

Report Pursuant To
Chapter 661 of the Laws of Maryland (2013)/HB1055
Maryland Public Service Commission Activity Under
MD. CODE ANN. Public Utilities Article (PUA), Section 7-510(c)(6)

I. LEGISLATION REQUIRING THE STUDY

This report is required by 2013's House Bill 1055 (HB1055), adopted as Chapter 661 of the Laws of Maryland (2013). HB1055 directed the Public Service Commission (PSC), the Maryland Department of Transportation (MDOT), and the Governor's Office of Minority Affairs (GOMA), in consultation with the Office of the Attorney General (OAG), to study the feasibility and legality of applying the State's Minority Business Enterprise (MBE) Program¹ requirements to the activities of the PSC when exercising its authority under § 7-510(c)(6) of the Public Utilities Article (PUA).

Specifically, Section 1 of HB1055 directs as follows:

The Department of Transportation, the Governor's Office of Minority Affairs, and the Public Service Commission, in consultation with the Office of the Attorney General, shall evaluate whether requiring the Public Service Commission to apply the provisions of the minority business enterprise program under Title 14, Subtitle 3 of the State Finance and Procurement Article **when exercising its authority under § 7-510(c)(6) of the Public Utilities Article** would be feasible and in compliance with the requirements of the Croson decision and any subsequent federal or constitutional requirements. (Emphasis added.)

To fulfill HB1055's mandate, representatives from PSC, GOMA, and MDOT established a Workgroup. The Workgroup collected and analyzed relevant and available data, policies and procedures and consulted with the OAG. It was determined that, under existing circumstances, it may not be legal or feasible to apply Maryland's MBE Program policies and procedures to the PSC's activity under PUA §7-510(c)(6), as contemplated by HB1055.

¹ The statute implementing Maryland's MBE Program is found in the Annotated Code of Maryland, State Finance & Procurement Article, §§14-301 thru 14-309.

II. LEGAL REQUIREMENTS FOR RACE AND GENDER BASED PROGRAM IMPLEMENTATION

The State of Maryland implements the Minority Business Enterprise (MBE) Program in an ongoing effort to remedy persistent race and gender discrimination against minority and women business owners.² In determining the legality of initiatives like Maryland's MBE Program, the courts have made it clear that in order to implement a race- and gender-based program that is legally defensible, the judicial test of constitutional strict scrutiny must be applied.³ To satisfy the judicial test of strict scrutiny, two requirements must be fulfilled. There must be an existing compelling interest and any remedy used must be narrowly tailored.⁴

The first requirement of strict scrutiny is the existence of a compelling interest. In regards to the implementation of Maryland's MBE Program, the compelling interest is the existence of present day discrimination and the ongoing effects of past racial discrimination in the state's procurement marketplace. To ensure that Maryland's MBE Program is supported by the strong basis in evidence required by the courts,⁵ the State commissions disparity studies, which review a great deal of data about minority and non-minority firms in Maryland's geographic and product markets for contracting and procurement.⁶ Historically, these studies have found extensive statistical and anecdotal evidence of discrimination against minority- and women-owned firms in Maryland's marketplace, thus providing the required evidentiary record necessary for establishing a compelling interest. Maryland's most recent study, entitled "The State of Minority- and Women-Owned Business Enterprise: Evidence from Maryland," was issued February 17, 2011.⁷

The second requirement of strict scrutiny involves narrow tailoring, which seeks to ensure that when the government considers race in decision-making, "the means chosen to accomplish the government's asserted purpose [are] specifically and narrowly framed to accomplish that purpose."⁸ In Maryland, the General Assembly and Executive Branch have taken numerous steps through legislation and regulations to ensure that the MBE Program is narrowly tailored. In addition, both branches of government regularly review the MBE Program to determine whether additional statutory or regulatory changes are necessary to ensure compliance with constitutional requirements.

² Maryland's MBE Program is codified at Section 14-301, *et seq.* of the State Finance and Procurement Article (SFP) (2012 Supp.) of the Annotated Code of Maryland.

³ *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 at 485-486 (1989).

⁴ *Id.*

⁵ *Id.* at 510.

⁶ The State's studies have historically been initiated by the Maryland Department of Transportation (the State's certification agency).

⁷ The 2011 Study can be found at the following weblink:

http://www.mdot.maryland.gov/Office%20of%20Minority%20Business%20Enterprise/Resources_Information/NER_A_MD_Disparity_Study_Final_20110218.pdf

⁸ *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 971 (8th Cir. 2003) (citing *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

III. THE PUBLIC SERVICE COMMISSION'S AUTHORITY AND IMPLEMENTATION OF PUA §7-510(c)6

In evaluating the feasibility and legality of requiring the PSC to apply MBE provisions to the PSC's licensing or permitting of generation plants and other regulated activities under PUA §7-510(c)(6), the following background information may be helpful.

