

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

Resolution ALJ-246  
Appeal GO 156 2009-12  
Administrative Law Judge Division  
April 8, 2010

**R E S O L U T I O N**

RESOLUTION ALJ-246. Denying the Appeal of Genesis Power Incorporated Pursuant of Clearinghouse Determination of Status Under General Order 156.

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**Summary**

This Resolution denies the appeal of Genesis Power Incorporated (GPI) from the denial of its application for verification as a minority- and woman-owned business entity by the Supplier Clearinghouse and finds that GPI does not qualify for verification as a minority-and woman-owned business entity under General Order 156. Administrative Law Judge Melanie M. Darling determined the appeal based on official public records, documentary evidence, and briefs<sup>1</sup> in lieu of an evidentiary hearing.

**Background**

General Order (GO) 156, adopted in 1988,<sup>2</sup> implements Sections 8281-8286,<sup>3</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

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<sup>1</sup> GPI's appeal brief included an undisputed Transcript of the Clearinghouse site visit with GPI's owners and Directors. The Transcript is the source of statements by these principals referenced throughout this Resolution as "said" or "stated" unless otherwise indicated.

<sup>2</sup> The Commission has subsequently amended GO 156 on several occasions, including most recently in August 2006.

<sup>3</sup> All Code references are to the Public Utilities Code, unless otherwise stated.

disabled veteran-owned business enterprises (WMDVBEs) in contracts for the provision of products or services to the utilities. This requirement was recently extended to water corporations that have gross annual revenues over \$25 million.<sup>4</sup> When adopting the WMDVBE program, the Legislature declared that the preservation and expansion of competition is “basic to the economic well-being of the state” and could not be realized without the development of these under utilized business enterprises. The Legislature also found that encouraging expansion of the number of suppliers for utility procurement provides benefits to ratepayers and utilities by encouraging competition and promoting economic efficiency.<sup>5</sup>

Under GO 156, the utilities must set short-term (one-year), mid-term (three-year), and long-term (five-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>6</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,<sup>7</sup> 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.

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 Supplier Clearinghouse (Clearinghouse) to audit and verify that business entities qualify as woman-owned or minority-owned businesses enterprises (WMBEs) and to establish and maintain a database of WMBEs for the Commission and utilities. A business that wishes to contract with utilities as a WMBE under GO 156 must apply for verification by the Clearinghouse.<sup>8</sup> The

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<sup>4</sup> Stats. 2008 ch. 316 § 2.

<sup>5</sup> Pub. Util. Code § 8281(a), (b)(1)(F).

<sup>6</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>7</sup> Each utility must offer the same assistance to non-WMDVBEs upon request.

<sup>8</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.

Clearinghouse has developed eligibility standards, known as guidelines (Guidelines), to inform applicants and to provide consistency to the evaluation of the nature of an applicant's ownership, management, and control. These are provided to business entities with the application form. One purpose of the verification process is to ensure that business enterprises that do not satisfy the WMBE qualifications do not wrongfully receive the benefits and advantages accorded to WMBEs. At the time of appellant's application for verification, Asian Inc. served as the Clearinghouse.<sup>9</sup>

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 Administrative Law Judge and the applicable Division Director within 20 days of service of the Clearinghouse's final decision.<sup>10</sup> The Chief ALJ then assigns 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.

### **Statement of Facts and Procedural History**

Genesis Power Incorporated (GPI) was incorporated in Nevada on April 24, 2009 and qualified to do business in California on May 26, 2009. There are three owners, one of which is Linda Manos (Linda), a Hispanic woman, along with James H. Manos (James), her brother-in-law, and Joseph T. Dibos (Joseph), an attorney who has a pre-existing business relationship with John W. Manos (John), Linda's husband.

The ownership interest of the individuals is in dispute. John is not an owner of GPI, but is a member of the Board of Directors along with Linda, James, and Joseph. GPI asserts that Linda owns 51% of the stock and that James and Joseph each hold 24.5%.

The company is not yet operational and the business concept has changed between the time of GPI's application to the Clearinghouse and the time the appeal was submitted four months later. GPI's application to the Clearinghouse, submitted on or about June 18, 2009, described the business as follows:

General Building and Engineering HAZ-MAT; Materials; Utility  
Contractor's Support; Demolition PCC and CIP; Concrete; Masonry;

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<sup>9</sup> In 2009, PRWT Services, Inc. became the designated Clearinghouse.

<sup>10</sup> The business entity must exhaust any available internal appeal processes with the Clearinghouse before appealing to the Commission.

AC Paving; Grading; Excavation; SWPPP; BMPs; Fencing; UST; and AST; Installation; Co-Generation [Solar and Wind].<sup>11</sup>

The application showed that GPI had submitted an application on or about June 9, 2009 for a Contractor's License in Category A: General Engineering Contractor, Category B: General Building Contractor, and HAZ: Hazardous Material Removal Certification. Such a license would conform with the originally conceived business activities described in the Clearinghouse application.

However, some obstacles to obtaining the license arose and GPI reconsidered its business focus. (Additional details are discussed below.) GPI decided going forward to start with supplying construction materials and to postpone construction and hazardous materials work. GPI obtained its business license and paid its business tax to the City of San Diego on July 2, 2009 and identified its primary business activity as "Other Construction Material Wholesale." During a July 21, 2009 site visit by a Clearinghouse employee, the company's owners said GPI's main activity would be to provide erosion control materials to two construction companies. GPI also intends to bid on future supply contracts related to the Commission-approved Sunrise Power Link transmission line being built by San Diego Gas & Electric (SDG&E) and federal government rehabilitation work at Camp Pendleton, a United States Marine Corps base.

Currently, GPI has no intention of taking possession of, or warehousing, any inventory of these various supplies. Instead, it will operate as a broker by arranging with manufacturers for timed jobsite delivery of the supplies by common carrier which will then be unloaded and stored by the customer.

#### **A. Linda L. Manos**

Linda Manos was born in the United States and in 2003 obtained dual Mexican nationality based on her mother's Mexican citizenship. She is President and Chief Executive Officer (CEO) of the company and a member of the Board of Directors. Prior to forming GPI, she held a number of clerical and office positions including office clerk, cashier/data entry clerk, office administrator, store auditor, and receptionist. She was then hired as Vice President of her husband's construction business, Silverton General Incorporated (SGI), and said she worked there from 2000 until 2005. John's resume says he worked for SGI from 2001 to 2003, but according to public records, SGI appears to have operated between January 2002 when it incorporated and November 2004 when it cancelled its contractor's bond.

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<sup>11</sup> GPI's description is verbatim and included no explanation of the construction-related acronyms used.

There is also some inconsistency in the description of her duties at SGI. Her resume states her duties were "Inventory & personnel management, equipment & material purchasing, construction scheduling, outside sales, performed all day to day construction activities." However, when asked at the site interview about her construction work, Linda described her duties at SGI as "office manager." Linda also served as office manager for her church and was responsible for files, correspondence, supplies, and bank deposits.

