority, to redress that error. The allegations of the complaint are sufficient to raise the issue.

3. In its third separate defense, defendant alleges the Commission lacks jurisdiction to entertain this matter since the complaint does not comply with Rule 9 of the Commission's Rules of Practice and Procedure. Defendant claims that the complaint does not allege a violation of law, order or rule by a public utility and neglects to name any of the 16 utilities that have contracted with the defendant. Once again, this defense lacks merit.

Quite aside from Rule 9 of the Commission's Rules of Practice and Procedure, the CHS' Policies and Procedures and Training Manual itself provides the necessary mechanism for Commission review. Section 7.18 of the manual (Exhibit I-H) provides as follows:

"7.18 Complaint to the California Public
Utilities Commission

"If the CHS protest results in a reaffirmation of a verification denial and the supplier still contends that his/her firm should be granted WMBE verification, the supplier may file a complaint with the California Public Utilities Commission (CPUC). If the matter is being handled informally with thy [sic] CPUC staff, CHS staff shall cooperate with the CPUC staff by providing copies of necessary documents on the case by the end of the next business day following a CPUC staff request.

"The CPUC shall review the supplier's complaint along with information provided by CHS and render a decision on the matter. The CPUC shall inform CHS as to the final disposition of the supplier's complaint.

"If CPUC determines in a formal proceeding that an applicant should be denied WMBE verification, all parties, including the supplier and the CHS shall be notified of this determination.

"If, however, CPUC determines in a formal proceeding that an applicant should be granted WMBE verification, all parties, including the supplier and the CHS, shall be notified of this determination. Upon such notification, the CHS MAST database can be revised."

4. In the fourth separate defense, defendant alleges that the claim, if any, contained in the complaint of the company, has been waived. This defense is also without merit. The complainant has, at all levels, vigorously pursued its claim and has timely availed itself of every procedural avenue open to it in its quest to achieve verification as a WMBE. It furnished additional information to overcome shortcomings in the initial application; it requested a field audit and made its records and personnel available to answer any question CHS may have had; it protested the initial denial; it sought review at the Commission staff level after its protest was ineffective; and it has pursued its claim in a formal proceeding before the assigned administrative law judge acting on behalf of this Commission. Considering the foregoing, the allegation that complainant has waived its claim borders on being frivolous.

5. The fifth separate defense requires less discussion than any of the preceding defenses. In this defense, defendant alleges that in denying verification, it was acting within the scope of authority granted to it by certain (otherwise unidentified) public utilities and the Commission, and that as a consequence, it is not

liable for any damages, if any, resulting from its denial of verification by reason of governmental immunity.

This is an administrative proceeding and the relief sought is verification as a WMBE, not damages. No damages are provided for under either the statute or GO 156, nor are damages available in this forum.

3. Background and Authority

California Assembly Bill (AB) 3678, signed into law on September 26, 1986, now codified as California PU Code §§ 8281-8285, requires every electric, gas, and telephone utility with gross annual revenues exceeding \$25 million to implement a program developed by the CPUC to encourage, recruit, and utilize WMBEs.

In response to AB 3678, this Commission issued GO 156 effective May 30, 1988. The order provides uniform rules and guidelines for California utilities companies to develop and implement WMBE programs. Public utilities subject to the order are obliged to seek to procure, at a minimum, 5% and 15% of their total applicable goods and services from WMBEs, respectively, over the 5 years immediately following the adoption of the order. These goals represent an annual market of up to \$1.2 billion for WMBEs prepared to do business in this state.

GO 156 also requires the participating utilities to jointly establish a CHS, as a separate entity, to verify that businesses credited toward the procurement goals are, in fact, owned and controlled by qualifying women and minorities. The Clearinghouse Advisory Board (CAB), made up of representatives from participating utility companies, WMBE associations, and the Commission, oversee the operation of the CHS in accordance with GO 156.

Defendant, in association with Asian, Inc. and RCA & Associates, has been awarded a contract by the participating utilities to establish, operate, and maintain CHS. The primary purpose of CHS, pursuant to the clearinghouse contract, is to audit

and verify the status of WMBE vendors/suppliers, and to establish and maintain a database that is accessible to the Commission and to the participating utilities. The database is to consist of WMBE vendors/suppliers whose WMBE status has been verified through an independent investigation by CHS. More specifically, the clearinghouse contract requirements include, but are not limited to, the "processing and verification of supplier applications for WMBE status, including development of application and verification forms, creation of desk audit and field audit procedures, creation of extensive document filing capabilities, training of contractor's personnel involved in operating the clearinghouse, internal manual and automated process tracking systems, and establishment of billing procedures." (Exhibit I-D.)

