

APR 8 1992

Decision 92-04-004 April 8, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

INLAND VALLEY CONSTRUCTION, INC.,)
A California Corporation,)

Complainant,)

vs.)

WMBE CLEARINGHOUSE/CORDOBA)
CORPORATION,)

Defendant.)

ORIGINAL

Case 90-10-037
(Filed October 9, 1990)

James Banks, Jr., Attorney at Law, for
Inland Valley Construction, Inc.,
complainant.

Riordan & McKinzie, by Anthony N.R. Zamora,
Attorney at Law, for WMBE Clearinghouse,
defendant.

David L. Huard, Attorney at Law, for
Southern California Gas Company,
interested party.

O P I N I O N

A. Introduction

This proceeding involves a complaint filed by Inland Valley Construction, Inc., (Inland or complainant), against WMBE Clearinghouse/Cordoba Corporation, (Clearinghouse (CHS)/Cordoba or defendant), seeking review of a determination made by the defendant denying complainant Women and Minority Business Enterprise (WMBE) status.

In its complaint, Inland alleges it was denied WMBE status despite the fact that it meets the eligibility standards for a woman-owned or controlled business enterprise set forth in Public Utilities (PU) Code § 8282, Commission General Order (GO) 156, and the WMBE Clearinghouse Operational Guidelines, and further that the

denial of WMBE status verification¹ was not made in accordance with WMBE Clearinghouse Operational Guidelines.

A Motion to Intervene 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 public 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 and the brief heretofore filed on behalf of these Intervenors is accepted. In this proceeding, the terms "Indicated Utilities" and "Participating Utilities" are used interchangeably.

B. Affirmative Defenses

In its Answer to the Complaint herein, defendant, in addition to general and specific denials of the allegations of the complaint, interposed five (5) "separate defenses" which we

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 Commission GO 156 for designation as a woman- or minority-owned and controlled business enterprise.

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 GO 156 and the WMBE CHS contract imbues defendant with broad discretion in determining whether a company should be verified as a WMBE, and that in the exercise of that discretion, defendant determined that Mary V. Kolby does not control the management, policies, or daily business operations of the company and that such a finding 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 its 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 (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 verification, 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 complainants 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 (CHS manual) itself provides the necessary mechanism for Commission review. Section 7.18 of CHS manual (Exhibit (Exh.) I-8) 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 by 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."

4. In its 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 protested the initial denial and requested a review meeting at which it made its records and personnel available to answer any question CHS may have had; it sought review at the Commission staff level after a final denial had been rendered; and it has pursued its claim in a formal proceeding before the assigned Administrative Law Judge acting on behalf of this Commission. Such activity is inconsistent with any possible waiver of the claim.

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 public utilities [otherwise unidentified, but presumably the indicated 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.

Pursuant to notice, a hearing was held in Los Angeles on June 3, 1991, at which all parties were afforded the opportunity to make an opening statement, call, examine, and cross-examine witnesses, and to offer exhibits. Further, the parties were afforded and accepted the opportunity to submit briefs. As a result of questions concerning the nature of Mrs. Kolby's financial interest in Inland which arose during the latter stages of the

hearing, counsel for the complainant, by post-hearing motion, requested that the record be reopened for the limited purpose of submitting documentary evidence relating to the circumstances surrounding the preparation and delivery in 1977 of a certain promissory note representing Mrs. Kolby's initial financial investment in Inland. Because of the potential probative value of this line of inquiry and documentation, the motion to reopen the record was granted, the record was reopened and a further hearing, limited to the issue of the promissory note, was held on September 25, 1991. At that hearing, the parties were once again afforded the right to call, examine, and cross-examine witnesses, and offer exhibits. At the conclusion of the hearing, the Declaration of James Banks dated July 11, 1991; a letter from James Banks to Kenneth Caruso dated January 19, 1978; and an undated, uncompleted promissory note signed by Kenneth Caruso as President of Inland Valley Construction Company, Inc. were collectively admitted into evidence as Exhibit 4.

C. Background and Authority

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

The public utilities which are subject to this law were required to seek to procure, at a minimum, 5% and 15% of their total applicable goods and services from WMBE's, respectively, over the five years immediately following the passage of this legislation. These goals represent an annual market of up to \$1.2 billion for WMBEs prepared to do business in this state.

