

Decision 00-04-004 April 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Personnel Resources and Clarence A.
Hunt, Jr.,

Complainants,

vs.

Pacific Gas and Electric Company,

Defendant.

Case 99-09-024
(Filed September 14, 1999)

O P I N I O N

Summary

The motion of Pacific Gas and Electric Company (PG&E) to dismiss this complaint is granted.

Procedural History

On September 14, 1999, California Personnel Resources and Clarence A. Hunt Jr. (Complainants) brought this complaint against PG&E. Complainants allege seven causes of action that stem from Complainants' belief that PG&E is violating General Order (GO) 156.

On October 25, 1999, PG&E filed its answer. On November 5, Complainants filed a motion in both this proceeding and in Case (C.) 99-07-005 requesting that the Commission consolidate this proceeding with C. 99-07-005.

On November 4, 1999, PG&E filed in C.99-07-005 a response to Complainants' motion to consolidate.¹ We take official notice in this proceeding of PG&E's November 4 response filed in C.99-07-005. On November 8, 1999, a prehearing conference was held in this matter in San Francisco. On November 29, 1999, PG&E filed a motion to dismiss the complaint. On December 17, 1999, Complainants filed a response to PG&E's motion to dismiss. On December 27, 1999, PG&E filed a reply to Complainants' response to PG&E's motion to dismiss. This matter was submitted on December 27, 1999 with the filing of PG&E's reply.

Background

General Order (GO) 156 Section 6, states:

"Each utility's WMDVBE program shall be designed to ensure that WMDVBEs are encouraged to become potential suppliers of products and services 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."

GO 156 requires each utility to maintain an appropriately sized staff to implement WMDVBE program requirements (Section 6.1) and ensure that its employees with procurement responsibilities receive WMDVBE program

¹ Some confusion may exist regarding the procedural history of Complainants' motion to consolidate. It appears that Complainants may have served its motion to consolidate on PG&E prior to filing the motion with the Commission. Complainants' motion was formally filed in both this proceeding and C.99-07-005 on November 5, 1999. However, PG&E's response to the motion to consolidate was filed only in C.99-07-005 on November 4, 1999. We assume that Complainants served the motion to consolidate on PG&E prior to November 4, 1999, and subsequently filed the motion with the Commission on November 5, 1999.

training program (Section 6.1.1). Utilities are also required to implement an outreach program to inform and recruit WMDVBEs to apply for procurement contracts and to offer this same type of assistance to non-WMDVBEs upon request (Section 6.2).

Utilities are required to establish a subcontracting program for the purpose of encouraging prime contractors to utilize WMDVBE subcontractors as an enhancement to their prime contractor outreach programs (Sections 6.3 and 6.3.1), and to encourage and assist prime contractors to develop plans to increase the utilization of WMDVBEs as subcontractors (Section 6.3.4).

Utilities are required to monitor and include in their annual reports to the Commission a summary of prime contractor progress in increasing the participation of WMDVBE subcontractors (Section 6.3.7) and to include in their annual WMDVBE plans a description of future plans for encouraging both prime contractors and grantees to engage WMDVBE subcontractors (Section 6.3.8). Utilities are authorized to include awards to verified WMDVBE subcontractors in their WMBE results (Section 6.3.9).

While GO 156 requires utilities to establish initial minimum long-term goals (Section 8.2), and to annually set short, mid, and long term goals (Section 8), there are no penalties for failure to achieve such goals (Section 8.12). Utilities voluntarily, and in good faith, strive to meet these target goals. (*Order Instituting Rulemaking on the Commission's own motion to revise General Order 156* [Decision (D.)98-11-030] (1998) 1998 Cal.PUC LEXIS 1022, * 28-29; see also, *Systems Analysis and Integration, Inc. v. Southern California Edison* [D.96-12-023] (1996) 69 CPUC2d 516, at 526).

In *Order Instituting Rulemaking on the Commission's own motion to revise General Order 156*, [D.95-12-045] (1995) 63 CPUC2d 203, at 208-209, the Commission stated that goals are neither floors nor ceilings:

"[T]he Commission clarifies that goals are neither floors nor ceilings. The Commission directs the parties to § 1.3.13 of GO 156 which defines goal in the following manner: "'Goal' means a target which, when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota.' Thus, goals are targets that utilities voluntarily, and in 'good faith,' strive to meet. There are no repercussions if a utility falls below desired goals."

D.95-12-045 amended Section 8.12 of GO 156 to read: "[n]o penalty shall be imposed for failure of any utility to meet and/or exceed goals." (63 CPUC2d at 209 and 216 (Ordering Paragraph 1).)

GO 156 does not dictate that goals be met in each procurement contract or in any particular way:

"The utility may satisfy its yearly WMBE goal by the award of a single contract to a WMBE, or it may meet its goal through a number of small contracts awarded to many WMBEs. In fact, subcontracts awarded to a WMBE by a non-WMBE prime contractor who receives a procurement contract qualif[y] toward meeting the utility's yearly goal. ... It is entirely up to the utility to determine how the goal is to be met as long as the process is fair and all bidders for any contract are treated equally. We term this as a level playing field." (D.96-12-023, *supra*, 69 CPUC2d at 526.)