The clearinghouse contract further requires the development of an internal Clearinghouse Policies and Procedures Manual. ("Policies and Procedures Manual", Exhibit I-H.) This manual more clearly delineates the manner in which the CHS is to manage the verification process on a day-to-day basis pursuant to the authority granted to the CHS by GO 156, the Operational Guidelines, and the clearinghouse contract terms and conditions.

In accordance with GO 156 and the rules of CHS, complainant made application for verification of its status as a WMBE. After investigation, defendant denied WMBE status to the complainant. It is that determination which complainant asks this Commission to review and to overturn.

4. Status of Case

This case raises issues which involve defendant's verification process and seeks verification of complainant as a WMBE, from this Commission. It is the first case filed with the Commission in which the complainant requests review of CHS' evaluation of the application for verification filed by an applicant and a reversal of the determination denying verification as a WMBE. This case is, therefore, a case of first impression.

Because of this, the discussion which follows will examine in some detail the procedures developed by CHS to evaluate an applicant's status, will examine what procedural provisions have been incorporated to provide an opportunity for "in-house" review, what role, if any, the Commission will play in the review of CHS' determinations denying verification as a WMBE to an applicant, and whether the action of the Commission, assuming it decides to undertake a review of the actions of CHS, should be in the nature of a de novo proceeding or be limited to a review utilizing the "substantial evidence" standard of review.

4.1 Standard of Review

Since this is a case of first impression, one of the threshold questions which must be determined is the standard of review which the Commission will adopt in exercising its review jurisdiction. This is, of course, a policy determination.

After considerable debate, we believe the standard of review most appropriate to cases involving review of the CHS verification process is the substantial evidence test. That is, is there substantial evidence in the record, when considered as a whole, to support the conclusion reached by CHS? If there is, CHS' conclusion should be affirmed or ratified. If there is not, the decision should be set aside as not supported by substantial evidence and the case remanded for further proceedings consistent with the Commission's instructions.

While such a review necessarily entails an examination of CHS' findings and conclusions and the evidence upon which those findings and conclusions are based, it is not to be confused with a de novo review. It is not our intent that the Commission rescind the delegation of verification authority previously granted to CHS or substitute its collective judgment on the inferences to be drawn from the evidence for that of CHS in the exercise of that delegated authority. CHS has, as noted below, gone to great lengths to design and implement a program of investigation and evaluation

which appears well-suited to accomplish its assigned verification task. It would be a waste of resources, both human and fiscal, to duplicate that program within the Commission. Rather, our goal will be to insure that in the final analysis, no unsupported or clearly erroneous conclusion is reached to the prejudice of an applicant for verification as a WMBE.

4.2 CHS Procedures to Evaluate WMBE Status

Following its retention as administrator of the Indicated Utilities WMBE investigation and evaluation obligations under GO 156 and PU Code §§ 8281-8285, defendant and its contractual associates prepared for the use of its employees a "Policies & Procedures Training Manual". While this manual and its contents are considered by defendant to be confidential because the material contained therein is proprietary in nature, pertinent excerpts from the manual were offered and admitted in evidence at the hearing before the administrative law judge. (Exhibit I-H, III-A, III-B, and III-D.) In addition, a CHS publication entitled "Clearinghouse Operational Guidelines" developed by the CAB was admitted in evidence. (Exhibit I-C.) After reviewing those exhibits, we feel compelled to note that, in general terms, the breadth of the procedures devised to assess the qualifications of applicants for WMBE status are well designed to achieve the goal of giving the applicant the greatest opportunity to prove eligibility for verification as a WMBE. Because this is a case of first impression, we will examine the verification process and the manner in which it was applied to the complainant's application.

5. The Verification Process

The verification process consists of the following steps and procedures as delineated in the CHS' Policies and Procedures Manual. (Exhibit III-A.):

1. Verification Application Package

Completion of the Verification Application Package (VAP) represents the first step in the verification process. (Exhibit III-B.) The VAP consists of a standard form which requires the applicant to provide information, both on the form itself and attached as exhibits to the standard form, relevant to the CHS' evaluation of the applicant company's ownership, expertise or product, finances, and management.

