



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

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Order Instituting Rulemaking to Revise General Order 156 to Include Certain Electric Service Providers and Community Choice Aggregators and Encourage Voluntary Participation by Other Non-Utility Entities Pursuant to Senate Bill 255; Consider LGBT Business Enterprise Voluntary Target Procurement Percentage Goals; Incorporate Disabled Business Enterprises; Modify the Required Reports and Audits; and Update Other Related Matters.

Rulemaking 21-03-010
(Filed March 18, 2021)

REPLY COMMENTS OF BUILD-OUT CALIFORNIA

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In accordance with the Scoping Memo issued June 25, 2021, BuildOUT California respectfully submits these Reply Comments. The utility companies have presented a virtual wall of opposition to BuildOUT California’s proposal for an aspirational goal of 1.5% for Lesbian, Gay, Bisexual and Transgender (“LGBT”)-owned business enterprises under the Commission’s General Order 156 Supplier Diversity Program. As we will explain, the utility companies are simply wrong, and their arguments against full equality for LGBT-owned businesses are circular and unconvincing. We respectfully urge that the Commission adopt an aspirational goal of 1.5% for LGBT-owned business enterprises.

I. INTRODUCTION: THE INJUSTICE OF “WAITING” FOR EQUALITY

The overarching theme of the Opening Comments of the utility companies is that it would be premature at this time for the Commission to adopt a goal of 1.5% for LGBT-owned businesses under General Order 156. Their unified message is “wait.”

The Commission should not be persuaded to “wait.” The position of the utility companies is unsupported by an honest evaluation of the data, as we will explain below. Its root cause is not analytical science, but an unwillingness to extend equal rights to LGBTQ persons.

The Reverend Dr. Martin Luther King, Jr., near the end of his life, wrote about the struggle for equality by African-American people. White Americans, he wrote, “including many of goodwill, proceed from the premise that equality is a loose expression for improvement.”¹

That is exactly the point of the Opening Comments filed by the utility companies in this case. The utility companies do not seek full equality for LGBTQ persons, but only a degree of “improvement.” This should not be accepted by the Commission.

II. DISCUSSION: RESPONSES TO SPECIFIC ARGUMENTS ADVANCED BY THE UTILITY COMPANIES

The opposition by the utility companies to an aspirational goal of 1.5% for LGBT-owned business enterprises does not withstand analytical scrutiny. We respond below to each of the principal arguments they have advanced in their Opening Comments.

A. The Utility Companies Misrepresent the History of How Progress Was Achieved by Disabled Veteran-Owned Business Enterprises

Several of the utility companies argue that the Commission’s experience in setting an aspirational goal for Disabled Veteran Business Enterprises (“DVBES”) provides a basis for rejecting the proposed goal of 1.5% for LGBT-owned businesses. AT&T, for example, cites this “track record” of DVBES as justification for its conclusion that a 1.5% goal for LGBT-owned businesses “would not be immediately attainable and may be out of reach and unattainable for many reporting companies in the long term.” (AT&T Comments, p. 3.)

¹ Martin Luther King, Jr., “Where Do We Go From Here: Chaos or Community?” (1967).

In fact, what happened was that the Commission in 1995, four years after the enactment of Senate Bill 2398 (Dills, 1991) (“SB 2398”), adopted an “interim goal” of 1.5% for DVBEs, and then later removed the term “interim” and thus established 1.5% as the DVBE goal.

The Commission explained this history in its 1998 Annual Supplier Diversity Program Report to the Legislature, as follows:

In 1995, the Commission established an interim goal of 1.5% for DVBE participation, subject to adjustment, if necessary, pending the receipt of [a] report [by a DVBE Goal Setting Task Force (“GSTF”).] The establishment of an interim goal was intended to provide the utilities with a working target while the GSTF prepared its recommendation for a numerical goal to be effective January 1, 1997. After considering all evidence presented by interested persons at an evidentiary hearing in mid-October of 1996, the Commission, via [Decision] 96-12-081 amended Section 8.2 of G.O. 156 and established 1.5% as the Disabled Veteran goal.