In *Re Rulemaking to Revise General Order 156* [D.96-04-018] (1996) 65 CPUC2d 265, 274, the Commission noted that:

"The Commission does not generally review nor approve the procurement decisions of utilities, except where there has been an allegation that the utility has engaged in unlawful discrimination or has in some other manner violated a statute, rule, or order of the Commission. We have always recognized that the utilities must use their best business judgment to select the best person for the particular procurement need. We also believe that the utilities are in the best position to design whatever incentives a utility deems necessary, to promote equal opportunity."

In *CMS Group, Inc. v. Pacific Bell* [D.98-07-024] (1998) 1998 Cal. PUC LEXIS 562, the Commission notes:

"[W]e have pointed out on several prior occasions that the submission of a proposal or bid by a WMDVBE, like a submission by any other bidder, is no guaranty that that particular bidder will be awarded the contract. Being a WMDVBE or having WMDVBE status gives no special privileges or advantages insofar as contract awards are concerned. The purpose of the WMDVBE program is to 'level the playing field' so as to give minority vendors and contractors knowledge of and a fair opportunity to compete for the provision of goods and services to covered utilities. It does not guarantee success in the effort to obtain a contract." (D.98-07-024, mimeo. at pp. 5-6; 1998 Cal. PUC LEXIS 562, *10-11.)

In this proceeding, Complainants offer the services of providing temporary personnel. Complainants desired to provide services to PG&E under the WMDVBE program.

Since January 1996, PG&E has contracted with a company called CORESTAFF² to provide and manage the temporary workforce that PG&E needs from time to time to augment its clerical and technical staff. In order to receive PG&E business, other vendor firms and individuals filling temporary personnel needs must associate with CORESTAFF or one of its subcontractors. Prior to contracting with CORESTAFF, PG&E contracted directly with numerous companies.

Under the CORESTAFF contract, PG&E submits job orders for temporary clerical or technical personnel as needed, and CORESTAFF is expected to fill those job orders with candidates meeting PG&E's qualifications. CORESTAFF itself fills some job orders either directly or through its division, CORESTAFF

² The original agreement was with Roberta Enterprises, which was subsequently purchased in January 1997 by CORESTAFF.

Technology Group. Other orders are filled by referral to one or more CORESTAFF approved secondary vendors. Under the CORESTAFF agreement there is no requirement that all vendors on the secondary list be contacted about all or any orders. PG&E states that the secondary list of vendors changes with CORESTAFF's business needs.

The Complaint

The complaint contains seven allegations.

First allegation – Violation of GO 156

Complainants' first allegation states that:

"...PG&E has abdicated its responsibilities with regard to hiring, selection and renewal of auxiliary vendor contracts to a company that has no direct legal responsibility for compliance with General Order 156."

Complainants then ask if:

"...using the Corestaff subcontracting program as a replacement for PG&E's WMBDVE prime contractor award program violates the spirit, intent, and substance of GO 156 section 6.2?"

Second allegation - Fraud and Deceit

Complainants' second allegation concerns fraud and deceit. Complainants state that CORESTAFF told Hunt that in return for Hunt becoming an approved vendor, Hunt could expect 25 to 50 job orders per month and annual billings of at least \$500,000. Based on that promise, Complainants assert they became a sub-vendor to CORESTAFF. Complainants then state that, without explanation from CORESTAFF, complainants did not receive the magnitude of orders promised. Complainants state that they would have never entered into the approval process and passed up other job opportunities if they had known that "PG&E had no intent to honor its agreement" with Complainants.

Complainants state that a CORESTAFF employee told Samuel Anderson³ not to give orders to Hunt. Additionally, Complainants allege that CORESTAFF staff told Anderson not to tell Hunt that he is not getting job orders. Complainants believe that this alleged false communication forms the basis for a claim for deceit.

Third Allegation – Racial Discrimination

Complainants allege that PG&E refused to give job orders to Hunt because of his race. In support of this claim, Complainants allege that an internal CORESTAFF document refers to Hunt as an "angry racist" and that Hunt was referred to as "the devil's own" by CORESTAFF managers. Complainants also believe that Hunt was retaliated against for complaining about racial discrimination in a 1988 complaint case.

Fourth Allegation – Negligence

Complainants state that PG&E was reckless and careless in its supervision of CORESTAFF. The Complainants assert that the PG&E supervisor assigned to oversee CORESTAFF could not say in her deposition whether the percentage goals contained in GO 156 represented a minimum or maximum. The same PG&E supervisor questioned a CORESTAFF employee as to whether job orders were sent to all approved vendors. Further, the same PG&E supervisor directed the CORESTAFF employee to send job orders to all approved vendors. However, Complainants believe that the PG&E should have done more to verify complaints filed by Anderson.

³ Anderson has also filed a complaint against PG&E. C.99-07-005, the case Complainants sought to consolidate with this matter, is Anderson's complaint against PG&E.

In addition, Complainants allege that CORESTAFF and PG&E used numerous different forms to track WMDVBE vendors, and that PG&E is not consistent with regard to who is an approved vendor. Complainants also contend that PG&E did nothing when it first learned about allegations made by Anderson.

Finally, Complainants allege that PG&E may have included in its WMDVBE reports contracts with Pinnacle Staffing, a company that is allegedly controlled by CORESTAFF and thus not a WMDVBE.

