

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Resolution ALJ-214  
Appeal GO 156 2007 1  
Administrative Law Judge Division  
April 10, 2008

**RESOLUTION**

RESOLUTION ALJ-214. Granting the Appeal of Beci Electric Company Pursuant of Clearinghouse Determination of Status Under General Order 156.

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**Summary**

This Resolution grants the appeal of Beci Electric Company (Beci) from the denial of its application for verification as a woman-owned business entity by the Supplier Clearinghouse (Clearinghouse) and finds that Beci qualifies for verification as a woman-owned business entity under General Order (GO) 156. Administrative Law Judge (ALJ) Myra Prestidge determined the appeal based on documentary evidence and briefs in lieu of an evidentiary hearing.

**Background**

GO 156, adopted in 1988,<sup>1</sup> implements Sections 8281-8286,<sup>2</sup> which require the Commission to establish a procedure to require gas, electric and telephone utilities that have gross annual revenues over \$25 million, as well as their Commission-regulated affiliates and subsidiaries, to adopt programs and submit annual plans to the Commission for increasing the participation of woman-, minority- and disabled

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<sup>1</sup> The Commission has subsequently amended GO 156 on several occasions, including most recently in August 2006.

<sup>2</sup> All Code references are to the Public Utilities Code, unless otherwise stated.

veteran-owned business enterprises (WMDVBEs) in contracts for the provision of products or services to the utilities.<sup>3</sup>

Under GO 156, the utilities must set short-term (1-year), mid-term (3-year) and long-term (5-year) goals for the utilization of WMDVBEs in procurement contracts. These goals must be set annually for each major product and service category that provides opportunities for procurement,<sup>4</sup> and must demonstrate the utility's commitment to encourage the participation of WMDVBEs in utility purchases and contracts as either prime contractors or subcontractors. If minimum long-term goals are not met, the utility's annual report to the Commission must discuss its efforts to find or recruit WMDVBE suppliers of products or services, or state that its inability to meet goals resulted from the unavailability of WMDVBEs to provide certain products or services, or occurred because sole source procurement was the only available procurement method for certain contracts.

The utilities are also encouraged to inform suppliers of products and services that the supplier's good faith efforts to subcontract with WMDVBEs will be a factor considered in the bid process.

However, GO 156 does not authorize or require utilities to utilize set-asides, preferences, or quotas in the administration of its WMDVBE program. The utility retains its authority to use its legitimate business judgment in selecting the supplier for a particular contract.

Under GO 156, the Commission utilizes a Clearinghouse to audit and verify that business entities qualify as woman-owned or minority-owned businesses (WMBEs) and to establish and maintain a database of WMBEs for the Commission and utilities. Asian Inc. currently serves as the Clearinghouse. A business that wishes to contract with utilities as a WMBE under GO 156 must apply for verification by the Clearinghouse.<sup>5</sup> In addition, WMBEs must submit updated verification forms to the Clearinghouse at least once every three years.

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<sup>3</sup> Utilities may request relief from the requirements of GO 156 in cases of undue hardship or if compliance would result in unreasonable expense to the utility.

<sup>4</sup> As an exception, the utility's subcontracting program need not apply to contracts for products manufactured for general consumption, such as pens or paper.

<sup>5</sup> The Disabled Veteran Business Enterprise Participation Program, a unit of the State Department of General Services, certifies businesses that wish to contract as Disabled Veteran-Owned Business Entities (DVBEs) under GO 156.

If the Clearinghouse denies an application for verification as a WMBE, the business may appeal the Clearinghouse's final decision to the Commission, by filing a Notice of Appeal with the Clearinghouse, with copies to the Chief ALJ and the applicable Division Director within 20 days of service of the Clearinghouse's final decision.<sup>6</sup> The Chief ALJ shall then assign an ALJ to hear the appeal and to conduct a hearing, if needed. After the case is submitted, the assigned ALJ shall issue an order resolving the appeal for consideration by the Commission. The Commission may approve, reject, or modify the ALJ's order on the appeal.

