

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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.

FILED
PUBLIC UTILITIES COMMISSION
JULY 30, 2009
SAN FRANCISCO, CALIFORNIA
RULEMAKING 09-07-027

**ORDER INSTITUTING RULEMAKING TO
REVIEW AND POTENTIALLY AMEND GENERAL ORDER 156,
TO CONSIDER OTHER MEASURES TO PROMOTE THE ECONOMIC
EFFICIENCIES OF AN EXPANDED SUPPLIER BASE, AND
TO EXAMINE THE COMPOSITION OF THE UTILITIES' WORKFORCE**

1. Summary

We institute this rulemaking to review the impact of General Order (GO) 156 and its success in encouraging Commission-regulated utilities to seek the full and fair participation of women, minority, and disabled veteran-owned business enterprises in their private procurement programs. We consider whether to amend GO 156, established over 20 years ago, and if additional actions or measures would be useful in bringing to the participating companies and their ratepayers or customers the benefits of expanding the number of suppliers, encouraging competition, and promoting economic efficiencies. The rulemaking will examine where supplier diversity gains have been achieved, the reasons behind low gains in some procurement areas, strategies for improvement, and if the changing nature of the energy, communications, and

water markets affords opportunity for the Commission to encourage development of diverse suppliers in new procurement areas.

In addition to reviewing trends and practices in procurement, the Commission also seeks information about the demographic composition of the workforce in each covered utility. Pursuant to Public Utilities Code Section 453 and § 701, the Commission may consider whether an aging workforce presents an opportunity or necessity for Commission guidance in assuring the utilities are developing and maintaining a broadly diverse and well-trained workforce to maintain continuity of service at the lowest reasonable cost.

2. Statutory Background

Beginning in 1986, the California Legislature enacted a series of statutes to encourage a fair proportion of total utility contracts and subcontracts for products and services be awarded to women, minority, and disabled veteran business enterprises (WMDVBE).¹ (Pub. Util. Code §§ 8281-8286.)² The purposes of these statutes are to (a) encourage greater economic opportunity for women, minority, and disabled veteran business enterprises; (b) promote competition among regulated public utility suppliers to enhance economic efficiency in the procurement of electrical, gas, and telephone corporations' (and their affiliates') contracts; and (c) clarify and expand the program for the utilities'

¹ The Legislature passed Assembly Bill 3678 (Stats. 1986, ch.1259), which requires California regulated utilities with \$25 million in annual revenues to establish a program to procure goods and services from woman- and minority-owned business enterprises. In response to Assembly Bill 3678, the Commission issued GO 156, which established guidelines for the utilities to follow in meeting these requirements.

² Unless otherwise indicated, all future statutory references to "section" mean to the Public Utilities Code.

procurement of products and services from WMDVBE enterprises.

(§ 8281(b)(2).)

Commission-regulated electrical, gas, and telephone corporations with gross annual revenues exceeding \$25,000,000 and their Commission-regulated subsidiaries and affiliates are directly covered by these laws. (§§ 8283-8285.) Commission-regulated water utilities, that are privately owned and operated, were not originally required to participate in the program; however, the largest water companies in the State have been voluntarily complying. The Legislature added water companies with gross annual revenues exceeding \$25,000,000 beginning in 2009.³ Other smaller utilities have chosen to similarly expand their procurement programs to achieve the statutory purposes.

GO 156, first adopted in 1988, sets forth Commission guidelines for the utilities to follow in meeting the statutory goals set forth in §§ 8281-8286. GO 156 has been amended numerous times over the years, most recently by Decision (D.) 06-08-031. Nothing in GO 156 authorizes or permits a utility to use set-asides, preferences, or quotas in administration of its WMDVBE program and utilities retain the authority to use legitimate business judgment to select a supplier for a particular contract.⁴ An updated version of GO 156, reflecting all amendments through the issuance of D.06-08-031, is set forth as Attachment A.

In GO 156, the Commission established voluntary procurement goals for each covered utility of 5% for woman-owned, 15% for minority-owned, and 1.5% for disabled veteran-owned business enterprises.⁵ The utilities report annually

³ Water companies were added by Stats. 2008, ch. 316.

⁴ GO 156 at § 6.

⁵ GO 156 at § 8.2.

on their procurement purchases from WMDVBEs, and their progress in meeting the procurement goals. GO 156 also authorized participating utilities to establish a joint clearinghouse to certify women-owned (WBE) and minority-owned (MBE) suppliers.⁶ Disabled veteran-owned business enterprises (DVBE) are certified by the California State Department of General Services, Office of Small and Minority Business. A utility that contracts with a supplier who is not certified may not count those expenditures toward their annual goal nor can the contract be included in the WMDVBE expenditures listed in the utilities' annual reports to the Commission. However, there is no penalty for failure of any utility to meet or exceed their annual goals.

On September 1st of each year, the Commission is required to file an annual report with the Legislature detailing the progress by each utility towards implementing the legislative policies. The report also contains information about successful programs and recommendations for improvement.

3. Review of GO156 Program Results

Several of the largest utilities have shown strong commitment to the GO 156 program goals and made strides in developing successful WMDVBE suppliers. However, with some individual exceptions, the utilities as a group are not meeting all of the target goals and not awarding WMDVBE contracts evenly across procurement areas. For 2007 and 2008, the Commission gathered information on results from thirty utilities, including seven water companies. Total utility spending on WMDVBE procurement increased from \$2.80 billion in 2007 to \$3.33 billion in 2008, an increase of 18.9%. As a percentage of total utility

⁶ GO 156 at 3.1.

procurement, amounts from WMDVBE firms decreased from 14.57% in 2007 to 14.37% in 2008.⁷

The Commission’s September 1, 2008 report (Report) to the Legislature on 2007 utility procurement information included a summary of the 2007 results for all reporting utilities:

Table 1⁸

2007 Total WMDVBE procurement: Category	Procurement Amount	Percentage Achieved	Goal
MBE	\$1.8 billion	9.40%	15.0%
WBE	\$927 million	4.83%	5.0%
DVBE	\$67 million	0.35%	1.5%

The Report is separated into two categories: 1) large utilities (those with total procurement over \$250 million); and 2) small utilities (those with procurement under \$250 million). The large utilities represent almost all (97%) of total utility procurement. Eleven large utilities reported activity in their WMDVBE programs:⁹

- Cingular Wireless
- Southern California Edison (Edison)
- Pacific Gas and Electric Company (PG&E)
- AT&T California
- AT&T Communications of California
- AT&T/ASI

⁷ 2008 data is preliminary and subject to adjustment.

