
PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 3, 2008

Agenda ID #7427

**TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ 213
(Appeal GO 156 2007 2)**

This draft resolution regarding S&S Tool and Supply, Inc. will be on the agenda at the April 10, 2008 Commission meeting. The Commission may then vote on this draft resolution, or it may postpone a vote.

When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the draft resolution. Opening comments shall be served no later than March 24, 2008, and reply comments shall be served no later than March 31, 2008. Service is required on all persons on the attached service list. Comments shall be served consistent with the requirements of Pub. Util. Code § 311(g) and Rule 14.5 of the Rules of Practice and Procedure.

Finally, comments must be served separately on Administrative Law Judge Ryerson at vdr@cpuc.ca.gov, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ PHILIP SCOTT WEISMEHL for
Angela K. Minkin, Chief
Administrative Law Judge

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Attachment

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-213
Appeal GO 156 2007 2
Administrative Law Judge Division
April 10, 2008

RESOLUTION

RESOLUTION ALJ-213. Granting the Appeal of S&S Tool and Supply, Inc. of the Clearinghouse Determination of Status Under General Order 156

Summary

This resolution grants the appeal of S&S Tool and Supply, Inc. of the Clearinghouse's determination that S&S is not a woman- and minority-owned business enterprise under the provisions of General Order (GO) 156. Administrative Law Judge Victor D. Ryerson heard this matter in San Francisco on October 24, 2007. The hearing concluded, and the matter was submitted, on that date.

Findings of Fact

1. Appellant S&S Tool and Supply, Inc. (S&S) is a corporation engaged in the business of selling and distributing tools and other products, and providing associated services. Most of its business dealings are with manufacturing concerns, but Pacific Gas and Electric Company (PG&E), an investor-owned utility with gross annual revenues in excess of \$25 million that is regulated by the Commission, is among its customers. At all relevant times, all of the shares in S&S were owned by Tracy Tomkovicz (Tracy) and her husband, Steve Tomkovicz (Steve).

2. Tracy is the current Chief Executive Officer (CEO) and Chief Operating Officer (COO) of S&S. She is an articulate college-educated woman with a record of managerial accomplishments at S&S and as a financial analyst with her previous employer, Shell Oil Company. Tracy's ethnic heritage is three-eighths Chinese, but

nothing in the record indicates that this has influenced her professional life in any way, and S&S does not hold itself out to the public as a minority-owned business by reason of this fact.

3. Steve is a white male. He founded S&S in 1983. He was married to his first wife at the time. Their marriage was dissolved in 1995, and Steve became the sole shareholder of S&S as part of the final dissolution order. Steve married Tracy in 1997. He remained the sole shareholder of S&S until January 1, 2004.

4. Asian, Inc. (Clearinghouse) at all relevant times has been the clearinghouse provided for the sharing of women, minority and disabled veteran business enterprise (WMDVBE) identification and verification information under Commission General Order (GO) 156. Paragraph 3 of GO 156 states that the primary purpose of the Clearinghouse is to audit and verify the status of women-and minority-owned business enterprises (WMBE).

5. On September 13, 2005, Tracy, who at that time was S&S' Chief Operating Officer (COO), submitted an application to obtain WMBE status for S&S.

6. On January 31, 2006, the Clearinghouse issued a letter denying S&S' application for WMBE status. The stated grounds for the denial were that S&S failed to demonstrate that, at the time of the application, it was independently owned and controlled by a woman. The specific reasons given in support of this determination were that Tracy was a subordinate of the non-minority male shareholder; that the non-minority male shareholder's role was disproportionate to his stated ownership interest; that Tracy's majority ownership was not real, substantial and continuous; and that Tracy did not share in the risks and profits commensurate with her stated ownership interest.