### **Procedural History**

Beci Electric applied for verification as a woman-owned business enterprise under GO 156 on February 22, 2005. According to the application, Rebecca Anderson (Rebecca) is a 60% shareholder of the corporation, a corporate officer, and a key employee. Robert Waggener (Robert), Rebecca's father, is a 30% shareholder, a corporate officer, and a key employee. Rex Waggener (Rex), Rebecca's brother, is a 10% shareholder, a corporate officer, and a key employee.

The Clearinghouse denied Beci's application for verification as a WMBE by letter on August 29, 2005 and again, after reconsideration, on February 28, 2006. Beci appealed the decision of the Clearinghouse to the Commission by letter on September 8, 2005 and again by letter of counsel on May 25, 2006. Since the Commission modified the appeal process in GO 156 in August 2006, Beci submitted a new notice of appeal on June 18, 2007.

A prehearing conference was held by conference call on August 23, 2007. The parties waived their right to a hearing under GO 156 and submitted briefs and documentary evidence in support of their positions.<sup>7</sup>

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<sup>6</sup> The business entity must exhaust any available internal appeal processes with the Clearinghouse before appealing to the Commission.

<sup>7</sup> The following documents submitted by Beci have been admitted into the record, without objection by the Clearinghouse:

1. 1986 Form 1120 Beci Electric Corporate Tax Return, pages 1 and 4;
2. Contractors State License Board C10 license issued to Beci Electric;
3. August 9, 1996 letters from Contractors State License Board;
4. Right Away Ready Mix Credit Application and Guaranty;
5. Kelly Pipe Co. Credit Application and Guaranty; and
6. Caltrol Credit Application and Guaranty.

## **Statement of Facts**

The relevant facts are as follows:

In 1984, Robert started a business named SAE-WAG Engineering Services with Mr. Saturino Estoque. Although articles of incorporation were filed for SAE-WAG, Robert and Mr. Estoque never completed the corporate formation process for this company, and the business did not develop as hoped.

In 1985, Robert and Rebecca founded Beci as a new electrical contracting business, using the existing corporate structure of SAE-WAG. SAE-WAG was renamed with the corporate name of R. Waggener, Inc., but the company began doing business as Beci. In late 1985, 500 shares of stock were issued to Robert based on a capitalization of \$6,000. Also in 1985, Rex began working for Beci as the business grew.

According to Beci, in 1986, Robert and Rebecca decided to jointly own Beci and that Rebecca would be the majority owner. They also decided to offer a minority ownership interest in Beci to Rex. Robert sold 60% of his stock to Rebecca for \$3,600 and 10% of his stock to Rex for \$600. However, the Clearinghouse states that according to the Contractors State License Board, Robert was president of Beci from 1985 until 1995, and Rebecca did not become president of the company until 1995.

According to Beci, during the first 10 years of Beci's operations, Robert worked in the field as an estimator. Beci states that when Rebecca and Robert started the company in 1985, Rebecca was involved in all phases of the business. However, beginning in 1986, as the business grew, Rebecca began to spend more time in the office than in the field, and her role became primarily managerial, including management of the company's finances. Beci states that during the second 10 years of the company's operations, Robert worked less as a project manager and ultimately phased out of project management completely. Robert has been working only part-time for Beci in the past few years as an estimator, but occasionally participates in management decisions as an estimator.

Rebecca has developed relationships with the company's bank and suppliers, and has a personally guaranteed Beci's lines of credit with Bank of the West, Wells Fargo Bank, and numerous suppliers, including Right Away Ready Mix, Kelly Pipe Company and Caltrol. Beci claims that Rex has never personally guaranteed a corporate obligation, and that Wells Fargo is the only corporate obligation guaranteed by Robert since the 1980's, because that bank requires a guaranty from each shareholder who has a greater than 10% interest in the company.

When the State Contractors License Board first issued a license to Beci, Robert was designated as the Responsible Managing Officer (RMO). However, Rebecca has been the RMO on the license since August 7, 1996, as approved by the State Contractors License Board.