To implement AB 3678, this Commission issued GO 156 effective May 30, 1988. That order provides uniform rules and guidelines for California utilities to develop and implement WMBE programs in order to meet the above-described goals. GO 156 also requires the participating utilities to jointly establish a WMBE 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 utilities, WMBE associations and the Commission, oversees the operation of the CHS in accordance with GO 156.

Cordoba, 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." (Exh. I-4.)

The clearinghouse contract further requires the development of an internal Clearinghouse Policies and Procedures Manual ("Policies and Procedures Manual" or CHS Manual, Exh. I-8). 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 verification to the complainant. It is that determination which complainant asks this Commission to review and to overturn.

D. Status of Case

This case raises issues which involve a review of Cordoba Corporation's WMBE verification process, and on this review Inland seeks verification as a WMBE from this Commission. This is only the second case to be considered by the Commission in which the complainant requests review of CHS's evaluation of an application for verification and a reversal of the determination denying verification as a WMBE.

In Decision (D.) 91-12-058 (Application (A.) 90-06-055), Scott Engineering, Inc. v. Cordoba Corporation, issued December 20, 1991, we examined for the first time the methodology utilized by CHS to evaluate applications for WMBE status. Because Scott was the first occasion this Commission had to review the CHS verification process, we deliberately set forth and reviewed at length the procedures developed by CHS to evaluate an applicant's status. After a step-by-step review of the CHS evaluation process, we stated:

"In view of the elaborate procedure enacted to discover the true status of an applicant for verification and the 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 out its case and provide safeguards against oversight or error."

We then rejected a request that future reviews of this nature by the Commission be de novo proceedings, and held in Scott that in exercising our review jurisdiction over CHS verification decisions, the Commission would utilize the "substantial evidence test" as its standard of review. That is, we would affirm the decision of CHS if it was supported by the record when considered as a whole.

In this case, CHS based its refusal to verify Inland as a WMBE on its conclusion that Mary V. Kolby, the majority shareholder and Secretary/Treasurer of Inland, and the person upon whom Inland relied to qualify as a woman-owned business, did not "have the ultimate managerial or operational control of Inland Valley Construction." (Exh. III-7.)

In an April 9, 1990 letter to Mrs. Kolby (Exh. III-7), CHS indicated that Article V, Section 7 of Inland's bylaws gives the President (Kenneth Caruso, a non-minority male and son of Mrs. Kolby) the power of general supervision, direction, and control of the business and the officers of the corporation. Further, it was noted that documents submitted to CHS by Inland--resume, minutes of first meeting of the Board of Directors, bank signature card--indicate that Mr. Caruso "has been the President of Inland Valley Construction (IVC) since its inception, and possess and exercises the power to direct or cause the direction of the management and day-to-day business operations of Inland Valley Construction." More specifically, CHS noted that the minutes of the first meeting of the Board of Directors states that Mr. Caruso was elected Chairman and President of Inland and presides over the meetings of the Board of Directors. CHS also noted that its decision that Mr. Caruso, not Mrs. Kolby, was the "Responsible Managing Officer" of Inland was supported by "the copy of the Contractors State License and as verified by the Contractors State License Board."

As a further ground for refusing to verify Inland as a WMBE, CHS noted that according to Inland's 1988 Federal Income Tax Return, Form 1120, Schedule E, was not commensurate with Mrs. Kolby's percentage of ownership. It pointed out that while Mrs. Kolby was the owner of 51% of the stock of Inland [and was Secretary/Treasurer of the corporation], she received no compensation, while Mr. Caruso, who held 49% of the stock [and was Chairman and President of the corporation] received compensation for that year in the amount of \$104,000.

Following receipt of the denial letter, Inland requested and received information from CHS concerning verification denial protest procedures. Thereafter, in accordance with those procedures, Inland submitted additional documentation and information in support of its application and requested a review meeting. A review meeting was held on June 14, 1990 and pursuant to permission, was recorded by tape. A transcript of the tape is contained in the record (Exh. III-12). On September 10, 1990, after consideration of the results of the review meeting, analysis of the additional documentation submitted by Inland and review of records of telephone calls between the Kolby residence and Inland's place of business, CHS sent Inland a final denial letter (Exh. III-15) refusing to verify Inland as a WMBE.