- a. The facts upon which the Clearinghouse relied in concluding that Tracy was subordinate to the non-minority shareholder (Steve) were that Tracy was the COO, whereas Steve was President and CEO, and that he was also the founder of S&S. The Clearinghouse consequently found that her role was administrative and "only supportive," and did "not demonstrate management control nor ... involve[ment] with the firm's primary business operations [which were] sales."
- b. The facts upon which the Clearinghouse principally relied in concluding that Steve's role was disproportionate to his stated ownership interest were that he had been the sole owner of the company until January 1, 2004, on which date Tracy first became a

- shareholder and 51% owner of the corporation, but that Steve nevertheless remained President of the corporation, a relationship the Clearinghouse regards as "unusual." The Clearinghouse compared the functions performed by Steve and Tracy, and concluded that because the company's primary business was sales, which fell within Steve's area of responsibility, Steve was more directly responsible for managing the company's primary business operations than Tracy.
- c. The facts upon which the Clearinghouse relied in concluding that Tracy's majority ownership was not real, substantial and continuous were that Tracy did not become an owner of S&S until 21 years after Steve founded the business; that there was no consideration paid for her shares because Steve gifted them to her; and that Steve had previously been sole owner after his divorce from his first wife in 1995.
 - d. The facts upon which the Clearinghouse relied in concluding that Tracy did not share in the risks and profits commensurate with her stated ownership interest were that she received substantially lower total compensation in salary in 2002 and 2003, and in combined salary and profits in 2004, than Steve did in those years, and that in 2005 Tracy continued to be paid the least compared to the other corporate officers.
 - e. Principally on the basis of the foregoing facts, the Clearinghouse inferred that Tracy's ownership interest was intentionally created so that the firm would appear to be majority-owned by a woman.

7. By letter to the Clearinghouse dated February 13, 2006, S&S submitted a Notice of Appeal of the September 13 denial. The appeal offered certain additional facts to supplement those relied upon by the Clearinghouse in making its denial determination, and argued that the Clearinghouse had misconstrued the facts and reached an incorrect conclusion.

- a. In S&S' protest, Tracy contends that Steve retained the title of President of the company for marketing reasons, specifically to validate his apparent authority to enter into large contracts with customers. She asserts, however, that Steve in reality was her subordinate, and that her responsibilities were broader and more sophisticated than Steve's.
- b. The protest addresses the Clearinghouse's perception that Steve's role was disproportionate to his compensation by setting forth a long series

of accomplishments for which Tracy takes credit, suggesting that Steve's role was not as great as the Clearinghouse assumed. The protest also points out that once Tracy became the majority shareholder in 2004, her K-1 distributions for the first time exceeded Steve's, consistent with her new majority-owner status.

- c. Regarding the Clearinghouse's finding that Tracy's majority ownership interest was not real, substantial and continuous, the protest points out that Tracy's 51 percent stock ownership is undisputed, satisfying the first two criteria. Although conceding that Steve and Tracy were married for seven years before he transferred the majority ownership to her by gift, the protest points to her continuity of important contributions to the success of the company from the outset of their marriage (and before) as the basis for earning her de facto majority ownership in 2004.
- d. In response to the Clearinghouse's finding that Tracy did not share in the risks and profits commensurate with her stated ownership interest, the appeal simply points to the existence of her post-2004 majority ownership and the compensation she has received since that time as evidence that she shares proportionately in both.
- e. S&S' appeal notes that the Clearinghouse investigator who interviewed Tracy in connection with the application declined her offer to take him on a tour of S&S' operations. She believes that if he had accepted the offer, he would have obtained a more accurate picture of how the company operates and a better sense of the nature and extent of her authority.

8. On July 12, 2006, the Clearinghouse issued a letter affirming its initial determination to deny verification of S&S as a WMBE. The Clearinghouse letter articulates various reasons for its decision not to alter its earlier determination. All of these are gleaned from general guidelines for eligibility for certification as a WMBE, which the Clearinghouse relies upon internally, but does not disseminate publicly or furnish to an applicant at the time of the initial application.