Her education is anchored by an associate degree in Business Management earned in 2006, shortly after forming a part-time mobile notary business which provides 0-3 transactions per month. She received her notary public certification in 2005, along with two related certifications involving real estate loan documents. In 2008, Linda acquired a certificate in CPR and First Aid. In April 2009, she completed an online Small Business Administration course about its disadvantaged business program.

The facts are not clear as to how she acquired the idea for the company. The weight of the evidence is that John had conversations with his employer who wanted to find minority suppliers to fill a "minority void" in supply lines for environmental materials. (John described "minority void" as trying to fill a 30% WMDVBE supplier goal sought by utilities that contract with his employer.) He told Linda about the opportunity, suggested she could form a minority company, and she made the decision to do so because she thought it could work. Her co-owners, James and Joseph, say Linda brought the idea to them and they agreed there was great potential to obtain significant contracts out of the \$1.7 billion SDG&E will spend on the Sunrise Powerlink project.

**B. John W. Manos, Jr.<sup>12</sup>**

John, Linda's husband, has no ownership interest in GPI but is a member of GPI's Board of Directors. He has thirty years experience working with various construction companies, usually where he had an ownership interest. According to the California State Contractor's Licensing Board (CSLB), he has held a contractor's license since 1980 with Manos Construction (a sole proprietorship) but it is currently inactive. He holds a license for Class A General Engineering, Class B General Building, and Class HAZ Hazardous Material Removal. Over the years he has had licenses associated with five other companies which have expired or been cancelled.

John's construction activities have focused on excavation, grading, concrete, foundations, hillside stabilization, environmental remediation, installation of underground utilities, infrastructure, residential construction, and construction of

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<sup>12</sup> John W. Manos, Jr is of Greek heritage and, thus, a non-minority male under the provisions of § 8282(b).

parking structures, underground tanks, and reservoirs. At Pacific Southwest Development,<sup>13</sup> an Arizona firm he co-owned with Linda that built custom homes, he said he was responsible for land acquisition, planning, scheduling, and working with architects and sub-contractors. He acquired an Arizona general contractor's license at that time.

According to his resume, John has been employed by DCXcavation (DCX) as a Senior Project Manager since 2006 and worked on construction of utility sub-stations with project managers preparing grading plans, budgets and estimates, and working with environmental consultants on matters including slope stabilization, drainage, and hydraulic storm water management, as well as removal of contaminated materials. He also acquired experience with storm water pollution policies (SWPP) and best management practices and is responsible for working with utilities and government agencies to get permits and maintain records. At the Clearinghouse site visit, Linda and John described his job at DCX as "an estimator" who makes sure there is a supply chain of materials for a project, but he later clarified that he would not be the one from DCX making supply orders to GPI.

Some of John's statements about his employment were not fully clear. He said he was employed full-time at DCX and had little time to take on responsibilities with GPI. However, he also disclosed that he manages "M&D Construction," a business he co-owns with Joseph that buys investment properties. Public records reveal two active companies co-owned by John and Joseph: M&D Construction Management LLC and M&D Management Strategies LLC. It is unclear which company he intended to identify and whether he is active with the other company.

There is limited information about John's education and training. He took courses at a community college in "engineering, mathematics, international languages, and political science" but there is no claim he received a degree. His resume states that he attended a law school for two years. John had a real estate agent's license that expired in 1985, and he received a certification for Storm Water Pollution Prevention from the California Department of Transportation in 1995.

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<sup>13</sup> Pacific Southwest Development LLC was registered with the Arizona Corporation Commission on July 27, 2005 and identified John and Linda Manos as the owners. The entity was administratively dissolved on June 25, 2009 due to a returned delinquency notice from an invalid address.

**C. James H. Manos**

James is John Manos' brother and Linda's brother-in-law, and has worked in both the construction and aviation fields. He is a member of GPI's Board of Directors as well as Vice President. He supplied a narrative description of his background instead of a conventional resume which made evaluation more difficult because of the lack of detail. For example, he said he attended a community college and two universities resulting in "degrees" in Business Management and Aviation Management. It is unclear whether these are associate, bachelors, or advanced degrees. He also took some advanced training in labor negotiations at the University of Minnesota School of Business.

James' narrative states that he is a licensed commercial pilot with numerous flight ratings. He has worked for airline companies in various positions in both the Operations and Flight Departments, has experience in Heavy Lift Operations, and serves as an In-Flight Security Coordinator. In 1999, the Allied Pilots Association selected James to serve as a member of their negotiating committee, giving him experience in direct union contract talks, contract language, and working with federal agencies. He currently works full-time for an airline, but states that he will retire and focus on working for GPI when it is operational.

On his resume, James claims "vast experience" in the construction field and that he has "worked his way up the ladder" as a general construction laborer, carpenter, estimator, and project manager of residential construction projects. However, his background narrative lacks specific dates, employers, and responsibilities. He said he served as Vice President of Mega Construction Inc. where his duties included "overseeing the Mega staff, Project Development, and Project Administration." However, there is no record of such a corporation registered in California or Nevada. Instead, he may be referring to Mega Sales, Inc. (MSI), incorporated in California in 1980 and later suspended by the Secretary of State. According to the CSLB, MSI received a Class B General Construction license in 1985, which expired in 1989. The only personnel listed for MSI are from the Manos family, including John as the Responsible Managing Officer (RMO) and James, as an unspecified officer. James has apparently never held his own general or specialty (e.g., carpentry) contractor's license.

At the site visit, James said he had worked as operations manager at SGI, but neither James nor Linda are listed at CSLB as officers of the company. John is the only listed officer: as CEO, President, and RMO. SGI had Class A, B, and HAZ licenses which expired in 2006.

**D. Joseph T. Dibos**

Joseph is a full-time San Diego attorney who has been in practice since 1982. His law office serves as the official address for GPI. He is not part of the Manos family, but has a prior business relationship with John and is described as a friend of both Linda and John. He is a member of GPI's Board of Directors and serves as GPI's Treasurer and Secretary. He graduated from Villanova University, has a masters degree, and while his resume states he graduated from Thomas Jefferson School of Law, the California State Bar records show he graduated from Western State University School of Law.

Joseph's resume is also in narrative form and claims extensive litigation experience involving environmental and safety issues arising from his representation of dozens of victims of the Pines Fire of July 2002 and the Cedar Fire of October 2003 and related work with numerous expert witnesses, including John Manos. He described his expertise in a long list of broadly described "environmental" issue areas which he separated into five categories: water, land, trees and plants, environmental, and structural. From 1993 to 2001, his resume stated he became "versed in international trade with Mexico, Vietnam, China, and Russia" by working with the United States Commerce Department. No further details were offered.