Discussion

PU Code § 8282(a) sets forth the definition of "Women business enterprise" as used throughout the statute, and its implementing regulation, Section 1.3.2 of GO 156, sets forth the definition of a "Women-owned business". Each of these definitions contains two elements, which are virtually identical in the two definitions. These elements are: (a) that the woman on whom the enterprise (business) relies to be characterized as a WMBE must own 51% of the business, or 51% of the stock (if a publicly owned business) and (b) the management and daily business operations of the enterprise must be controlled by a woman or women.

In this case, while CHS did not contest the first element, contrary to the statements that Mrs. Kolby owns 51% of Inland's stock and Mr. Caruso only 49% (Exh. III-17, p. 1), the available evidence indicates, Mrs. Kolby actually owns less than the required 51% of Inland's stock. It appears to have been accepted by all parties that Mary V. Kolby is the record owner of 760 of the 1,500 outstanding shares of Inland stock and the remaining 740 shares are owned by Mrs. Kolby's son, Kenneth Caruso (Exh. III-12, p. 10). Assuming these numbers to be correct, 760 equals 50.666% of 1,500. 50.666% does not satisfy the statutory or regulatory requirement of 51%, which in this case would amount to 765 shares. Lest we be accused of being "picky" or hyper-technical, we must note that while we might like, for ease of calculation, to "round off" the percentage figure to the nearest whole number, there is no authority in either the statute or its implementing regulation, GO 156, for us to do so. Though ownership of less than 51% of the stock is disqualifying, it is not the ground upon which either CHS's decision denying verification or our affirmance of that decision rests.

After review of the record in its entirety, we are of the opinion that CHS's conclusion that Inland's management and daily business operations are not controlled by Mrs. Kolby or any other female is supported by substantial evidence.

The evidence clearly establishes that Mrs. Kolby was 70 years of age at the time the application was filed, has no technical expertise, and does not participate on a continuing or substantial basis in the day-to-day management of Inland. The evidence indicates that she does not have an office at Inland's place of business and visits Inland's facilities infrequently. Though she is furnished periodic financial information concerning Inland, it does not appear to be the detailed, "in depth" contemporaneous type of documentation upon which corporate decisions are based, but more in the nature of a generalized post

facto, "how are we doing" submission. Inland stated that a computer would soon be installed in Mrs. Kolby's home, thus giving her greater access to Inland's financial records. It is to be noted that no computer had been made available to Mrs. Kolby prior to the date of hearing.

Telephone records examined by CHS show that Mrs. Kolby remains in telephone contact with Inland's offices, but not on a daily basis, and then only for very brief periods of time. On average, telephone contacts between Mrs. Kolby and Inland numbered approximately 3 per week (Exh. III-12, p. 3) and were less than 3 minutes in duration.

With respect to Mrs. Kolby's original financial contribution to Inland, the record indicates that at the time Inland came into being in 1977, Mrs. Kolby and her husband, Mr. Caruso's stepfather, put up \$50,000 and Mr. Caruso \$15,000 to purchase the business. According to Mr. Caruso's testimony, at the time the purchase of the business took place, his attorney, Mr. Banks, prepared a promissory note to secure the Kolby's interest, which note Mr. Caruso signed in blank. It appears this note was to be sent to Mr. and Mrs. Kolby for completion, however for unknown reasons, it was never completed (see Exh. 4). In 1987, several years after he signed the promissory note, Mr. Caruso and his wife divorced and as part of their property settlement, he became the sole owner of all outstanding shares of Inland's stock.

Shortly after Mr. Caruso's divorce, it was agreed that in view of the size and nature of the contributions of each to the corporation, Inland's stock was to be redistributed in such a manner that Mr. Caruso became the owner of 740 shares and his mother, Mrs. Kolby, became the owner of 760 shares. Mr. Kolby gave up his claim to any shares. It thus appears that Mrs. Kolby's interest in Inland was converted from that of a simple creditor of Inland to a shareholder in the corporation.