- a. The Clearinghouse's letter states that, "Presenting a male leader in the foreground, for whatever reason, goes against the spirit of promoting women-owned (and managed and controlled) businesses and diversity programs." Accordingly, the fact that Tracy did not hold the title of President and/or CEO was, in the Clearinghouse's determination,

sufficient to deny verification on the grounds that she was subordinate to Steve, who held those titles.

- b. That Steve received greater compensation Tracy, and that he presented himself as leader and manager of the business, were facts sufficient to show that his role was disproportionate to his stated ownership interest, in the Clearinghouse's determination.
- c. The Clearinghouse disregarded de facto share ownership in favor of recognizing the community property character of S&S, because Steve and Tracy are married. On that basis, the Clearinghouse determined that Tracy is not the majority owner of the company under California law, defeating S&S' contention that she is majority owner. Consequently, the Clearinghouse concluded that S&S is not a WMBE.
- d. Relying upon additional language in its guidelines to the effect that a woman owner must enjoy the customary incidents of ownership and share the risks and profits commensurate with her ownership interest to establish that she controls the company, the Clearinghouse concluded that Tracy did not qualify, because her salary was lower than that of other officers of the company, even though the amount of the dividends she received was not lower.

9. On October 10, 2006, S&S appealed the Clearinghouse's final determination to the Commission's Program Director, Utility Supplier Diversity Program.

10. At the hearing on October 24, 2007, Tracy provided testimony to explain her role at S&S at the time of the Clearinghouse denial, and her history of employment with the company. Her testimony was credible. Steve was not present to testify at the hearing, because he was participating in a major fundraising activity for a non-profit organization in which he and Tracy are significantly involved.

- a. Tracy has played an important role in helping Steve manage the company, and contributed a great deal toward its financial turnaround and growth during the period from 1997 to 2003, following their marriage. In recognition of the managerial function she performed, which encompassed all aspects of the company's business operations, she was appointed COO of the company in 2003. In that capacity she had principal responsibility for all of the company's operations, and authority to make major commitments on its behalf. By this time Steve, who retained the office of President, had essentially withdrawn

- from managing the company, leaving that function in Tracy's hands, and restricted his activities to sales, which is his forte.
- b. On January 1, 2004, Tracy for the first time received a stock ownership interest in S&S as a result of a gift of shares from Steve, who had been the sole shareholder until that date. By that time Steve and Tracy also regarded the company a community asset under California law because it had grown substantially after their marriage in 1997, and after Tracy became significantly involved in its operations. Tracy explained that this growth occurred primarily as the result of specific managerial actions she took in the exercise of her discretion.
 - c. As part of this stock transaction Steve expressly gifted 100 of his shares of S&S stock to Tracy as her sole and separate property. Steve thus became the owner of 4,900 shares (49 percent), and Tracy became the owner of 5,100 shares (51 percent). Consequently, Tracy emerged from this transaction as the majority owner of S&S.
 - d. After January 1, 2004, up to and including the date of the hearing, Tracy's ownership interest in the company did not change.

11. The Clearinghouse provided no additional testimony at the hearing regarding facts pertaining to its denial of verification, and it relies entirely upon the state of the facts at the time the appeal was first filed to support its determination that S&S is not a WMBE.

Conclusions of Law

1. All jurisdictional requirements for this appeal have been met by reason of the facts stated in Findings of Fact 1 through 9.
2. Tracy's three-eighths Chinese heritage is insufficient to accord S&S standing as a minority-owned business for the purpose of determining whether it has WMBE status. In order to be a "minority" for purposes of GO 156, an owner must have a minority ethnic background sufficient to invoke GO 156's goal of ensuring full participation in utility procurement programs to those who have been denied such participation by reason of their minority ethnic background. Although there is a history of nonparticipation in utility procurement programs by Asian-owned companies, there is no evidence that this has ever been the case with S&S. Tracy's Chinese heritage is attenuated to a degree that it is immaterial.