Beci is a union shop, and all of its electricians are members of the International Brotherhood of Electrical Workers (IBEW). Rex is also a member of the IBEW. Beci utilizes IBEW superintendents, including Rex, to serve as project managers. Beci is required to pay all IBEW members, including Rex, prevailing union wages.

The Clearinghouse stated the following reasons for denying Beci certification as a WMBE in its August 29, 2005 letter:

- Disproportionate Role Played By Robert in Managing Beci's Operations. Inc.
  - Robert, a non-minority male, holds 30% of the company's stock and remains active in Beci's operations, was the original incorporator of Beci, its original responsible managing officer (RMO), its sole shareholder, and its first president. Robert has significant previous experience in the industry and attended trade schools. Robert worked directly on electrical contracting projects for several years before co-founding Beci-Electric.
  - Although Rebecca plays a major role in the administration of the business, Robert plays a disproportionate role in managing the firm's construction projects, including the New Haven school project and a project for BART. The Clearinghouse noted that on a project for the New Haven school, Robert was listed as the project manager on the Subcontractor Information Sheet, while Rebecca was listed as the contracts administrator, and several proposals from subcontractors were addressed to Robert, rather than Rebecca.
- Woman Owner's Lack of Technical Expertise to Control the Business.
  - The Clearinghouse concluded that Rebecca has spent most of her career managing administrative projects, while the two male shareholders of Beci, Robert and Rex, have spent most of their careers working directly on electrical contracting projects, which is the company's main operation, because:

- Although Rebecca is listed as the RMO for Beci's electric contracting license, she holds the license by virtue of "grandfathering" and did not take the contractor's license examination herself.
  - Rebecca does not have field experience as an electrician.
  - During a site visit at Beci, the Clearinghouse found that Rebecca's name appeared primarily on contract administration and insurance documents, but not on job management documents.
- The Woman Owner Does Not Share in the Risks and Profits of the Firm Commensurate with her Ownership Interest.
    - A review of Beci's tax returns and payroll information for the period from 2001-2004 showed that Rebecca received less in salary and total compensation than Rex, who is one of the non-minority male owners and is not merely a valued employee.
  - The Woman Owner is a Former Subordinate Employee of One of the Non-Minority Male Owners Who Remains Active in the Business.
    - Rebecca previously was a subordinate of her father, Robert, when he was the sole owner of the company.<sup>8</sup>

The Clearinghouse stated the following reasons for reaffirming its previous denial of Beci's certification as a woman-owned business in its February 28, 2006 letter:

- The non-minority male shareholder plays a disproportionate role in managing the firm's operations.

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<sup>8</sup> Asian Inc.'s August 29, 2005 letter also denied Beci WMBE status on the grounds that the woman owner of the company did not control the Board of Directors. Asian Inc. noted that at that time, the Board of Directors consisted of two women, Rebecca and Ms. Petra DeJesus, the firm's attorney, and two men, Robert and Rex. Therefore, women controlled only 50% of the votes on the Board. However, in its February 28, 2006 letter reconsidering Beci's request for certification as a woman-owned business, Asian Inc. found that at that time, the Board of Directors of the company consisted of three women, so that the women did have control of the Board.

- Rebecca's primary duties relate to administrative and finance, and she is dependent on non-minority males, Robert and Rex, to carry out the estimating and other technical aspects of the business.
- Although Rebecca's protest stated that Robert may retire in November 2005 at the age of 70, the Clearinghouse found that Beci failed to establish by a preponderance of the evidence that Robert was no longer involved in the operations of the company.
- Rebecca has no education or field experience in electrical services, which is the Beci's main activity.
  - Clearinghouse Guidelines state that in order to demonstrate control of a business entity, the individual controlling the company must have a combination of managerial or technical and/or educational experience and competency consistent with industry standards in the field in which the business operates, in order to demonstrate the ability to make major decisions on matters of management, policy, and operations for the business.
- The woman owner does not share in the risks and profits of Beci in a manner commensurate with her ownership interest.
  - Rebecca did not submit sufficient evidence to rebut that Rex, a non-minority male who is a 10% owner of the company, earns a higher compensation compared to Rebecca and Robert.
  - According to Beci's 2001 and 2002 tax returns. Rebecca paid only \$3,600 for her share of the company's stock. Therefore, Rebecca's majority share was practically gifted to her under the agreement between herself and Robert.
- The woman owner is a former subordinate employee of the non-minority male owner of the company, Robert.