⁸ Report at 3.

⁹ Sprint reported its data in a manner inconsistent with GO 156 and is excluded from reported data.

San Diego Gas & Electric Company (SDG&E)
Southern California Gas Company (SoCalGas)
Verizon of California
Verizon Wireless

The 2007 results for the large utilities show an overall WMDVBE procurement increase from 2006 of \$55 million to a total of \$2.72 billion, as well as an increase of 1.89% of total procurement to 14.88%.¹⁰ The large utilities increased their percentages from the prior year in each of the three WMDVBE categories, and the small utilities increased their percentages in the MBE and WBE categories.¹¹ The results show the utilities are nearly meeting the 5 percent goal for women-owned businesses, but are neither achieving the 15 percent goal for minority-owned business enterprises, nor the 1.5 percent goal for disabled veteran-owned business enterprises.

Based on preliminary 2008 data recently submitted by participating utilities, the six largest California utilities report the Supplier Diversity program is successful insofar as meeting the total aggregated goal of 21.5% procurement from certified diversity suppliers. A five-year summary of the total WMDVBE procurement percentage for the six largest utilities is set forth in Table 2 below:

¹⁰ Report, Tables 1A and 1B in Attachment A.

¹¹ Report at 3.

Table 2

WMDVBE %	2004	2005	2006	2007	2008
AT&T - CA	32.0%	30.3%	30.0%	26.2%	30.9%
PG&E	18.5%	19.4%	21.7%	21.7%	23.9%
SoCal Edison	22.5%	24.0%	22.6%	24.1%	20.1%
SoCal Gas	27.2%	25.6%	23.4%	26.9%	31.1%
SDG&E	21.1%	21.6%	22.9%	25.1%	29.2%
Verizon - CA	21.8%	22.2%	23.6%	30.1%	37.0%

The data strongly suggest that the Commission's GO 156 program has helped California's largest utilities to increase the procurement percentage of WMDVBEs from single digits to more than twenty percent (20%). As a result, diverse business enterprises now procure billions of dollars in annual revenue from Commission-regulated utilities. On the other hand, not all of the utilities, or even all of the largest, have met their program goals especially for MBEs and DVBEs.

Close scrutiny of the data also indicates that WMDVBE procurement is not spread evenly throughout product and service categories. Commission staff has reviewed utility reports and observed that WMDVBE procurement is usually much lower in professional service categories, e.g., legal, financial, consulting, and engineering services, than in so-called "blue collar" categories, e.g., auto dealers and gasoline service stations, building construction, etc. For example, Table 3 below shows the procurement dollars from WMDVBE financial suppliers for calendar year 2008.

Table 3**2008 Financial Services**

UTILITY	WMDVBE Financial Services	Total Financial Services	Percent
AT&T	\$8,380,000	\$44,296,000	18.92%
PG&E	\$30,514	\$24,951,663	0.12%
SCE	\$682,119	\$15,479,566	4.41%
SCG	\$469,915	\$9,787,537	4.80%
SDG&E	\$340,235	\$6,802,366	5.00%
VERIZON	\$0	\$2,252,067	0.00%
TOTAL	\$9,902,783	\$103,569,199	9.56%

In total, the six largest utilities spent less than ten percent (9.56%) of their total 2008 financial procurement dollars on contracts with WMDVBE suppliers.¹² This is an increase from 2007 where less than 4% of their total financial procurement dollars went to WMDVBE suppliers, but still significantly less than other categories of procurement.

Table 4 below illustrates in some detail the categories most heavily used by the six largest utilities when awarding contracts to WMDVBE suppliers as reported for 2008.

¹² The 2008 data is preliminary and is subject to adjustment.

Table 4
For Calendar Year 2008

	Largest Spend	Percent
AT&T	Transportation Services	51.84%
	Business Services	47.57%
	Wholesale Trade-Nondurable Goods	38.10%
PG&E	Auto Dealers & Gasoline Service Stations	77.30%
	Personal Services	50.30%
	Motion Pictures	39.20%
SCE	Health Services	55.80%
	Building Construction-General Contractors	51.00%
	Primary Metal Industries	43.70%
SCG	Home Furniture, Furnishings & Equipment	99.31%
	Auto Dealers & Gasoline Service Stations	99.23%
	Lumber & Wood Products-non furniture	98.78%
SDG&E	Home Furniture, Furnishings & Equipment	99.97%
	Auto Dealers & Gasoline Service Stations	98.52%
	Miscellaneous Retail	93.27%
VERIZON	Building Construction-General Contractors	71.74%
	Construction Special Trade Contractors	52.93%
	Engineering, Accounting, & related services	35.93%

The percentages above are of total spend in each specific area. For instance, for every dollar that AT&T spent on transportation services \$0.52 went to a WMDVBE supplier.

Section 8.11 of GO 156 states, "Each utility shall make special efforts to increase utilization and encourage entry into the marketplace of WMDVBEs in product or service categories where there has been low utilization of WMDVBEs, such as legal and financial services, fuel procurement, and areas that are considered technical in nature." The Commission has previously recognized and attempted to address continued disparity in diversity contracting. During its 2006 public hearing on diversity programs, the Commission initiated a new focus on expanding efforts in the areas of legal services and financial services, areas of spend that are traditionally underrepresented in WMDVBE procurement. As a

result, the utilities' procurement levels in both legal and financial services appear to have increased in both 2007 and 2008.¹³ However, the results were neither uniform among utilities nor up to program goals.¹⁴ This rulemaking will provide an opportunity for the Commission to consider new efforts and practices to expand WMDVBE contracting to underutilized categories of procurement.