While Mrs. Kolby holds the title of Secretary/Treasurer, the evidence indicates that she does not have authority to sign checks of the corporation. That authority rests in Mr. Caruso and certain designated others.

In summary, the evidence of record clearly indicates that Mrs. Kolby's interest in Inland is limited. She does not exercise control over the management or daily business operations of Inland. While Mrs. Kolby has a financial interest in Inland and participates to some extent in its affairs, her son, Kenneth Caruso, is the real power in this family-owned business, as it is he who, in practice, controls the management and daily business operations of Inland.

Findings of Fact

1. Inland is a domestic corporation having its principal place of business at 8976 Vernon Avenue, Montclair, California, and is engaged in various types of construction.
2. The "Indicated Utilities" or "Participating Utilities" is a group of 16 public utilities subject to the requirements of PU Code §§ 8281 through 8285 and GO 156.
3. The WMBE CHS is an entity established by the participating utilities pursuant to PU Code §§ 8281 through 8285 and GO 156 for the purpose of verifying that businesses credited toward WMBE procurement goals are, in fact, owned and operated by qualifying women and minorities.
4. Cordoba Corporation (Cordoba) is a domestic corporation having its principal place of business at 617 South Olive Street, Los Angeles, California, and has been awarded a contract by the participating utilities to operate the WMBE CHS.
5. On or about January 30, 1990, Inland filed an application with Cordoba seeking verification as a WMBE.
6. By letter dated April 9, 1990, Cordoba denied Inland verification as a WMBE on the ground that Mary V. Kolby did not have the ultimate managerial or operational control of Inland, and

did not share in the risks and profits of Inland commensurate with her ownership interests as demonstrated by an examination of the substance rather than form of arrangement.

7. By letter dated May 7, 1990, Cordoba furnished Inland's counsel with a copy of the following documents: (a) GO 156; (b) CHS Operational Guidelines; (c) WMBE Verification Eligibility Standards; and (d) WMBE Verification Denial Protest Procedures.

8. By letter dated June 6, 1990, Cordoba acknowledged receipt of Inland's May 24, 1990 request for a review meeting and advised that such review meeting was scheduled for June 14, 1990.

9. On June 14, 1990, the scheduled review meeting was held, at which Inland was given a opportunity to present addition evidence in support of its application.

10. On August 27, 1990, a tape recording of the review meeting was sent by Cordoba to Mary Kolby at Inland's office address.

11. By final denial letter dated September 10, 1990, sent to Mrs. Kolby at Inland's office address, Inland was advised that Inland did not meet WMBE eligibility criteria set forth in GO 156 and CHS Operational Guidelines and could not be verified as a WMBE on the grounds that: (a) Mrs. Kolby did not possess or exercise the power to direct or cause the direction of the management and policies of Inland or make the day-to-day decisions on the matters of management, policy, and operations and (b) the form and frequency of Mrs. Kolby's business involvement indicated that she was not actively involved in the day-to-day management of Inland.

12. Mrs. Kolby has limited involvement in the financial affairs of Inland.

13. Mrs. Kolby has little or no control over the management and daily business operations of Inland.

Conclusions of Law

1. Cordoba's conclusion that Mrs. Mary V. Kolby does not control the management or daily business operations of Inland is supported by substantial evidence in the record considered as a whole.
2. Cordoba's denial of verification of Inland as a WMBE is supported by substantial evidence in the record considered as a whole.
3. Cordoba's decision denying verification as a WMBE to Inland should be affirmed.
4. The Commission's order in this case should be effective immediately.

O R D E R

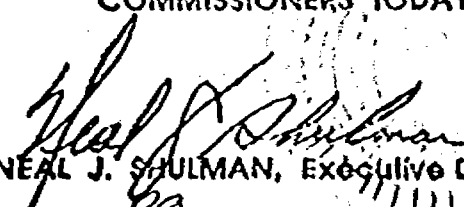
IT IS ORDERED that Cordoba Corporation's decision denying verification as a Women and Minority Business Enterprise to Inland Valley Construction, Inc. is affirmed.

This order is effective today.

Dated April 8, 1992, at San Francisco, California.

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

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


NEAL J. SHULMAN, Executive Director