

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

Decision 18-03-021 March 22, 2018

(Date of Issuance 3/29/18)

Petition of Quad Knopf, Inc., dba QK
to Adopt, Amend, or Repeal a Regulation
Pursuant to Public Utilities Code § 1708.5.

Petition 17-10-011

(Filed October 11, 2017)

**APPLICATION FOR REHEARING OF COMMISSION DECISION DENYING
PETITION OF QUAD KNOPF, DBA QK, TO ADOPT, AMEND, OR REPEAL A
REGULATION PURSUANT TO PUBLIC UTILITIES CODE SECTION 1708.5**

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April 26, 2018

Quad Knopf, dba QK (hereafter QK), received notice of the Public Utilities Commission's (Commission) decision via mail on March 29, 2018.

QK, understands that the Commission cannot declare Public Utilities Code Section 8281, *et seq.*, unconstitutional, and that the PUC adopted General Order 156 in order to implement those laws. However, because the Order and Code Section 8281, *et seq.*, were adopted prior to the voters' approval of Proposition 209 (California Constitution Article I, Section 31(a)), the Commission should reconsider the implementation of the sections regarding "race, sex, color, ethnicity, or national origin."

The Commission's decision describes the various other groups for which greater inclusion is deemed necessary in the utility procurement process, but those groups are not covered by Proposition 209. Nor are they at issue in Quad Knopf's rulemaking petition. Proposition 209 is similar to, but not synonymous with, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Under Equal Protection Clause principles, state action that relies on suspect classifications must be tested under strict scrutiny to determine whether there is a compelling governmental interest. Proposition 209, is different—it has no compelling state interest exception. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 567 (2000). Instead, Proposition 209 "prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the government action could be justified under strict scrutiny." *C&C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284, 293 (2004) (quoting *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 42 (2001)). A program is unconstitutional where it "affords preferential treatment to MBE/WBE[s] on the basis of race or sex." *Hi-Voltage Wire Works, Inc.* at 560.

Proposition 209 extends to state agencies and all instrumentalities of the state government, including the Public Utilities Commission. *See* Article I, Section 31(f). The PUC rulemaking decision argues that QK “must demonstrate that the ‘State’ is a party to a public contract.” PUC Decision at section 2.2.1, p. 15. That is not so. The State of California and the State Public Utilities Commission adopted laws and rules that compel regulated utilities to provide contracting preferences to certain groups of people based on race and gender. Other people—white males--do not enjoy such preferences. The statutory contracting scheme established under Section 8281, *et seq.*, is specifically designed to encourage greater economic opportunity for women- and minority-owned businesses.

The PUC’s decision in this case describes the need for “short-and-long-term goals and timetables, but not quotas, as well as methods for encouraging women, minority ... business enterprises to compete for subcontracts” PUC Decision at section 1.2, p. 6. Quad Knopf’s argument does not claim that the PUC Code or Order require quotas. Rather, QK argues that those laws challenge the preferential treatment described in the last part of the previous sentence: the practice of encouraging some people, but not others, creates a preference.

The California Supreme Court adopted the Webster’s dictionary definition of “preferential treatment”—“‘preferential’ means giving ‘preference,’ which is ‘a giving of priority or advantage to one person ... over others.’” *Hi-Voltage*, 24 Cal. 4th at 559-60, citations omitted. This definition has been universally adopted by the appellate courts. *See, e.g., C&C Constr., Inc.*, 122 Cal. App. 4th at 302 (“The [state] Supreme Court is the final authority on interpretation of the [state] Constitution.”); *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th at 41 (“Giving preferential treatment ... is ‘a giving of priority or advantage to one person over others.’ [Citation.]”) The fact that white male-owned business enterprises must request the assistance that is automatically provided to

women- and minority-owned businesses in GO Section 6.2.1(8) provides preferential treatment to women- and minority-owned businesses.

General Order 156 was designed to implement the statutory scheme. It does not merely suggest that regulated entities increase the number of contracts with minority- and women-owned businesses--it *requires* that they do so. GO 156 provides a long list of detailed efforts, plans, and programs regulated utilities must implement for the specific purpose of increasing the number of MBE and WBE contractors. *See*, QK's Petition at Section IV, p. 11. Every year, a regulated entity must submit a report to the PUC, explaining whether it increased its MBE and WBE contracting or, if it did not, why not. *Id.* at p. 11. The results are chronicled in annual reports to the Legislature. *See, e.g.*, the Commission's 2017 Supplier Diversity Procurement Report, at ft. 1 (PUC Code Section 8281 requires regulated utilities "to submit an annual report regarding the implementation of their diverse supplier program and annual verifiable plans for increasing procurement from "women- and minority-owned enterprises.). The message conveyed to the regulated utilities is that they must apply the preferences described in Section 8281, *et seq.*, and GO 156. *Id.* at p. 1. *See, Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 875 (9th Cir. 1995) ("[T]he clear message sent to the utilities by [the adoption of the Code and Order] may have been that racially neutral outreach programs were insufficient.").

Article 1, Section 31, is based on the principle that the government should be color-blind in the operation of public employment, education, and contracting—it should not treat people differently based on gender, race, or national origin. People disagree on whether this principle is right. But, right or wrong, that is the principle animating Section 31. QK respectfully requests that the Commission reconsider its decision in this case.

Respectfully Submitted,

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TABLE OF AUTHORITIES

CASES

Bras v. Cal. Pub. Utils. Comm’n,
59 F.3d 869 (9th Cir. 1995) 3

C&C Construction., Inc. v. Sacramento Municipal Utility District,
122 Cal. App. 4th 284 (2004) 1, 2

Connerly v. State Personnel Board,
92 Cal. App. 4th 16 (2001) 1, 2

Hi-Voltage Wire Works, Inc. v. City of San Jose,
24 Cal. 4th 537(2000) 1, 2

STATUTES

General Order 156..... 1, 3

General Order Section 6.2.1 (8).....3

Public Utilities Code Section 8281 3

Public Utilities Code Section 8281, *et seq.*..... 1 - 3

CONSTITUTIONAL PROVISIONS

Cal. Const. Art. I, § 31 3

Cal. Const. Art. I, § 31(a)..... 1

Cal. Const. Art. I, § 31(f)..... 2