As a point of reference, the Maryland Public Service Commission recently addressed the procurement disparity issue with regard to utility supplier diversity programs in that state by reaching agreement for new voluntary goals for its regulated utilities boosting their contracting targets for women-, minority-, and disabled veteran-own business to an aggregate twenty-five percent (25%).¹⁵ "There are so many different ways to include minority suppliers," said LaWanda Edwards, a spokeswoman for the Commission. "Accounting, financial services, legal, construction, materials . . . expanding the list of services is part of the goal here."¹⁶ The Commission is interested to hear whether an increase in target goals for California regulated utilities would be useful in achieving a better balance among procurement areas. For example, the results in Table 2 show that three of the largest utilities are achieving about 30% procurement from certified diversity suppliers, suggesting that the current 21.5% aggregated goal may be too low.

¹³ Report at 1.

¹⁴ Report at 14. 2008 data for legal services is not yet available.

¹⁵ *The Washington Post*, "Md Utilities Boost Goals for Minority Contracting," at D4, February 9, 2009.

¹⁶ *The Washington Post*, "Md Utilities Boost Goals for Minority Contracting," at D4, February 9, 2009.

4. Improvements to GO 156 Program and Beyond

Over the past twenty years of the GO 156 program, it seems that many utilities have achieved successes in opening procurement opportunities to WMDVBEs. However, the Commission does not want to rest on the gains made to date by the utilities in developing broadly diverse supplier pools. Instead, the Commission seeks to maintain its leadership in promoting diversity by closely monitoring the program, listening to the utilities and the public, and offering guidance and encouragement to assure that the legislative policies in §§8281-8286 are fully carried out for the benefit of ratepayers.

4.1. Economic Benefits of Diversity Procurement

The Commission embraces the statutory policy of bringing to the utilities and their ratepayers the benefits of expanding the number of suppliers, encouraging competition, and promoting economic efficiencies. Research has shown that having minority and women suppliers makes good business sense. In fact, nearly half of companies that rated themselves as having a good supplier diversity program say their company's rationale for doing business with women and minority-owned establishments is that these firms offer competitive prices and quality products and services.¹⁷

“The realities of the American marketplace are such that, if companies don’t embrace supplier diversity, they are acting to the detriment of their bottom line,” said Harriet R. Michel, president of Minority Supplier Development

¹⁷ Whitfield, Gwendolyn and Landeros, Robert, *Journal of Supply Chain Management*, “Supplier Diversity Effectiveness: Does Organizational Culture really Matter?,” Fall 2006, at 16.

Council in 2006.¹⁸ Moreover, minority-owned companies are a fast growing segment of business and “by their very nature, are very competitive,” said John W. Murray, Jr., chief executive of the Southern California Minority Business Development Council, Inc.¹⁹ In addition to more competitive pricing in procurement, such purchases from minority-owned firms “will come back into the corporate pocket.”²⁰

GO 156 does not currently require reporting or measurement of whether increased competition has resulted in lower procurement costs to participating California utilities. The Commission believes this benefit could be documented and will seek information from participating utilities about the issue, including whether such information should be included with their regular annual reports.

4.2. Sharing Information, Practices, and New Ideas

The Commission observes that results of supplier diversity programs vary widely between individual utilities but it lacks clear evidence for the source of these disparities. It is possible that some utilities have more initiative, better

¹⁸ Deutsch, Claudia H., *The New York Times*, “Bedrock of Law on Workplace Should Remain as Justice exits,” at C1, July 4, 2005; See also, Jones, Steven D., *The Wall Street Journal*, “Moving the Market – Tracking the Numbers / Outside Audit: Benefits to Supplier Diversity May Go Beyond Social Good,” p. C3, August 21, 2006. (“companies that focus heavily on supplier diversity generate a 133% greater return on procurement investments than the typical business... Such companies spend on average 20 percent less on their buying operations and have procurement staffs half the size of their peers whose supplier programs aren’t as diverse.”)

¹⁹ Zwahlen, Cyndia, *The Los Angeles Times*, “Helping Minority-owned Suppliers Win Bids,” at C5, June 23, 2008.

executed and developed programs, stronger leadership, linked executive compensation to specific supplier diversity program results, and better outreach.

For example, the disparity in procurement categories exposed by the data in Tables 3 and 4 may indicate an emphasis by some utilities on an already saturated procurement area with a concentration of minority suppliers. At the same time, utilities have reported shortages of diverse suppliers in some areas where other utilities have been successful. There are, no doubt, numerous reasons for these circumstances and this rulemaking presents an opportunity for the utilities and others to inform the Commission of their ideas on the subject.

More than 1,000 corporations based in the United States have supplier diversity programs in place,²¹ and California utilities themselves have 20 years experience with the GO 156 program. The Commission believes that this rulemaking provides an opportunity for the utilities and the public to come forward and share experiences, both successful and not, that could help participating utilities expand their network of diverse suppliers rather than depend on past practices and suppliers. As one example, several major corporations, including IBM, Wal-Mart, Proctor & Gamble, and Home Depot, offer programs to mentor small companies, particularly businesses owned by women, minorities, and others.²²

²⁰ Meyer, Ann, *The Chicago Tribune*, "Chipping Away for a Chance," at C3, March 10, 2008.

²¹ Meyer, Ann, *The Chicago Tribune*, "Chipping Away for a Chance," at C3, March 10, 2008.

²² Olson, Elizabeth, *The New York Times*, "A Guiding Hand From Big to Small," at B9, July 2, 2009.