As noted above, John and Joseph co-own two businesses: M&D Management Strategies LLC, an active Nevada entity registered in January 2008, and M&D Construction Management LLC, an active California entity registered in January 2009. However, there is little information about these businesses. Although both companies use the address of Joseph's law office in official corporate records, no Fictitious Business Name Statement appears to have been filed for either company with the San Diego County Recorder/Clerk. Similarly, neither appears to have a business tax certificate from the City of San Diego.

**E. Genesis Power Incorporated**

GPI adopted Bylaws on or about April 22, 2009, which provide in Section 3.1 that "[t]he property, business, and affairs of the Corporation shall be managed and controlled under the direction of its Board of Directors" and except as otherwise provided "all of the powers of the Corporation shall be vested in such Board. Such management and general control will be by majority vote of the Board, with each Director having one equal vote." Bylaw Section 3.2 established three Directors to sit on the Board. Pursuant to Section 3.3, Directors are elected by the shareholders, any Director may be removed from office at a meeting called by shareholders holding a majority of shares, and a vacancy on the Board may be filled by a majority of the Directors. Section 3.4 states that a majority of Directors authorized by Section 3.2 constitutes a quorum for the transaction of business.

In addition, the Bylaws establish in Article IV the terms and duties of corporate officers who are elected by the Board and may be removed by the Board without cause at any time. The only corporate minutes in the record are from the initial meeting of the Board on April 22, 2009. The corporate resolutions provided with the application are not entirely consistent with GPI's Bylaws. It appears the intent of the resolutions may be to reflect that the shareholders met on April 22, 2009 to name the initial Board of Directors consisting of Linda, James, and Joseph and then for the elected Board to elect them as officers.

There is inconsistent information about when John was added as a Director. The Clearinghouse verification denial letters refer to Board minutes dated April 29, 2009 as the point John joined GPI's Board. However, the record provides a Resolution purportedly adopted by GPI's Board of Directors on April 22, 2009 in which John is elected by unanimous consent as a full rights member of the Board. Joseph, as corporate Secretary, certified the meeting occurred on April 22, 2009, but dated his signature on May 28, 2009. At the site visit, Linda and John said the meeting took place in June.

Three stock certificates were issued on April 23, 2009 transferring 510 shares to Linda and 245 shares each to James and Joseph. The shares were valued at \$0.01 each when GPI registered with the Nevada Secretary of State. However, the stock transfer ledger discloses that each of the three paid \$500 for his or her block of shares. GPI established two business bank accounts on which Linda, James, and Joseph all have signature authority with only one signature required. On May 19, 2009, the owners each deposited \$500 into one of the accounts, an amount they say was suggested by the bank officer. Linda and James both contributed funds from joint accounts with their spouses and Joseph appears to have used his business account. There is no other evidence of any monetary contributions made by the shareholders. No bank statements were in the record.

Joseph subleases about 2,600 square feet from a law firm and then splits the space with another attorney. In addition to saving money, the company offered several reasons for establishing GPI's official address at Joseph's law office. According to Linda, it was centrally located, a more prestigious and credible address than her rural home, Joseph would keep corporate records there as Secretary/Treasurer, and the space was "under utilized." GPI is able to use Joseph's office equipment and mailing services, although Linda stated these expenses are reimbursed. There is no evidence or claim that GPI reimburses Joseph for any rent, or that his provision of space is considered a capital contribution. Linda said that as soon as GPI gets business income, the company will get its own office. Joseph did not provide his sublease for the office space but did submit copies of his rent checks for April and June 2009 in the amount of \$1,838.00.

GPI's application to the CSLB for a contractor's license in classifications A, B, and HAZ identified John as the qualifying person and Responsible Managing Employee (RME) who would be GPI's contract administrator. The application included affirmations by John that:

- As the qualifying individual, he would perform direct supervision or control by performing one or more specified activities, i.e., supervising construction, managing construction by making technical or administrative decisions, checking workmanship, or direct supervision at job sites.
- As the RME, he would work at least 32 hours per week or 80% of total operating hours for GPI.

The CSLB notified GPI in early July 2009 that it needed a contractor's bond and a workers' compensation certificate. GPI got the bond. There is inconclusive evidence that John's election to the Board was intended to result in a waiver of the workers' compensation requirement. In any event, Linda stated that no waiver was possible and GPI abandoned the application due to the cost. John also became concerned about conflicts of interest with his employment by DCX. Therefore, GPI decided not to pursue construction or handling of hazardous materials and to instead focus on construction supplies for which no license was required.

No written business plan or marketing plan was provided by GPI. However, GPI's owners have repeatedly said that GPI seeks WMBE status to position itself to do business with two companies that have contracts from SDG&E: DCX and Roel Construction (Roel). According to GPI's owners, these companies want to contract with a reliable WMBE as part of the utility's GO 156 program and no WMBE currently provides erosion control products. DCX is a certified woman-owned business and John is a longtime close friend of her husband, a DCX principal and the company's RMO. Linda and John said they both know well the owners of Roel. GPI's first business will be to get contracts with DCX, Roel, and also with SDG&E directly, all related to SDG&E's Sunrise Powerlink transmission project. Linda said at the site visit that she wants to expand the business in the future to other products and actual construction in areas that do not compete with DCX.

#### **F. Officer and Director Responsibilities**

GPI does not yet have any contracts and has only undertaken preliminary business development steps. Each of the Directors currently has other responsibilities and is undertaking small tasks as needed for the start-up of GPI. For example, Linda has a small notary business and provides daily care for her young child. James, Joseph, and John all have full time jobs and may have other business activities. Therefore, it is

difficult to determine how the corporate officers will allocate responsibilities when GPI is in operation.

Section 4.4 of the Bylaws provides some general descriptions of officers' duties, including that the President shall be the CEO and be "primarily responsible for the implementation of the policies of the Board and shall have authority over the general management and direction of the business and operations of the Corporation...subject only to the ultimate authority of the Board."

GPI's Directors and co-owners said they all discuss GPI business matters and Linda makes the decisions. Along with John, they described their own current and projected duties, as follows:

- **Linda:** is currently spending three to five hours per day researching the Sunrise project and manufacturers of environmentally safe erosion control products, making contacts, and developing business forms; she expects to manage and control the operations of GPI, including doing the marketing.
- **James:** is consulting with the other owners over business decisions "as directed by Linda," primarily focused on getting the licenses; he expects to have the same operations manager role he had at SGI, including "overseer of office/interoffice type conduct," have daily duties coordinating between the field and the supply side (e.g., fulfilling orders), and use his union negotiating skills when GPI contracts with unions in the future.
- **Joseph:** handled the formation and registrations of GPI; he is currently spending four to five hours a day, seven days a week, doing research for GPI, primarily doing due diligence on information he gets from Linda involving utility demands, types and cost of supplies, and "environmental issues," often consulting with John about how things work in the field; he also has a contact at Camp Pendleton.
- **John:** has no full time responsibilities at GPI due to employment at DCX, but he advises Linda about utility environmental concerns and provided initial customer contacts; he expects to work up to three hours a day: to notify Linda or James of field contacts at DCX and Roel in order to "keep the supply line going for the Sunrise project;" he may assist GPI in estimating projects.