Pursuant to PUA §2-112, the PSC has jurisdiction over each public service company that engages in or operates a utility business in Maryland. The PSC supervises and regulates public service companies to ensure their operation is in the public interest and to promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination. (*See* PUA § 2-113). Also, with regard to generation plants and generation-related regulatory activities, the PSC is empowered to assure "safe, adequate, reasonable, and proper [electric] service. (PUA § 5-101(a)). These statutes, in conjunction with PUA §7-510(c)(6), provides the PSC with broad authority to ensure the availability of adequate electrical supply. In fact, PUA §7-510(c)(6) specifically provides as follows:

In order to meet long-term, anticipated demand in the State for *standard offer service (SOS)* and other electricity supply, the Commission may require or allow an investor-owned electric company to construct, acquire, or lease, and operate, its own generating facilities, and transmission facilities necessary to interconnect the generating facilities with the electric grid, subject to appropriate cost recovery. (Emphasis added.)

The PSC interprets PUA §7-510(c)(6) as a literal command directing the PSC to anticipate and meet the "long-term, anticipated demand in the State for SOS and other electricity supply." Within the authority granted to the PSC by the law is the power to require the construction of new facilities. Although this section of PUA was enacted in 1999, PSC did not determine that there was a need to exercise this authority until 2010. Specifically, in December 2010, after determining that the construction of a power plant was needed to meet the State's projected energy reliability needs, the PSC solicited offers from suppliers for new generating facilities in and around Maryland. After reviewing a number of responses (over an extended period of time), on April 12, 2012, the PSC issued Order No. 84815 approving the response submitted by CPV of Maryland, LLC ("CPV") to build a facility in Charles County, Maryland with an in-service date of June 1, 2015.⁹ As a result of this activity, the PSC was forced to respond to an enormous amount of litigation from generators (merchant firms whose bids were not successful) and electric distribution companies ("EDCs").¹⁰

⁹ In December 2010, the PSC prepared a draft RFP, including a form of contract, to solicit offers from merchant firms for new generating facilities in and around Maryland. After receiving numerous comments and after several revisions to the draft RFP, the PSC issued a Notice of Approval of the RFP on September 29, 2011, and required that BGE, Pepco and Delmarva to issue the RFP – inviting persons interested in submitting proposals for not more than 1,500 megawatts of generation capacity located in the Southwest Mid-Atlantic Area Council (SWMACC) as defined by the PJM Interconnection. The PJM Interconnection LLC (PJM) operates the bulk electric power grid in 13 states including Maryland and the District of Columbia. PJM also operates the regional market for wholesale electric generation capacity, which provides the ability to produce electric energy on a real-time and day-ahead basis.

¹⁰ EDC is the acronym used in the utility industry for electric distribution companies.

On September 30, 2013, the United States District Court for the District of Maryland (Judge Marvin J. Garbis) issued the Court's Memorandum and Decision in *PPL Energyplus, LLC v. Nazarian* (MJG-12-1286) that the PSC's Case No. 9214 Generation Order issued under PUA § 7-510(c)6 is preempted by the Federal Power Act, and thus violative of the Supremacy Clause of the U.S. Constitution. The PSC appealed that decision to the United States Court of Appeals for the Fourth Circuit. On June 2, 2014, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision, adding that the Generation Order is both field and conflict preempted under the Supremacy Clause. Subsequently, on June 30, 2014 the Court denied PSC's request for rehearing.

Despite the PSC's breadth of authority under PUA § 7-510(c)(6), the above discussed law suit is the direct result of the PSC's implementation of the statute.¹¹ Even if the PSC were to receive a favorable outcome on any further appeal of this matter,¹² it is unlikely to order new generation in the same fashion, given that it has only exercised such authority under PUA § 7-510(c)(6) once in the past 15 years.¹³ Therefore, the Workgroup believes that the application of Maryland's MBE Program standards to the activity of the PSC pursuant to the statute is not feasible and may even be moot depending upon the outcome of the aforementioned litigation.

¹¹ See the PSC's Order in Case No. 9214.

¹² The PSC intends to file a Petition for a Writ of Certiorari to the U.S. Supreme Court in this matter in mid to late September 2014.