The Commission has previously hosted Small Business Expos throughout the state, launched an initiative to better understand the unique characteristics of the traditionally underrepresented DVBE community, and assisted utilities with outreach events to expand the available pool of diverse suppliers. For example, the Commission has helped to organize New Connections Events, which are financial services symposiums designed to bring together WMDVBE firms with the regulated utility representatives to share best practices, network, and begin building relationships that can lead to sustainable business partnerships. The Commission has also held full panel hearings on diversity issues. A continued and advanced open dialogue among the utilities, and between utilities and the public, for sharing in detail experiences and practices initiated to overcome market saturation in some categories and expansion into others with little or no penetration could greatly assist in improving supplier diversity. This rulemaking could provide an opportunity for such information sharing that could help the utilities and the public.

4.3. New Procurement Sources from Clean Energy Programs

Many utilities have reported difficulty in finding new sources for more WMDVBE procurement opportunities. The Commission sees possibilities for leadership in this area by looking to the changing energy markets for new procurement areas, particularly related to clean energy, or “green” categories. President Michael Peevey has said that “global warming is the defining environmental challenge of our time” and numerous Commission initiatives and proceedings in recent years have targeted this specific challenge. The synergy between the Commission’s dual responsibilities to address climate change and

promote diversity creates new opportunities to unify actions in furtherance of both goals. By integrating new “green” utility programs, such as utility contracts for renewable energy, solar energy distributed generation projects, and energy efficiency, into the existing supplier diversity programs, utilities may fully embrace the Commission’s broad vision of institutionalizing supplier diversity in all areas of procurement as they arise.

This rulemaking will consider comments on whether these green and clean markets are sufficiently developed to afford new opportunities for supplier diversity in procurement. Additionally, the Commission seeks input about other unrecognized areas for companies and utilities to expand diversity procurement.

4.4. Diversity in Utility Workforce

The Commission has long believed in the benefits of a diverse and prepared utility workforce for the utilities and for the ratepaying public. It has previously gathered data and held public hearings on the issue.²³ This rulemaking will consider workforce composition and succession planning by the participating utilities.

President Peevey has long recognized the importance of this issue. “We live and work in the largest, most diverse state in the nation and our employment and procurement practices should reflect this. I am committed to ensuring that this Commission and the utilities it regulates promote diversity in their hiring practices.”²⁴ California’s estimated population in March 2007 was

²³ “California’s Workforce in 2015 - Will We Be Ready?” October 2005.

²⁴ California Public Utilities Commission News Release, “PUC to Hold Hearing on Diversity” at 1, July 3, 2003.

36.2 million.²⁵ Hispanics accounted for about 36% of this total while Asians comprised 11.7% and Blacks 6.1%, yet business ownership lags behind these numbers.²⁶ A 2002 report by the U.S. Census Bureau reported that in California only 3.9% of businesses were Black-owned, 12.8% were Asian-owned, and just 14.7% were Hispanic-owned.²⁷ While the state is projected to grow by about 22% over the next twenty years, the Hispanic portion of the population is expected to grow at a faster rate resulting in about 41.4% of the total by 2030.²⁸ Although the Black population is projected to decline slightly over this period, Asians are expected to advance to 12.5% of the 2030 total.²⁹ If the utilities do not actively join the statewide push for development of a diverse workforce, and minority-owned businesses through the supplier diversity programs, we could see a state in twenty years where ratepayer dollars are not fairly spent among the diverse populations which provide those dollars.

The Commission has previously received testimony from utilities regarding diversity in the workforce, but the information is outdated. For example, in PG&E's 2003 general rate case (GRC), Application (A.) 02-11-017,

²⁵ State of California, Department of Finance, *California Current Population Survey Report: March 2007*. Sacramento, California. January 2009 at 1.

²⁶ *Id.*

²⁷ U.S. Census Bureau, Quick Facts at <http://quickfacts.census.gov/qfd/states/06000.html>

²⁸ State of California, Department of Finance, *Population Projections for California and its Counties 2000-2050, by Age, Gender and Race/Ethnicity*, Sacramento, California, July 2007.

²⁹ *Id.*

PG&E submitted testimony regarding its workforce diversity.³⁰ In its 2003 GRC, A.02-05-004, SCE submitted testimony regarding the diversity of its workforce over the prior 10 years, as well as its present and future plans regarding workforce diversity.³¹ SoCal Gas and SDG&E reached an agreement with Greenlining Institute in their 2003 GRC addressing work force diversity, supplier diversity, and other issues.³² In A.04-12-014, SCE's 2006 GRC, the company provided information to show that its nuclear workforce was aging and expressed its concerns that in several job classifications replacements would require a lengthy period of training and qualification.³³

The Commission is concerned about the demographic composition of the workforce in each covered utility, particularly regarding issues of diversity and continuity. In this rulemaking, the Commission will seek information about the composition of each utility's workforce and comments about each utility's internal diversity programs for recruitment, training and advancement and how it is facing issues of an aging workforce, if applicable.

5. Preliminary Scoping Memo

The general scope of this proceeding is to review the impact, success, target goals, and disparities within procurement areas of utility General Order 156 programs. The scope also includes consideration of the economic efficiencies of compliance, information sharing to improve performance, integration of new

³⁰ PG&E Exhibit 14, Chapter 2, dated March 17, 2003.

³¹ Assigned Commissioner's Supplemental Ruling Regarding Testimony on Workforce Diversity, issued May 5, 2003.

³² D.04-12-015 at 40-41, issued December 2, 2004 in A.02-12-027.

³³ D.06-05-016 at 29-30 issued May 11, 2006 in A.04-12-014.

procurement areas such as “green” energy-related contracts, and examination of diversity and continuity in each utility’s workforce. To address the issues delineated above, we pose the following questions for all interested parties to comment on.