## G. Procedural History

On June 18, 2009, the Clearinghouse received GPI's application requesting certification as a WMBE. On July 21, 2009, Victor Vallejo from the Clearinghouse conducted a site visit of GPI at Joseph's San Diego office and met with all of the corporate Directors. After the visit, Linda provided the Clearinghouse with supplemental information

including "email, telephone, and research information," a rough draft Storm Water Pollution Prevention Program template that GPI was developing, and letters from DCX and Roel which indicate interest in doing business with GPI, once it gets certified as a WMBE.

The emails, dated in May, June, and July 2009, were largely between the Directors, related to obtaining the WMBE certification, James' flight schedule, unspecified meetings with third parties, and James advising Linda about premature customer contact and workers compensation requirements. The research submitted consisted of four pictures of erosion control products downloaded on July 18, 2009, ten pages of contact information for suppliers of erosion control products downloaded on July 23, 2009, two newspaper articles and some Camp Pendleton web pages about military construction projects there also downloaded on July 23, 2009, a copy of SDG&E's brochure on Diverse Business Enterprises, and a copy of a statement titled GPI's "Operations Mission."

The Clearinghouse denied GPI's application on July 30, 2009 on the grounds that:

- Linda does not control the day-to-day business because she works part-time, she relies on John's thirty years of experience in construction, and GPI lacks independence based on its use of Joseph's office space, equipment, and shipping account without paying for them.
- Linda lacks the knowledge, training, or experience in the company's proposed construction-related operations.
- John is Linda's husband and has the power to control GPI through his role as the RME/RMO without which GPI could not operate.
- Linda owns 33.33%, not 51%, of GPI based on the initial capital and funding of GPI.

GPI protested and argued that the Clearinghouse erred because: (1) it did not understand that GPI's business plan changed from construction to a procurement and supply firm and thus overstated John's role, (2) it undervalued Linda's education and experience and her role at GPI, (3) GPI is an independent business that intentionally uses Joseph's office address to benefit the company and pays its own equipment and shipping costs, (4) Linda does own 51% of GPI regardless of the \$500 bank deposits, and (5) Linda's time commitment is sufficient at this stage.

The Clearinghouse rejected the protest on October 2, 2009 and concluded GPI had not met its burden of proof to establish it met WMBE eligibility standards, citing, *inter alia*, (1) any confusion about GPI's business arises from GPI presenting itself as a construction company that required a contractor's license and John's prominent

supervisory role, (2) Linda's numerous conflicting statements and changes to the business reflect a lack of planning and control, (3) James and John have vastly more experience than Linda in the construction side of the business she still intends to pursue and appear to have directed and controlled GPI's start-up activities, (4) management and control is vested with the Board which Linda does not control, and (5) there is no credible explanation in the record to support awarding Linda 51% ownership.

On October 9, 2009, GPI appealed the denial of verification as a WMBE, essentially making the same arguments offered on protest. The appeal included a more detailed description of how GPI changed its business focus, its viability without a contractor's license, and also asserted a shift in the burden of proof onto the Clearinghouse to show that Linda is not the majority owner of GPI. Lastly, GPI contended that the "Clearinghouse Standards" relied on by the Clearinghouse are often in conflict with the GO 156 Guidelines and have been found to be in error.<sup>14</sup>

A telephonic pre-hearing conference was held on November 4, 2009, where the parties discussed the necessity for an evidentiary hearing in this appeal and other procedural matters. The parties waived their right to a hearing and agreed to submit briefs and documentary evidence in support of their positions. The ALJ issued a ruling which required GPI to submit its brief by November 30, 2009 and Respondent to file a reply brief by December 14, 2009. The parties were required to make any request for a hearing based on disputed new evidence by December 18, 2009, including an explanation of why the disputed new evidence could not be addressed by additional written briefs.

### **Standard of Review**

Although the Commission has delegated decision-making authority to the Clearinghouse for verification of businesses as WMBEs, it has specifically retained jurisdiction to review Clearinghouse determinations to ensure that applicants are afforded due process and that the decisions of the Clearinghouse are supported by substantial evidence in light of the whole record.<sup>15</sup> The Commission has previously rejected exercise of *de novo* review.<sup>16</sup>

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<sup>14</sup> This argument is unclear and not further developed by GPI. The eligibility "Standards" and Clearinghouse "Guidelines" are identical.

<sup>15</sup> Residential Weatherization, Inc. (RWI), Resolution ALJ-226 (12/29/08). Scott Engineering Inc. v. Cordoba Corporation (Scott), 42 CPUC 2d 421.

<sup>16</sup> Scott, 42 CPUC 2d at 426.

The Commission said in *Residential Weatherization, Inc.*<sup>17</sup> (RWI) that in reviewing a Clearinghouse decision in light of the whole record, the Commission must consider all relevant evidence, even if it detracts from the decision. Substantial evidence has been defined as evidence having “ponderable legal significance...reasonable in nature, credible, and of solid value.”<sup>18</sup> Therefore, if the Clearinghouse findings lack evidentiary support or are based on arbitrary inferences and without reasonable foundation, the decision may be reversed. Additionally, the Commission must independently review the legal conclusions of the Clearinghouse to ensure the decision is not based on legal error.

The Commission has said it does not want the criteria for verification to be mechanically applied. “Like most prescribed standards, those by which eligibility for verification as a WMBE are to be judged must be interpreted in light of reason with the goal of satisfying the spirit of the underlying legislation.”<sup>19</sup> That spirit is to facilitate the participation of traditionally underutilized WMDVBES in public utility procurement.<sup>20</sup> Therefore, the Commission provides an opportunity for an applicant to appeal a Clearinghouse decision and, if necessary, seek a hearing to submit evidence showing the decision was incorrect. The point of such a hearing is for an applicant to demonstrate the Clearinghouse made legal error or misunderstood the evidence presented, including bringing forward evidence that could have, or should have, been provided to the Clearinghouse at the time of the application but was not, probably due to the inexperience of the applicant.

## Discussion

GPI waived its right to an evidentiary hearing and decided to pursue the appeal on a written record which included a transcript GPI prepared of the Clearinghouse site visit conversations with Linda, James, Joseph, and John. We note that a majority of GPI’s appeal brief consisted of rebuttal to a Site Visit Questionnaire (SVQ) prepared by the Clearinghouse representative which summarized responses to some of the questions. GPI argued that the SVQ contained numerous errors and misrepresentations of the actual discussion. GPI urged the ALJ and the Commission to instead rely on the actual transcript it provided, and we have done so.

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<sup>17</sup> RWI at 5.