### Discussion

Under GO 156, a woman-owned business is defined as a business enterprise that:

- (1) Is at least 51% owned by a woman or women or, if a publicly owned business, at least 50% of the stock is owned by one or more women; *and*

- (2) Whose management and daily business *operations* are *controlled* by one or more of those individuals.<sup>9</sup>

Here, the Clearinghouse does not dispute that Rebecca owns 60% of the company's stock or that women control Beci's Board of Directors. Therefore, the issue is whether Rebecca controls the management and daily operations of the company.

GO 156 further defines "control" to mean "exercising the power to make policy decisions,"<sup>10</sup> and "operate" to mean "being actively involved in the day-to-day management and not merely acting as officers or directors."<sup>11</sup> These definitions mirror the statutory definitions stated in Section 8282.<sup>12</sup>

In addition, the Clearinghouse has developed eligibility guidelines (Clearinghouse Guidelines) for the verification of businesses as WMBEs under GO 156. These guidelines set forth additional criteria for business entities seeking verification as WMBEs. We take official notice of the Clearinghouse Guidelines.

The Clearinghouse Guidelines require women or minority business owners to themselves possess technical training and experience in the trade or field of the company's operations in order for the company to qualify as a WMBE.<sup>13</sup> However,

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<sup>9</sup> GO 156 at § 1.3.2.

<sup>10</sup> See *id.* § 1.3.11.

<sup>11</sup> *Id.* § 1.3.12.

<sup>12</sup> Pub. Util. Code § 8282 states in pertinent part:

§ 8282. Definitions

For the purposes of this article, the following definitions apply:

(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.

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(d) "Control" means exercising the power to make policy decisions.

(e) "Operate" means being actively involved in the day-to-day management and not merely officers or directors.

<sup>13</sup> The Clearinghouse Guidelines provide in pertinent part:

despite the expertise of the Clearinghouse, we do not believe that the legislative intent behind Section 8282(d) was to require that women or minority owners of business entities possess the experience and expertise to make all technical decisions themselves, when these owners can hire other qualified persons to perform these functions for the company, but are responsible for the overall management and direction of the company themselves. Neither Section 8282(d) nor GO 156 specifically states women or minority business owners must themselves have technical expertise or experience in the all areas of service offered by their companies.

The Commission has previously addressed this issue in Scott Engineering, Inc. v. Cordoba Corporation (Scott), Decision (D.) 91-12-058. In Scott, we found that the company qualified as a woman-owned business under GO 156 even though the woman business owner did not have technical expertise in the field of engineering, which was the main area of the company's operations, and was previously a housewife. When the woman owner's husband started the business, she worked for the company as an employee and was primarily responsible for office management and finances. Several years later, when the company incorporated, the woman owner was named secretary and chief financial officer of the corporation. She later acquired control of 97.5 percent of the company's stock as a result of her husband's disability and death, continued to serve on the board of directors and as the company's chief financial officer, worked full-time managing the business, and had the "final say" on all management and

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#### Management & Control

1. An eligible WME under this program shall be an independent business. The ownership and control by minorities or women shall be real, substantial and continuing and shall go beyond the *pro forma* ownership of the applicant concern as reflected in its ownership documents. It shall not rely upon non-WMBE individual(s) or entities for financial management, or technical assistance or other resources to the extent that it is not in control of its business destiny.

2. The minority or women owners shall possess and exercise the power to direct or cause, the direction of the management and policies of the applicant concern and to make the day-to-day as well as major decisions on matters of management, policy, and operations, and not merely act as officers or directors. The minority or women owner(s) must be responsible for the operation of the applicant, concern consistent with standard industry practices.