Fifth Allegation – Conspiracy

Complainants assert that a scheme existed between CORESTAFF and PG&E to deny job orders to approved vendors and to keep the job orders for CORESTAFF. The factual basis of Complainants' allegation is that meetings were held on December 18, 1998 and on January 11 and 26, 1999, regarding mark up information for bidding jobs.

Also, Complainants rely upon an e-mail stating that it is important that a vendor certify as WMDVBE qualified. Complainants also assert that CORESTAFF Technology Group was getting "first crack" at technical orders.

Sixth Allegation – Theft of Employees

Complainants allege theft of employees. The factual basis of the allegation is that CORESTAFF's predecessor, Roberta Enterprises, placed transitioning workers onto its payroll. Complainants asks if this is the level playing field envisioned by GO 156.

Seventh Allegation – Safe Harbor

Complainants' seventh allegation is unclear. Complainants refer to an organization or program named "Safe Harbor" and allege that Complainants apparently lost workers to Safe Harbor. Complainants allege that Safe Harbor is a CORESTAFF-controlled company.

Position of Complainants

Complainants seek all damages allowed by law. Complainants basically believe that a calculated plan exists between CORESTAFF and PG&E to deny Complainants a practical opportunity to participate in contracts with PG&E under the WMDVBE program.

Position of PG&E

PG&E believes that Complainants do not allege a violation by PG&E of the WMDVBE statute, GO 156, or of any other law, or order or rule of the Commission. PG&E states that most of Complainants' allegations concern the activities of CORESTAFF, not the activities of PG&E.

Additionally, PG&E contends that Complainants have no standing to assert these claims in a Commission complaint proceeding since PG&E believes they are not WMDVBEs and since they do not allege that PG&E itself violated any statute or rule or order of the Commission. PG&E also asserts that, to the extent Complainants' believe PG&E has not met its WMDVBE goals, it should address this issue in the annual WMDVBE proceeding referenced in *Minority Business Enterprise Legal Defense & Education Fund and Liberty Builders v. Pacific Gas & Electric Company* [D.94-10-048] (1994) 56 CPUC2d 694, 1994 Cal. PUC LEXIS 687. PG&E further asserts that a dispute resolution agreement between PG&E and Hunt precludes Complainants from bringing this complaint against PG&E. PG&E states that the dispute resolution agreement specifically requires Hunt to arbitrate any "claims of discrimination or disadvantaged treatment by Hunt and/or Hunt entities..."

Attached to PG&E's answer is a copy of a dispute resolution agreement between Hunt and PG&E. The agreement states that:

"Any controversy or claim that may arise January 1, 1994 onward between Clarence Hunt, Jr. (Hunt) and/or any entity owned or controlled by Hunt, or in which he is a founder or initiator,

including but not limited to Allied Temporaries, Inc., (collectively "Hunt entities"), on the one hand; and Pacific Gas and Electric Company (PG&E), its officers, directors, agents, attorneys, employees, successors or affiliated entities, on the other hand, shall be settled in accordance with the dispute resolution procedure set forth below. This procedure shall cover, but not be limited to, claims of discrimination or disadvantaged treatment by Hunt and/or Hunt entities, of whatever sort, and based on statute, regulation, constitution, and/or common law. It shall also cover all claims of whatever sort sounding in contract or tort, as well as all claims under statute, government regulations, and the United States or California Constitutions, including, but not limited to, claims under P.U.C. §§ 453, 2106, 8281, et seq.; GO 156. This Agreement pertains to Hunt only in his capacity as owner or controlling manager of a business, and does not affect his rights as an individual consumer or in the event of non-business related injury to his person...."

The dispute resolution agreement expands further on the particular steps to be taken for resolving a dispute.

Discussion

Complainants have made a broad array of allegations ranging from racial discrimination to negligence. In general, we find that Complainants do not allege facts sufficient to support their claims. Also, most of Complainants' allegations concern the activities of CORESTAFF, an entity we do not regulate. Additionally, Complainants are barred from bringing some of the allegations before the Commission due in part to the existence of a dispute resolution agreement, and in part to the fact that Complainants seek monetary damages that the Commission does not award.

Standing

Prior to addressing Complainants' individual allegations, we address PG&E's defense that Complainants lack standing.

GO 156 Section 7, states in most relevant part that:⁴

"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."

As noted in D.98-11-030, *supra*, "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 special set of CPUC appeal or complaint rights." (1998 Cal. PUC LEXIS 1022, *25.) Any complainant may file a complaint under GO 156 Section 7, regardless of their status as a WMDVBE. COMPLAINANTS assert that it is a verified WMDVBE. Even if COMPLAINANTS were not verified, it would still have standing to file a complaint under GO 156 Section 7, subject to the Section 7.1 limitation on complaints raising general contract disputes.