<sup>18</sup> RWI at 5, citing *Lucas Valley Homeowner’s Association v. County of Marin*, 233 Cal. App. 3d 130, 141-42 (1991).

<sup>19</sup> Scott 42 CPUC 2d at 431.

<sup>20</sup> Pub. Util. Code § 8281.

The issues in this appeal are whether the Clearinghouse erred in concluding that Linda (1) does not own 51% of GPI, and (2) does not control the management and daily operations of GPI in conformance with the requirements of GO 156. Specifically, GPI asserts that the Clearinghouse bears the burden of proof to overcome the evidence of Linda's majority ownership of GPI consisting of the stock certificate issued to Linda and statements by the minority owners that she in fact owns 51% of the company. In addition, GPI asks that Linda be deemed to control the business prior to its operation by reliance on statements of the principals where such power is vested in a four person Board of Directors she does not control, and there is no documentary support for claims of Linda's training and experience to do so, but abundant evidence the non-minority male Directors and owners have such experience and training.

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>21</sup>

### **Linda's Majority Ownership**

GPI argues that Linda owns a majority of the stock, has provided the majority of GPI's funding, and the decision she would own 51% was intentional in order to comply with the requirements of certification as a WMBE. However, GPI's stock transfer ledger shows that Linda, James, and Joseph each paid in \$500, an equal amount of capital, for the block of shares issued to each one. There is also evidence that this is the amount each actually contributed to GPI based on the checks each deposited into GPI's bank account. There is no other evidence of capital contributions actually made by Linda.

GPI has not adequately demonstrated that Linda owns 51% of GPI or contributed the majority of funding, despite the conclusory statements offered by the other principals. Clearly, there was an intention to form a company that would qualify for WMBE status because John's professional contacts at DCX and Roel said they wanted a WMBE to assist with supply lines and would use GPI once it was certified. But, intention is not enough.

The Guidelines provide that the contributions of capital or expertise by the minority or women owners to acquire their interests in the applicant concern shall be real and substantial and can be verified through objective documentation which the applicant is

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<sup>21</sup> GO 156 at § 1.3.2.

required to submit. Here, Linda contributed the same amount of money as the other shareholders and has less experience to bring to the table.

GPI tries to shift the burden of proof to the Clearinghouse to prove that Linda does not own 51% of GPI, but this argument fails. GPI never made its prima facie case. Here, the documentary evidence submitted consists of the stock certificates, the stock transfer ledger, and the checks deposited into GPI's bank account. GPI's argument that the \$500 contributed by each owner to the bank account was solely at the suggestion of the banker without regard for ownership interest, simply lacks credibility. It is outside ordinary business practice for a bank employee to tell a customer how to apportion among owners the funding of their business. Moreover, if Linda had the business background she claimed, she likely would have known the implications of such an action.

Although GPI asserts that Linda made additional contributions, the transcript reference is to her statement that she intended to contribute another \$500 to cover clerical expenses. Even if GPI meant to argue that Linda contributed sweat equity sufficient to justify a 51% ownership interest, this is offset by the extra contributions from Joseph who handled formation and registration duties, contributes office space, and works on GPI matters up to 35 hours per week, at least as much as Linda claims to contribute.

The Clearinghouse initially argued that Linda's ownership interest was diluted by the use of community funds and community property laws. Upon protest, the Clearinghouse backed off the argument as "strained," but also noted that such concerns could be avoided by proper legal advice on segregating separate property. As part of its appellate brief, GPI submitted an "affidavit" by John that states Linda has owned and continues to own the shares as her sole and separate property.<sup>22</sup> In any case, we disregard the argument in this decision.

### **The Board of Directors**

GPI's Bylaws vest all powers of management and control of GPI in a three member Board of Directors which can act by a majority vote. GPI apparently violated the Bylaws, which specifies that Directors are elected by shareholders, when the Board adopted a resolution adding John as a fourth Director. Furthermore, it is unknown if the Bylaws were also amended to correct anomalies arising from the change.<sup>23</sup>

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<sup>22</sup> Although GPI calls the affidavit "sworn" it lacks the basic language of a declaration under penalty of perjury and therefore is merely a statement.

<sup>23</sup> For example, Section 3.2 established that there are three Directors on the Board and Section 3.4 states that a majority of Directors authorized by Section 3.2 constitutes a quorum for the transaction of business.

When it denied GPI's protest, the Clearinghouse first raised the issue that Linda cannot control the majority vote of the Board. GPI did not respond to this issue.

Paragraph 7 of the Guidelines states:

The minority or women upon whom WMBE eligibility is based shall control the Board of Directors of the applicant concern, either in actual numbers of voting directors or through weighted voting...

Paragraph 9(a) states:

Non-minority male individuals or entities owned by such individuals shall be deemed to control or have the power to control the applicant concern in any of the following circumstances.

a. Non-minority male individuals control the voting of the Board of Directors of the applicant concern, either directly through majority voting membership, or indirectly, if the Bylaws allow non-minority male individuals to block any action proposed by the minority/women individuals through negative control.

Here, the GPI Bylaws provide for three directors who have full authority to manage and control GPI. There is no provision for weighted voting based on shares of stock owned. The Bylaws also provide that a majority must be present to constitute a quorum and all actions by the Board are by majority vote. Therefore, regardless of whether there are legally three or four Directors, the non-minority male Directors could defeat any matter Linda brought to the Board and are deemed to control or have the power to control GPI.

GPI might argue that Linda retains ultimate control because Directors are elected by the shareholders and may be removed by shareholders holding a majority of shares. However, this power is more illusory than real and a vacancy on the Board would be filled by a majority of the remaining Directors. Furthermore, corporate officers are elected by the Board and may be removed by the Board without cause at any time. Therefore, the Board could fire Linda as President and continue to operate.

It is theoretically possible that Linda could fire all the Directors and elect new ones, but then she would lose the experience, expertise, and contacts of the other Directors. Two of the Directors are also family, including her husband. Consequently, assuming she is a majority shareholder, it is unlikely she would take the one extreme action she would need to in order to establish that she has ultimate control of the Board and management of the business.

## **Management and Control of day-to-day Operations**

We initially observe that GPI's provision of the site visit transcript (Transcript) was very useful in the context of this issue because the company is not operational, Linda's qualifications are in dispute, and it afforded an opportunity to hear from the principals in their own words how they interact and intend to operate.

The Clearinghouse found that Linda does not control the management and daily operations of GPI primarily because (1) she lacks the knowledge, experience, and training in the company's proposed operations, (2) she must rely on John's extensive history and contacts in the construction industry, (3) John has the power to control GPI through his role as the RME/RMO, (4) she works only part-time for GPI, and (5) GPI lacks independence based on its use of Joseph's office space, equipment, and shipping account.

Although we do not agree with every factual conclusion drawn by the Clearinghouse, the overall finding that Linda does not control the management and operations of GPI is based on substantial evidence in the record.