¹³ *In the Matter of Petition of Calpine Corporation (Calpine)* (Baltimore City Circuit Court, Case No. 24-C-12-002853), the Court held that PSC orders (i) directing Maryland EDCs to negotiate and enter into a Contract for Differences ("CfD") and (ii) requiring the utilities to purchase output of a new merchant power plant authorized by the Commission were within the Commission's statutory authority. The CfD authorized the utilities to recover their costs, or return credits to their ratepayers through the Standard Offer Service ("SOS") provisions of the Companies' tariffs. However, the EDCs' appeal directly challenges the PSC's authority to implement the statute as it did in the Case No. 9214 Generation Order, leaving the PSC little room by which to require new generation in a way that would allow for MBE participation goals. The circuit court decision in *Calpine* remains pending appeal in the Maryland Court of Special Appeals. (Despite the *Calpine* and *PPL Energyplus* lawsuits, the expectation is that CPV will proceed with its existing contractual commitment to construct a new electricity generating facility.)

IV. CONSTITUTIONAL CONSIDERATIONS IN THE APPLICATION OF MBE PROGRAM REQUIREMENTS TO ACTIVITY UNDER §7-510(c)(6)

As the previous section concludes, it appears very unlikely that the PSC will use its statutory power to require the construction of generation or transmission facilities any time soon. Still, it is worth noting that even if the PSC did order the construction of such a facility, there are still constitutional considerations that might bar the application of the MBE program to such construction. In considering the constitutionality of applying minority business provisions to procurement activity authorized by the State or its agencies, Maryland must comply with the requirements of strict scrutiny.¹⁴ The OAG cautions that the application of such provisions will only be upheld if the provisions are narrowly tailored to achieve a compelling governmental purpose.¹⁵ The OAG further cautions against applying the provisions of the State's MBE Program in the manner suggested in HB1055 until there is an analysis of whether the State has a compelling interest to support the application of race- and gender-conscious remedies in specific regard to PSC licensees and permittees.¹⁶

To determine whether the State's 2011 Disparity Study, or any future study, supports the application of MBE Program requirements to PSC's activity under PUA §7-510(c)(6), a complicated analysis of PSC data as well as pertinent study data would have to be performed by someone with the requisite expertise. However, the Workgroup has concluded that HB1055 did not contemplate performing such an analysis where (i) PSC does not foresee ordering new generation under PUA § 7-510(c)(6) in the near future, and (ii) the Workgroup has concluded that the application of the State's MBE Program requirements to that activity is not feasible and may even be moot depending upon the outcome of the aforementioned litigation.

¹⁴ *Croson*, 488 U.S. at 485-486.

¹⁵ See *Opinions of the Attorney General* 181, 182 (2006) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Croson*, 488 U.S. 469 (1989)). See also *Bill Review Letter on Senate Bill 638 of 2011 Session* (May 13, 2011) at 1 (reviewing MBE provisions of video lottery terminal legislation).

¹⁶ Letter of Advice to the Honorable Nathaniel J. McFadden from Assistant Attorney General Kathryn M. Rowe (Feb. 26, 2013) at 2-3 (responding to request for advice concerning a proposal to apply MBE Program requirements to the recipients of licenses and permits from the PSC).

V. CONCLUSION

The HB1055 Workgroup has determined that the application of Maryland's MBE Program requirements to the activity of the PSC under PUA §7-510(c)(6), as contemplated by HB1055, is not legal or feasible for the following two reasons.

1. The statute itself is being challenged in what is expected to be a lengthy court case and judicial appeals which could render the law invalid and thus make application of the MBE Program to activity under the statute either moot or impracticable; and
2. Further study (and financial expenditures) would be needed to determine whether there is a compelling interest to support the application of race and gender conscious remedies in specific regard to PSC licensees and permittees.

Despite the above conclusions of the HB1055 Workgroup, there are still efforts underway to *encourage utility* companies that serve Maryland to implement diversity efforts in their daily procurement activity. At present, the PSC has a voluntary Diversity Memorandum of Understanding (MOU)¹⁷ in place with fifteen (15) companies (including regulated investor-owned utilities, cooperatives, communications and telecommunications companies) and is working towards an effort to have that MOU recognized in State regulation. Any implementation of the MOU by regulation will have to be both consistent with PSC's statutory authority and compliant with constitutional requirements. A workgroup consisting of state legislators, utility company representatives and State personnel has been established to develop the final proposal. The PSC expects the process to be completed before the start of the 2015 calendar year.

¹⁷ See PSC Final Minority Business Enterprise Workgroup Report – Model Memorandum of Understanding, Public Conference Docket No. 16 (Jan. 16, 2009); http://webapp.psc.state.md.us/Intranet/AdminDocket/CaseAction_new.cfm?CaseNumber=PC16