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4. In order for a minority or woman individual to demonstrate control of the concern, that individual must have, a combination of managerial or technical and/or educational experience and competency consistent with industry standards in which the applicant concern operates which supports the conclusion that this individual can make daily as well as major decisions on matters of management policy, and operations for the applicant concern.

internal affairs of the corporation. The Clearinghouse denied the company's application for certification as a WMBE on the grounds that the woman owner did not have technical expertise and experience. The Clearinghouse noted that the woman owner's son was the company's chairman, president and chief executive officer, had over 18 years of technical experience in the field of engineering, and had the expertise and skills to manage the company's operations on a day-to-day basis.

The Commission found in Scott that the company was a woman-owned business under GO 156 because as the owner of 97.5 percent of the company's stock, the woman owner had ultimate and absolute control over the company. She had the legal power to change the direction of the company or to overrule the decision of any other person regarding the company's operations; to fire every director, officer, and employee; and even to dissolve the corporation if she chose to do so. Therefore, the woman owner both owned and controlled the operations of Scott Engineering. The Commission noted that the applicable statute defines "control" of a business to mean "exercising the power to make policy decisions."

In finding that the woman owner controlled the operations of Scott Engineering, the Commission also reasoned that as a business grows, more employees are hired to perform specialized tasks, and a division of labor occurs. Therefore, an increase in the number of employees decreases the individual owner's responsibility for completion of the entire tasks involved in the work of the company.<sup>14</sup> However, the corporate officer nonetheless retains the ultimate responsibility for the functions performed under his/her management. The Commission also noted that the woman owner in Scott had worked full-time in the business since its inception.

We believe that our decision in Scott was well-reasoned, and we disagree with the Clearinghouse's determination that Beci is not a woman-owned business because Rebecca does not have technical expertise or training as an electrician. The evidence clearly shows that Rebecca has been president of the company for 12 years, actively manages the company's operations on a day-to-day basis, and has the power to make major policy decisions. She also has a majority ownership interest in Beci, which enables her to control the Board of Directors and to set policy for the company, and to overrule the management or policy decisions of the other two stockholders.

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<sup>14</sup> For example, in Scott, the Commission stated that although in the early days of a business, a corporate treasurer might be responsible for functions ranging from time and attendance recordkeeping to preparation of corporate tax returns and might have skills in all of those areas, over time, more employees, such as a time and attendance clerk and a bookkeeper, are hired to perform these tasks. However, the corporate treasurer retains management responsibility for all of these functions.

Further, both the Clearinghouse and Beci state that Rebecca has been designated as the RMO on Beci's license with the State Contractors Licensing Board for approximately 12 years. Rebecca has the overall management responsibility for the projects contracted for by Beci and ensures that the company has the necessary technical expertise by hiring and managing qualified electricians and other personnel to assist her. She has personally guaranteed the company's credit obligations, which has allowed Beci to remain financially viable. Neither Robert nor Rex (with one old exception) has assumed this financial responsibility for the company.

We do not believe that the woman- or minority- owner's technical education, training, or experience is irrelevant to a determination of whether the company qualifies as a WMBE under GO 156. Rather, the owner's technical education, training, and experience are one factor to be considered in making this determination, along with the other criteria stated in the applicable statutes, GO 156, and the Clearinghouse Guidelines. The Clearinghouse and the Commission must evaluate whether a company qualifies as a WMBE based on the circumstances involved in each case. In cases in which a minority- or woman-owner has a majority ownership interest, controls the management of the company, and sets corporate policy, the absence of technical training, education, or experience alone should not disqualify the company from certification as a WMBE.

We also reject the Clearinghouse's finding that Beci is not a woman-owned business because Robert plays a disproportionate role in the management of Beci. Robert is 71 years old and, according to his declaration, has been working only part-time for Beci in the past several years. His work has generally been limited to estimating, but he occasionally participates in management decisions related to estimates. He has not worked as a project manager for a number of years. Both Rebecca and Robert have submitted declarations under penalty of perjury that Robert was not the project manager for the BART project or the New Haven School project, and that Robert was only an estimator for these jobs. According to Rebecca's declaration, the project managers for these jobs were several IBEW superintendents employed by Beci. Robert's 30 percent ownership interest in the company's stock and his part-time work as an estimator for the company do not give him the power to control the board of directors, to make major corporate policy decisions, or to control the day-to-day operations of Beci. Further, although Rebecca worked for Robert as an employee in the early years of the company, Rebecca has been an owner of Beci since 1986. The evidence shows that Rebecca, not Robert, is fully responsible for the management and