### **A. Managerial or technical and/or educational experience and competency**

Establishing control requires an applicant owner to show that she both possesses the skills necessary to operate the particular business and that she, in fact, manages and operates the business. The Guidelines state in paragraph 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 (emphasis added.)

Thus, to establish control, an applicant must first demonstrate, at a minimum, that she has managerial, technical, or educational experience and competency consistent with industry standards. Linda has not met her burden of proof because there is no documentary support for claims of Linda's disputed key training and experience, but abundant undisputed evidence that the non-minority male Directors and owners have such experience and training.

In fact, there is minimal of evidence about Linda's background. She has identified some relevant business education and office management experience; however, the essential

technical experience and training she claims from her work at SGI is unsupported and questionable under the totality of the circumstances.

GPI intends to begin as a construction supply business that operates as a broker or middleman between manufacturers and construction companies working primarily with SDG&E. Linda has a two-year degree in business management which is enhanced by her experience working in offices performing various administrative duties. However, GPI's assertion that she is an experienced small business owner is an exaggeration. Linda has a small part-time business as a notary in which she performs up to three notarizations a month, with fees limited by statute to \$5-\$20 per transaction.<sup>24</sup> Such a business bears no resemblance to that envisioned by GPI.

Her title as "Vice President" at her husband's construction company, and the duties she performed, are also open to question. Despite her resume claim that she "performed all day-to-day construction operations," there is nothing in her prior work background to suggest that she was ready to move into a high-level executive position at a construction firm. She lacked the license to supervise construction operations. Her own words describe her actual duties as "office manager," a designation more in line with her past experience.

GPI argues it is error to not recognize her construction-related experience as described on her resume. We do not agree but, giving her the benefit of the doubt, it is possible to find that, informed by the construction experience of John and James, she may have acquired the knowledge and skills at SGI to perform purchasing of equipment and materials and construction scheduling as part of her office management. However, this is still insufficient to establish she has the knowledge and skills to decisively manage and control GPI's intended operations which are described as complex by her co-owners due to utility requirements and environmental regulations.

Linda claims that the business was her idea, but a fair reading of all the evidence shows that without John she would not even be aware of the supply niche GPI seeks to fill, particularly for John's employer. While it is possible that she approached James and Joseph without John's guidance, each of her co-owners have far more experience and knowledge about construction supplies and environmental rules, while her husband has far more knowledge and experience with utility demands. These are the key areas of technical expertise necessary for the initial business GPI now says it intends to pursue. Thus, even if the construction side of the business were left out of the evaluation, Linda must still rely on her co-owners and Directors.

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<sup>24</sup> Government Code § 8211.

Given the lack of objective documentation that Linda has acquired essential technical, managerial or educational experience and competency, GPI must rely on the credibility of its principals' statements. This is problematic as highlighted by certain anomalies like (1) the quantity of inconsistencies between statements of the principals, (2) conflicts and omissions related to public records of their activities, (3) vague references to work experience, (4) failure to explain how Linda has substantively contributed capital and expertise worth 51% ownership, and (5) John's representations to CSLB when he intended to remain a full-time employee at DCX (and also manage his joint venture with Joseph.)

The record also reveals that Linda lacks the comprehensive grasp of GPI's business necessary to establish she has acquired the expected level of expertise to run a complex supply line business seeking to integrate with a utility transmission project the size of Sunrise Powerlink. Linda initially exhibited a lack of clarity about GPI's business plans. In one instance, Linda wrote that she initially wanted to focus on construction supply, then after discussion with her "partners," they decided to include "green" construction, prompting an application for a contractor's license and the addition of John to the Board. She also wrote the exact opposite: that she originally wanted to focus on construction, but after discussions with stockholders, she decided to also specialize in green construction supplies.

She also showed she was unfamiliar with the types of materials GPI seeks to sell as indicated by the extensive research she has had to undertake and her inability to identify any manufacturers at the site visit.<sup>25</sup> John is the one with the expertise in the types of projects GPI wants to undertake. Even Joseph, with his vast experience in environmental issues has to consult with John and James to form his opinions on GPI's business matters. He asserts that complex utility demands and environmental laws are implicated by the business, and Linda has no experience or training in these areas.

Linda, and/or other principals, appear to have done little advance thinking to determine the viability of the construction side of the business. Furthermore, their marketing plan for the supply side is focused on selling to John's contacts, and Linda's extensive "research" seems to have yielded few tangible results other than some web pages downloaded after the site visit that are elementary and unlikely to have taken long to find.

There is scant evidence that Linda has brought any unique or advanced business skill set driven by managerial or educational experience which positions her to control the

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<sup>25</sup> She identified one possible supplier that is not a manufacturer but did not provide an explanation of how a competitive price could be achieved when a product is acquired through an additional middleman.

company and its more credentialed principals. Moreover, the record of GPI's application for certification as a WMBE suggests a rush to form the company without the thorough planning expected of a skilled businesswoman. The number of errors, omissions, and inconsistencies in the record imply a lack of due care. In addition, her failure to assure that the Bylaws provided her with weighted voting or other mechanisms of control of the Board also suggest a lack of business acumen or, at a minimum, a failure to investigate the minimum requirements of the WMBE certification she sought for GPI.

At this stage, it is difficult to predict whether GPI will actually move into construction, and now GPI asserts on appeal that it will not. However, since the co-owners previously said this was the plan, it was not erroneous for the Clearinghouse to consider Linda's ability to manage and control GPI in light of both business plans, absent evidence showing such expansion would not occur during the first certification term. We briefly review Linda's experience, education, and training to manage and control a construction business and find it insufficient. She lacks the ability to perform, and thus supervise, cost estimates, prepare bids, assess project risks, evaluate materials, or oversee field workers because she lacks the technical knowledge to do so. The business would be unable to engage in construction without a contractor's license and John serving as RMO, as originally planned.

Therefore, we conclude that the Clearinghouse finding that Linda lacks the combination of managerial, or technical and/or educational experience and competency consistent with industry standards is supported by substantial evidence. Even if GPI limits itself to supply line procurement, rather than venturing into construction, Linda will still have to rely on John's extensive experience and contacts in the industry and Joseph's extensive background in environmental law. Not only did Linda exhibit a lack of information which belied her claimed experience in construction and supply management, her co-owners offered lengthy descriptions of their understanding of the business plans and their integral roles in its start-up operations which diminished Linda's possible knowledge and contributions.

#### **B. Actual control of management, policy, and operations**

Linda is also unable to demonstrate she has actual control of the day-to-day management and core operations of GPI. Paragraph 2 of the Guidelines states:

The minority or woman owners should possess and exercise 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 woman owner(s)

must be responsible for the operation of the applicant concern consistent with industry practices (emphasis added).

