

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



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Order Instituting Rulemaking for the Purpose of Reviewing and Potentially Amending General Order 156 and to Consider Other Measures to Promote Economic Efficiencies of an Expanded Supplier Base and to Examine the Composition of the Utilities' Workforce.

R.09-07-027
(Filed July 30, 2009)

**REPLY COMMENTS OF VERIZON ON THE WORKSHOP REPORT
REGARDING UNDERUTILIZED AREAS**

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Pursuant to the March 17, 2010 Assigned Commissioner and Administrative Law Judge Scoping Memo and Ruling Determining the Scope, Schedule, and Need for Hearings in this Proceeding, Verizon California Inc., Verizon Business and Verizon Wireless (collectively, “Verizon”) respectfully submit these reply comments on the May 25, 2010 Utility Supplier Diversity Program Staff Report, Workshop on Underutilized Areas (the “Staff Report”).

INTRODUCTION

These reply comments focus on the Opening Comments of The Black Economic Council, Latino Business Chamber and Mabuhay Alliance (jointly filed) (hereafter “BEC” comments), the Greenling Institute, the California Asian Pacific Chambers of Commerce, and the California Hispanic Chamber of Commerce (“Intervenors”). While the purpose of commenting on the Staff Report is to ensure accuracy in the report, Intervenors go well beyond that purpose and provide a number of specific proposals they would like the Commission to adopt as mandates. Many of these proposals are variants of work that is already part of reporting company¹ efforts. Other proposals simply ignore operational, legal or other limitations. These reply comments provide a response to some of the Intervenor proposals.²

¹ For purposes of these comments, reporting companies are the companies that are required to follow GO 156 and who annually report their compliance with the General Order.

² Due to the abundance of proposals, Verizon is not commenting on each. Silence on a particular proposal should not be interpreted as tacit support for it.

DISCUSSION

I. THE PROPOSAL TO REQUIRE THE CREATION OF A \$135 MILLION UTILITY-SOURCED FUND FOR TECHNICAL ASSISTANCE AND CAPACITY BUILDING IS UNNECESSARY AND INAPPROPRIATELY MANDATES PHILANTHROPY

BEC proposes that reporting companies create a \$135 million fund that would be used to pay for technical assistance and capacity building.³ There are many issues with this proposal but the main problem is that the Commission has no authority to mandate the creation of such a fund. Tellingly, BEC's comments do not articulate a legal path to the creation of such a fund, nor could it. An additional problem with this proposal is that it seeks to mandate philanthropy and philanthropy by definition is voluntary.

Intervenors have previously sought to require philanthropy.⁴ But the Commission has repeatedly recognized that it lacks authority to require such. The nature, amount, and recipients of any shareholder philanthropic activities are not within the scope of any general rate proceeding or other regulatory purview. For many reasons, including good corporate citizenship and social responsibility, utilities and carriers believe philanthropy is an important activity. Indeed, in the absence of any regulatory requirement, utilities and carriers engage in robust philanthropy. In prior efforts to have a vehicle to enforce voluntary but non-binding agreements regarding philanthropy, intervenors have sought to include this type of requirement in several general rate cases ("GRC"), and each time the Commission has rejected the request.

³ BEC Opening Comments at Exhibit A (unnumbered page 2) (proposing that reporting companies allocate a minimum of "\$27 million per year over five years").

⁴ See African American Voice Opening Comments (September 30, 2009) at 3 (seeking commitments that carriers and utilities spend 2% of each corporation's pre-tax income on philanthropy); Greenlining Institute Opening Comments (September 30, 2009) at 21 (seeking ways to promote carriers and utilities to spend 2% of each corporation's pre-tax revenues on philanthropy); California Hispanic Chamber of Commerce Opening Comments (September 30, 2009) at 3 (seeking 33% of philanthropy dollars for Hispanic businesses).