5.1. Issues to Be Addressed

GO 156 Program Results

1. Are the utilities achieving the 15% goal for minority-owned business enterprises, the 5% goal for woman-owned business enterprises, and 1.5% goal for disabled veteran business enterprises set forth in § 8.2? If not, what steps are they taking to meet them? Are utilities encouraging their prime contractors to develop and use qualified WMDVBE sub-contractors? Should utilities be working with communities, businesses, and non-profits to help diverse businesses grow and thrive?
2. Have utilities focused on diversity suppliers in certain areas of procurement (e.g., “blue collar” categories) without making similar gains in other more technical areas such as legal, financial, and consulting? If so, what new steps and practices could the utilities take to expand use of qualified WMDVBE suppliers in underutilized procurement categories?
3. Specifically describe all efforts (including any mentoring programs that have been developed) by utilities to develop WMDVBE suppliers of legal services and financial services, including investment fund managers for private pensions and other managed funds.
4. What are the biggest barriers that WMDVBE companies face in becoming competitive for procurement contracts? What can the Commission do to assist utilities in developing a pool of diverse suppliers in underutilized categories of procurement?
5. If the largest utilities are meeting the initial aggregate goal of 21.5% for WMDVBE suppliers, would an increase in targeted goals promote a renewed emphasis on seeking diverse suppliers

across a broad range of procurement? Are there other reasons to increase any or all of the targeted goals? If so, is an aggregate goal of 30%, or some other number, reasonable?

Improvements to GO 156 and Beyond

6. Should GO 156, §9, be amended to require utilities to report on the economic benefits of using WMDVBE suppliers? Has this information been previously gathered by the utilities? If so, utilities should provide it. Are there any issues about measurement of such benefits?
7. Are there any internal or external obstacles to utilities that cause WMDVBE procurement to be spread unevenly throughout product and service categories, e.g., a shortage of diverse suppliers in some areas? Are there any amendments to GO 156 that would help reduce or eliminate such obstacles? If so, please provide the actual language of any proposed amendment.
8. Should the Commission organize a forum to bring the utilities and the public together for open dialogue to share experiences, practices, and actions within the GO 156 programs to overcome market saturation in some procurement categories and underutilization in others?
9. What problems do utilities face in finding new areas of procurement for WMDVBE suppliers? Identify areas for procurement not currently recognized in current GO 156 programs.
10. Have any of the utilities' affiliated companies, including any holding company or parent corporation, developed supplier diversity programs for non-regulated business entities and activities? If yes, please describe these programs and the economic benefits thereof. Do the utilities acquire goods and services from an unregulated affiliate who contracts directly with outside suppliers? If yes, explain why the procurement contracts are not made directly between the utility and the supplier.

11. What new procurement areas are now, or are becoming, available to utilities related to clean energy, so-called “green” categories? Are there certain skills and training that suppliers need for these areas? Should diversity goals be applied to contracts for renewable energy, solar energy distributed generation projects, and energy efficiency? Are these markets sufficiently developed to include diversity goals? Are there strategies in place to develop diverse supplier pools? Are there other “green” procurement areas that should be included in the GO 156 programs?
12. What is the current demographic composition of each utility’s workforce? Provide the information in three categories using the applicable categories set forth in GO 77-M: Executive Officers and employees, 2nd tier employees above specified compensation levels, and other employees. How does this compare with the five previous years? Describe the utility’s internal diversity programs for recruitment, training, and promotion.
13. Do the utilities have workforce areas where significant numbers of workers in certain job classifications are approaching retirement age? If so, what are the classifications, how much lead time is needed for adequate replacement training, and what actions have the utilities taken to assure continuity of the workforce?
14. Are the utilities working with communities, non-profits, and schools to ensure a diverse and well-trained workforce is being developed? What specific programs have the utilities supported at community colleges and job training institutes (e.g., solar panel installation, renewable energy generation, pre-engineering, etc.). What other resources have the utilities offered to promote a trained replacement workforce (e.g., classroom expertise, equipment, internships, etc.).
15. Are there any other programs not identified by the above questions that the utilities are involved in to create and sustain a diverse utility workforce?

16. Are there any other ideas or issues that the Commission should consider as it undertakes this evaluation of the GO 156 program?

5.2. Schedule and Initial Comments

The schedule for this proceeding is stated below in Table 5:

Table 5

July 30, 2009	Issuance of Order Instituting Rulemaking.
September 30, 2009	Responses and Opening Comments addressing scope, schedule, and other procedural issues and responding to the questions above to be filed with the Commission.
October 30, 2009	Replies filed with the Commission.

Parties are strongly encouraged to meet and confer to determine whether they can reach sufficient agreement on some matters so that they can jointly file Responses, Opening Comments, and Replies. Following the receipt of Responses, Opening Comments, and Replies, we anticipate holding a prehearing conference (PHC).

This proceeding will conform to the statutory case management deadline for quasi-legislative matters set forth in Pub. Util. Code § 1701.5. In particular, it is our intention to resolve all relevant issues within 24 months of the date of the assigned Commissioner's scoping memo for each phase. In using the authority granted in Section 1701.5(b) to set a time longer than 18 months, we consider the number and complexity of the issues and tasks.

5.3. Proceeding Category and Need for Hearing

Rule 7.1(d) of the Commission's Rules of Practice and Procedure (Rules) specifies that an order instituting rulemaking will preliminarily determine the category of the proceeding and the need for hearing and include a preliminary

scoping memo. Pursuant to Rule 7.1(e), we determine that this proceeding is quasi-legislative as defined in Rule 1.3(d). We anticipate that the issues in this proceeding may be resolved through a combination of comments and workshops without the need for evidentiary hearings. Any person who objects to the preliminary categorization of this rulemaking or to the preliminary hearing determination shall state their objections in their Responses or Opening Comments. The assigned Commissioner will issue a scoping memo making a final category determination; this final determination is subject to appeal under Rule 7.6(a).

