

ORIGINAL

Decision 90 08 007 AUG 8 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Allied Temporaries, Inc.,
 Complainant,
 vs.
 Pacific Gas and Electric Company,
 Respondent.

Case 88-08-048
(Filed August 24, 1988)

O P I N I O N

Complainant Allied Temporaries, Inc. (Allied) seeks compensation from the Advocates' Trust Fund (Trust) for \$52,994. Allied's request is opposed by Pacific Gas and Electric Company (PG&E).

This decision grants Allied \$3,323.30 in fees from the Advocates' Trust Fund.

I. Background of the Complaint

Allied filed this complaint against PG&E on August 24, 1988. The complaint alleged that PG&E had violated, among other things, General Order (GO) 156. GO 156 sets forth guidelines for utility programs designed to promote participation of Women and Minority Business Enterprises (WMBE) in utility contracting. The complaint also alleged that PG&E had discriminated against Allied on the basis of race.

Hearings were held on May 15, 16, and 19, 1989, and the matter was submitted June 22, 1989. The Commission issued Decision (D.) 90-03-032, resolving this complaint, on March 14, 1990.

D.90-03-032 found that PG&E rejected Allied's bids "for reasons unrelated to the competitiveness of the terms bid by Allied" and thereby "acted in a manner inconsistent with GO 156 and Public Utilities (PU) Code §§ 8281-8285." The decision ordered PG&E to consider complainant's bids in future contracting periods consistent with GO 156. It also ordered PG&E to submit a report addressing improvements to its bidding procedures, and to hold a "pre-bid conference" at which PG&E would provide contracting information to prospective WMBE vendors.

Allied's request for compensation and PG&E's response were filed prior to the issuance of the Commission's final decision. Both filings were based on the Administrative Law Judge's (ALJ) proposed decision, issued to the public pursuant to PU Code § 311. The Commission's final decision differed somewhat from the ALJ's proposed decision. The final decision, however, was not so different from the ALJ's proposed decision that Allied or PG&E need to submit new pleadings addressing the request. We resolve the issues with the information and argument presented in Allied's December 6, 1989 filing and PG&E's January 9, 1990 response.

II. The Appropriateness of Allied's Request for Fees From The Advocates' Trust Fund

Allied seeks compensation from the Advocates' Trust Fund. The Commission created the Trust on November 11, 1982. In order to qualify for fees from the Trust, several conditions must be met.

The Trust is designed to reimburse intervenors in "quasi-judicial" complaint cases where funding might not otherwise be available. This complaint case is clearly quasi-judicial. Other compensation is not available to Allied in this case.

Most compensation requests brought before us are filed under Article 18.7, rather than from the Fund. Article 18.7 permits compensation for participation in proceedings which affect rates. This case affects utility contracting with WMBE vendors. Section 8281(b)(F) states that WMBE procurement by utilities may benefit consumers of the state by encouraging competition and economic efficiency. In that way, WMBE contracting may ultimately or indirectly affect rates. Because this case does not directly affect utility rates, however, Allied's request for compensation is more appropriately made under the Trust.

PG&E objects to Allied's request for several reasons. First, it argues that Allied should have followed the procedures set forth in Article 18.7 and its request is therefore too late for consideration. PG&E is correct that D.89-07-063 found reasonable Toward Utility Rate Normalization's (TURN) application of Article 18.7 procedures when it applied for fees under the Trust. No Commission decision, however, requires the use of Article 18.7 procedures for requests for compensation under the Trust and it would be unfair to impose that requirement retroactively. The Trust itself does not set forth a deadline for filings requests for compensation from the Trust. We will consider Allied's request as timely.

PG&E states that Allied is not entitled to fees because the Trust is created to "defray expenses...directly related to litigation or representation of consumer interests." According to PG&E, Allied does not represent consumer interests. The language of PU Code § 8281, however, determines a direct relationship between WMBE contracting and consumer interests.

Allied sought and was granted certain equitable remedies which will benefit all WMBE vendors, and promote the development of a more competitive marketplace. To the extent those remedies promote efficiency and competition, they would, according to PU Code § 8281, benefit public utilities and consumers of California.

PG&E also argues that Allied did not show "significant financial hardship" would result from participation, as required under Rule 76.54. The Trust, however, does not require that "significant financial hardship" result from the litigation. That requirement refers to compensation under Article 18.7.

As PG&E comments, the Trust does require that no award be made where a party's own economic interest is sufficient to motivate participation. This is a difficult issue to resolve in this case. PG&E argues that the complainant pursued this complaint in order to obtain substantial financial reward for Allied and its sole shareholder, Clarence Hunt. Specifically, Allied's complaint sought damages in the amount of \$1.7 million.

Clearly, Allied had an economic interest in obtaining contracts from PG&E and its interest in obtaining financial remedies for contracts which it alleges it was unfairly denied. This economic interest might have been sufficient to motivate participation. However, it also appears that Allied's complaint was not motivated solely by Allied's economic interests. The complainant spent time and resources seeking to provide services at competitive rates and to improve PG&E's contracting program in ways which might benefit PG&E and its ratepayers. The testimony of Allied's president indicated his concern for the development of minority businesses, and over the causes and effects of racial inequality.

Because the Advocates Trust Fund permits compensation only where a party's self interest would not have been sufficient motivation for participation, we will compensate Allied only for its participation in pursuit of WMBE policy and program issues rather than those issues which are specific to Allied. The WMBE issues regarding PG&E's bidding practices were clearly incidental to Allied's main claims that it had personally been mistreated by PG&E. Nonetheless, resolution of these narrow, but important, issues should benefit the WMBE community as a whole.

Given the importance of this first major WMBE complaint proceeding and the past absence of an appropriate forum to address generic issues such as Allied raised here, we will compensate Allied for the role it played in bringing PG&E's bidding practice inadequacies to our attention and in suggesting certain improvements in the system. In light of the incidental relationship of these bidding issues to Allied's main complaints, we will award Allied 20% of the amount of compensation it is seeking, after other adjustments are made, as discussed in subsequent sections of this decision.

III. The Quality and Necessity of Allied's Participation in this Proceeding

Under the terms of the Trust, an intervenor may be entitled to fees where a private party has "made a direct, primary, and substantial contribution to the result of the case." It is undisputed that Allied, as the only party to the proceeding except the defendant, made a substantial contribution to the outcome of the case.

Three other criteria must be considered for an intervenor to receive an award from the Trust:

1. The strength or societal importance of the public policy vindicated by the litigation. Allied claims the Commission's decision in this complaint attests to the societal importance of the issues litigated. We agree with Allied that women and minority business contracting is an important policy issue and has been recognized as such by the State Legislature in its enactment of PU Code §§ 8281-8285. Specifically, § 8281(b) states that it is "in the state's interest to expeditiously improve the economically disadvantaged position of women and minority enterprises" by promoting their participation in utility procurement activities.

2. The number of people standing to benefit from the decision. Allied states its participation will benefit many WMBEs. PG&E argues Allied's complaint will only benefit Allied. As our discussion above indicates, the State Legislature found that women and minority business contracting will provide benefits to the state's consumers. The Commission has made similar findings prior to the passage of PU Code §§ 8281-8285. D.90-03-032 will affect PG&E's WMBE contracting program and thereby provides some benefit, however small or indirect, to the state's consumers by improving competitive bidding.

3. The necessity for private enforcement and the magnitude of the resultant burden on the complainant. Is this the type of case which requires enforcement by a private party, or is it one that typically would be pursued by Commission itself or the staff? Unlike a rate case, questions of selective discrimination must usually be addressed by way of individual complaints. In this particular case, the complainant identified program shortcomings which have not been the subjects of other proceedings where WMBE contracting is under review.

IV. The Reasonableness of Hours Claimed by Allied

Allied seeks \$52,994 from the Trust. Of this amount, Allied seeks \$41,262 for the participation of Clarence Hunt, Allied's president and sole shareholder, and \$10,274 for the participation of Allied's attorney, Walter Cook. The amount also includes \$1,458 in secretarial services provided by Allied. Allied provides a breakdown of its expenses.

Allied may only receive reasonable fees for activities which are directly related to its complaint and for work on matters on which Allied prevailed. Allied seeks compensation for several activities which do not qualify for funding. Some are still outside the scope of the proceeding:

Communications with the State Legislature.

Contacts with PG&E during the course of contract negotiations or in the course of its normal business.

The preparation and filing by both Hunt and Cook of a request for attorney's fees under Article 18.7, a request which was improper and failed to follow procedural guidance of that Article.

Expenses by Hunt and Cook associated with an amendment to the complaint which was filed after the issuance of the ALJ proposed decision and which was rejected by ALJ ruling.

The filing by Hunt on August 24, 1989 of an unidentified complaint against PG&E.

A contact with the Commission's Public Affairs Office on October 4, 1989.

Secretarial time spent prior to development of the complaint, for legislative correspondence, and for the intervenor fee filing under Article 18.7.

Hunt's time on a letter to Charles Shepard regarding "contract payroll and programmer areas" on October 6, 1989 after submittal of the proceeding.

Cook's time on a partnership contract which is unrelated to the complaint.

Cook's time spent reviewing a General Telephone case on June 11, 1989 which does not appear to be related to complaint.

Some are not adequately supported:

Cook's time on a telephone call with and about "Alexander," who is not identified as anyone associated with this complaint.

Hunt's time on May 24, 1988 for writing a letter regarding a meeting with PG&E, the subject of which is undisclosed.

Some result from careless bookkeeping:

Cook's time for replying to PG&E's comments on the proposed ALJ decision because Hunt also claimed such time.

A duplicative claim on May 15, 1989 for three days of hearing preparation by Hunt.

Eliminating these activities from consideration, Cook's allowable time on the complaint is 77.9 hours. Hunt's allowable time on the complaint is 275 hours. Allowable secretarial time is 53.7 hours.

Allied is entitled to fees associated with reasonable time spent on the complaint. A review of Allied's breakdown of requested hours shows that Hunt spent an extraordinary amount of time on certain items. For example, Hunt claims 64 hours for reviewing his files and preparing the complaint, 6 hours of which is claimed for copying and filing the complaint. As D.90-03-032 points out, the pleadings do not set forth "with any specificity whatsoever" Allied's legal challenge against PG&E. The complaint is mainly a recitation of Hunt's own experience. Considering the nature of the complaint, Hunt should not have needed to spend 64 hours on its preparation.

Similarly, Hunt seeks 22 hours of compensation for the preparation of a motion to compel documents. The motion is a simple data request which is less than two pages long. The hours claimed for its preparation, therefore, appear unreasonably high.

There are several other examples of time estimates which appear much higher than one would expect. Because the hours Allied claims for Hunt's work in this proceeding appear high, and are not explained by Allied's documentation, it is reasonable to discount the total requested hours by 20%. A reasonable estimate of Hunt's time in this proceeding is therefore 220 hours.

V. The Reasonableness of Allied's Requested Fees

Allied seeks a rate of \$75 per hour for Hunt and a rate of \$125 per hour for Cook. PG&E argues that Allied is not entitled to these rates because Allied has not presented any justification for them.

Allied seeks \$75 for Hunt on the basis that the rate is well below that of a San Francisco attorney. As PG&E points out, however, Allied does not state that Hunt is an attorney. We therefore assume that he is not one.

Although Allied does not show that Hunt is an attorney, Hunt need not be an attorney to qualify for fees. Hunt originally appeared on his own behalf and later as a witness. Contrary to Allied's claim, Hunt did not appear as an expert witness. Hunt testified only on matters of his own experience. He would therefore not qualify for a rate comparable to that of an expert. In both roles, Hunt took time away from his business to pursue his case. He is therefore entitled to fees as long as all other criteria are met. In recent years, we have granted expert witness fees ranging from \$45 per hour (D.88-01-045) to \$150 per hour (D.88-11-025). Hunt's fees should be less than those allowed for expert witnesses absent justification for why his fees should be comparable. Allied has not provided any such justification. We will allow an hourly rate of \$40.

Allied seeks \$125 for Cook but again provides no justification for the rate. D.89-07-063 granted a TURN attorney an increase in fees from \$90 per hour to \$125 per hour after the attorney had gained experience in matters brought before the Commission. Cook does not appear to have experience in either public utilities matters or cases involving racial discrimination. We cannot tell from Allied's request how long Cook has been practicing law. Accordingly, a reasonable hourly fee for Cook is \$90 per hour.

VI. Total Allowable Fees

Considering the above determinations regarding appropriate hours, activities and fees, Allied is entitled to the following award from the Advocates' Trust Fund:

Clarence Hunt	20% x 220 hours at \$40	= \$ 1,760.00
Walter Cook	20% x 77.9 hours at \$90	= 1,402.20
Secretarial	20% x 53.7 hours at \$15	= <u>161.10</u>
	Total	\$3,323.30

We will direct the Trustee to pay Allied this amount.

Findings of Fact

1. This complaint initially alleged that PG&E had violated, among other things, GO 156, which sets program guidelines for WMBE procurement and contracting.

2. D.90-03-032 found that PG&E's actions towards Allied were inconsistent with PU Code §§ 8281-8285 and GO 156. It also ordered PG&E to file a report on modifications to its WMBE contracting program and to hold bidders' meetings for potential WMBE vendors.

3. Allied seeks compensation from the Advocates' Trust Fund for \$52,994 for its pursuit of this complaint.

4. This proceeding is quasi-judicial in nature.

5. Funding from other sources, such as that available under Article 18.7, is not available to Allied for its pursuit of this complaint.

6. The Trust requires that no award may be made where a party's own economic interest is sufficient to motivate participation.

7. Allied's original complaint requested \$1.7 million in damages. Allied did not pursue this relief in hearings or other pleadings.

8. Allied sought relief which would benefit only Allied. Allied also sought relief which would incidentally improve PG&E's WMBE contracting program and thereby confer benefits on other WMBE vendors, PG&E, and the state's consumers.

9. Allied's president testified to his concerns regarding the causes and effects of racial inequality and the importance of minority business development.

10. Allied's complaint against PG&E was the first of its kind to be brought before the Commission. The Commission had not previously considered a complaint against a utility by a WMBE vendor alleging a violation of GO 156.

11. The efficacy of utility WMBE procurement programs is an important policy issue, as recognized by the State Legislature in its enactment of PU Code §§ 8281-8285.

12. The issues brought forth in the complaint were not highly technical and the Commission found that Allied failed to present adequate legal analysis. Therefore, Allied's burden in this proceeding was significant but not onerous.

13. Private enforcement was necessary to address the contracting problems identified by Allied.

14. Allied's cost breakdown lists activities which are not reasonably related to this complaint. Allied also seeks compensation for activities related to matters on which Allied did not prevail.

15. Allied seeks an hourly rate of \$125 for Walter Cook and \$75 for Clarence Hunt, but does not present any justification for those rates.

Conclusions of Law

1. PU Code § 8281 determines that promoting WMBE contracting with utilities will promote efficiency and thereby benefit the state's utilities and consumers.

2. Because WMBE policy and program issues raised in Allied's complaint were incidental to the issues raised which were specific to Allied, allowable hours in this proceeding should be discounted so that Allied receives compensation for 20% of those hours.

3. A reasonable estimate of allowable time for Walter Cook's efficient participation in this complaint is 20% of 77.9 hours.

4. A reasonable estimate of allowable time for Clarence Hunt's efficient participation in this complaint is 20% of 220 hours.
5. A reasonable estimate of allowable time for secretarial assistance is 20% of 53.7 hours.
6. A reasonable hourly rate for Clarence Hunt is \$40.
7. A reasonable hourly rate for Walter Cook is \$90.
8. Allied's request for compensation from the Advocates' Trust Fund should be granted to the extent set forth in this decision.

ORDER

1. The request of Allied Temporaries, Inc. (Allied) for compensation from the Advocates' Trust Fund is granted in part as set forth in this decision.

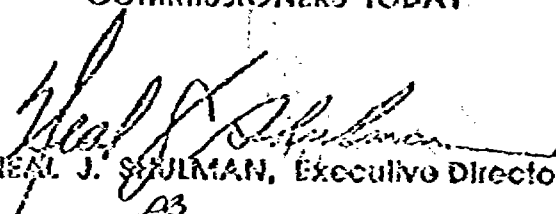
2. Trustee, Pacific Union Bank and Trust Company, shall pay to Allied \$3,323.30 plus interest at the three-month commercial paper rate commencing 60 days from the effective date of this decision and continuing until payment is made.

This order is effective today.

Dated AUG 8 1990 , at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


NEAL J. SHULMAN, Executive Director
AB