In a GRC for Southern California Edison (“SCE”), the Commission found it had no authority to compel SCE or its parent Edison International (“EIX”) to take any involuntary action related to philanthropy and stated: “For many reasons, including good corporate citizenship, social responsibility, and public perception, philanthropy is an important consideration for SCE/EIX and corporations in general. However, as we have previously indicated, we have no jurisdiction to order a change in SCE's giving practices.”⁵ The Commission came to a similar conclusion with regard to SDG&E and SoCalGas:

[W]e find that the Commission has no authority to make a lawful order to either SDG&E or SoCalGas to adopt the Greenlining agreement's provisions on philanthropy⁶

This acknowledgement regarding the Commission’s lack of jurisdiction over corporate giving was recently reaffirmed in D.09-03-025: “the Commission has no jurisdiction over a utility's charitable contributions.”⁷ Mandating creation of a fund paid for by reporting companies is the equivalent of mandating philanthropy. As the Commission has no jurisdiction to require corporate giving, this proposal must be rejected. Indeed, the

⁵ *Re Southern California Edison Co.*, Decision No. 06-05-016, *Opinion on Southern California Edison Company's Test Year 2006 General Rate Increase Request*, 2006 Cal. PUC LEXIS 189, *mimeo*, at 183. See also *Re Southern California Edison Co.*, Decision No. 04-07-022, *Opinion on Base Rate Revenue Requirement and Other Phase I Issues*, 235 P.U.R4th 1, 305 (July 8, 2004) (noting that although Greenlining proposes to require increased philanthropic goals, Greenlining acknowledges that “the Commission does not appear to have the explicit authority to require Edison to set goals with respect to philanthropy”).

⁶ *Re San Diego Gas & Electric Co.*, Decision No. 08-07-046, *Decision on the Test Year 2008 General Rate Cases for San Diego Gas & Electric Company and Southern California Gas Company*, 2008 Cal. PUC LEXIS 281, *102, *reh'g denied*, Decision No. 09-06-052 (rejecting claims that Commission had jurisdiction over philanthropy).

⁷ *Re Southern California Edison Co.*, Decision No. 09-03-025, *Alternate Decision of President Peevey on the Test Year 2009 General Rate Case for Southern California Edison Company*, 2009 Cal. PUC LEXIS 165, *476 (recognizing the Commission’s lack of authority in this area, but encouraging SCE to increase its philanthropic giving).

Commission should continue to reject any role in enforcing corporate commitments regarding philanthropy.

II. REQUIRING PRIME CONTRACTORS TO ACHIEVE 30% DBE PROCUREMENT IS INAPPROPRIATE

The California Asian Pacific Chambers of Commerce (CAPCC) recommends that the Commission mandate reporting companies to require prime contractors to spend 30% of their dollars on diverse business enterprises (DBEs).⁸ The CAPCC fails to explain, however, how the Commission can require such a mandate when it cannot by law require reporting companies to have quotas or set-asides. Such a mandate would be an indirect way to establish a prohibited set-aside. Because quotas or set-asides threaten the GO 156 program, CAPCC's recommendation must be conclusively and expressly rejected.

Even if the Commission could mandate such a requirement, it is unworkable and unenforceable. Prime contractors face some of the same challenges that reporting companies face in finding qualified DBEs for certain products and services, and a 30% set-aside could be the equivalent of mandating an impossibility in some scenarios. Finally, such a mandate could lead to unnecessary controversies with prime contractors, especially if the prime contractor is making good faith efforts at retaining DBEs but is simply falling short of the 30% mark.

⁸ CAPCC Opening Comments at 2.

III. THE PROPOSAL THAT THE COMMISSION ADOPT SPECIFIC GOALS FOR EACH MINORITY GROUP AND WOMEN OF COLOR SEEKS TO CIRCUMVENT THE SCOPING MEMO'S EXCLUSION OF INCREASING GOALS

BEC asks the Commission to establish specific goals for women of color, ethnic categories and service disabled veteran business enterprises (DVBEs). Specifically, BEC would require 10% spend with Asian businesses, 15% with Latino businesses, 6.5% with African American businesses, 10% with women of color businesses and 3% with DVBEs.⁹ Because BEC allows that spend with women of color businesses could be assumed to be part of one of the other ethnic goals,¹⁰ the total goal would be 31.5% for ethnic categories and 3% for DVBEs for a grand total of 34.5%. BEC's recommendation is inappropriate because the Assigned Commissioner and ALJ have already ruled that increased goals are eliminated from the scope of this proceeding:

The issue of whether to increase the voluntary initial minimum long-term goals of 15% of procurement spend for MBEs, 5% for WBEs, and 1.5% for DVBEs is modified based on party comments. Instead of increasing parts of, or the aggregate, 21.5% target goal for DBE spend, all covered utilities will submit to the Commission responses to specific questions about their own self-identified short-term steps towards achieving or exceeding the target goals of GO 156 as described in Section 4 below.¹¹

BEC's attempt to circumvent the scoping memo by providing a more specific set of goals must also be rejected because the goals are completely arbitrary. As previously explained, the only target that is based on an availability study is the DVBE target.¹² While BEC couches its recommendation with reference to the number of

⁹ BEC Opening Comments at unnumbered page 4.

¹⁰ Id. ("Women of color goals can be reflected both in the women of color and in the appropriate minority category.").

¹¹ Scoping Memo at 10.

¹² *Re Rulemaking to Revise General Order 156*, Decision No. 96-12-081, 70 CPUC2d 422, 424 (Dec. 20, 1996).

Asian, Latinos and African Americans in the California population,¹³ the existence of a certain percentage of a particular group in the population of California does not translate into a corresponding percentage of qualified vendors.¹⁴ To avoid establishing arbitrary targets, the Commission would have to undertake an availability study to determine the number of qualified Asian, Latino, African American and women of color vendors and the current number of qualified disabled veteran vendors, as the Commission required with respect to DVBE vendors when it established the existing goal of 1.5%. Performing an availability study avoids arbitrary targets. Without such a study, any changes to the goals as proposed by BEC would be arbitrary and lack an evidentiary basis.

IV. THE PROPOSAL TO HAVE REPORTING COMPANIES PROVIDE HIGH LEVEL FORECASTS OF PROCUREMENT OPPORTUNITIES IS ALREADY PART OF SOME PROGRAMS BUT CANNOT BE MANDATED

Some reporting companies have stated in workshops that they provide some advance notice of procurement opportunities, but most cannot provide such forecasts for competitive reasons (that is, forecasting may tip off competitors) or simply because the ebb and flow of contracting is too fast to do so. Verizon provides very high level forecasting of major procurement areas in its GO 156 plans submitted each March 1. But beyond that, Verizon considers its RFPs confidential and requires any potential bidder to sign a non-disclosure agreement. Thus, providing forecasts of these opportunities is simply not workable for Verizon.

In practice, this type of forecasting is likely unnecessary. The areas of work that carriers and utilities have are fairly well known and qualified DBEs that register on

¹³ BEC Opening Comments at Exhibit A, unnumbered page 2 (15% is modest, given the 38% Latino population in California); (“Mabuhay Alilnace has proposed a goal of 10% for Asian American-owned business. Asian Americans are presently more than 15% of the state’s population.”) and unnumbered page 3 (Goals “are well below the state’s more than 55% minority population”).

Verizon's supplier diversity website, for example, have a very good chance of sufficient notice to prepare a quality bid. The issue is not forecasting opportunities, but becoming sufficiently qualified to register. Perhaps a major step for a DBE to improve chances of obtaining work from a telecommunications company is to become ISO 9000 certified. Verizon has provided technical assistance through the Black Economic Council's Total Quality Management program to help DBEs become ISO 9000 certified.¹⁵ These types of programs are more helpful than simply providing a forecast of procurement opportunities.

V. REQUIRING UNBUNDLING OF CONTRACTS COULD LEAD TO A CONSTITUTIONAL CHALLENGE OF THE GO 156 PROGRAM AND SHOULD BE CONCLUSIVELY REJECTED

Several Intervenors would have the Commission mandate unbundling.¹⁶ Verizon addressed in opening comments why the Commission should not and cannot require unbundling. First, the assumption that unbundling will lead to more DBE contracts is questionable because unbundling will open up bidding to numerous non-DBE vendors. Second, unbundling effectively substitutes the Commission's judgment for the reasonable business judgment of management on how to achieve GO 156 targets. Third, the requirement would be an unprecedented departure from the Commission's practice of avoiding micromanaging utility business. And fourth, mandating unbundling that causes economic harm or has no economic benefit could be deemed an indirect mechanism of establishing a prohibited preference for DBEs, leading to a potential

¹⁴ Tellingly, BEC does not tie the 10% women of color goal to their incidence in the population.