operations of Beci. Therefore, Robert's former role as Rebecca's employer over 22 years ago does not give him either actual or potential control over the company.<sup>15 16</sup> Similarly, although Rebecca utilizes the technical expertise of Rex, who is an IBEW electrician and superintendent, on various jobs, the evidence fails to show that Rex plays a disproportionate role in the management of Beci. Rex's 10% ownership interest in the company does not enable him to control the Board of Directors or major policy decisions for the company. Further, Rex's role as one of several IBEW electrician superintendents employed by Beci does not give him the power to control the day-to-day operations of the company.

In addition, we disagree with the Clearinghouse's determination that Beci does not qualify as a woman-owned business under GO 156 because from 2001 through 2004, Rex's wages exceeded the compensation received by Rebecca.<sup>17</sup> Since Rex is a union electrician, Beci is required to pay him prevailing wages. As a manager and the

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<sup>15</sup> The Clearinghouse Guidelines state that:

Non-minority male individuals may be involved in the management of an applicant concern, and may be stockholders, partners, officers, and /or directors of such concern. Such individual (s)... may not, however:

a. exercise actual control or have the power to control the applicant concern;

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d. be former and/or current employers of the minority/women owner(s) of the applicant concern, unless it is determined that the contemplated relationship between the former employer and the minority/woman individual or applicant concern does not give the former employer actual control or the potential to control the applicant concern and such relationship is in the best interest of the applicant concern.

<sup>16</sup> Moreover, it appears that Robert's technical expertise and experience and his familiarity with the operations of the company may benefit Beci. Therefore, his continued involvement with the company may be in the best interests of Beci.

<sup>17</sup> The Clearinghouse Guidelines regarding Management and Control state in pertinent part:

8. Non-minority male individuals may be involved in the management of an applicant concern, and may be stockholders, partners, officers, and/or directors of such concern. Such individual(s)...may not, however:

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b. receive excessive compensation from the applicant concern as directors, officers or employees.

c. receive excessive individual compensation in any form, including but not limited to, compensation, salary, consulting fees, and/or dividends, which exceeds the compensation to be received by the minority/woman, Chief Executive Officer, or the President.

majority owner of Beci, Rebecca's salary reflects the financial position of the company, as well as the fact that she is not a unionized worker.

Moreover, at the time that Rebecca purchased 60 percent of her father's stock for \$3,600, the value of the capital stock reported on the corporate balance sheet was \$6,000. Therefore, she did not receive the stock from her father as a gift and paid a reasonable consideration for the stock.<sup>18</sup>

### **Conclusion**

Based on the foregoing, we find that Beci qualifies for verification as a woman-owned business under GO 156.

### **Public Review and Comment**

The proposed Resolution was mailed to the parties for review and comment pursuant to Section 311(g)(1). Timely comments were filed by Beci and Clearinghouse.

We have reviewed the comments of the parties and make no changes to the Resolution.

### **IT IS THEREFORE ORDERED that:**

1. The appeal of Beci Electric Company (Beci) from the denial of its application for verification as a woman-owned business entity by the Supplier Clearinghouse (Asian Inc.) is granted.
2. Beci qualifies for verification as a woman-owned business entity under General Order (GO) 156.
3. Asian Inc. is directed to verify Beci as a woman-owned business entity under GO 156, effective immediately.
4. Appeal Number GO 156 2007 1 is closed.
5. This order is effective today.

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<sup>18</sup> According to Rebecca's declaration, the capital stock value on the corporate balance sheet for 1986 through 1990 was \$6,000. In 1991, Beci's accountant changed the value of the stock to \$30,000. However, the increased value of the stock resulted only from the accountant's adjustment and not from any additional contribution of capital.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on \_\_\_\_\_, 2008, the following Commissioners voting favorably thereon:

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PAUL CLANON  
Executive Director