6. Parties and Service List

This proceeding could affect all Commission-regulated utilities required to participate in the GO 156 program. We will, therefore, direct that this rulemaking be served on all such Commission-regulated utilities who are listed in Attachment B. Such service does not confer party status on any person or entity, and does not result in that person or entity being placed on the service list for this proceeding. The following procedures regarding party status and inclusion on the service list shall be followed. While all the utilities set forth in Attachment B may be bound by the outcome of this proceeding, only those who notify us that they wish to be on the service list will be accorded service until a final decision is issued.

The Executive Director shall serve copies of this rulemaking on the utilities listed in Attachment B. In addition, the Executive Director shall serve copies of this rulemaking on the service list for Rulemaking (R.) 06-04-011, the most recent rulemaking concerning GO 156, and the service lists for R.06-04-010 (Energy Efficiency Rulemaking), R.08-02-007 (Procurement Rulemaking), R.05-12-013 (Long Term Resource Adequacy Rulemaking), R.08-04-012 (Planning Reserve

Margin Rulemaking), A.08-07-021 et al. (Energy Efficiency Program Plans), R.08-03-008 (California Solar Initiative), R.08-08-009 (California Renewables Portfolio Standard), A.08-05-022 et al. (Low Income Energy program budgets), R.04-12-001 (Lifeline program changes), and I.07-01-022 (conservation objectives for Class A water companies). The temporary service list, which includes the entities referenced in this paragraph (and Ordering Paragraph 5) is appended as Attachment C to this OIR and should be used for service of all pleadings until a service list for this proceeding is established. Such service does not confer party status in this proceeding upon any person or entity, and does not result in that person or entity being placed on the service list for this proceeding.

We invite broad participation in this proceeding. All persons or entities seeking to be added to the service list, including respondents, shall inform the Commission's Process Office no later than 20 days after the issuance date of this rulemaking via email (Process_Office@cpuc.ca.gov) or by postal mail (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). To be included on the service list for this proceeding, the request to the Process Office must include pertinent information such as:

- Name and party represented, if any
- Address
- Telephone number
- Email address
- Request for party, state service or information only status.³⁴

³⁴Party status is for those planning to actively participate in this rulemaking through, at a minimum, submission of written comments on the questions raised in the Preliminary

Footnote continued on next page

- Specify the docket number of this rulemaking in the subject line

The service list will be posted on the Commission's website at www.cpuc.ca.gov. We anticipate that the service list will be posted before Response and Opening Comments are due to be filed. Parties should ensure they are using the most up-to-date service list by checking the Commission's website prior to each service/filing date.³⁵ Those seeking party status shall comply with Rule 1.4 (b).³⁶

We encourage electronic filing in this proceeding. Electronic filings should be made according to Rule 1.10 and Resolution ALJ-188. Consistent with those rules, a hard copy of all pleadings shall be concurrently served on the assigned ALJ.

7. Public Advisor

Any person or entity interested in participating in this rulemaking who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor in San Francisco at (415) 703-2074 or (866) 849-8390 or e-mail

Scoping Memo. State service status is for employees of the State of California who will not be submitting comments. Information Only status is for those who wish to follow the proceeding and receive documents associated with it, but who will not be actively participating.

³⁵In addition, pursuant to Rule 1.4 (a), persons and entities seeking party status may (a) file a response to this rulemaking; or (b) file a motion to become a party at a later date. If you do not provide your information to Process Office in advance of filing a response, you will not receive service of responses by parties.

³⁶ Rule 1.4(b) states that those seeking party status shall "(1) fully disclose the persons or entities in whose behalf the filing, appearance or motion is made, and the interest of such persons or entities in the proceeding; and (2) show that the contentions will be reasonably pertinent to the issues already presented."

public.advisor@cpuc.ca.gov; or in Los Angeles at (213) 576-7055 or (866) 849-8391, or e-mail public.advisor.la@cpuc.ca.gov. The TYY number is (866) 836-7825.

8. Intervenor Compensation

Any party that expects to claim intervenor compensation for its participation in this rulemaking shall file its notice of intent to claim intervenor compensation no later than 30 days after the PHC or pursuant to a date set forth in a later ruling which may be issued by the Assigned Commissioner or Administrative Law Judge.

9. Ex Parte Communications

Pursuant to Rule 8.2(a) *ex parte* communications in this investigation are allowed without restriction or reporting requirement.

IT IS ORDERED that:

1. The Commission hereby institutes this Rulemaking to review the impact, success, target goals, and disparities within procurement areas of utility General Order 156 programs; the scope also includes consideration of the economic efficiencies of compliance, information sharing to improve performance, integration of new procurement areas such as “green” energy-related contracts, and examination of diversity and continuity in each utility’s workforce.

2. The Executive Director shall serve all regulated utilities that are required to participate in the General Order 156 program pursuant to Public Utilities Code Section 8283 with this Order Instituting Rulemaking. Such entities will not automatically become parties to this proceeding and should follow the direction in Section VI to become parties. Attachment B lists such entities as reflected in the Commission records. Any error or omission in Attachment B shall not

excuse any participating regulated utility from being bound by the outcome of this proceeding.

3. This proceeding is classified as quasi-legislative, as that term is defined in Rule 1.3(d). Parties shall file Responses and Opening Comments addressing the questions identified in this order and scope, schedule, and other procedural issues by September 30, 2009. Parties shall file Reply Comments by October 30, 2009.

4. The assigned Commissioner or Administrative Law Judge may adjust the schedule identified herein and refine the scope of this proceeding as needed.

5. The Executive Director shall cause this Order Instituting Rulemaking to be served on all regulated utilities required to participate in the General Order (GO) 156 program, and the service lists for Rulemaking (R.) 06-04-011 (most recent for GO 156), R.06-04-010 (Energy Efficiency Rulemaking), R.08-02-007 (Procurement Rulemaking), R.05-12-013 (Long Term Resource Adequacy Rulemaking), R.08-04-012 (Planning Reserve Margin Rulemaking), Application (A.) 08-07-021 et al. (Energy Efficiency Program Plans), R.08-03-008 (California Solar Initiative), R.08-08-009 (California Renewables Portfolio Standard), A.08-05-022 et al. (Low Income Energy program budgets), R.04-12-001 (Lifeline program changes), and I.07-01-022 (conservation objectives for Class A water companies).