¹⁵ This effort through BEC is explained in detail in Verizon's September 2009 submission at pages 6-7.

¹⁶ BEC Opening Comments at unnumbered page 2; CAPCC Opening Comments at 4; and CHCC Opening Comments, Exhibit 1 at 2.

constitutional challenge of the program.¹⁷ All of these reasons are discussed in Verizon's opening comments.¹⁸

VI. SEVERAL PROPOSALS THAT REPORTING COMPANIES USE CBOs/CHAMBERS ARE ALREADY PART OF MANY SUPPLIER DIVERSITY PROGRAMS

The Opening Comments of Intervenors have a commonality in that they propose that Community Based Organizations (CBOs) and ethnic Chambers of Commerce (Chambers) be used, in effect, as a conduit for supplier diversity work. Specifically, Intervenors suggest that reporting companies use CBOs and Chambers:

- to coordinate *all* outreach efforts;¹⁹
- to serve as a conduit for training DBEs and networking;²⁰
- provide technical assistance and capacity building;²¹ and,
- to facilitate relationship building between DBEs and purchasing managers.²²

Reporting companies already voluntarily use CBOs and Chambers in differing degrees to serve as a conduit for outreach, training DBEs and networking, technical assistance and capacity building and facilitating relationship building. But the use of CBOs and Chambers has been a completely voluntary and mutually beneficial effort.

¹⁷ The GO 156 program has recently been challenged on constitutional grounds so there is no reason to believe that the long existence of the program insulates it from such challenges. See *Pegastaff v. Corestaff Services, LP*, San Francisco Superior Court, Case No. CGC-09-492995 (filed September 29, 2009).

¹⁸ The California Asian Pacific Chamber of Commerce's proposal to adopt a program to set aside small contracts less than \$75,000 for DBEs is nothing more than a form of unbundling and, as discussed in the text, cannot be mandated. See California Asian Pacific Chamber of Commerce's Opening Comments at 4 and Exhibit 3 (describing the Sacramento Municipal Utilities District's Supplier Education and Economic Development program).

¹⁹ CAPCC Opening Comments at 3.

²⁰ American Indian Chamber of Commerce Comments on Aspirational Goals at 2.

²¹ BEC Opening Comments at unnumbered page 1.

²² Greenlining Institute Opening Comments at 4.

There is no evidence that these efforts need to be mandated (or that the Commission has authority to do so). To the extent an Intervenor is seeking to have the Commission mandate use of CBOs and/or Chambers as conduits for supplier diversity efforts, the Commission must reject the proposal and instead encourage underperforming reporting companies to consider the proposals as best practices. Some of these proposals are discussed below.

The CAPCC (at 3) proposed that reporting companies coordinate **all** outreach activities through CBOs or Chambers. This suggestion fails to recognize that it is not workable to coordinate all outreach efforts through Chambers. There are simply too many outreach events to allow for coordination. Nor is there any evidence that any Chamber could handle all outreach efforts. Moreover, even if the Commission were inclined to consider this proposal, there is no obvious or fair way to select which Chamber would coordinate all outreach efforts for all reporting companies.

And like outreach efforts, reporting companies must be left to voluntarily continue use of CBOs and Chambers for other work, like training, networking and providing technical assistance. Mandating use of CBOs and Chambers could derail or detract from other efforts. For example, SDG&E provides technical assistance by paying DBEs to attend Management Development for Entrepreneurs classes at UCLA, Finance Success for Diverse Business classes at USC, the APEX Academy for Business Success at the University of San Diego. Mandating the use of a particular Chamber or set of Chambers would set up a dynamic where the Chamber might demand that dollars spent for these classes be funneled through the Chamber or, worse, that the Chamber

have some kind of veto power over how those dollars are used. Such a dynamic would be disruptive of supplier diversity work.