Commission Forum

In its defense of Complaints' allegations of GO 156 violations, PG&E raises issues concerning the proper forum for addressing GO 156 violations. In D.95-12-045, *supra*, the Commission addressed the appropriate

⁴ GO 156 Sections 7.2 and 7.3 establish specific procedures governing complaints concerning verification decisions of the contractor the Commission has engaged to review applications for verification of WMBE status. Because the clearinghouse contractor is not a public utility, and thus not subject to PU Code Section 1702, it was necessary to develop a process by which clearinghouse decisions could be formally reviewed. Since the current complaint does not involve clearinghouse verification decisions, GO 156 Sections 7.2 and 7.3 are irrelevant.

forum for reviewing complaints challenging a utility's WMDVBE goal achievements:

"In D.89-08-026, we held that an annual generic proceeding was the proper forum for resolution of complaints challenging a utility's WMDVBE goal achievements.

We now find that the proper means for resolving complaints challenging a utility's WMDVBE goal achievement is informal review by Commission WMDVBE staff. This review comports with the voluntary nature of the utilities' efforts to achieve goals, and allows staff to meet and confer with the utility in an effort to enhance the utility's effectiveness." (63 CPUC2d at 215 (Findings of Fact 22 and 23); see also, discussion at 63 CPUC2d at 210-211.)

The Commission ordered that:

"3. Challenges to utility Women/Minority/Disabled Veteran Business Enterprise (WMDVBE) outreach efforts or achievement levels shall be referred to and reviewed by the Commission's WMDVBE Program Manager, who shall examine and evaluate it in light of the WMDVBE participation levels set forth in the affected utility's yearly WMDVBE reports filed with the Commission." (63 CPUC2d at 216 (Ordering Paragraph 3).)

Given our order in D.95-12-045, it would, of course, be inappropriate to direct Complainants to an annual generic proceeding for review of the portions of their complaint challenging PG&E's contracting achievements. To the extent that Complainants challenge PG&E's contracting achievements, they are free to review these concerns with the Commission's WMDVBE staff.

Since GO 156 Section 8.12 expressly states that: "[n]o penalty shall be imposed for failure of any utility to meet and/or exceed goals," Complainants could not successfully allege that any possible failure of PG&E to meet goals constituted a violation of GO 156.

Complainants' allegations that PG&E may in its WMDVBE report have included contracts with Pinnacle Staffing and that Pinnacle Staffing is not a

WMDVBE raise questions of integrity that can best be addressed by PG&E reviewing Pinnacle Staffing's WMDVBE status and refrain from including contracts with Pinnacle Staffing in its WMDVBE results if Pinnacle Staffing is in fact not a WMDVBE.

Violation of GO 156

Complainants contend that PG&E has abdicated its responsibilities for compliance with GO 156 because PG&E has replaced its WMBDVE prime contractor award program with the CORESTAFF subcontracting program. Complainants ask if PG&E's program violates the spirit, intent, and substance of GO 156 Section 6.2.

PG&E denies that it has in any manner abdicated or delegated to CORESTAFF its responsibilities for implementation of GO 156. PG&E states that it administers its own WMDVBE programs with a full time staff of four plus an intern, and that it has never used an outside contractor to administer its commitment to supplier diversity. PG&E states that all PG&E vendors, including CORESTAFF, are expected to assist the company in meeting its WMDVBE goals. PG&E states that since approximately January, 1996, it has had a master contract with CORESTAFF to provide and manage the temporary agency workforce PG&E needs from time to time to augment its clerical and technical staff. PG&E claims to have entered into this contract as part of a "Smart Spending" program to reduce costs by consolidating purchases through fewer vendors, thereby obtaining volume discounts and transactional cost savings. PG&E denies that its CORESTAFF contract encompasses the administration of all secondary vendors, stating that this is only one of many PG&E procurement contracts and is limited to the provision of temporary clerical and technical staff. PG&E acknowledges that vendor firms and individuals needed to associate with CORESTAFF or one of its subcontractors to receive PG&E business, and that, as one of many

approved vendors, CORESTAFF itself fills some job orders either directly or through its division, CORESTAFF Technology Group (CTG). PG&E notes that other orders are filed by referral to one or more CORESTAFF approved secondary vendors, and avers that there is no legal or contractual requirement that all vendors on the secondary vendor list be contacted about all or any orders.

It is evident that Complainants and PG&E disagree over the extent to which CORESTAFF is responsible for PG&E's procurement of products and services, and for implementing PG&E's responsibilities under GO 156.

In determining whether to grant PG&E's motion to dismiss Complainants' claim regarding PG&E's alleged violation of GO 156, we must view the alleged facts, and the exhibits attached to the Complaint, in the light most favorable to Complainants. Doing so, we conclude that the allegations do not support a finding of a violation of the spirit, intent, or substance of GO 156.

First, the Complaint states that: "PG&E has basically abdicated its responsibilities with regard to the hiring, selection and renewal of auxiliary vendor contracts to a company that has no direct legal responsibility for compliance with 156." (Complaint at 2.) In support of this allegation, the Complaint references Exhibit 3, which is single sheet of paper headed "GENERAL ORDER 156" which states in full that:

"The goals of this contract shall be to purchase a minimum of fifteen (15) percent of the services provided under this Contract from minority-owned business enterprises; a minimum of five (5) percent of the services provided under this Contract from women-owned business enterprises; and a minimum of one and a half (1.5) percent of the Services provided under this Contract from disabled veteran business enterprises."