2. Desk and Site (Field) Audits

Upon submission of the VAP, the CHS subjects the VAP to intensive analysis. This process is referred to as a desk audit. The CHS can, however, request a site or field audit to gather additional information not available in the VAP. A site or field audit consists of a pre-arranged visit to the applicant's business location by a member of the CHS' field staff. The CHS will typically conduct interviews, inspect the business premises, and possibly request additional documentary evidence.

3. Initial Denial Letter

Upon completing its review of the VAP and any other information gathered in the desk and/or site audit, the CHS determines whether to grant or deny the applicant verification. If the CHS decides to deny the applicant verification, the CHS processes an Initial Denial Letter which identifies applicable WMBE standards (Exhibit III-C), lists relevant findings of fact, and summarizes the CHS' conclusions.

4. Clearinghouse Written and Oral Protest Procedures

If the CHS denies an applicant's verification, the CHS simultaneously informs the applicant of the procedures for appealing the CHS' Initial Denial Letter. (Exhibit III-D.) These procedures require

the applicant to indicate its interest in appealing the Initial Denial Letter. The applicant has the option of submitting a written protest or scheduling a face-to-face review meeting with CHS representatives. Both options provide the applicant with the opportunity to submit evidence to rebut the CHS' Initial Denial Letter. The review meeting is taped and summarized in writing by the CHS. A copy of the tape is made available to the applicant.

5. Second Denial Letter

Upon reviewing the evidence submitted by the applicant pursuant to the protest procedures, the CHS renders its final verification decision. If the CHS decides to reaffirm its initial denial, the CHS will process a Final Denial Letter which, like the Initial Denial Letter, identifies applicable WMBE standards, lists relevant findings of fact, and summarizes the CHS' conclusions. At this point, the internal CHS appeals process ends and the CHS' decision is considered final, but may be appealed by the applicant to the Commission.

6. Informal Resolution Conference

The Informal Resolution Conference is not a creature of the CHS' procedures or rules. It is rather, a mechanism permitted by the Commission's Rules of Practice and Procedure after the denied applicant files its complaint with the Commission. This process offers yet another opportunity for a denied applicant to submit additional evidence in furtherance of its quest for verification as a WMBE. The Informal Resolution Conference is convened by a representative of the Commission without participation from the CHS. At the request of the Commission, however, the CHS will review any additional information or documents submitted by the denied applicant to determine whether there is any basis to reverse the CHS' denial. If the CHS

reviews the additional information and/or documents and determines that a reversal is not in order, then the Commission representative informs the presiding administrative law judge that the dispute could not be resolved.

6. Scott's Verification File

In order to determine whether the evaluation of the complainant's application for WMBE designation met the criteria established by the CHS and is supported by substantial evidence, it is necessary to examine the manner in which the evaluation was conducted and review the evidence relied upon to support the ultimate conclusion.

1. VAP

Complainant submitted its VAP on February 21, 1991.

2. Desk Audit

The CHS conducted a desk audit of the information submitted in complainant's VAP.

3. Site Audit

The CHS conducted a site or field audit of complainant's facility operations on May 10, 1990.

4. Initial Denial Letter

After reviewing complainant's VAP and supporting evidence (Exhibit II-A1), CHS processed the Initial Denial Letter (Exhibit III-G) on April 9, 1990. The Initial Denial Letter outlined the WMBE Eligibility Standards which were central to the CHS' verification decision, a brief summary of relevant factual findings, and a summary of CHS' conclusions.

The following points were noted in the Initial Denial Letter:

a. WMBE Eligibility Standards

The CHS cited WMBE Eligibility Standards that require the minority or women owners to control the day-to-day management of the company.

b. CHS' Factual Findings

The CHS noted that Michael J. Scott, a nonminority male and complainant's chairman, president, and chief executive officer, exercised extensive formal and informal management authority, and had extensive technical experience in complainant's field of specialty. In contrast, the CHS noted that Jacqueline L. Scott lacked technical experience and had limited formal and informal management authority. Mrs. Scott, a nonminority female and complainant's chief financial officer, was identified as complainant's majority stockholder.

c. CHS' Conclusions

CHS concluded that complainant could not be verified because Mrs. Scott did not control complainant's management, policies, and operations as required by GO 156 (Exhibit I-H), the CHS Operational Guidelines (Exhibit I-C), and the Policies and Procedures Manual.