A side-by side comparison of DVBE contracting in the years following the 1991 enactment of SB 2398, and LGBT contracting in the years following the 2014 enactment of Assembly Bill (Gordon, 2014) (“AB 1678”), reveals a strikingly similar parallel.

DVBE CONTRACTING	LGBT CONTRACTING
1992 – 0.04%	2015 – 0.02%
1993 – NA	2016 – 0.12%
1994 – 0.17%	2017 – 0.14%
1995 – 0.12%	2018 – 0.11%
1996 – 0.16%	2019 – 0.17%

AT&T complains that, after a 1.5% procurement goal for DVBEs was adopted in 1997, it took another 21 years – until the year 2013 – for the utilities to finally achieve the 1.5% goal.

(AT&T Comments, p. 2.) AT&T cites this as a reason why the Commission should set only an extremely modest goal of 0.5% for LGBT-owned business enterprises. (*Id.*, p. 3.)

The history of goal-setting for Disabled Veterans in the Supplier Diversity Program does *not* support the timid, go-slow recommendation urged by AT&T and the other utilities for LGBT-owned businesses. On the contrary, this history shows that the Commission should firmly establish 1.5% as the aspirational goal for LGBT-owned businesses.

B. The Utility Companies Have Not Provided Any Explanation for Their Exceedingly Poor Performance in Contracting with LGBT Businesses Since the Enactment of AB 1678

As BuildOUT California has pointed out repeatedly in this proceeding, roughly a third of the utility companies have done zero or close to zero procurement from LGBT businesses since the enactment of AB 1678 in 2014.

A summary of the Annual Diversity Spend of the utility companies on contracts with LGBT-owned businesses, based upon the annual reports submitted by the utilities to the Commission, was appended to the Opening Comments of BuildOUT California filed on August 4, 2021. These self-reported figures, which are part of the administrative record in this case, confirm the poor performance of the utility companies as a group.

In their August 4 Opening Comments, the utility companies do not acknowledge or provide any explanation for this conspicuous underperformance. They act as if they wish the Commission would simply not pay any attention.

The only fair inference the Commission can draw from the silence by the utility companies, in the face of data showing such a dearth of contracting with LGBT businesses, is

that it is inexcusable. It does not matter whether the underperformance results merely from inattention, or from bias and animosity against LGTB-owned business owners.

When Commissioner Rechtschaffen directly asked the utility companies' spokesperson about this at the Public Workshop on July 21, the spokesperson said he had nothing to offer. The utility companies owe an explanation in response to the question posed by Commissioner Rechtschaffen, but they have provided none.

It is revealing that, without any trace of embarrassment, Pacific Gas and Electric Company ("PG&E") in its Opening Comments made the following statement: "PG&E's spend with LGBTEs in 2020 was \$6.2 million, which represented a decline from the previous year's results of \$17.6 million (0.2%)." (PG&E Comments, p. 3.) To be fair, PG&E's showing with respect to LGBT businesses is much better than of other utility companies. Still, the fact that PG&E's spending on contracts with LGBT businesses dropped precipitously by two-thirds in 2020 would seem to call out for some explanation, but PG&E has provided none.

More directly offensive, from the perspective of the LGBTQ community, are self-serving statements by utility companies that have zero or close-to-zero spend with LGBT businesses. For example, Comcast Phone of California, LLC ("Comcast") has expended *less than \$3,000.00 with LGBT-owned businesses over a six year period* – a miniscule spend for a major enterprise the size of Comcast – but nevertheless stated in its Opening Comments:

Comcast's supplier diversity program aims to promote and increase the participation of diverse businesses, including women-owned, minority-owned, disabled veteran-owned and LGBT-owned business enterprises, and *Comcast is firmly committed to continuing to advance the economic inclusion of these underrepresented businesses across its organization.*

(Comcast Comments, pp. 1-2 (emphasis added).)

Another such example is Southwest Gas Corporation, which had *slightly over \$18,000 in spending with LGBT-owned businesses over six years* – a tiny expenditure in relative terms. Nevertheless, Southwest Gas has assured the Commission that “Southwest Gas remains committed to outreach to LGBT businesses along with other methods to attempt to increase participation in the Program[.]” (Southwest Gas Comments, p. 3.)

A group of major communications carriers identifying themselves collectively as “Charter”² profess that they “support” the statutory goal of “aid[ing] the interests of women, minority, disabled veteran, and LGBT business enterprises.” (Charter Comments, p. 1.) Yet, this group of companies had *a combined total of only \$4,008 in spend with LGBT-owned enterprises over the past six years* – again, a truly *de minimis* amount. Given this poor track record, the Commission should look with skepticism upon the following argument advanced by Charter and its fellow companies:

Based upon the Staff’s own proposed metric, the average 5-year utility spend, the target goal should be set at 0.135%. While Charter does not oppose a 1.5% target procurement percentage for LGBTBEs, the 5-year data confirms the challenges that participants will face in implementing this target goal.

(Charter Comments, p. 5.)

It should go without saying that, in establishing an aspirational goal for a marginalized category of business owners, such as LGBTQ persons, the Commission should not take as its baseline an unacceptably poor performance by the utility companies.

² Charter Fiberlink CA-CCO, LLC, Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC).

C. The Utility Companies' Reported Data Have Been Used by BuildOUT California to Demonstrate the Reasonableness of a 1.5% Procurement Goal for LGBT Businesses

In a letter to Assigned Commissioner Rechtschaffen dated July 20, 2021, which was provided to all the parties in advance of the July 21 Public Workshop, BuildOUT California's President, Paul Pendergast presented a data-based analysis showing (1) that there are enough LGBT-owned businesses to meet a 1.5% procurement goal, and (2) that these LGBT-owned businesses possess the right variety of skills the utility companies need.

A copy of Mr. Pendergast's letter was included as Attachment A to BuildOUT California's Opening Comments filed with the Docket Office on August 4, 2021, and thus is part of the administrative record in this case.

By using the data reported by the utility companies themselves, BuildOUT California was able to demonstrate, as Mr. Pendergast explained, "that there appears to be sufficient quality and quantity needed for LGBTBEs to meet a procurement goal of 1.5%." (*Id.*)

In their August 4 Comments, the Sempra Utilities (Southern California Gas Company and San Diego Gas & Electric Company) allege that BuildOUT California's analysis suffers from "inaccuracies" in the data upon which it relies. They claim that a recent check of the Supplier Clearinghouse database shows only 366 LGBT-certified suppliers, rather than the 509 suppliers reported in the Joint Utilities Spend Analysis (2016-2019), upon which BuildOUT California relied. They request that BuildOUT California "revise its calculations and provide an accurate picture of the LGBT supplier population." (Sempra Utilities Comments, p. 3.) The Sempra Utilities make a similar demand to include Disabled Veterans Business Enterprises in the data set, and they further contend that they have not been given access to "a list of qualified organizations considered in BuildOUT's analysis." (*Id.*) Until these alleged deficiencies are

cured, the Sempra Utilities claim, they “stand on the substantial and verifiable Procurement Target Goal of 0.5% for LGBT-Owned Business Enterprises.” (*Id.*, p. 3.) According to the Sempra Utilities, “a target goal of 1.5% is not realistic at this time.” (*Id.*)

The simple response to all this criticism by the Sempra Utilities is that BuildOUT California properly relied upon data reported by the utility companies in the Joint Utilities Spend Analysis (2016-2019). The Sempra Utilities are part of the Joint Utilities group.

BuildOUT California – like the Commission – should be able to rely upon data reported by the utility companies. The data, as BuildOUT California has demonstrated, amply support the adoption of a 1.5% procurement goal for LGBT-owned business enterprises. The Sempra Utilities are attempting to move the goal line in refusing to embrace this aspirational target.

Various members of the Joint Utilities group also contend that LGBT-owned businesses do not have the range of skill sets the utility companies need. But their comments, purportedly based on the same Joint Utilities Spend analysis, appear to directly contradict one another. Thus, AT&T has claimed there is a deficit of LGBT business owners who provide Business Services, which according to AT&T “is a key and primary spend driver for the communications company sector.” (AT&T Comments, p. 3.) Meanwhile, PG&E has argued the exact opposite, claiming that the LGBT-owned businesses are overly concentrated in the areas of Business Services and Engineering Management Services. (PG&E Comments, p. 5.)