There is no business operation to evaluate, so we look to how the principals have acted to date in the development stage. As discussed above, Linda would not have a business idea if John had not identified it. This alone is not determinative, as no fact alone is determinative to control. However, she is in business with her husband, her husband's brother, and her husband's business associate. Linda and her co-owners state they discuss business decisions between them and turn to John for practical input. The evidence indicates that John and Joseph exercise more control over the day-to-day operational choices of GPI than Linda based on their respective expertise, experience, professional accomplishments, and client contacts. Technical questions ultimately go to them.

GPI relies on statements of its principals that Linda has actual control. As noted above, the reliance on statements alone required the Clearinghouse to assess their credibility. The Transcript provided crucial evidence in this regard. The Transcript revealed dominance by John and Joseph both in actual knowledge and work done, and in how the principals interact with Linda. Notably, Linda calls the group "our team." Yet, John, James, and Joseph appear far more informed and all talk much more than Linda about the idea for the company, the changes in thinking about its operations, and everyone's role. They also supplement and correct Linda's answers.

For example, John gave a lengthy explanation of why GPI decided to provide erosion control materials to two construction companies already contracting with SDG&E that he knows well and works with. Linda, who claims she spends fifteen to twenty hours a week or more primarily researching suppliers, was able to identify only one non-manufacturer supplier of the four products she identified. At that point, James added another supplier and then emphasized their plans to develop more. Joseph stepped in to respond to the question of how Linda's \$500 contribution to GPI warranted a 51% ownership stake, thus reflecting his control over the business formation.<sup>26</sup>

Similarly, after Linda said her only other business was the notary practice, John added she was also "a household engineer" and Joseph said her business was "taking care of the child." When she said she spent three to five hours a day on GPI research, John corrected her by saying she also worked late at night and Joseph agreed, although Linda only affirmed her work usually occurred after her child went to sleep. When Linda was asked about an "illness protection plan" she had given Joseph to review, her explanation was limited to "an employee packet type deal" and seemed disconnected

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<sup>26</sup> Joseph re-iterated that the banker told them to write \$500 checks.

from another claim she made that GPI had no intention of hiring employees in the near future.

Joseph said he spends four to five hours a day, seven days a week, on research for GPI after Linda “comes across an issue.” Thus, Joseph’s description suggests that Linda has ideas and he does the analysis, which conforms with his stated legal expertise. In particular, he identified his work as researching types and costs of supplies, utility demands, and environmental issues.

After getting information from Linda, Joseph said he runs “the concept and theory” by John for an idea of the “applicability,” and after he researches something he will “discuss it with the president, Jim, and we get back to Linda...” (He corrected himself to say that Linda was president.) These types of comments, combined with John’s clear dominance of the discussion about the business operations, undercut Linda’s claims that she has actual control of the day-to-day and major decisions of GPI on management, policy, and operations. Instead, it appears she has a narrow role, while the other principals flesh out the business plans, products, and customers based on their relevant knowledge and experience.

GPI attempts to refute John’s dominance of the business by charging the Clearinghouse with wrongly characterizing the business as construction and assuming John will have a large operational role. This is not accurate. The Clearinghouse considered both business plans: short-term construction supplies and long-term construction because that is what GPI put forth in its application and at the site visit. John is a formidable presence in either business plan because he is squarely involved in the contracting which GPI seeks to penetrate. James also has some potentially applicable construction experience that might supplant John in helping Linda with the supply side, but his work experience is so thinly described it is difficult to evaluate. In contrast, John’s experience is directly on point. In fact, GPI wants to bid on supplying DCX contracts that John manages as an employee of that company.

GPI protests that the Clearinghouse has relied in its denial on arguments that have been previously rejected by the Commission. Citing *RWI*, GPI contends that *RWI* similarly shared office space with another business for cost savings and the woman owner relied on a spouse’s contractor’s license. GPI is correct that these arguments were raised in the *RWI* appeal and were rejected by the Commission in its decision. We generally agree with GPI that either sharing office space or a woman owner not holding a necessary technical license, in and of itself, is not grounds for denial of certification as a WMBE. However, this is not determinative because each applicant must be evaluated on the unique facts and totality of circumstances.

The facts in *RWI* differ significantly from those in *GPI*. In *RWI*, a mother and daughter owned 70% of the company, the mother was CEO and Chief Operations Officer, she managed and controlled the daily business, she had final authority over hiring and firing, she conducted all contract negotiations and dealings with the utility, and both women had long histories in the relevant energy efficiency field including management experience and specialist certifications.

The burden of proof is on the applicant business entity to establish it is entitled to certification as a WMBE. *GPI* may not solely rely on pulling a singular fact or conclusion from another Commission decision in a GO 156 appeal, in order to conclude that the Clearinghouse has committed error. Instead, each case is driven by the particular facts of the applicant company. Here, the applicant *GPI* is a non-operational start-up, so there is little history or operation to review. There are few activities to date and most are undocumented except for formation-related events. Thus, the Clearinghouse, as well as the Commission, was limited to the available documentation and the credibility of the principals' statements.

In light of all the circumstances, we conclude that John and Joseph, rather than Linda, have primary management responsibility for, and control of, the core operations of *GPI* including day-to-day decisions. Linda makes some contributions but they are undocumented and are subject to review by the Board of Directors which she does not control as one vote out of four. Over time, as evidenced by women owners in other Commission decisions,<sup>27</sup> she may acquire the relevant hands-on experience or certification necessary to control *GPI*'s operations.

Therefore, we find no error in the Clearinghouse's evaluation of John's role in both business plans, and find substantial evidence to support its conclusion that Linda does not have actual control of *GPI*'s management and operations. It is possible that Linda could rise to the occasion, and her co-Directors recede in their operational role, once the business is actually supplying customers. However, it is premature to speculate as to whether future operational facts will sufficiently differ from those to date where Linda has not been in control.

Furthermore, there was no claim that the Clearinghouse failed to follow its established procedures which are part of the record. In the absence of a breach of the established procedures, we find that *GPI* has been afforded due process in view of the "elaborate procedures enacted to discover the true status of an applicant for verification and the procedural safeguards in place."<sup>28</sup>

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<sup>27</sup> See, e.g., *Beci Electric Company*, Resolution ALJ-214, GO 156 2007-1 (April 10, 2008); *S&S Tool and Supply, Inc.*, Resolution ALJ 213, GO 156 2007-2, (April 24, 2008); *RWI*.

<sup>28</sup> *Scott Engineering, Inc. v. Cordoba Corporation*, 41 CPUC 2d, 421, 431.

### **Supplemental Submission - Motion to Exclude**

On December 18, 2009, Joseph served an email with “comments” about Respondent’s Reply brief which primarily focused on several of Respondent’s exhibits and the asserted standard of review to be applied by the Commission. GPI argued that the exhibits could constitute “new evidence” and particularly objected to Exhibit 14, a U.S. Government Accountability Office (GAO) report of fraud and abuse case studies in the Service-Disabled Veteran-Owned Small Business Program,<sup>29</sup> because it may have implied that GPI’s application was an attempted fraud. GPI did not request an evidentiary hearing and Respondent stated it had no objection to the comments but sought an opportunity to file an additional brief.