5. CHS Written and Oral Protest Procedures

Complainant appealed the CHS' initial decision by submitting correspondence that disputed CHS' decision and requested a meeting with CHS. (Exhibit II-B1.) A site or field audit was held on May 10, 1990, with Mr. and Mrs. Scott in attendance. CHS added the oral and documentary evidence provided at the site audit to the record (Exhibits III-1 and II-B1), and concluded that complainant had still failed to prove that Mrs. Scott controlled complainant's management, policies, and operations. Upon completion of defendant's analysis, the

Final Denial Letter was processed on May 29, 1990. (Exhibit III-J.)

6. Final Denial Letter

Like the Initial Denial Letter, the Final Denial Letter outlined the WMBE Eligibility Standards which were central to CHS' verification decision, provided a summary of relevant factual findings, and provided a summary of CHS' conclusions. The following points were made in the Final Denial Letter:

a. WMBE Eligibility Standards

CHS cited GO 156 and WMBE Eligibility Standards that require minority and women owners to exercise day-to-day management responsibilities in addition to owning at least 51% of the company's stock.

b. Factual Findings

CHS noted Michael J. Scott's extensive formal and informal authority over applicant's management and operations, the extensive time devoted to complainant's management and operations by Mr. Scott, Mrs. Scott's limited range of involvement in complainant's management and operations, and Mrs. Scott's lack of working technical knowledge in complainant's field of specialty.

c. Conclusions

CHS concluded that Michael J. Scott exercised day-to-day control over Scott's management, policies, and operations. In contrast, CHS concluded that Mrs. Scott's involvement in the day-to-day management of complainant's operations was limited to bookkeeping and ministerial financial transactions. Finally, CHS concluded that the complainant could not be verified because Mrs. Scott did not control

complainant's day-to-day management as required by GO 156, the Operational Guidelines, and the Policies and Procedures Manual.

7. Filing of Complaint and Informal Resolution Conference

Following the receipt of CHS' Final Denial Letter, complainant filed this complaint seeking review by the Commission of CHS' denial of verification. In response to the complaint, the then assigned administrative law judge requested an Informal Resolution Conference by Commission staff.

Arthur Jimenez, the WMBE program manager, conducted the requested Informal Resolution Conference by reviewing the existing record and neither CHS nor anyone on behalf of complainant directly participated in the Informal Resolution Conference. Following his review of the record, Jimenez had a discussion with a representative from CHS to determine if CHS was willing to reverse its decision. CHS informed Jimenez that its decision was firm and that it was unable to reverse its determination. The matter was then referred back to the Office of Administrative Law Judges for hearing or other resolution. A hearing in this case was held before Administrative Law Judge Robert L. Ramsey on June 4, 1991, at Los Angeles.

7. Summary of Evidence on which Defendant's Decision was Based

In written testimony offered and admitted into evidence on behalf of defendant (Exhibit II), Angelica Martinez, assistant project manager of CHS provided the following comprehensive summary of CHS' findings and conclusions that encompass CHS' Initial and Final Denial Letters:

"1. WMBE Eligibility Standards

"GO 156, the Operational Guidelines and the Policies and Procedures Manual which

includes the WMBE Eligibility Standards are consistent in the requirement that a minority or woman owner not only own a majority of a company's stock but that the minority or woman control the day-to-day management, policies and operations of the company.

"In order to apply these standards to Scott's [complainant] application, CHS examined, among other things:

- "a. The company's history;
- "b. The formal titles and authority vested in all key management personnel involved in the company, including the minority or woman owner;
- "c. The contribution of expertise to the company by the minority or woman owner;

"In this way, the Clearinghouse can determine whether the minority or woman owner truly controls the management, policies and operations of the applicant company.

"2. Factual Findings

"Based on the oral and documentary evidence submitted by Inland [sic] and guided by the authorities governing the verification process, the Clearinghouse has made the following findings of fact:

"a. Company History

"Scott Engineering was founded by Mr. James H. Scott and Mrs. Scott. Mr. Scott had been a former utility employee and saw the need for a company that could produce certain specialty products. Mrs. Scott, in contrast, was a homemaker without experience in Scott's field of specialty. Mrs. Scott was made responsible for office procedures and management. In 1983, Mrs. Scott came into control [of] 97.5% of Scott's outstanding stock due to

Mr. James H. Scott's failing health. Mrs. Scott continues to perform the same functions and continues to serve on the board of directors and as Scott's Chief Financial Officer. Mr. Michael J. Scott, Mrs. Scott's son, was appointed Scott's Chairman, President and Chief Executive Officer and continues to serve in this capacity. Mr. Michael J. Scott possesses over eighteen years of technical experience in the field of engineering, a field of specialty central to Scott's business and operations.