6. Interested persons shall follow the direction in Section VI to become a party to this proceeding.

7. The temporary service list, which includes the entities referenced in Ordering Paragraph 5, is appended as Attachment C to this Order Instituting Rulemaking and shall be used for service of all pleadings until a service list for this proceeding is established. A service list for this proceeding shall be created

by the Commission's Process Office and posted on the Commission's Website (www.cpuc.ca.gov) as soon as it is practicable after the first prehearing conference. Parties may also obtain the service list by contacting the Process Office at (415) 703-2021.

8. Parties serving documents in this proceeding shall comply with Rule 1.10 regarding electronic service. Any documents served on the assigned Commissioner and Administrative Law Judge shall be both by e-mail and by delivery or mailing a paper format copy of the document.

9. A party that expects to request intervenor compensation for its participation in this rulemaking shall file its notice of intent to claim intervenor compensation in accordance with Rule 17.1 of the Rules.

10. *Ex parte* communications in this investigation are governed by Rule 8.2(a).

This order is effective today.

Dated July 30, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

I will file a concurrence.

/s/ JOHN A. BOHN
Commissioner

Concurrence of Commissioner Bohn on R.09-07-027

I support this Commission’s opening of this Rulemaking. However, I have serious concerns about our forthcoming deliberations.

It goes without saying that “full and fair participation of women, minority, and disabled veteran owned businesses”¹ in our work force is important. Broader participation of able, engaged, and skilled Californians is a critical element of our resurgence and our progress as a State, and, for that matter, as a nation. Such broad participation expands the number of suppliers, encourages competition, and promotes economic efficiencies. One can make a strong case, in addition, that it is also good business for the public utilities to draw from the State’s diverse communities, both for employees and business skills and services. We cannot afford to waste talent, capacity, or labor for any reason, particularly with issues on the immediate horizon such as an aging workforce and demand for new skills.

Our State, like the rest of the country, however, draws a line between social norms and state sanctioned preferential treatment. Indeed, in 1996, for example, the voters of this state amended the Constitution of California by Proposition 209, which reads in part as follows:

- (a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

- (f) For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and

¹ I recognize the special nature of disabled veterans business enterprises (DVBE) in General Order (G.O.) 156. I fully support federal and state veterans’ preference programs, including the U.S. Veterans’ Preference Act, California’s DVBE Participation Program and this Commission’s DVBE program under G.O. 156, which were established to recognize the great sacrifices made by the men and women who serve in the United States military, particularly with regard to disabled veterans. Indeed, courts across this country, including the U.S. Supreme Court, have repeatedly found Veteran’s hiring preference programs to be constitutional and consistent with the Equal Protection Clause. (*See, e.g., Personnel Administration of Massachusetts v. Feeney* (1979) 442 U.S. 256; *White v. Gates, Secretary of the Navy* (D.C. Cir. 1958) 253 F.2d 868; *Colemere v. Hampton, Chairman, U.S. Civil Service Commission* (UT 1973) 1973 U.S. Dist. LEXIS 11547; *Koelfgen v. Jackson* (Minn. 1972) 355 F.Supp. 243; *August v. Bronstein* (SDNY 1974) 369 F. Supp. 190; *Mitchell v. Cohen* (1948) 333 U.S. 411.) These programs have “traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations.” (*Personnel Administration of Massachusetts*, 442 U.S. 256, 265.)

county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.²

In addition to Proposition 209, there are a number of federal and state constitutional provisions, statutes, and regulations that impose limitations on this Commission's ability to mandate preferential procurement or employment policies, and which require utilities to refrain from discriminating against, or providing preferences to, particular classes of women and minority business enterprises.

For example, the Equal Protection Clause of the 14th Amendment of the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."³ As Justice Harlan eloquently stated in his dissent from *Plessy v. Ferguson*, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."⁴ We are all familiar with the discussions on the application of the Equal Protection Clause; I will not detail it further here. Suffice it to say, equal application of the law is a fundamental aspect of our society.

Title VII of the Civil Rights Act of 1964, amended in 1991⁵ (Title VII), disallows discrimination in employment on the basis of race, ethnicity, national origin, or gender.⁶ "Congress intended that Title VII reflect Justice Harlan's

² Cal. Const., Art. I, § 31 (emphasis added). http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crn Ct=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pus hme=1&tmpFBsel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsC hked=0&prefFBsel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&brand=&_m=0059a850a5ddf4de98b72eff2228574f&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzW-zSkAb&_md5=dfa1bbd041ae76c680963cdc196ea00d&focBudTerms=ATLEAS T10%28%22Proposition+209%22%29&focBudSel=all - fnote5#fnote5

³ U.S. Const., 14th Amendment, § 1.

⁴ *Plessy v. Ferguson* (1896) 163 U.S. 537 (dis. opn. of Harlan, J).

⁵ 42 U.S.C., §§ 2000, *et seq.*

⁶ Title VII provides, in relevant part:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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understanding of the Constitution and ‘be ‘colorblind’ in its application.’⁷ Title VII contains disparate treatment (i.e., intentional discrimination) and disparate impact (i.e., facially non-discriminatory practices that have a discriminatory impact) provisions. The Supreme Court recently narrowly interpreted the disparate impact provision of Title VII in *Ricci v. DeStefano*. In this case, the Court held that “[u]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”⁸

There are also several State laws and provisions that prohibit discrimination. The California Constitution contains a section that closely mirrors the Equal Protection Clause, though it does not explicitly include a state action requirement:⁹ “A person may not be . . . denied equal protection of the laws.”¹⁰ California has adopted the Fair Employment and Housing Act (FEHA)¹¹ which prohibits discrimination because of race, color, national origin, and sex among other things.¹²

The Public Utilities Code also contains a non-discrimination provision, Section 453, subdivision (a), which states, in relevant part:

(a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.¹³

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
(42 U.S.C., § 2000e-2(a).)

