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Decision 98-11-030 November 5, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's
own motion to revise General Order 156.

Rulemaking 93-09-026
(Filed September 27, 1993)

ORDER AMENDING GENERAL ORDER 156

By this order, the Commission amends General Order (GO) 156. In Decision (D.) 96-04-018, the Commission reopened this proceeding for the limited purpose of considering proposed amendments (Proposed Amendments) to GO 156 pursuant to Public Utilities (PU) Code § 1708. In that order, the Commission proposed several amendments to Sections 6, 7 and 8 of GO 156, the majority of which were proposed pursuant to a settlement reached by J. Jack Bras and the Commission in his civil action against the Commission in U.S. District Court, Northern District of California, *Bras v. California Public Utilities Commission*, Case (C.) 92-0304-WHO.¹ In setting forth the Proposed Amendments for comment in D.96-04-018, we stated that the Proposed Amendments merely restated or clarified our existing policy with respect to the Commission's WMDVBE Program.² The amendments that we adopt today not only restate and clarify our existing WMDVBE Program policy but are, in large part, the result of extremely helpful input that we received from all the stakeholders which participated in this process and worked closely with Commission staff to address the issues raised by the Proposed Amendments.

¹ In that action, Bras challenged the constitutionality of the Commission's Women, Minority and Disabled Veterans Business Enterprises (WMDVBE) Program. Having settled the federal action, the issue of the constitutionality of the WMDVBE Program is not before us in the instant order.

² The Women and Minority Business Enterprises (WMBE) Law is codified at Sections 8281-8286 of the California PU Code. GO 156 implements the Code and the Commission's WMDVBE Program.

Procedural History

Extensive comments were received from a number of utilities and other interested parties, several of whom requested that one or more workshops be held to explore more fully the implications of the Proposed Amendments.³ Many of the parties proffered their own amendments to GO 156, either in addition to, or in place of, the Proposed Amendments. On August 8, 1996, the assigned Administrative Law Judge (ALJ) issued a ruling scheduling a workshop in this matter to facilitate productive discussion regarding the Proposed Amendments and other amendments proposed by various parties. The ALJ stated in his ruling that a workshop would also provide an informational context for a discussion of the impact of the *Bras* case on the Commission's WMDVBE program. Two days of workshops were held on September 10, 1996, and October 16, 1996. On November 26, 1996, WMDVBE Staff issued its "WMDVBE Staff Report on the September 10, 1996, and October 16, 1996, Workshops and Recommendations Regarding the Proposed Amendments to General Order 156, R.93-09-026" (WMDVBE Staff Report). Following the issuance of the WMDVBE Staff's own Report, parties filed initial and reply comments to the WMDVBE Staff recommendations.⁴

³ Comments were received by the Greenlining Institute and Latino Issues Forum, Pacific Bell (Pacific), GTE California, Incorporated (GTEC), Roseville Telephone Company, AirTouch Cellular and its affiliates, Bay Area Cellular Telephone Company, Southern California Edison Company (Edison), Pacific Gas and Electric Company (PG&E), MCI Telecommunications Corporation (MCI), Sierra Pacific Power Company (Sierra Pacific), Southern California Gas Company (SoCalGas), Southwest Gas Corporation (Southwest Gas), and Sprint Communications Company (Sprint).

⁴ Comments were filed by the Greenlining Institute, the Latino Issues Forum, the Disabled Veterans Business Enterprise (DVBE) Network and the Joint Utilities. At this juncture, the Joint Utilities consist of: GTEC, MCI, Pacific, PG&E, Roseville Telephone Company, San Diego Gas & Electric Company (SDG&E), Sierra Pacific, SoCalGas, Southwest Gas, and Sprint Communications Company. Reply comments were filed by the Joint Utilities.

WMDVBE Staff Report

The WMDVBE Staff Report is a report on the two days of workshops held on September 10, 1996, and on October 16, 1996. The WMDVBE Staff Report also provides WMDVBE Staff's Recommendations. According to the report, extremely productive discussions were held on all aspects of the Proposed Amendments. This view is also generally reflected in the parties' comments to the WMDVBE Staff Report. During the workshops, various parties proposed specific amendments to the Proposed Amendments, or proposed entirely new amendments/revisions to GO 156. The WMDVBE Staff Report at p. 2 states:

"In the discussions that took place, the parties made every attempt to reach consensus where possible, while at the same time, considered every party's position. As a result, a tremendous amount of consensus was reached by the parties. The WMDVBE Staff commends the parties for their hard work and cooperation in the achieving this high level of consensus."

As a result of the two days of workshops, the parties reached an agreement to propose a set of amendments to GO 156. The parties' proposed set of amendments are set forth in Attachment B to the WMDVBE Staff Report. For purposes of this discussion, we will refer to these parties as the Consensus Parties. This proposed set of amendments would modify the Proposed Amendments that we promulgated in D.96-04-018. WMDVBE Staff states that these modifications are consistent with the Proposed Amendments and enjoy the wide support of the parties; including WMDVBEs, utilities, and Bras. WMDVBE Staff recommends that the Commission adopt these agreed-to modifications proposed by the Consensus Parties.

While there was consensus on most of the issues, there were a few areas where consensus was not reached. With respect to these disputed issues, the Consensus Parties at the workshop agreed to brief their positions. Greenlining Institute, Latino Issues Forum and the Joint Utilities filed in support of the consensus modifications reached at the two-day workshop. The DVBE Network opposes the adoption of certain proposed modifications. In this decision, we adopt the Consensus Parties' proposed modifications to the Proposed Amendments. We now discuss in detail the Proposed

Amendments, the amendments proposed by the Consensus Parties and supported by the WMDVBE Staff, as well as the disputed issues.

Amendments to GO 156 Proposed by the Commission and the Parties

We will discuss the Commission's Proposed Amendments and the amendments proposed by the Consensus Parties, section by section. In deciding these issues, we afford great weight to the agreement that was achieved by the Consensus Parties after extensive debate and discussion, particularly since these parties work on a daily basis implementing and participating in the Commission's WMDVBE Program. In this context, we find it significant that the Consensus Parties were able to achieve this degree of accord in proposing these amendments, a fact which we believe reflects the parties' deep understanding and experience of how the Commission's WMDVBE actually operates.

Proposed Amendments to Section 6 of GO 156

In D.96-04-018, we proposed amendments to Section 6 of GO 156³ in order to make absolutely clear, as we have stated in prior decisions, that our WMDVBE program is an equal opportunity program, aimed at maximizing participation of WMDVBES in utility procurement contracting. It is not a set-aside program. These Proposed Amendments to Section 6 were aimed at reaffirming that utilities are not authorized or permitted to design their WMDVBE programs utilizing set-asides, quotas, preferences, or preferential treatment. The current language of Section 6 UTILITY IMPLEMENTATION reads as follows:

"6. UTILITY IMPLEMENTATION

"Each utility's WMDVBE program shall be designed to ensure that a fair proportion of product and services contracts are awarded to WMDVBES. The following minimum program elements shall be incorporated into each utility's WMDVBE program."

³ Unless otherwise indicated, all sections cited herein refer to sections of GO 156.

In D.96-04-018, the Commission proposed that the first sentence of Section 6 be changed to the following:

"Each utility's WMDVBE program shall be designed to ensure that all persons have a fair and equal opportunity to obtain contracts for supply of products and services to the utilities subject to this general order. Nothing in this general order authorizes or permits a utility to utilize set-asides, preferences or grant preferential treatment to WMDVBEs in the administration of its WMDVBE program. The purpose of the general order is to provide equal opportunity in utility contracting to all vendors, without discrimination on the basis of race, color, national origin, physical handicap or disability, or sex."

During the workshops, the Consensus Parties proposed the following amendment to the first sentence of Section 6. This language would replace the above-cited Proposed Amendment:

"Each utility's WMDVBE program shall be designed to ensure that WMDVBEs are encouraged to become potential suppliers of products and services to the utilities subject to GO 156. Nothing in GO 156 authorizes or permits a utility to utilize set-asides, preferences, or quotas in administration of its WMDVBE program. The utility retains its authority to use its legitimate business judgment to select the supplier for a particular contract."

In its support for this modification, WMDVBE staff stated that, like the original Proposed Amendment, this amendment makes absolutely clear that GO 156 is not a set-aside program, and does not authorize quotas or preferences in the administration of the WMDVBE Program. As pointed out by WMDVBE Staff, Section 1.3.13 already defines a "goal" as a "target which, when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." We find the amendment proposed by the Consensus Parties acceptable. It accomplishes the same intention of the original Proposed Amendment, and is consistent with the Commission's prior

decisions on our WMDVBE Program.⁶ The Commission adopts the Consensus Parties' amendment of the first sentence of Section 6, UTILITY IMPLEMENTATION.

In D.96-04-018, the Commission proposed deleting the second sentence of Section 6.1.1. The current Section 6.1.1 reads as follows:

"Each utility shall ensure that its employees with procurement responsibilities receive training in the implementation of its WMDVBE program. These employees shall be evaluated on the basis of their progress in meeting the goals of their specific area of procurement."

The Commission proposed this deletion in recognition that the Commission does not generally review nor approve the procurement decisions of utilities, except when there has been an allegation that the utility has engaged in unlawful discrimination or has in some manner violated a statute, rule, or order of the Commission. In addition, the Commission has always recognized that the utilities must use their best business judgment to select the best person for the particular procurement need and that the utilities are in the best position to design whatever incentives a utility deems necessary, to promote equal opportunity. As stated in D. 96-04-018, mimeo. p. 18, consistent with our general non-intrusion into the utilities' procurement decisions, we will not require that utility employees be evaluated on the basis of their progress in meeting WMDVBE goals. We will leave such management decisions to the utilities, recognizing that each utility is free to employ a variety of non-discriminatory measures to maximize the utilization of WMDVBEs in procurement, and we encourage all utilities to do so. All parties have agreed to the Commission's Proposed Amendment to delete the second sentence of Section 6.1.1. The Commission adopts its original Proposed Amendment deleting the second sentence of Section 6.1.1 for the reasons stated above.

⁶ E.g., *Lam Securities Investment v. San Diego Gas & Electric Company*, D. 91-02-012, mimeo. at p. 11 (1991); *Muse Cordero Chen, Inc. v. Pacific Bell*, D.90-10-032, mimeo. at p. 11, 38 CPUC2d 5 (1991); and *Re Public Utilities Code Sections 8281 to 8285 Relating to Women and Minority Business Enterprises*, D.90-12-026, 38 CPUC2d 384, 394 (1990).

The Commission also proposed amending Section 6.1.1 (3). Currently, Section 6.1.1(3) reads as follows:

"Programs to train and encourage employees involved in procurement activities to break apart purchases and contracts as appropriate to accommodate the capabilities of WMDVBEs."

The Commission proposed adding language at the end of the sentence:

"Programs to train and encourage employees involved in procurement activities to break apart purchases and contracts as appropriate to accommodate the capabilities of WMDVBEs, and non-WMDVBEs upon request."

The Consensus Parties, however, have suggested an alternate amendment to Commission's Proposed Amendment. In agreeing to the Commission's Proposed Amendment to delete the second sentence of Section 6.1.1, the Consensus Parties reconsidered Sections 6.1.1(1), 6.1.1(2) and 6.1.1(3). The Consensus Parties concluded that, since the Commission has reaffirmed its policy of the utilities' procurement management decisionmaking prerogative about how best to structure their own individual WMDVBE programs, Sections 6.1.1(1), 6.1.1(2) and 6.1.1(3) were unnecessary.⁷ The WMDVBE Staff Report states:

"As a result of this careful review and discussion of Sections 6.1.1(1), 6.1.1(2) and 6.1.1(3), the parties propose deleting these three subsections altogether. This proposal would also obviate the need to amend GO Section 6.1.1(3), which is part of the Commission's Proposed Amendments. While WMDVBE Staff believes that the guidance provided in GO Sections 6.1.1(1), 6.1.1(2) and 6.1.1(3) is helpful, this guidance prescribes specific major components that must be included in the utilities' WMDVBE training program. The prescriptive nature of these components of the utilities' training program is inconsistent with Commission policy of not micromanaging the utilities' procurement decisions. In addition, we believe that the WMDVBE program is mature enough at this stage to allow the utilities maximum flexibility in designing

⁷ Sections 6.1.1(1), 6.1.1(2) and 6.1.1(3) require the utilities WMDVBE training program to include certain provisions.

training and implementation of their individual WMDVBE programs. Therefore, WMDVBE Staff agrees with the parties' proposal to delete GO Sections 6.1.1(1), 6.1.1(2) and 6.1.1(3)."

The Commission has considered the Consensus Parties' position with respect to the prescriptive nature of Sections 6.1.1(1), 6.1.1(2) and 6.1.1(3) and concludes that the Consensus Parties' position has merit. We agree that these sections are inconsistent with our policy of not micromanaging the utilities' procurement decisions. We also agree that the WMDVBE Program is sufficiently mature enough at this stage to allow the utilities maximum flexibility in designing training and implementation of their individual WMDVBE programs. However, we also note that it is only fairly recently that many new cellular companies have come under the requirements of GO 156 and that in that context these utilities lack the depth and breadth of experience garnered by the utilities that have been subject to GO 156 from the beginning. Therefore, we urge these utilities to seek guidance from our WMDVBE Staff where they may have particular questions about the implementation of GO 156. We will adopt the Consensus Parties' proposal to delete Sections 6.1.1(1), 6.1.1(2) and 6.1.1(3). As a result of our adoption of the Consensus Parties' proposed deletions, in conjunction with the Commission's Proposed Amendment to Section 6.1.1, the new Section 6.1.1 will read as follows:

"6.1.1 Each utility shall ensure that its employees with procurement responsibilities receive training in the implementation of its WMDVBE program."

The remainder of the current 156 Section 6.1.1 (including 6.1.1(1), 6.1.1(2) and 6.1.1(3)) is deleted.

The Commission has also proposed amending Section 6.2 EXTERNAL OUTREACH by adding a new section, Section 6.2.1(8). The Consensus Parties were unable to reach agreement on this Proposed Amendment. This Proposed Amendment reads as follows:

"Each utility is directed to offer the same assistance set forth in Section 6.2 to non-WMDVBES, upon request."

The Consensus Parties did not reach agreement to support this Proposed Amendment at the two-day workshop.⁶ The Joint Utilities were the only party who addressed this Proposed Amendment in their comments. The Joint Utilities state that the WMDVBE Staff Report emphasizes two important Commission policies underlying the modified Proposed Amendments. The first Commission policy emphasized is that GO 156 is not a set-aside program and does not authorize quotas or preferences in the administration of WMDVBE programs. The second policy emphasized is the Commission's policy of not micromanaging the utilities' procurement decisions. The Joint Utilities argue that any Proposed Amendments should be evaluated in terms of whether or not they further these Commission's policies. In that light, the Joint Utilities oppose this amendment because it is not needed in order for the Commission to achieve its policy of protecting GO 156 from legal attacks. The Joint Utilities cite the California Supreme Court in *Domar Electric, Inc. v. County of Los Angeles*, 9 CAL. 4th 161 (1994), which upheld an outreach program. The Joint Utilities argue that, to preserve GO 156 as an outreach program, Section 6.2.1 should be retained as originally adopted. They further argue that in extending the WMDVBE outreach program to non-WMDVBEs as well as WMDVBEs, the Commission will be micromanaging the WMDVBE programs of each utility subject to GO 156, thus conflicting with the Commission's policy of affording utilities flexibility in maintaining their programs. Therefore, the Joint Utilities argue that this Proposed Amendment should not be adopted. No party filed reply comments in opposition to the position of the Joint Utilities.

As we stated in D.96-04-018, we believe that the Commission's WMDVBE Program is consistent with the California Supreme Court's *Domar* decision which allows for such outreach programs. And as we recognized in D. 96-04-018, in practice, the utilities where requested have offered the same assistance to any vendor. We direct the

⁶ It is the WMDVBE Staff's position that wherever the parties were unable to agree on a Proposed Amendment, WMDVBE Staff supports the original Proposed Amendment of the Commission.

utilities to continue with this practice. In proposing this Proposed Amendment, we indicated that it merely reflects utility practice, making it clear that utilities are required to offer the same assistance to non-WMDVBEs, upon receiving such a request.

(D.96-04-018). Therefore, we adopt this Proposed Amendment.

We also note that PU Code § 8286 requires any utility subject to GO 156 to facilitate the participation of women-owned business, minority-owned business, and small businesses in contract procurement by considering the following measures to include those businesses in all phases of their contracting:

- (a) Timely or progressive payments to those businesses.
- (b) An amendment of the performance bond requirements when past performance within a specified area of business justifies that consideration.
- (c) The provision of assistance to those businesses by securing contract payments to those businesses with letters of credit, negotiable securities, or other financing arrangements or measures.

Thus, the utilities already have statutory obligations to facilitate the participation of small businesses in their WMDVBE Program.

The Commission also proposed amending Section 6.3.5(1). The parties were unable to reach agreement on this revised section. Currently, Section 6.3.5(1) reads as follows:

"It is the policy of the utility that women, minority and disabled veteran owned business enterprises shall have the maximum practicable opportunity to participate in the performance of contracts."

The Commission has proposed adding a second sentence to the end of the section. The section reads as follows:

"It is the policy of the utility that women, minority and disabled veteran owned business enterprises shall have the maximum practicable opportunity to participate in the performance of contracts. However, nothing herein shall be used to exclude any non-WMDVBE from equal opportunity to compete for utility contracts."

The parties at the two-day workshop did not reach agreement on this proposed language. However, in its Comments, the Joint Utilities proposed their own

modification to the Proposed Amendment. The Joint Utilities proposed replacing the second sentence with the following:

"However, this policy shall not be used to exclude qualified non-WMDVBEs from participating in utility contracting."

The Joint Utilities state that they suggest this modification because they are concerned that the Proposed Amendment could be construed as an expansion of GO 156 into a regulation governing the general procurement processes of utilities. The Joint Utilities also argue that their suggested modification clarifies the Commission's policy of not micromanaging the utilities' WMDVBE Programs. Finally, the Joint Utilities argue that the proposed "equal opportunity" language could be misleading and confusing when applied to utility procurement processes. No parties filed reply comments in opposition to the Joint Utilities' modification to the Proposed Amendment.

We disagree that the Proposed Amendment could be misconstrued as a regulation governing the general procurement process of the utilities or as the micromanaging the utilities' WMDVBE programs. Similarly, we do not find the "equal opportunity" language of the Proposed Amendment confusing. We have stated repeatedly in our decisions that the WMDVBE Program is intended to help establish a level playing field, not to give special advantage to particular players, and that no class of people can be excluded from participating. *Lam Securities Investment v. San Diego Gas & Electric Company*, D.91-02-012, mimeo. at p. 11 (1991); *Muse Cordero Chen, Inc., v. Pacific Bell*, D.90-12-032, 38 CPUC2d 5 (1990). While, we do not share the Joint Utilities' concerns about the misinterpretation of the Proposed Amendment, the Commission, nonetheless, finds the modification suggested by the Joint Utilities acceptable and fully consistent with other amendments that we adopt today, allowing all potential suppliers to participate in utility contracts. We adopt the Joint Utilities' modification.

Finally, the Commission has proposed amending Section 6.3.6. The parties were unable to reach agreement on this Proposed Amendment. Currently, Section 6.3.6 reads as follows:

"Each utility is encouraged to inform suppliers of products and services that subcontracting with WMDVBEs is a factor that will be considered, in the bid evaluation process. A statement to that effect could be included in all appropriate procurement documents."

The Proposed Amendment reads as follows:

"Each utility is encouraged to inform suppliers of products and services that suppliers' good faith efforts to subcontract with WMDVBEs is a factor that will be considered, in the bid evaluation process. A statement to that effect could be included in all appropriate procurement documents."

The parties were unable to reach agreement on this Proposed Amendment. The Joint Utilities proposed to modify this Proposed Amendment in their Comments. The Joint Utilities' would replace the proposed language of "suppliers' good faith efforts" with "suppliers' demonstrated efforts." In proposing this modification, the Joint Utilities argue that "good faith" is a term of art found in state and federal procurement and contracting laws that could be misinterpreted to apply to utilities. They argue that the word "demonstrated" gives the utilities more flexibility to design subcontracting efforts most appropriate to each specific utility. No party filed reply comments in opposition to the Joint Utilities' proposed modification. We disagree with the utilities' concerns about the term "good faith," a term that we have used in our own WMDVBE decision. The Commission adopts the original Proposed Amendment.

Proposed Amendments to Section 7 of GO 156

In D.96-04-018, the Commission proposed to amend Section 7 in order to make absolutely clear that any complainant may file a complaint under Section 7. These Proposed Amendments simply reflect the fact that PU Code § 1702 already allows for complaints to be filed with the Commission. The parties who reached accord at the workshop agreed to a wholesale replacement of the Commission's Proposed Amendments to this Section with an alternative proposal. The DVBE Network filed Comments in support of the Commission's original Proposed Amendments to Section 7 and in opposition to the Consensus Parties' proposed amendments. To facilitate the discussion, we will first present the Commission's Proposed Amendments before discussing the Consensus Parties' proposal and the DVBE Network's Comments.

Section 7.1 - Internal Utility Appeals Process presently reads as follows:

"Each utility shall provide a mechanism through which WMDVBEs or prospective WMDVBEs can present complaints to the utility's management."

The Commission proposed to add additional language to this section. The Proposed Amendment reads as follows:

"Each utility shall provide a mechanism through which WMDVBEs, prospective WMDVBEs, and non-WMDVBEs can present complaints to the utility's management."

Section 7.1.1 reads as follows:

"7.1.1 Complaints shall first be submitted to a WMDVBE program administrator within a reasonable time after the event complained of. WMDVBEs should be encouraged to make their complaints in writing."

The Commission also proposed to add additional language to this section. The Proposed Amendment reads as follows:

"7.1.1 Complaints shall first be submitted to a WMDVBE program administrator within a reasonable time after the event complained of. Complainants should be encouraged to make their complaints in writing."

Section 7.2 reads as follows:

"7.2 WMDVBE complaints to the Commission.

In the event that a WMDVBE believes that a utility WMDVBE program administrator's decision, or any other act or omission of the utility, violates any provision of law or of any order or rule of the Commission, the WMDVBE may file a complaint with the Commission pursuant to Public Utilities Code Section 1702 and Article 3 of the Commission's Rules ... and an existing or prospective WMDVBE, such as failure to win a contract award."

The Commission proposed to make a few language changes to this section. The Proposed Amendment reads as follows:

"7.2 WMDVBE complaints to the Commission.

"In the event that a complainant believes that a utility WMDVBE program administrator's decision, or any other act or omission of the utility, violates any provision of law or of any order or rule of the Commission, the complainant may file a complaint with the commission pursuant to Public Utilities Code Section 1702 and Article 3 of the Commission's Rules ... and an existing or prospective WMDVBE, or non-WMDVBE, such as failure to win a contract award."

Section 7.2.1 reads as follows:

"7.2.1 WMDVBE complaints filed with the Commission shall be handled..."

The Commission proposed to make some language changes to this section. The Proposed Amendment reads as follows:

"7.2.1 Complaints filed with the Commission pursuant to this general order, shall be handled..."

Section 7.2.2 reads as follows:

"7.2.2 The Commission's Office of the Public Advisor may assist WMDVBEs in preparing to file complaints against utilities."

The Commission proposed to make one language change to this section. The Proposed Amendment reads as follows:

"7.2.2 The Commission's Office of the Public Advisor may assist complainants in preparing to file complaints against utilities."

The WMDVBE Staff Report indicated that there was considerable discussion among the parties regarding the Commission's Proposed Amendments to Section 7. As previously stated, these Proposed Amendments simply reflect the fact that PU Code § 1702 already allows for complaints to be filed with the Commission. GO 156 does not confer any additional complaint rights other than those rights already set forth in PU Code § 1702. The Consensus Parties concluded that it made sense to simplify Section 7 altogether, obviating the need to make all the various minor adjustments set forth in the Commission's Proposed Amendments. Accordingly, the Consensus Parties have proposed the following amendments to Sections 7.1 and 7.2. Under their proposal, Section 7 would be rewritten as follows, combining Sections 7.1 and 7.2:

"7. COMPLAINT PROCESS

"Complaints relating to this general order shall be filed pursuant to PU Code § 1702 and Article 3 of the Commission's rules and procedures.

"7.1 The Commission will not, however, entertain complaints which do not allege violations of any law, Commission rule, order, or decision, or utility tariff resulting from such Commission action, but which instead involve only general contract-related disputes, such as failure to win a contract award."

Under the Consensus Parties' proposed amendments, Sections 7.3, 7.3.1 et seq. would be renumbered accordingly, starting as new Sections 7.2 et seq.

The DVBE Network opposes the Consensus Parties' proposed amendments.⁹ The DVBE Network states that they do not agree to mingle GO 156 issues with other CPUC appeals or complaints but desire to continue Sections 7.1 and 7.2 as proposed, preferring the continuance of the "Internal Utility Appeals Process" and the "WMDVBE Complaints to the Commission" sections as amended. As we stated in D.96-04-018, GO 156 does not confer any additional formal complaint rights other than those rights already set forth in PU Code § 1702. The WMDVBE Program does not have its own

⁹ The DVBE Network raises concerns that representatives from the DVBE community were not identified at the workshops nor were any DVBE representative invited from the current service list provided by R.93-09-026. For the record, on August 8, 1996, the ALJ sent out his "Administrative Law Judge's Ruling Scheduling Workshop," to the official service list. On August 12, 1996, the Calendar Clerk sent a "Workshop Notice," setting forth the time and place of the September 10, 1996, workshop to the official service list. The "Workshop Notice" also appeared on the Commission's Daily Calendar in advance of the scheduled workshop. On August 28, 1996, the ALJ issued his "Administrative Law Judge's Ruling Setting Workshop Agenda," to the official service list. On September 18, 1996, the ALJ issued another "Workshop Notice" which was mailed to the official service list, announcing the time and place for the October 15, 1996, workshop. That "Workshop Notice" also appeared on the Commission's Daily Calendar in advance of the workshop. According to the Reply Comments of the Joint Utilities, the transcript of the September 10, 1996 workshop, and to Commission WMDVBE Staff, DVBE representative Gerry Metz attended the September 10, 1996 workshop. If the DVBE Network was on the official service list of this proceeding, then the DVBE Network should have received copies of all of these notices. In addition, the Commission notices all of its public proceedings in its Daily Calendar, which is published daily and is available on the Commission's Web site (Web site Address: www.cpuc.ca.gov).

special set of CPUC appeal or complaint rights. We find merit in the Consensus Parties' proposal to simplify this section and will adopt the Consensus Parties' amendments in place of the Commission's Proposed Amendments to Section 7.

Proposed Amendments to Section 8 of GO 156

The Commission also is proposing amendments to Section 8 in order to make absolutely clear, consistent with Commission decisions, that the Commission's WMDVBE program is an equal opportunity program, aimed at maximizing participation of WMDVBEs in utility procurement contracting, and that goals are targets that utilities voluntarily, and in "good faith," strive to meet. The Commission has proposed amending the last sentence of Section 8 - Goals. Currently, the last sentence, immediately preceding Section 8.1 reads as follows:

"Substantial Goals' means goals which are realistic and clearly demonstrate a utility's commitment to increase WMDVBEs' share of the utility's purchases and contracts."

The Commission's Proposed Amendment reads as follows:

"Substantial Goals' means goals which are realistic and clearly demonstrate a utility's commitment to allow full and fair participation of WMDVBEs in utility purchases and contracts."

The Consensus Parties propose the following alternative language to the Commission's Proposed Amendment:

"Substantial Goals' means goals which are realistic and clearly demonstrate a utility's commitment to encourage the participation of WMDVBEs' in utility purchases and contracts."

The WMDVBE staff report states at p. 7 that the parties believe this minor modification to the Proposed Amendment is consistent with the WMDVBE statute which sought to "encourage" the participation of WMDVBEs in utility procurement. The Commission finds this amendment acceptable and agrees that it is consistent with the WMDVBE statute and with the Proposed Amendment we are adopting today to Section 6 of GO 156. We will adopt the Consensus Parties' suggested language.

The last Proposed Amendment that the Commission promulgated in D.96-04-018 was a new Section 8.13. The Commission proposed the following new Section 8.13:

"Goals are targets that utilities voluntarily, and in 'good faith,' strive to meet."

The Consensus Parties are recommending against the adoption of this new section. In the WMDVBE Staff report at p. 7, the report states that this addition is unnecessary, particularly since this point is made quite clear in D.96-04-018. While noting that this Proposed Amendment merely codifies existing Commission precedent, WMDVBE Staff, recommends that this new section be deleted in light of the consensus reached on this issue. The Commission agrees that this new section simply codifies existing Commission precedent, and, with or without this amendment, this is the Commission's stated policy. In this instance, we will accede to the Consensus Parties' request to delete this Proposed Amendment as unnecessary. Inasmuch that the Commission policy is clear on this point, the deletion of this Proposed Amendment will have no impact. We will adopt the Consensus Parties' recommendation and will not adopt this Proposed Amendment.

Consensus Parties' Additional Proposed Amendments to GO 156

During the workshops, the Consensus Parties decided that there were some additional modifications to GO 156 that were in order and have put forth amendments to Sections 5 and 10 of GO 156.

Proposed Deletion of GO 156 Section 5

Section 5 of GO 156 created a GO 156 Advisory Board. The purpose of this Advisory Board was to allow WMDVBE Staff to consult with the Board, and to seek advice on matters relating to GO 156 and PU Code §§ 8281-8286. This Section was in place at the beginning of the WMDVBE Program and served to help guide the WMDVBE Staff and all the parties in the initial implementation of the Program. The Consensus Parties recommend deleting Section 5 entirely. The WMDVBE Staff report recognized that, although the Board was convened in the early days of the program, it has been defunct for over two years. The WMDVBE Staff Report concluded that there

did not seem to be the need for a formal GO 156 Advisory Board at this stage of maturity of the WMDVBE program. WMDVBE Staff supported the deletion of Section 5 in order to accurately reflect the current status and practice under the WMDVBE Program. WMDVBE Staff also stated that the removal of this section in no way precludes informal interaction by any interested party with WMDVBE Staff on a variety of issues, or a request for initiation of formal processes on a case-by-case basis.

The DVBE Network opposes the deletion of Section 5. They state that the DVBE community will always appreciate the opportunity to be represented by appropriate personnel who understand issues and have the ability to articulate the DVBE perspective. They state that the perspective that they advocate is one where it is their intent to assist each and every utility to meet and exceed the 1.5% procurement participation goal. They argue the following:

"The key forum to exchange ideas is at the GO 156 Advisory Board where participants can come together not as adversaries but as entrepreneurs who collectively attempt to reach the same objectives. Although it may be unnecessary for the minority and/or women businesses communities to participate because they have attained their participation goals (15% and 5% respectively), it would be useful to benefit from their successes by way of personal anecdotal testimonies. Additionally, those new cellular utilities now being impacted by GO 156 could benefit their outreach program by hearing about both successful and unsuccessful activities to provide procurement opportunities."

The DVBE Network recommends a forum to exchange ideas at least on a quarterly basis, alternating between northern and southern California locations.

The only party filing reply comments on this issue was the Joint Utilities. The Joint Utilities argue that the purpose of Section 5 of GO 156 was to implement GO 156, consistently with the applicable sections of the PU Code. They argue that the implementation of GO 156 has been completed for many years and there is no need for the Advisory Board to provide its function. They further state that this is reflected by the fact that the Advisory Board is no longer in existence, and to, their knowledge, no one has complained about the discontinuation of their meetings. The Joint Utilities argues that the DVBE Network actually seeks a forum for increasing utility

procurement to meet the DVBE goal, which they believe is an issue specific to each utility and does not involve the operation of GO 156 as a whole. They believe this issue is best left to meetings between individual utilities and DVBEs.

The Commission agrees with the WMDVBE Staff report regarding the underlying purpose of the Advisory Board being that of initial WMDVBE Program implementation. The fact that the Advisory Board is currently defunct is not in dispute. In light of the history of the Advisory Board and of its current status, we agree that Section 5 should be deleted from GO 156. However, we note that the DVBE 1.5% participation goal is relatively new and that the DVBEs may feel the need to have discussions with both WMDVBE Staff and individual utilities regarding DVBE participation in utility procurement. We encourage DVBEs to contact and meet with our WMDVBE Staff and individual utilities informally with respect to the WMDVBE Program and DVBE participation. Nothing in this decision precludes the initiation of more formal process in the future, as needed, on a case-by-case basis.

Proposed Amendments to GO 156 Section 10

The Consensus Parties proposed an amendment to GO 156 Section 10, consistent with the other recommended changes to GO 156. The current preamble to GO 156 Section 10 reads as follows.

"10. ANNUAL PLAN

"Utilities shall serve twelve (12) copies on the Executive Director, by March 1 of each year, beginning in 1989, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprises procurement in all categories."

The Proposed Amendment would read:

"10. ANNUAL PLAN

Utilities shall serve twelve (12) copies on the Executive Director, by March 1 of each year, beginning in 1989, a detailed and verifiable plan for encouraging women, minority, and disabled veteran business enterprises procurement in all categories."

The Proposed Amendment substitutes the word "encouraging" for "increasing." We agree that language focusing on "encouraging" WMDVBE participation is consistent

with our WMDVBE Program and the other amendments we adopt today. No party opposes this amendment. We will adopt this change to Section 10 of GO 156.

Findings of Fact

1. The Commission promulgated Proposed Amendments to GO 156 in D.96-04-018.
2. On April 30, 1996, the ALJ issued a ruling soliciting comments from the parties on the Proposed Amendments.
3. Two days of workshops were held on September 10, 1996, and October 16, 1996, to discuss the Proposed Amendments.
4. Parties at the workshop (Consensus Parties) reached a consensus on proposed modifications to the Commission's Proposed Amendments, and suggested additional amendments. The Consensus Parties failed to reach consensus on a few Proposed Amendments.
5. On November 26, 1996, the WMDVBE Staff filed its "Report on the September 10, 1996, and October 16, 1996, Workshops and Recommendations Regarding the Proposed Amendments to General Order 156, R.93-09-026."
6. The WMDVBE Staff report summarized the Consensus Parties' proposed modifications to the Proposed Amendments.
7. The WMDVBE Staff supported the Consensus Parties' proposed modifications to the Commission's Proposed Amendments, and supported the Commission's Proposed Amendments where agreement had not been reached.
8. Parties filed comments and reply comments on the WMDVBE Staff report reflecting their positions on all outstanding issues.
9. The Commission adopts the Consensus Parties' modifications to the Commission's Proposed Amendments that were presented in the WMDVBE Staff Report as well as other amendments, consistent with the opinion.
10. Amendments and revisions to GO 156 are set forth in Appendix A, attached to this opinion.

Conclusion of Law

GO 156 should be amended consistent with this order.

IT IS ORDERED that:

1. General Order (GO) 156 is revised, consistent with this opinion. The Amendments and revisions to GO 156 are fully set forth in Appendix A, attached to this opinion.

2. Copies of this order shall be served upon all the parties to Rulemaking 93-09-026.

3. This proceeding is closed.

This order is effective today.

Dated November 5, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

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AMENDMENTS TO GENERAL ORDER 156

Section 5 of GO 156

Section 5 is deleted. The remaining Sections of GO 156 continue with their current numbering (i.e., Section 6 follows, it is not renumbered due to the deletion of Section 5).

Section 6 of GO 156

The first sentence of Section 6 of GO 156, will be amended as follows, replacing the existing language:

"6. UTILITY IMPLEMENTATION

"Each utility's WMDVBE program shall be designed to ensure that WMDVBEs are encouraged to become potential suppliers of products and services to the utilities subject to GO 156. Nothing in GO 156 authorizes or permits a utility to utilize set-asides, preferences, or quotas in administration of its WMDVBE program. The utility retains its authority to use its legitimate business judgment to select the supplier for a particular contract."

Section 6.1.1 will be amended as follows:

"6.1.1 Each utility shall ensure that its employees with procurement responsibilities receive training in the implementation of its WMDVBE program."

All the remainder of 6.1.1, including 6.1.1(1), 6.1.1(2) and 6.1.1(3) are deleted.

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Section 6.2 of GO 156 is amended, by adding a new Section 6.2.1(8).
as follows:

"Each utility is directed to offer the same assistance set forth in Section 6.2 to non-WMDVBES, upon request."

Section 6.3.5(1) of GO 156 is amended as follows:

"It is the policy of the utility that women, minority and disabled veteran owned business enterprises shall have the maximum practicable opportunity to participate in the performance of contracts. However, this policy shall not be used to exclude qualified non-WMDVBES from participating in utility contracting."

Section 6.3.6 of GO 156 is amended as follows:

"6.3.6 Each utility is encouraged to inform suppliers of products and services that suppliers' good faith efforts to subcontract with WMDVBES is a factor that will be considered in the bid evaluation process. A statement to that effect could be included in all appropriate procurement documents."

Section 7 of GO 156

Section 7 is amended as follows, combining Sections 7.1 and 7.2:

"7. COMPLAINT PROCESS

"Complaints relating to this general order shall be filed pursuant to PU Code § 1702 and Article 3 of the Commission's rules and procedures.

7.1 The Commission will not, however, entertain complaints which do not allege violations of any law, Commission rule, order, or decision, or utility tariff resulting from such Commission action, but which instead involve only general contract-related disputes, such as failure to win a contract award."

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Section 7.3, 7.3.1 et seq. are to be renumbered accordingly, starting as new Sections 7.2 et seq.

Section 8 of GO 156

Section 8 of GO 156 (preceding Section 8.1), is replaced with the following language:

“Substantial Goals’ mean goals which are realistic and clearly demonstrate a utility’s commitment to encourage the participation of WMDVBEs in utility purchases and contracts.”

Section 10 of GO 156

Section 10 will be amended as follows:

“10. ANNUAL PLAN

“Utilities shall serve twelve (12) copies on the Executive Director, by March 1 of each year, beginning in 1989, a detailed and verifiable plan for encouraging women, minority, and disabled veteran business enterprises procurement in all categories.”

Section 10.1 continues unchanged.

(END OF APPENDIX A)