The Commission cannot mandate any particular form of training or networking or technical assistance, as doing so would require the Commission to mandate philanthropy and to micromanage each reporting company's supplier diversity efforts. Such micromanagement would interfere with the daily operations of reporting companies, and should thus be rejected.

VII. THE COMMISSION CANNOT REQUIRE REPORTING COMPANIES TO ADOPT THE WALMART APPROACH

BEC also seeks to have reporting companies adopt what it calls the Walmart approach, which BEC describes as giving warnings to prime contractors that they must meet certain subcontracting obligations, putting the prime contractor on probation if those obligations are not met, and ultimately refusing to do business with a non-compliant prime contractor.²³ While reporting companies certainly should find ways to enforce contractual commitments—including commitments to subcontract to DBEs—the Commission has no legal authority for mandating inclusion of any particular enforcement mechanism in reporting company contracts.

VIII. THE COMPANIES THAT OPPOSE POSTING BID OPPORTUNITIES CORRECTLY ARGUE SUCH A PRACTICE WOULD BE UNWORKABLE, WASTEFUL AND INEFFICIENT

AT&T and SDG&E both commented on the Staff Report's recommendation under the rubric "Transparency" that utilities be encouraged to publicly post their procurement

²³ BEC Opening Comments at unnumbered page 3; Exhibit A, unnumbered page 6 ("[T]he Wal-Mart [sic] approach . . . includes, for example, specific warnings to suppliers and putting suppliers on probation, temporarily suspending suppliers and in some cases, termination all relations with suppliers.").

opportunities.²⁴ SDG&E comments that while transparency is a worthwhile goal, reporting companies “face unique constraints” such as business requirements, including legal, regulatory and/or contractual confidentiality constraints. SDG&E concludes that a “one-size-fits-all solution” may be unworkable across all companies. Verizon agrees with these comments and as discussed above in relation to forecasting opportunities, “Verizon considers its RFPs confidential and requires any potential bidder to sign a non-disclosure agreement.” Thus Verizon would not be in a position to post RFPs.

AT&T also opposes Staff’s recommendation regarding posting bidding opportunities because doing so would lead to wasteful inefficiencies for both AT&T and potential bidders. AT&T states as follows:

Unlike a governmental agency, AT&T does not post its bids externally, and we do not have a public bidding system. Our attsupplierdiversity.com website allows any interested company to self-register as a prospective supplier. When we have a need to source a product or service, we use this database to help identify candidates who are good fits for our specific needs. In contrast, the open bidding process tends to attract large numbers of vendors, many of whom have only marginal capabilities for the area of need. Businesses may surmise that they will make an attempt to win a bid, even though they know they are not qualified. In practical terms, there are very long odds of an unqualified bidder winning a contract. Thus, for our business, a public bidding system would be an inefficient use of everyone’s time and will lead to more frustration and dissatisfaction for many bidders, especially given that responding to RFPs can be costly time drain to small businesses.

Verizon agrees with AT&T on this issue, as AT&T’s processes are very similar to Verizon’s. Like Verizon, AT&T uses a supplier database of self-registered DBEs from which potential bidders that likely fit the requirements of a job are found. Publicly posting bid opportunities will attract a number of marginally qualified or unqualified

²⁴ AT&T Opening Comments at 4-5; SDG&E Opening Comments at 2-4.

non-DBE vendors, overwhelming the procurement process. Staff's recommendation would indeed lead to waste and inefficiencies and Verizon therefore cannot support that practice.

CONCLUSION

Many of the ideas that Intervenors propose should be discussed as possible best practices that underperforming reporting companies can voluntarily follow. But to the extent a proposal is meant to be adopted as a mandate, the Intervenors suggestion is not helpful. The GO 156 program is appropriately a voluntary program. Any effort to make elements of the program mandatory is misguided, as doing so threatens constitutional challenges. Verizon looks forward to continuing its leadership position in supplier diversity by establishing what may be considered best practices.

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Respectfully submitted,

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