The Complaint then asks: "[d]oes using the Corestaff subcontracting program as a replacement for PG&E's WMDVBE prime contractor award program violate the spirit, intent and substance of GO 156 Section 6.2?" As

outlined above, GO 156 Section 6.2 sets forth requirements for utility external outreach programs designed primarily to identify WMDVBE contractors, inform such contractors of potential business opportunities, encourage utility employees with procurement responsibilities to be sensitive to the capabilities of WMDVBEs, and offer the same assistance to non-WMDVBEs upon request.

Assuming that Exhibit 3 is alleged to be part of PG&E's contract with CORESTAFF, we find that Exhibit 3, viewed in any light, cannot be seen as an abdication of PG&E's responsibilities under GO 156. This exhibit simply states that a goal of the contract is procurement consistent with PG&E's own WMDVBE goals.

Under the heading of its second allegation, Fraud and Deceit, the Complaint states in part:

"In 1996, PG&E delegated to a company called 'Roberta Enterprises,' later to be called Corestaff Services, Inc., Corestaff (California), Inc., the administration of and hiring of all secondary vendors. A true and accurate copy of selected pages of the Master Contract between PG&E and Corestaff is attached hereto and referred to as Exhibit 4. This Contract contained numerous provisions pertaining to Corestaff's understanding of and obligation to comply with 156. Additionally, Corestaff was required to advise each subvendor of their obligations under 156. (Exhibit 2.)"

The referenced master contract pages fully support the Complaint's statements that the Contract between PG&E and CORESTAFF contained numerous provisions pertaining to CORESTAFF's obligations to comply with GO 156 and to advise subcontractors of their obligations under GO 156.⁵ For example, Contract Section 6.4 states that:

⁵ The exhibit number references in the Complaint do not correlate well with the actual exhibits. For example, Exhibit 4, referenced on page 3 of the Complaint as selected pages of the Master Contract between PG&E and CORESTAFF, is actually an August 8,

Footnote continued on next page

"Before completing a signed agreement, Contractor shall provide Subcontractor a copy of California Public Utilities Commission General Order 156 and PG&E's Equal Opportunity Purchasing Program statement of policy. As part of a signed agreement, Contractor shall obtain Subcontractor's acknowledgment of receipt of these items and an agreement to comply with both the spirit and the letter of both of the above."

And under Section 6.7, entitled "EQUAL OPPORTUNITY PURCHASING PROGRAM (EOPP)," the Contract provides among other things that:

"6.7.1 No more than sixty (60) days from the commencement of this Contract, Contractor shall submit to PG&E, in writing, a plan in accordance with the requirements of EOPP (see Exhibit 2) of the General Conditions regarding how Contractor will contribute to PG&E's goals of purchases with women, minority, and disabled veterans business enterprises (WMDVBE).

6.7.2 The goals of Contractors plan shall be to purchases a minimum of (fifteen (15) percent of the services provided under this Contract from minority-owned business enterprises; a minimum of five (5) percent ... from women-owned business enterprises; and a minimum of one and one-half (1.5) percent ... from disabled veteran business enterprises.

6.7.3 Contractor's plan shall include the following:

6.7.3.1 Contractor shall provide PG&E with a list of certified WMDVBE's doing business with Contractor as of the Contract execution date. Business enterprises on the list

1997, letter from PG&E to CORESTAFF authorizing changes in the contract between Roberta Enterprises and PG&E which allow CORESTAFF to assume Roberta Enterprise's rights, liabilities, and obligations, and reciting CORESTAFF's agreement to indemnify PG&E for any and all claims, loss, expense or damage that may arise under the contract between Roberta Enterprises and PG&E and under CORESTAFF's assumption of the contract. The actual Exhibit 5 appears to include the pages referenced as Exhibit 4. Alternatively, the Complaint's subsequent reference to Exhibit 2 may a mistranscription of Exhibit 5.

will be categorized as either direct (Subcontractors used by Contractor to provide Agency Workers to PG&E under this Contract) or indirect (services and products purchased by Contractor for Contractor.

Primary certification of WMDVBE's shall be the California Public Utilities Commission (CPUC) WMDVBE Clearinghouse or CPUC Clearinghouse comparable agencies ...

- 6.7.3.2 Contractor shall provide monthly and monthly year-to-date reports to PG&E, showing total dollars Contractor has spent with WMDVBE's pursuant to this Contract no later than the 10th calendar day of each month for each successive year during the Contract term."

Section 8 of the Contract sets forth performance criteria, and states in part that certain services and deliverables will be accepted by PG&E only if the Section 8 requirements are met. One requirement, in Section 8.5, is that "Contractor shall demonstrate to PG&E's satisfaction that a minimum of five (5) percent of work requests are being placed with women owned business enterprises" and so on.

Viewed in the light most favorable to Complainants, the Complaint text and supporting exhibits regarding PG&E's alleged abdication of GO 156 responsibilities to CORESTAFF do not support the allegation that PG&E's actions in contracting with CORESTAFF violate the letter or spirit of GO 156. On their face, they do not suggest that any abdication occurred; instead, they suggest that PG&E went to some length to ensure that its contractor - CORESTAFF - well understood its contractual obligation to help PG&E meet its equal opportunity goals and to inform subcontractors about GO 156 and its implications.