⁷ *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal. 4th 537, 549.

⁸ *Ricci v. DeStefano* (2009) 557 U.S. ___, slip. op., p. 2.

⁹ See *Gay Law Students Association v. Pacific Telephone and Telegraph* (1979) 24 Cal. 3d 458, 468.

¹⁰ Cal. Const., Art I, § 7, subd. (a).

¹¹ Cal. Govt. Code, §§ 12900, *et seq.*

¹² The FEHA states, in relevant part: “It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.” (Cal. Govt. Code, § 12920.)

¹³ Cal. Pub. Util. Code, § 453(a).

The California Supreme Court has found that “the language of section 453, subdivision (a) is broad and unrestricted and the legislative history suggests that the Legislature intended to impose general restrictions on discrimination by public utilities.”¹⁴ Indeed, this Commission has held that a utility may not discriminate against a vendor for a contract for a particular service on grounds unrelated their qualifications, i.e., race, under Section 453. In *Muse Cordero Chen, Inc. v. Pacific Bell*, the Commission found Pacific Bell in violation of G.O. 156 and Public Utilities Code section 453 because it had disqualified a company from participating in Pacific Bell’s selection process for an advertising contract targeted at an Asian audience solely because the company was not 51% Asian-owned and operated.¹⁵

This Commission has adopted a series of what it has denominated as numerical “goals” for our public utilities for procurement from minority and women owned business enterprises. Though there is no “penalty” specifically imposed for the failure to meet those goals, we have required the utilities to provide annual reports of their achievement toward those goals. We require the senior management of these utilities to appear at public meetings to be questioned about and to defend their actions when they fail to meet those goals. Indeed, it is not unusual for public criticism for failure to meet these goals to be offered at public meetings, and even during Commission meetings. Comparison of those “goals” and the achievement thereof occupies a prominent part of this proposal. Moreover, G.O. 156 on its face states, that “[e]ach utility shall make special efforts to increase utilization and encourage entry into the workplace of WMDVBE’s in product or service categories where there has been low utilization of WMDVBE’s, such as legal, financial services, etc.”¹⁶ Additionally, this rulemaking also seeks to makes the employment plans and practices of each utility, with respect to as yet, unstated objectives, pursuant to as yet, unstated, authority.

Some may take comfort in the fact that G.O. 156 only contains “goals” and not “quotas” for utility procurement with WMBEs. However, the concept that establishing “goals” versus “quotas” somehow gets one around equal protection arguments can be misleading. For example, the Ninth Circuit stated in *Bras v. California Public Utilities Commission* that, “[Public Utilities Code sections 8281-8286 and G.O. 156] are not immunized from scrutiny because they purport to establish ‘goals’ rather than ‘quotas.’ We look to the economic realities of the program rather than the label attached to it.”¹⁷

¹⁴ *Gay Law Students Assoc. v. Pacific Tel. and Telegraph* (1979) 24 Cal. 3d 458, 485.

¹⁵ *Muse Cordero Chen, Inc. v. Pacific Bell*, D.90-10-032, 1990 Cal PUC LEXIS 958, *1-*2, *14-*16.

¹⁶ G.O. 156, § 8.11 (emphasis added).

¹⁷ *Bras v. California Public Utilities Commission* (9th Cir. 1995) 59 F.3d 869, 874.

Other courts have rejected the idea that regulations that stop short of establishing preferences, quotas, or set-a-sides do not violate the Equal Protection Clause, Title VII, and/or Proposition 209. The California Supreme Court stated in *Hi-Voltage Wire Works, Inc. v. City of San Jose* that “[a] participation goal differs from a quota or set-aside only in degree; by whatever label, it remains ‘a line drawn on the basis of race and ethnic status’ as well as sex.”¹⁸ The Court further reasoned, “[t]hus understood, such a goal plainly runs counter to the express intent of the historic Civil Rights Act and, concomitantly, the intent of Proposition 209.”¹⁹ Also, in *Lutheran Church-Missouri Synod v. FCC*, the D.C. Circuit held: “we do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race.”²⁰

Lest we undo the important work that this Commission has done in broadening procurement to small business and to all Californians, I caution my fellow Commissioners that as we proceed in our inquiry, we be mindful of the fact that as a State Public Utilities Commission we have a direct, controlling influence over the operations of these utilities, over their profits, expansion, service quality and relationship with ratepayers. These utilities occupy a privileged monopoly place, granted by the State and administered by this Commission. It is hard to imagine that any comment by this Commission, let alone a public hearing on progress toward Commission established goals and to which senior management is summoned by this Commission, can be ignored by these entities “voluntarily.”

Indeed, the California Supreme Court has found that “a public utility is in many respects more akin to a governmental entity than to a purely private employer.”²¹ The Court has further reasoned:

In this state, the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct, both in the public's perception and in the utility's day-to-day activities. (See generally Cal. Const., art. XII, §§ 1-9; Pub. Util. Code,

¹⁸ *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal. 4th, 537, 563 (quoting *Regents of the University of California v. Bakke* (1978) 438 U.S. 289.)

¹⁹ *Id.*; see also *Connerly v. State Personnel Board* (2001) 92 Cal. App. 4th 16, 55 (holding that “when the government chooses to rely upon racial and gender distinctions, the scheme is presumptively invalid; we cannot defer to legislative pronouncements, and the burden is on the government to justify the use of the distinction” (quoting *City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 499, 501-503).)

²⁰ *Lutheran Church-Missouri Synod* (D.C. Cir. 1998) 141 F.3d 344, 354.

²¹ *Gay Law Students Assoc.*, 24 Cal. 3d 458, 469.