3. By reason of Tracy's gender, S&S has standing to appeal the Clearinghouse's determination that S&S does not have WMBE status on grounds that the business is not woman-owned.

4. The purpose of the verification process under GO 156 is to ensure that business enterprises that do not satisfy the qualifications to be accorded WMBE status do not wrongfully receive the benefits and advantages accorded to WMBEs by reason of having that status.

5. The marital relationship between Steve and Tracy complicates the issue of determining ownership and control of S&S, because the couple has acted as a team in running the business. However, Tracy has manifestly performed a role in the company's operation that is separate and distinct from Steve's since she became COO in 2003. Tracy has had overall management responsibility for the entire company, and Steve's role has been limited to that of being in charge of sales since 2003. Tracy's testimony that Steve retained the title of President for marketing reasons is credible.

6. Inasmuch as Steve continued to own all of the shares in the company until January 1, 2004, we presume that Tracy's management role until that date was the result of a delegation of authority, based upon a mutual perception that this arrangement would make the best use of their respective strengths.

7. When Steve conveyed a majority share ownership in the company to Tracy on January 1, 2004, her delegated management control and authority were coupled with actual majority ownership of S&S. By reason of her majority ownership of the stock, as of January 1, 2004, Tracy could operate the company in accordance with her own policies and goals and exercise the authority, if she so desired, to fire Steve or any other manager employed by the company.

8. There is no basis in the record to support the Clearinghouse's inference that Tracy's ownership interest was intentionally created so that the company would appear to be majority-owned by a woman. The stock transaction occurred more than 20 months before S&S applied for verification of its WMBE status, and the Clearinghouse has offered absolutely no evidence to corroborate its position that the stock transaction was accomplished with the intent of attaining that status. No inference regarding the degree of Tracy's ownership or control may be drawn by reason of the differences in compensation paid to corporate officers and managers before January 1, 2004, because those variations were made for other purposes, such as employee retention and Steve and Tracy's personal income tax planning, according to Tracy's uncontested testimony. Such arrangements are not uncommon or unreasonable in the operation of a small

business like S&S. The Clearinghouse's inference that the ownership transfer was made for ulterior reasons is speculative.

9. By reason of the facts stated in Findings of Fact 1 through 3, 7, 10 and 11, since January 1, 2004, Tracy has not been a subordinate of Steve; Steve's role has not been disproportionate to his ownership interest in S&S; Tracy's interest has been real, substantial and continuous; and Tracy has shared in the risks and profits commensurate with her stated ownership interest. The fact that majority ownership has not reverted to Steve since that date is a significant indication that Tracy's interest is real and continuous, and was not a sham accomplished for the purpose of attaining WMBE status.

10. Based upon Conclusions of Law 5 through 9, the Commission's Order should declare that S&S was a WMBE at the time the application was filed on September 13, 2005.

Public Review and Comment

The proposed resolution was mailed to the parties for review and comment pursuant to Section 311(g)(1).

IT IS THEREFORE ORDERED that:

1. The relief requested by S&S Tool and Supply, Inc. (S&S) in Appeal Number GO 156 2007 2 is granted.
2. The determination of the Clearinghouse in this matter is reversed.
3. S&S is a woman-owned business enterprise, or WMBE, within the meaning of Commission General Order 156, under the facts set forth in its application dated September 13, 2005.
4. Appeal Number GO 156 2007 2 is closed.
5. This order is effective today.

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:

PAUL CLANON
Executive Director

INFORMATION REGARDING SERVICE

I have served the foregoing Draft Resolution ALJ-213 on the attached special service list developed for this purpose (see Rules 1.9 and 1.10 of the Commission's Rules of Practice and Procedure).

Dated March 3, 2008, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

Resolution ALJ-213 ALJ/VDR/sid
Appeal GO 156 2007 2

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