Pursuant to GO 156, utilities are expected to have programs designed to ensure that WMDVBEs are encouraged to become potential suppliers of products and services to utilities. The Commission assumes that utilities will continue to

make voluntary good faith efforts to award a portion of their total annual procurement contracts to companies owned and operated by WMDVBEs. GO 156 does not dictate that goals be met in each procurement contract, or that they be met in a particular way. Indeed, GO 156 Section 8.12 makes clear that there will be no penalties for failure to meet goals altogether. It is up to the utility to devise and implement a plan designed to increase participation by WMDVBEs in the procurement of goods and services by that utility. (D.96-12-023, *supra*, 69 CPUC2d 516.)

In this instance, even if we assume for the purpose of considering PG&E's motion to dismiss that PG&E had replaced its prime contractor award program with the CORESTAFF subcontracting program, we find no inherent violation of the letter or spirit of GO 156. There is nothing unlawful about a utility's decision engage a contractor to perform certain contract management functions the utility would otherwise need to perform directly. Complainants' dislike of PG&E's new program does not constitute a violation of GO 156.

Fraud and Deceit

Complainants describe as fraud and deceit a contractual dispute it has with CORESTAFF. The relief Complainants seek is unclear. To the extent Complainants seek damages or award of future business, we dismiss Complainants' allegations on ground that the Commission does not award damages. Furthermore, past Commission decisions have generally refused to entertain complaints brought to enforce the terms of a contract, to establish the existence of a contract, or to compel a contract in the context of GO 156.

Racial Discrimination

Given colorable evidence of racial discrimination by a regulated utility or its agent, we would consider such a claim. In this instance, however, the evidence tendered by Complainants is a hand-scribbled note that says "angry

racist" next to Complainants' name. The note is made upon a 1998 approved WMDVBE list of vendors. Samuel Anderson, a former CORESTAFF employee who has also filed a complaint against PG&E, made the note. Complainants assert that Anderson made the note at the direction of Dougherty, a manager at a CORESTAFF office. Other notes appear on the same WMDVBE list next to the names of other WMDVBE vendors. These notes purportedly state business-related reasons for granting or denying contracting opportunities. For instance, next to names of other WMDVBE vendors appear hand-scribbled notes stating "great relationship," "finance only," "unorganized," "immature," "very messy." Other descriptive characterizations such as "evil person" also appear next to the names of vendors other than Complainants that may reflect a lack of professionalism on the part of CORESTAFF, but not racial discrimination.

In determining whether to grant PG&E's motion to dismiss Complainants' claim of racial discrimination, we must view the alleged facts in the light most favorable to Complainants. Doing so, we conclude that the allegations do not support a finding of racial discrimination. None of the allegations made by Complainants show that CORESTAFF or PG&E were discriminating against Complainants based on Hunt's race or national origin in awarding contracts. The term "angry racist" could refer to a person of any race or national origin.

In this instance, we find that facts recited by Complainants are insufficient to support a claim of racial discrimination. However, we direct PG&E to make efforts within its managerial discretion to ensure that it and its agents gauge a vendor's ability by using objective performance criteria, not by subjective and inflammatory epithets.

Negligence

Complainants claim that PG&E was reckless and careless in its supervision of CORESTAFF. Again, the specific relief sought is unclear. The claim appears to

treat recklessness and carelessness as synonymous. Complainants make no allegations that would rise even to the level of negligence, let alone recklessness.

One basis of Complainants' allegation is that Qualls, a PG&E Human Resources Planning and Development employee assigned to oversee PG&E's contract with CORESTAFF (Complaint at p. 5 (footnote 6) and Exhibit 4) could not state in her deposition whether the percentage goals contained in GO 156 represented a minimum or maximum. The confusion of an employee on a single point does not establish carelessness or recklessness.

Complainants also believe that the PG&E should have done more to verify complaints filed by Anderson. As best we can determine, one of Anderson's allegations is that:

"Ms. Qualls asked him if he was sending job orders to all approved vendors and when he evaded a direct answer because that was not true, she ordered him to send job orders out to all approved vendors. Yet, Ms. Qualls did nothing to investigate on her own or report this critical allegation to PG&E. ... When asked what she did upon receiving this complaint, Ms. Qualls stated that she asked [CORESTAFF On-Site Manager] Dougherty to start preparing a weekly vendors report rather than the monthly and quarterly reports that had been done prior. She further admitted that she still did not ask Dougherty if the allegations were true. When asked why, she simply stated at her deposition that he did not think it was necessary because she went back and checked and 'we made our goals.' This of course is not true; PG&E failed miserably to fulfill their minority hiring goal of 15%." (Complaint at 5.)

Complainants go on to allege that Qualls "was notified "in passing" that "CPR was cut," and that CORESTAFF Manager Dougherty believes that there is a 25% WMDVBE procurement requirement. (Id.) Complainants next state that:

"This explanation for her failure to verify Anderson's complaints fails for two reasons: First Corestaff and PG&E by it OWN admission, did not make its hiring goals. Minorities were only placed in the 9% range, not the 15% required. Part of the program

(sic) could be simply that Ms. Qualls was unfamiliar with the specific sub-targets of 156. [Footnote omitted.] This is negligent training by PG&E. The second problem with the explanation is that even the minority reports were incorrect and falsely listed one non-WMBE vendor (Pinnacle) as a WMBE. This later allegation should be of utmost importance to the Commission because it now calls into question the validity of all information submitted to you by PG&E." (Id.)