"b. Formal Corporate Authority

"Inland's [sic] by-laws (Exhibit II-A16 and A17) vests Mr. Michael J. Scott with the authority to manage and control Inland's [sic] business as Inland's [sic] Chairman, President and Chief Executive Officer. In contrast, Mrs. Scott, the Chief Financial Officer, is limited to ministerial functions such as bookkeeping, accounting, disbursements and bank deposits.

"c. Contribution of Expertise

"As stated earlier, Mr. Michael J. Scott possesses the technical experience necessary to control Scott's management, policies and operations. Scott provides padmount electrical switchgear, fuse cabinets, capacitor cabinets and pole line hardware. Mr. Michael J. Scott's educational, professional and technical expertise clearly qualify him for his position at Scott. In contrast, Mrs. Scott has no such background and contributes basic financial management skills to Scott's operations.

"3. Conclusions

"Based on these factual findings and guided by the authorities governing the verification process, the Clearinghouse has made the following conclusions:

"a. Company History

"Scott was formed by Mr. James H. Scott and his wife, Mrs. Scott. Mr. James H. Scott possessed the experience, vision, direction to start such a company. Mrs. Scott, in support of her husband's plan, performed basic, ministerial financial functions for the company until Mr. James H. Scott's unfortunate illness. At this time, Mr. Michael J. Scott took control of Scott's management, policies and operations. Mrs. Scott gained control of 97.5% of Scott's stock which is held in a trust.

"b. Formal Corporate Authority

"As Chairman, President and Chief Executive Officer of Scott, Michael J. Scott possesses all real and apparent authority to control Scott's management, policies and operations. Mrs. Scott, in contrast, possesses limited formal corporate authority. Scott failed to prove that Mrs. Scott possesses the formal authority necessary to control Scott's management, policies and operations.

"c. Contribution of Capital and Expertise

"Michael J. Scott possesses the expertise, professional experience and licenses necessary to manage Scott's operations on a day-to-day basis. In contrast, Mrs. Scott does not possess any educational or technical experience in the construction [sic] industry. Inland [sic] failed to prove that Mrs. Scott possesses the expertise and

skills to control Scott's management, policies and operations.

"Based on the foregoing standards, factual findings and conclusions, the Clearinghouse concluded that Scott failed to prove, as required by GO 156, that Scott should be verified as a WMBE."

8. Discussion

While cumbersome in certain respects, the verification procedure promulgated by CHS and set forth in the Policies and Procedures Manual is, for the most part, understandable and capable of being followed as is illustrated by this case. The VAP contains questions specifically designed to elicit answers capable of verification as to ownership and control of the entity seeking verification and the documentation required to support the application, while somewhat burdensome, is not unreasonably so. Provision is made for supplementation of the record after an initial denial and the applicant is also given the option of submitting a written protest or scheduling a face-to-face review meeting in connection with the applicant's attempt to overturn the initial denial. Further, in the event of a final denial, provision is made for the filing of a complaint with the Commission.

In view of the elaborate procedure enacted to discover the true status of an applicant for verification and the procedural safeguards referred to above, we cannot say that a complainant has been denied procedural due process if the procedures set forth are followed. The procedures give the applicant ample opportunity to make its case and provide safeguards against oversight or error.

This is not to say, however, that the criteria for verification can be mechanically applied and receive our blessing. Like most prescribed standards, those by which eligibility for verification as a WMBE are to be judged must be interpreted in the light of reason with the goal of satisfying the spirit of the

underlying legislation. In this respect, we believe CHS has erred by holding the applicant to an unreasonable standard.

In the final analysis, under both the statute and GO 156, two things must be proved in order for an applicant to attain the desired status: First, 51% ownership of the applicant must be held by a woman or women, or by a minority group or groups; and second, the management and daily business operations must be controlled by one or more of those individuals.

In the case under consideration, there is little doubt that the ownership criterion is satisfied. No one seriously contests that Jacqueline L. Scott, now chief executive officer and chief financial officer of the applicant, a nonminority female, widow of the founder, James H. Scott, and mother of Michael J. Scott, president and chairman of the board, holds 97.5% of the 200 outstanding shares of complainant. While these 195 shares are held in the name of the Scott Family Trust, a revocable living trust (Exhibit II-A-24), the corpus of the trust is made up of these 195 shares of stock and the community property of James H. Scott and Jacqueline L. Scott. Mr. Scott is now deceased, thus in the absence of any testamentary disposition of his share of the community property, title is presumed to be solely in Jacqueline L. Scott, the sole surviving spouse. There is evidence in the record that at the time of his death, James H. Scott was suffering from Alzheimer's disease and that Jacqueline L. Scott had been appointed as conservator of his property and affairs by a court of competent jurisdiction. Further, on October 20, 1987, the trust instrument had been amended to delete James H. Scott as a trustee and one Paul Hugh Scott substituted in his place. In the absence of evidence to the contrary, we conclude that no testamentary disposition of James H. Scott's interest in the trust corpus occurred, and that title to the same vested in Jacqueline L. Scott, subject to the terms of the revocable trust.

A more difficult problem is presented by the issue of "control" of the management and daily business operations of the applicant. Section 8282(a) of the PU Code sets forth the statutory requirement in these words:

- "(a) 'Women Business Enterprise' 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."

In the case now before us, CHS, in the Final Denial Letter to Mrs. Scott dated May 29, 1990 (Exhibit III-J), denied verification to the applicant in the following words:

"CONCLUSION:

"Based on the foregoing findings we conclude that:

- "1. Through By-Law provisions, Michael Scott, as Chairman of the Board, CEO, and President, possesses and exercises the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day decisions on matters of management, policy, and operations.
- "2. The powers afforded Michael Scott through these By-Law provisions, and your bilateral 'team' decision making policy prevent you, the woman owner, from making unilateral, independent business decisions of Scott Engineering, Inc. without the co-operation of non-WMBE owners.

"Therefore, we regret to inform you that, at this time, we cannot verify Scott Engineering, Inc. as a WMBE."

The term "control" is defined in PU Code § 8282(d) to mean "exercising the power to make policy decisions."

We believe CHS has applied a construction of "control" that ignores the realities of corporate structure, division of responsibility along functional lines in a corporation, delegation of responsibility to the lowest level possible, experience requirements dictated by job function, and the restrictive wording of the statute.

The larger the corporate structure is, the greater the reliance upon specialization, the narrower the employee or officer's job description and responsibilities, and the higher his or her skill level in the performance of the assigned task(s). In most corporate organizations, the day of the multi-skilled, multi-tasked generalist has long since passed.

In only the smallest of organizations can one reasonably expect all or the majority of the attributes of "control" to reside in a single individual or office. In a sole proprietorship or a one person corporation, all management functions are, of necessity, performed by that one individual. He or she performs a number of different jobs, often unrelated, necessary to insure the success of the undertaking. Without that one person, the business simply cannot exist.

As the nature of the business structure becomes more sophisticated, the more specialized the workforce becomes. In most instances, as a business grows, so does the payroll. With an increase in number of employees comes a dilution of individual responsibility for completion of the entire task. Likewise, at the management level, officers formerly "wore several hats," but have now become specialists in a given task. For instance, the treasurer was once in charge of all financial matters ranging from time and attendance recordkeeping to preparation of the annual corporate income tax return. In the early days of a corporation's life, the individual holding that office is skilled in each of the individual tasks encompassed by that job title. As the corporation grows, a bookkeeper is hired, a time and attendance clerk is

retained, new and additional employees are hired to share the workload and to increase the corporate output, and hopefully, its profits. Under these changing conditions, it becomes more and more difficult to trace control over the company's day-to-day management and operations decisions to a single individual.

It would come as no surprise or cause for alarm for a management consultant to compare a modern corporation's bylaws and official corporate organization chart with a chart showing actual job duties and find great disparities between them. That is the reality of the workplace. Thus, review of corporate bylaws may provide information useful in determining where corporate control lies but should not be deemed dispositive of that issue. To say that because the corporate bylaws designate certain responsibilities to certain specified officers or employees, no one else is assigned those responsibilities or actually performs those duties is to ignore reality.

In the case of complainant, the ultimate control of that company lies solely in Jacqueline L. Scott. It is a hard fact that in the final analysis she has absolute control over all corporate endeavors. If she desires to change the direction the corporation is heading or overrule any decision of anyone in any position of responsibility anywhere in that company, she has the legal power to do so. As owner of 97.5% of the corporation's issued stock, it is her will that will prevail. She has the raw power to fire any officer or director simply by calling a special meeting of the stockholders, listing that subject on the agenda and voting as she wishes. Carried to the extreme, she has the power to fire every director, officer, and employee, and even to dissolve the corporation should she so desire. Nothing anyone else can do can prevent that.

We note that the statute defines "control" to mean, as indicated above, "exercising the power to make policy decisions." We believe Mrs. Scott satisfies that definition.

8.1 Corporate History of Complainant

Sometime prior to May 22, 1968, the date complainant was incorporated, James H. Scott formed a sole proprietorship under the name Scott Engineering and Sales Company (Exhibit II-20, p. 4), and Mrs. Scott, his wife, worked full time in the business. (Tr., p. 11.) On May 22, 1968, complainant was incorporated. (Exhibit II-15.) At that time, Michael J. Scott was approximately 20 years of age and was a student.

At the first meeting of incorporators and directors held on June 20, 1968 (Exhibit II-20), a resolution was passed authorizing the corporation to issue and sell to James H. Scott and Jacqueline L. Scott, husband and wife, as Tenants-in-Common, 200 shares of stock of the corporation, each having a par value of \$100, in exchange for \$41,451.04 in assets of Scott Engineering and Sales Company, and the assumption by the corporation of \$21,451.04 of the liabilities of Scott Engineering and Sales Company. (Exhibit II-20, p. 6.) At that meeting, Mr. Scott was elected chairman and president, and Mrs. Scott was elected secretary. Over the years, the corporation continued to grow and the Scott's son Michael, worked for the corporation on a part time and later a full time basis

On April 27, 1983, the Scotts established a revocable living trust under the name of Scott Family Trust, naming themselves as trustees. On October 27, 1987, the trust was amended to, among other things, delete James H. Scott as trustee and name Paul Hugh Scott as trustee. At that time, due to declining health, James H. Scott had been replaced as president by his son, Michael J. Scott, who continues to hold that office to the present time.

Mrs. Scott has worked for "the family business" on a full time basis since its inception in 1967, as an unincorporated proprietorship. When the company incorporated, she was named secretary and chief financial officer of the corporation, positions she has retained to the present time. Mrs. Scott has

seen the company grow to include 46 employees and to reach gross sales of \$4,975,765 (both figures represent the period 1988-1989). She testified that she works 40-50 hours per week for the corporation (Tr. pp. 12 and 18), draws a salary in excess of that of her son (Tr. pp. 17, 18, 23, and 24), owns the property occupied by the corporation and receives lease payments for it from the corporation in the amount of \$13,455 per month (Exhibit II-7 and II-8), now serves as chairman of the board (Tr. p. 18), participates actively in all aspects of the company's business (Tr. pp. 9, 11, and 12), and has the "final say" in all management and internal affairs of the corporation. (Tr. pp. 19, 24, and 25.)

In her testimony (Tr. pp. 9-26), Mrs. Scott explained in detail the manner in which the corporation and its business evolved, the informal "family like" atmosphere which prevails, the informal manner in which the various officers of the corporation have been selected, and the complete lack of a sense of corporate hierarchy among the officers of the corporation. In this regard, it appears that each of the officers, whatever his or her specific job or office title, in actuality does whatever needs to be done when it needs to be done, regardless of what the bylaws specify. From this, it appears that there is a great deal of cross-performance of duties by the officers, but that the ultimate responsibility for the business rests on the shoulders of Mrs. Scott.

In attempting to determine who managed the corporation on a daily basis, CHS placed much emphasis on, and appears to have given great weight to the fact that Mr. Scott possesses a degree in engineering, while noting negatively on several occasions that Mrs. Scott has no such technical expertise, nor any degree in any subject area. We do not assign the same significance to this disparity as CHS appears to, and we challenge the idea that possession of a degree in the technical discipline of a corporation's product line infers qualification for, or possession

of management responsibilities. While possessing a degree in the same area as the company's product line may give rise to an inference that the holder of the degree knows something about the product, the lack of such a degree does not necessarily indicate a lack of knowledge about the product. If CHS' apparent assumption is true, then the efforts of this nation's business schools in training liberal arts majors to be managers are wasted and doomed to failure. Mrs. Scott, while lacking a formal degree, has demonstrated the ability to successfully manage the financial affairs of the company over a sustained period of time with no apparent negative impact on the company. Quite the contrary. To say that she would have done a better job had she possessed a degree in finance or financial management would be speculative at best. The simple fact remains that she has been responsible for and has managed the financial affairs of the company on a day-to-day basis for several years and the company has grown and apparently prospered.

In our view, the legislature intended, by the legislation here involved, to insure that the women or minority owners upon whom the request for verification is based had to demonstrate that in addition to owning the required percentage of the business, they also participate to a meaningful and substantial degree, on a regular and continuing basis, in policy-making decisions of the company.

In view of the above, we are of the opinion that CHS erred in applying a more restrictive test for determining control than is required or contemplated by the statute.

Findings of Fact

1. Jacqueline L. Scott is the owner of 97.5 percent (195 shares) of the 200 outstanding issued shares of stock of complainant.

2. Jacqueline L. Scott is the chairman of the board of directors, secretary, and chief financial officer of complainant.

3. Jacqueline L. Scott works full time for and devotes 40 to 50 hours per week to the business affairs of complainant.

4. Complainant made application to defendant for verification as a WMBE pursuant to PU Code §§ 8281 through 8285 and CPUC GO 156.

5. Complainant was denied verification as a WMBE by defendant on the ground that Jacqueline L. Scott did not control the day-to-day management and operations of complainant.

6. Complainant has exhausted, without success, all internal review and appeal rights which defendant provides under the WMBE program administered by it.

7. Jacqueline L. Scott is paid a regular salary by complainant in an amount in excess of that paid to Michael J. Scott, president of complainant.

8. Jacqueline L. Scott is the owner of the premises occupied by complainant and is paid a monthly rental by complainant in the amount of \$13,455.00 for the use of said property.

9. Jacqueline L. Scott has final authority over all aspects of complainant's business affairs.

10. The bylaws of complainant do not accurately represent or describe the actual distribution of authority among the officers of complainant.

11. Jacqueline L. Scott has veto authority over any action taken by any officer or employee of complainant.

12. Jacqueline L. Scott participates on a regular, continuing, and significant basis in the management and business affairs of complainant.

13. Within complainant, Jacqueline L. Scott possesses and exercises the power to make policy decisions.

Conclusions of Law

1. Defendant is the duly appointed administrator of the WMBE verification program established under the authority of PU Code §§ 8281 through 8285 and CPUC GO 156.

2. The items which defendant considers when investigating an applicant for WMBE status are appropriate areas of inquiry, but no single item or specific combination of items is to be controlling on the issue of the applicant's eligibility for verification as a WMBE.

3. In determining whether Jacqueline L. Scott exercised control over the affairs of complainant, defendant applied a stricter test for "control" than that set forth in PU Code § 8282(d) and GO 156, § 1.3.10.

4. Defendant erred in its determination that Jacqueline L. Scott did not control complainant.

5. In determining whether Jacqueline L. Scott operated complainant, defendant applied a stricter test for "operate" than that set forth in PU Code § 8282(e) and GO 156, § 1.3.11.

6. Defendant erred in its determination that Jacqueline L. Scott does not operate complainant.

7. There is insufficient evidence of record to support the denial of WMBE status to complainant.

O R D E R

IT IS ORDERED that:

1. The decision of the Cordoba Corporation (defendant) denying verification as a Woman/Minority Business Enterprise (WMBE) to Scott Engineering, Inc. (complainant) is vacated.

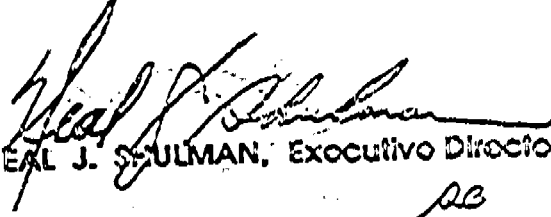
2. Defendant is directed to verify complainant as a WMBE without further delay.

This order is effective today.

Dated December 18, 1991, at San Francisco, California.

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

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners


NEAL J. SEULMAN, Executive Director

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