We accept the email into the record as a Motion to Exclude Respondent’s argument about the standard of review and Exhibit 14. Pursuant to Rule 11.1(g) of the Commission’s Rules of Practice and Procedure, we decide the motion without further response from Respondent.

Respondent’s argument about the applicable standard of review is not new evidence. This includes Respondent’s assertion that the Commission should look for “guidance” in decisions made by the federal Small Business Administration (SBA) in connection with review of its own Small Disadvantaged Business program. Respondent submitted the SBA regulations and some SBA decisions as exhibits. This is merely Respondent’s view and the motion to exclude this argument is denied.

However, the motion is granted as to the exclusion of Exhibit 14 because the GAO report is not relevant evidence. Since the Clearinghouse did not deny the application on the basis of fraud, there is no foundation for relevance of the report and its inclusion could be seen as a prejudicial inference of fraud.

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<sup>29</sup> GAO Report to the Chairwoman, Committee on Small Business, House of Representatives, Service-Disabled Veteran-Owned Small Business Program, Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts (October 2009).

## Public Review and Comment

The proposed Resolution was mailed to the parties on March 9, 2010 for review and comment pursuant to Section 311(g)(1). Under Rule 14.3(c) of the Commission's Rules of Practice and Procedure, comments must "focus on factual, legal, or technical errors in the proposed...decision and in citing such errors shall make specific references to the record." No comments were received.

## Findings of Fact

1. Applicant, GPI was afforded due process in connection with its application for verification as a WMBE.
2. Applicant became an active Nevada corporation in April 2009, qualified to do business in California in May 2009, and initially intends to engage in the business of providing erosion control materials and other construction supplies to contractors working on the Sunrise Powerlink transmission project.
3. Linda Manos (Linda) is Chief Executive Officer and President of GPI, and a member of the Board of Directors. Her background includes an associate degree in business management and experience in various clerical duties and office administration. She operates a part-time notary business.
4. Linda's claimed experience in construction management with her husband's company is not supported by her prior work experience or documentary evidence.
5. John Manos (John), Linda's husband, is a member of GPI's Board of Directors and owns no GPI stock. He has 30 years experience in construction activities including excavation and erosion control, he has long held a contractor's license in three categories, and currently works for DCXcavation, Inc. (DCX).
6. GPI applied for a contractor's license based on a supervisory role by John, but it is not currently pursuing the application. This decision resulted in the indefinite postponement of GPI's plans to expand into construction.
7. James Manos (James), brother of John, is Vice President of GPI and a member of the Board of Directors. He has education and experience in both construction and aviation fields, including work as a project manager for residential construction projects and union contract negotiations. He currently works for a commercial airline.
8. Joseph Dibos (Joseph) is a full-time attorney specializing in environmental regulation and litigation who handled the formation and registrations of GPI. He is Secretary/Treasurer of GPI and a member of the Board of Directors. He provides a temporary office address for GPI without charge.

9. John and Joseph have a previous business relationship that includes John appearing as an expert witness for Joseph in litigation and one or more business ventures.
10. GPI has issued stock certificates to Linda for 510 shares, to James for 245 shares, and to Joseph for 245 shares.
11. Linda's ownership of 51% of GPI's stock is not supported by objective evidence. Each shareholder made equivalent \$500 capital contributions and Joseph has invested more sweat equity than Linda.
12. GPI is in the development stage and not operational. It has written commitments from two construction companies to buy supplies after it receives WMBE certification. One company is John's employer, DCX, and the other, Roel Construction, is professionally known to John.
13. Linda, John, James, and Joseph are the Directors of GPI's Board. The Bylaws vest management and control of GPI in the Board, including the right to fire officers without cause.
14. The Bylaws provide for action by a majority of the Directors and do not provide for weighted voting by shareholder interest. Each Director has identical rights.
15. On June 18, 2009, the Clearinghouse received GPI's application requesting certification as a WMBE.
16. On July 21, 2009, the Clearinghouse conducted a site visit of GPI at Joseph's office and discussed the business with all four members of GPI's Board of Directors. GPI prepared and submitted a transcript of the visit. The Clearinghouse offered no objection to the transcript's accuracy.
17. Linda's primary responsibilities to date involve finding manufacturers and suppliers of construction materials. She forwards information and issues to Joseph for further research and review. Joseph often reviews GPI matters with John before reaching his opinions.
18. At the site visit, John and Joseph dominated the conversation about GPI's business plans. They also corrected and supplemented some of Linda's statements.
19. No written business or marketing plan for GPI was provided by Linda or any other GPI principal. John and Joseph exhibited more knowledge and expertise about GPI's proposed operations than Linda.
20. GPI's idea to supply erosion control materials to companies working on the Sunrise Powerlink transmission project implicates John's expertise in utility demands and his construction company contacts, as well as Joseph's expertise in environmental law.
21. There are inconsistencies between statements of the principals of GPI about the idea for the business, the planned operations, and the role of each principal at GPI.

22. There are omissions and inconsistencies between representations by GPI and its principals, including the claimed experience of the principals and public records of their activities.
23. The errors, omissions, and inconsistencies of GPI and its principals during the application process negatively affect the credibility of their representations.
24. Joseph, Linda, and James all have singular signature authority over GPI's business accounts.
25. On July 30, 2009, the Clearinghouse issued a letter that denied GPI's application for verification as a WMBE.
26. GPI subsequently protested the denial in a letter to the Clearinghouse.
27. On October 2, 2009, the Clearinghouse denied the protest by GPI.
28. On October 9, 2009, GPI submitted to the Commission an appeal of the Clearinghouse's final determination.
29. Upon agreement by all the parties, the Administrative law Judge (ALJ) determined the record on appeal would be the documentary evidence submitted and briefs in lieu of an evidentiary hearing.
30. The ALJ has taken official notice of certain state and local government public records.
31. Pursuant to a Ruling by the ALJ, GPI and Respondent timely filed appeal briefs and concurrently submitted exhibits for the record.
32. On December 18, 2009, GPI served a motion to exclude a portion of respondent's argument and an exhibit, a U.S. Government Accountability Office (GAO) report of fraud and abuse case studies in the Service-Disabled Veteran-Owned Small Business Program.

### **Conclusions of Law**

1. All jurisdictional requirements for this appeal have been met.
2. GPI does not qualify for verification as a WMBE at this time because Linda Manos has not established that she owns 51% of GPI based on real and substantial contributions.
3. GPI does not qualify for verification as a WMBE at this time because Linda lacks the necessary experience and competency consistent with industry standards to make major decisions on matters of management, policy, and operations related to its primary services.