Assuming all these facts to be true, the evidence is insufficient for us to find that PG&E was negligent in its supervision of CORESTAFF.

First, GO 156 does not require that utilities send job orders to all approved vendors or any specific set of WMDVBES. Such a requirement would be inconsistent with our policy decision to refrain from micro-managing utility procurement practices. Further, a universal requirement that utilities offer bidding opportunities to all potentially qualified businesses would not be reasonable or practical.

In *Allied Temporaries, Inc. v. MCI Telecommunications Corporation* [D.92-01-022] (1992) 43 CPUC2d 114, 1992 Cal. PUC LEXIS 22, *5-6, we noted that:

"In D.91-05-025, *Allied Temporaries, Inc. v. Southern California Gas Company*, Reh. Den. D.91-08-034, we held that no prebid conference, formal bidding process, or even competitive bidding is required by either Public Utilities Code Sections 8281-8285 or GO 156. ...

Likewise, in D.91-01-012, *Lam Securities Investment v. San Diego Gas & Electric Company*, et al., ... we held that neither the WMBE statute nor GO 156 requires a utility to deal with or hire any particular vendor seeking a contract; it need only establish a level playing field for all vendors."

Although Complainants allege that CORESTAFF did not offer job opportunities to certain WMDVBES on the approved secondary vendor list, they offer no evidence that opportunities were denied on the basis of WMDVBE status. The secondary vendor provided as Exhibit 15 lists both WMDVBES and

non-WMDVBEs, with positive notes next to the names of some WMDVBEs and non-WMDVBEs, and negative notes next to the names of some WMDVBEs and non-WMDVBEs. The Complaint itself notes that approximately half of the approved vendors are WMDVBEs. (Complaint at 7.) Whether or not CORESTAFF limits job opportunities for secondary approved vendors as Complainants' allege, and whether or not such limitations violate CORESTAFF's contract with PG&E or PG&E's own procurement policies, we see nothing here to suggest CORESTAFF uses WMDVBE status as a basis for its actions. From a WMDVBE status standpoint, the playing field appears level.

Second, Anderson's statement that Qualls asked him whether he was sending job orders out to all approved vendors and ordered him to do so when he answered evasively, and Qualls' statement that she responded to Anderson's allegations by requiring weekly, rather than monthly or quarterly, vendor reports, appear to show Qualls' concern that PG&E's procurement practices proceed properly. Since Section 6.7.3.2 of the PG&E contract with CORESTAFF only requires monthly reports (Exhibit 5), Qualls' actions reflect concern rather than negligence.

Third, the allegations regarding Qualls' knowledge of Complainant's status and CORESTAFF Manager Dougherty's understanding of PG&E procurement goals do not, even if true, show negligent oversight of CORESTAFF on the part of PG&E.

Fourth, while the 1998 WMDVBE Report PG&E filed with the Commission suggests that PG&E did not fail miserably to meet its minority contracting goal, even if we accept as true Complainants' allegations regarding CORESTAFF and PG&E's failures to meet PG&E's goals and Qualls' unfamiliarity with certain

elements of GO 156, we still find neither negligent supervision nor any violation of the substance or spirit of GO 156.⁶ We repeat once again that GO 156 does not require that utilities meet their WMDVBE goals or impose any penalties for the failure to do so.

Fifth, we addressed Complainants' allegations regarding reporting of contracts with Pinnacle Staffing in our discussion of the appropriate forum for raising concerns regarding utility WMDVBE achievements, and will not repeat that discussion here.

The remainder of the allegations of negligent supervision, including the allegations that PG&E was made aware of the failure of PG&E and CORESTAFF to give complainants contract opportunities, raise disputes which are contractual in nature and presumably should be governed by the dispute resolution agreement.

On the whole, Complainants invite us to believe there's a fire where we can't even see smoke.

Conspiracy

Complainants' allegation of conspiracy is as feeble as the negligence theories discussed above. Complainants may pursue this allegation in a proper forum (presumably the dispute resolution process created by agreement with PG&E).

⁶ We take official notice that the WMDVBE Reports PG&E filed with the Commission indicate that PG&E spent \$88.3 million (12.81% of net procurement) on contracts with minority business enterprises in 1998, and \$92.1 million (13.62% of net procurement) on such contracts in 1999.

Theft of Employees

Complainants' allegation of employee theft presumably should be governed by the dispute resolution agreement for the reasons stated above. Even if this were not the case, the allegations and supporting exhibit do not on their face show any colorable claim of racial or ethnic discrimination. Exhibit 6, which suggests that "Agency Workers recruited by PG&E will be placed on CORESTAFF's payroll as opposed to being given a 'choice,' for the following reasons: ..." says nothing whatsoever about WMDVBE status. Presumably, all Agency Workers would be treated the same, regardless of WMDVBE status. While Complainants may disagree with PG&E and CORESTAFF's contractual practices, we will not address this general contract dispute here.