The Commission should recognize that what it is hearing from the utility companies with respect to LGBT-owned business enterprises is in the nature of “the dog ate my homework.” The utility companies are simply not doing enough to improve contracting opportunities for LGBT businesses, and they are offering lame excuses for their poor performance.

D. BuildOUT California Respectfully Offers the Declaration of Former Commission General Counsel Frank Lindh to Show the Passivity of the Utility Companies With Respect to Contracting with LGBT-Owned Business Enterprises

Frank Lindh, the undersigned representative of BuildOUT California, is the Commission's former General Counsel, and a prominent attorney with over 36 years of experience in the field of public utilities law and regulation. Mr. Lindh operates a solo law practice, focused on cases before this Commission and before the Federal Energy Regulatory Commission ("FERC"), where Mr. Lindh also worked early in his legal career.

We are providing as Appendix A to these Reply Comments the Declaration of Frank R. Lindh, setting forth the facts upon which we rely. Mr. Lindh's Declaration confirms the depth of his experience and expertise, and his stature as a leader in the specialized bar of legal practitioners who appear before the Commission and the FERC.

For a period of three years, from 2016 until 2019, Mr. Lindh's legal practice was registered with the Supplier Clearinghouse as an LGBT business owner. Legal services, of course, are an important area of contracting by the utility companies. Yet, despite Mr. Lindh's strong credentials, for the entire time during which he was registered as an LGBT business owner in the Supplier Clearinghouse he did not receive even so much as a single inquiry from any utility company about the prospect of performing legal services for them.

Although anecdotal in nature, the facts set forth in Mr. Lindh's Declaration nevertheless are an indication that the utility companies have been unacceptably passive when it comes to doing business with LGBT-owned business enterprises. Their resistance to an aspirational goal of 1.5% or more as a target for LGBT businesses under General Order 156 must be considered by the Commission in light of their own demonstrated lack of effort and initiative.

E. The Utility Companies Should Be Directed to Collaborate in Good Faith With Entities Like BuildOUT California to Promote Contracting with Qualified LGBT Businesses

The mission of BuildOUT California, a non-profit LGBTQ business association, is the sustainable growth of LGBT-owned and certified businesses and their allies. BuildOUT California is focused on the fields of architecture, engineering, construction services, real estate development, and related industries.

Since its founding in 2020, BuildOUT California has established a commendable track record of bringing together a diverse range of LGBT entrepreneurs with major significant experience in working with Utilities, Public Agencies, General Contractors (“GCs”) and large engineering/project management firms.

BuildOUT California serves as an “engagement center” in two distinct ways:

1. We work with project owners (Utility Companies, Public Agencies, GCs/Consulting firms) on a one-to-one basis where we break down contract opportunities and identify:
 - Qualified LGBT firms who match the distinct scopes of work outlined in the project descriptions
 - Potential Prime/Tier One Contractors/Consultants that include LGBT firms to act as subcontractors/subconsultants
2. Every month, BuildOUT California hosts a “Golden Pitch” event, at which three or four LGBT-owned businesses showcase their qualifications, capacity, and experience, for the benefit of these infrastructure enterprises.³

³ More information about the Golden Pitch events can be found on BuildOUT California’s website: <https://www.buildoutcalifornia.org/the-golden-pitch>

For each Golden Pitch event, BuildOUT California extends invitations to utility company representatives. There is no cost for participation. Unfortunately, the utility companies under the Commission's jurisdiction have been conspicuously under-represented at these monthly Golden Pitch events. This is a missed opportunity for the utility companies to gain significant insights into the pool of qualified LGBT firms.

We ask, therefore, that the Commission direct the utility companies to increase their efforts to collaborate in good faith with BuildOUT California and other LGBT business associations. This will help ensure success in meeting the 1.5% or greater goal we have asked the Commission to establish for LGBT-owned businesses under General Order 156.

III. CONCLUSION

For the reasons set forth above and in our Opening Comments filed on August 4, 2021, BuildOUT California respectfully urges the Commission to adopt an aspirational goal of at least 1.5% for LGBT-owned business enterprises under General Order 156.

Respectfully submitted,

By:  _____

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