Safe Harbor

Complainants' seventh allegation does not inform us why PG&E's use of Pinnacle Staffing as a safe harbor entity would violate GO 156, and Exhibit 6 suggests that PG&E was seriously considering ending the safe harbor program in 1998. Exhibit 6, in fact, suggests that Complainants' allegation that Pinnacle Staffing is PG&E's only safe harbor provider may not be accurate. Exhibit 6 states in pertinent part that:

"Effective immediately, Pinnacle Staffing will be the only Safe Harbor provider to PG&E *adding new employees to its payroll*. As a decision is expected in late January of 1998 with regard to ending all "new" Safe Harbor employees, this change, (while in keeping with our Master Contract with PG&E) should have little or no effect on current operations." (Italics in original.)

We read this language as implying that PG&E may have utilized other safe harbor providers in the past. Complainants do not address the question whether any such other providers may have been WMDVBEs.

We decline to put the flesh on the bones of such an unclear allegation. We note, however, that to the extent Complainants may be alleging that they lost business to Pinnacle Staffing because of some improper action by PG&E, the allegation appears to be one which should be governed by the dispute resolution process agreed to by Complainants.

Motion to Dismiss

For all the above foregoing reasons, we find that Complainants either have failed to state a cause of action or otherwise should be barred from bringing this complaint. Thus, we grant PG&E's motion to dismiss.

Motion to Consolidate

Since we grant PG&E's motion to dismiss, the motion to consolidate is moot and therefore denied.

Need for Hearing

This matter was categorized as an adjudicatory proceeding and the instructions to answer indicated that an evidentiary hearing was needed. In resolving this matter, we view the facts in the light most favorable to Complainants, but even so we grant PG&E's motion to dismiss. Thus, no factual dispute exist that requires an evidentiary hearing, and we change the prior determination from evidentiary hearing is required to no evidentiary hearing is required.

Comments on Draft Decision

The draft decision of ALJ DeUlloa in this matter was mailed to the parties in accordance with Section 311(g) of the Public Utilities Code and Rule 77.1 of the Rules of Practice and Procedure. Comments were filed on March 16, 2000 by PG&E. No reply comments were filed.

Findings of Fact

1. Complainants do not allege that PG&E has not met its overall annual target goal for WMDVBE participation under GO 156.
2. Complainants seek to have the Commission examine the spirit, intent and substance of GO 156.
3. PG&E contracted with CORESTAFF as part of a cost savings program wherein CORESTAFF manages for PG&E the procurement of temporary workers to provide clerical and technical services, both providing such workers directly or through its CORESTAFF technical Group Division, or through subcontracts with outside suppliers.
4. Complainants have a contractual dispute with CORESTAFF concerning an alleged promise that was made regarding the amount of business Hunt would receive, 25 to 50 job orders per month and annual billings exceeding \$500,000.
5. Complainants state no specific relief associated with the claim for fraud and deceit.
6. A dispute resolution agreement exists between Complainants and PG&E.
7. The dispute resolution agreement covers claims related to "discrimination or disadvantaged treatment by Hunt and/or Hunt entities, of whatever sort, and based on statute, regulation, constitution, and /or common law."
8. Complainants allege that a CORESTAFF employee scribbled by hand a note that says "angry racist" next to Complainants' name. The note is made upon a 1998 approved WMDVBE list.
9. None of Complainants' allegations refer to an action that was taken by PG&E or CORESTAFF based on Complainants' race or national origin.
10. Complainants have not alleged facts that support a finding that PG&E was reckless or careless in its supervision of CORESTAFF.

11. Complainants have not alleged facts that support a finding that PG&E has negligently administered GO 156.

12. Complainants' allegation of employee theft is a contractual dispute.

13. Complainants' allegation regarding Safe Harbor is unclear.

14. This matter is submitted with the filing of PG&E's reply on December 27, 1999.

Conclusions of Law

1. GO 156 does not dictate that specific goals be met in any particular manner or impose any penalties for failure to meet goals.

2. PG&E has not abdicated its responsibilities for compliance with GO 156 by contracting with CORESTAFF for the management of its procurement of temporary workers to provide clerical and technical services.

3. PG&E has not violated the letter or spirit of GO 156.

4. The Commission does not generally entertain complaints brought to enforce the terms of a contract, to establish the existence of a contract, or to compel a contract in the context of GO 156.

5. To the extent Complainants seek monetary damages or an award of future business, Complainants' claims should be litigated in civil court.

6. In determining whether to grant PG&E's motion to dismiss Complainants' claim of racial discrimination we must view the facts in the light most favorable to Complainants.

7. Viewing the facts alleged in the light most favorable to Complainants, Complainants' allegations do not support a finding of racial discrimination.

8. PG&E should only report in its WMDVBE results contracts and/or subcontracts with actual WMDVBEs.

9. PG&E's motion to dismiss should be granted.

10. Complainants' motion to consolidate should be denied as moot.

11. No evidentiary hearing is required in this matter.
12. In the interest of finalizing this case, the order should become effective on the date that it is signed.

O R D E R

IT IS ORDERED that:

1. PG&E shall review the status of Pinnacle Staffing as a WMDVBE and refrain from including contracts and/or subcontracts with Pinnacle Staffing in its WMDVBE results if Pinnacle Staffing is not in fact a WMDVBE.
2. The motion of Complainants to consolidate this proceeding with Case 99-07-005 is denied.
3. The motion of Pacific Gas and Electric Company to dismiss this matter is granted.
4. This proceeding is closed.

This order is effective today.

Dated April 6, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners