

JAN 15 1991

Decision 91-01-012 January 15, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Lam Securities Investment)
Dick Lam - Sole Proprietor,)
Complainant,)

vs.)

San Diego Gas & Electric Company,)
Retirement Fund Department,)
Defendant.)

ORIGINAL

Case 90-07-005
(Filed July 6, 1990)

Lam Securities Investment)
Dick Lam - Sole Proprietor,)
Complainant,)

vs.)

Roseville Telephone Company,)
Retirement Fund Department,)
Defendant.)

Case 90-07-006
(Filed July 6, 1990)

Lam Securities Investment)
Dick Lam - Sole Proprietor,)
Complainant,)

vs.)

AT&T Communications of California)
Retirement Fund Department,)
Defendant.)

Case 90-07-007
(Filed July 6, 1990)

Lam Securities Investment)
Dick Lam - Sole Proprietor,)
Complainant,)

vs.)

Pacific Power and Light Company,)
Retirement Fund Department,)
Defendant.)

Case 90-07-008
(Filed July 6, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,

Complainant,

vs.

Pacific Gas and Electric Company,
Retirement Fund Department,

Defendant.

Case 90-07-021
(Filed July 3, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,

Complainant,

vs.

MCI Communications Corporation,
Retirement Fund Department,

Defendant.

Case 90-07-022
(Filed July 9, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,

Complainant,

vs.

CP National Corporation,
Retirement Fund Department,

Defendant.

Case 90-07-023
(Filed July 9, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,

Complainant,

vs.

Pacific Bell,
Retirement Fund Department,

Defendant.

Case 90-07-024
(Filed July 9, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,
Complainant,

vs.

Southwest Gas Corporation,
Retirement Fund Department,
Defendant.

Case 90-07-025
(Filed July 9, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,
Complainant,

vs.

Southern California Gas Company,
Retirement Fund Department,
Defendant.

Case 90-07-026
(Filed July 9, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,
Complainant,

vs.

Sierra Pacific Power Company,
Retirement Fund Department,
Defendant.

Case 90-07-028
(Filed July 9, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,
Complainant,

vs.

Southern California Edison Company,
Retirement Fund Department,
Defendant.

Case 90-07-029
(Filed July 3, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,
Complainant,

vs.

General Telephone Co. of California,
Retirement Fund Department,
Defendant.

Case 90-07-030
(Filed July 3, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,
Complainant,

vs.

Citizens Utilities Co. of California,
Retirement Fund Department,
Defendant.

Case 90-07-031
(Filed July 3, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,
Complainant,

vs.

U.S. Sprint,
Retirement Fund Department,
Defendant.

Case 90-07-033
(Filed July 3, 1990)

Lam Securities Investment
Dick Lam - Sole Proprietor,
Complainant,

vs.

Continental Telephone Company,
Retirement Fund Department,
Defendant.

Case 90-07-034
(Filed July 3, 1990)

ORDER DISMISSING COMPLAINTS

Complainant Dick Lam, doing business as Lam Securities Investment, a sole proprietorship (Lam or complainant), filed identical complaints on July 3, July 6, and July 9, 1990, against the 16 defendants named above. The complaints allege that Lam, an Asian minority securities investment brokerage in San Francisco, sought to do business with the retirement fund investment managers serving the defendants, and that such efforts had been rebuffed. Lam alleges that this failure to retain its services violates General Order (GO) 156 and Public Utilities (PU) Code §§ 8281-8285 related to the obligation by regulated utilities to establish programs to increase procurement of goods and services from women and minority business enterprises (WMBE).

By ruling dated September 12, 1990, the Commission's WMBE staff was directed to confer informally with representatives of the complainant and with representatives of defendants in an attempt to resolve these complaints. (Rule 10 of the Commission's Rules of Practice and Procedure (Rule or Rules) and § 5.1 of GO 156.) Staff on October 23, 1990, filed notice of the conclusion of the informal proceedings and the resolution reached.

This decision dismisses these complaints. Two of the complaints are dismissed at the request of complainant. One complaint is dismissed on motion. The remaining 13 complaints are dismissed on the basis that they fail to state a violation of "any provision of law or of any order or rule of the Commission" as required by § 1702 of the PU Code and by § 5, GO 156.

I. Lam's Complaint

Complainant has filed the identical complaint against the "Retirement Fund Department" of the 16 companies listed above. The complaint states:

"Under General Order 156 Public Utilities Code Section 8281-8285. The above-named Defendant refused to do business with the Complainant, the first Asian Minority Company in securities investment business in San Francisco. We have written to Defendant and requested under General Order 156 to be given consideration as a minority.... We did not get a written response. We received many cold rejections on telephone calls with Defendant's Retirement Fund Managers. They do not want to deal with Small Business and Minorities. Our request was to ask the Defendant's Retirement Fund Managers to direct orders of execution (buy and sell securities - stocks and bonds) through use of Lam Securities Investment but this has not been successful.

"The first complaint did not get handled therefore I was advised by the Public Utilities Commission to again file a formal complaint."

In its prayer for relief, complainant states:

"We plead that the Public Utility Commission enforce General Order 156. The Defendant will direct trades to the Complainant to execute buy and sell transactions on their investments of the Retirement Plan. Lam Securities Investment would like very much to be appointed as a Minority Fund Manager."

II. Defendants' Responses

Defendants have denied Lam's allegations. Most state that they received one or more inquiries from Lam, and that they responded by letter or by telephone either referring Lam directly to pension fund investment managers or advising Lam of the company procedure for seeking consideration as a minority vendor.

Substantive Responses

For example, Southern California Edison Company (Edison) states that it wrote to Lam encouraging the firm to submit its qualifications to any or all of 12 fixed income and equity

managers, and included a list of the money managers, their addresses, telephone numbers, and contact individuals. AT&T Communications of California, Inc. (AT&T), states that it wrote to its corporate director of investment management enclosing information about Lam and encouraging consideration of the firm. Southwest Gas Corporation states that its treasurer wrote to Lam via certified mail inviting further contact that was never made. Southern California Gas Company states that it referred Lam to its four investment fund managers, then called the four managers asking that they consider the use of Lam's services when new brokers were selected. Pacific Gas and Electric Company (PG&E) states that it referred Lam's inquiry to its investment managers, then encouraged the investment managers to consider Lam's services.

San Diego Gas & Electric Company (SDG&E) states that its investment management branch reviewed Lam's services and concluded that Lam was charging 8 to 10 cents per share on transactions, as opposed to the 4 to 5 cents per share that the company's pension managers typically paid. The company states: "(W)hat may have been interpreted as 'cold rejections' by Mr. Lam may have been justifiable business decisions on the part of defendant's retirement fund managers...."

ERISA Preemption

Pacific Bell moves to dismiss the complaint on the basis that GO 156 is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 2001, et seq. (ERISA). Other defendants raise this preemption argument as an affirmative defense. The parties refer to § 1144(a) of ERISA, which states, in part, that ERISA "supersede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title...." There is no question that pension plans are employee benefits plans.

Because of our decision in these complaints, we do not reach the preemption issue. We note, however, that no party has

referred us to an appellate decision declaring that ERISA has preempted GO 156 or PU Code §§ 8281-8285. Under Art. 3, § 3.5 of the California Constitution, we are precluded from refusing to enforce state law on the basis of preemption "unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." (West's Ann.Cal.Const. Art. 3, § 3.5, cl. (c).) In passing, we note that a recent federal district court decision held that ERISA did not preempt a non-conflicting California law related to an employer's duty to deal in good faith with employees, even though the underlying complaint, as here, dealt with a benefits plan. Kanne v. Connecticut General Life Ins. Co. (C.D.Cal. 1985) 607 F.Supp. 899.

III. Informal Resolution Proceedings

In addition to its answer, Edison moved to dismiss the complaint against it under Rule 56 or, alternatively, to refer the complaint, pursuant to Rule 10, to the Commission's staff for informal resolution proceedings. By order dated September 12, 1990, Edison's alternative motion was granted and the Commission's WMBE staff was directed to meet with complainant and defendants to attempt informal resolution.

On October 23, 1990, WMBE Program Coordinator Phil Bremond filed with the Docket Office a staff report on the attempted informal resolution. Staff states that, as a result of AT&T's commitment to assist Lam in communicating with the investment fund managers of the company's parent corporation, Lam was willing to dismiss its complaint against AT&T. Similarly, as a result of further explanation by Contel of California, Inc.

(Contel)¹ of its pension fund administration, Lam agreed to dismiss its complaint against that company. While other utilities, notably GTE, SDG&E, and PG&E, also arranged meetings between Lam and investment executives, or directed Lam to the proper individuals to consider its requests, Lam declined to dismiss its complaints against those utilities. Staff attempted communications with other utilities named in Lam's complaints, but staff states that it was not able within the prescribed time limits, to conduct further informal meetings with those companies.

We will regard Lam's request to dismiss its complaints against AT&T and Contel as motions to dismiss, and these motions will be granted. Accordingly, we will dismiss C.90-07-007 and C.90-07-034.

IV. Lam's Cause of Action

In D.88-04-057, we adopted GO 156, establishing rules and guidelines for increasing participation of women and minority owned business enterprises in procurement of contracts from utilities. The guidelines were modified in D.88-09-024.

The guidelines provide that in the event a WMBE contractor believes that an act or omission of a utility violates any provision of law or any rule or order of the Commission, the contractor may file a complaint with the Commission. The guidelines further provide that the Commission will not entertain complaints that do not allege violations of any law, rule, order, decision, or tariff, but which instead involve only general contract disputes between a utility and a contractor.

1 Formerly Continental Telephone Company of California.

As we have often stated:

"As a general rule this Commission has no jurisdiction to adjudicate contract disputes merely because one party is a public utility. However, the Commission does adjudicate contract disputes in the exercise of its regulatory jurisdiction. The adjudication of reparation claims and service disconnection disputes, for example, are clearly within Commission jurisdiction even though the interpretation of contracts may be involved."
(Penaloza v. P.T.&T. Co., 64 CPUC 496, 497 (1965).)

Under GO 156, the Commission has determined that it will also adjudicate contract disputes between a WMBE contractor and a utility, provided that the complaint alleges a violation of a law, rule, order, or tariff, and involves more than a general contract dispute. (GO 156, § 5.)

In each of the 16 complaints before us, Lam alleges that a utility: (a) failed to respond to Lam's inquiries seeking securities business and (b) failed to do business with Lam. In its motion to dismiss, Edison notes that the complaint on its face acknowledges that Lam communicated by telephone with retirement fund managers of the utilities. Thus, Edison states, the complaint itself refutes the allegation that a utility failed to respond to Lam's inquiries. Edison adds:

"Except for the failure to respond to Complainant, Complainant alleges no violation of law on the part of Defendant. Complainant's only grievance is that Defendant refused to utilize the services of Complainant. Defendant is not compelled by General Order 156 or any other law to contract for Complainant's services."

We agree. GO 156 implements legislation that became effective on January 1, 1987. (PU Code §§ 8281-8285.) It requires every gas, electric, and telephone utility with gross annual revenues exceeding \$25 million to develop programs to recruit and

utilize WMBE contractors. It requires each utility to submit to the Commission annual detailed and verifiable plans for increasing procurement from business enterprises run by women and by minority persons. In D.88-04-057, covered utilities were challenged to meet a goal of 20% procurement from WMBE contractors within a five-year period. A clearinghouse Advisory Board has been established to qualify WMBE vendors and to counsel both the utilities and contractors. In D.89-08-026, the Commission instituted an annual generic proceeding to review WMBE policies, practices, procedures, and costs.

However, as Edison and other defendants note, GO 156 does not require utilities to hire particular vendors. The legislation and implementing order are intended to help establish a level playing field, not to give special advantage to particular players.

As PG&E states in an affirmative defense, the complaints here form a shotgun pattern aimed at the utility industry in general. No specific law, rule, or order is alleged to have been violated by a particular defendant. Indeed, the generic nature of these complaints makes it clear that Lam criticizes the utility industry, in general, rather than particular companies or practices specifically. Such an approach might be appropriate for a generic investigation. It is inappropriate for a complaint, where a violation of some provision of law or order or rule of the Commission must be alleged or be capable of being inferred. (PU Code § 1702; Rule 9(a).)

Accordingly, we will grant Edison's motion to dismiss as to Complaint (C.) 90-07-029.² We also grant Lam's requests to dismiss C.90-07-007 and C.90-07-034. For the reasons stated above, we will dismiss the remaining 13 complaints for failure to state a cause of action as required by PU Code § 1702 and our Rule 9(a). In doing so, however, we caution defendants that their procedures for handling inquiries like those of Lam Securities will continue to be a subject of scrutiny by the Commission and its staff both in the annual generic WMBE proceeding and in other proceedings. See, e.g., Allied Temporaries, Inc. v. Pacific Gas and Electric Co., C.88-08-048. Complainant is advised that it may file a subsequent complaint against any utility that complainant believes has violated a specific law, rule, or order of the Commission.

Findings of Fact

1. Lam on July 3, July 6, and July 9, 1990, filed identical complaints against the 16 utility defendants named above.
2. The complaints allege that Lam sought to do business with retirement fund investment managers serving defendants, but that none had retained its services.
3. Lam alleges in each of its complaints that the utility violated GO 156 and PU Code §§ 8281-8285.
4. By order dated September 12, 1990, the complaints were referred to the Commission's staff for informal resolution proceedings, pursuant to Rule 10.
5. On October 23, 1990, the Commission's staff reported that Lam had agreed to dismiss complaints against AT&T (C.90-07-007) and

² Motions to dismiss also have been filed by MCI Communications Corporation (MCI) and by Pacific Bell (Pacific) on the basis that parent organizations rather than the regulated utility subsidiaries are responsible for retirement fund investments. Because we have decided to dismiss the complaints against MCI and Pacific on other grounds, we do not reach these incorporation arguments.

against Continental Telephone Co. (C.90-07-034) on the basis of conversations with those utilities.

6. Through the efforts of staff, Lam conferred further with a number of other defendants. However, Lam declined to withdraw or dismiss complaints against other defendants.

Conclusions of Law

1. GO 156 implements legislation that requires major utilities to develop programs to recruit and do business with WMBE contractors.

2. While GO 156 provides that the Commission will hear complaints by WMBE contractors, the Commission will not do so unless the complaints allege a violation of a law, or of a Commission rule, order, decision, or tariff.

3. The 16 complaints filed by Lam do not allege violation of a law, rule, order, decision, or tariff, nor can the complaints reasonably be construed to raise an inference of such violation.

4. Under Art. 3, § 3.5, of the Constitution of California, the Commission may not dismiss a complaint on the basis of federal law preemption unless an appellate court has made a determination that enforcement of a particular statute is prohibited by federal law.

5. Lam's agreement to withdraw C.90-07-007 and C.90-07-034 should be granted, and those complaints should be dismissed.

6. Edison's motion to dismiss pursuant to Rule 56 should be granted, and C.90-07-026 should be dismissed.

7. The 13 other complaints filed by Lam should be dismissed for failure to state a violation of a law or of a Commission rule, order, decision, or tariff.

IT IS ORDERED that:

1. The request of complainant Lam Securities Investment, Dick Lam - Sole Proprietor (Lam) to dismiss Complaints (C.) 90-07-007 (AT&T Communications of California, Inc.) and C.90-07-034

(Contel of California, Inc., formerly Continental Telephone Company of California) is granted. Those complaints are dismissed.

2. The motion of Southern California Edison Company, pursuant to Rule 56 of the Commission's Rules of Practice and Procedure (Rule or Rules) to dismiss C.90-07-029 for failure to state a claim of violation of any provision of law or of any order or rule of the Commission is granted. C.90-07-029 is dismissed.

3. The following complaints are dismissed for failure to allege violation of any provision of law or of any order or rule of the Commission, as required by PU Code § 1702 and Rule 9:

- C.90-07-005 (San Diego Gas & Electric Company)
- C.90-07-006 (Roseville Telephone Company)
- C.90-07-008 (Pacific Power & Light Company)
- C.90-07-021 (Pacific Gas and Electric Company)
- C.90-07-022 (MCI Communications Corporation)
- C.90-07-023 (CP National Corporation)
- C.90-07-024 (Pacific Bell)
- C.90-07-025 (Southwest Gas Corporation)
- C.90-07-026 (Southern California Gas Company)
- C.90-07-028 (Sierra Pacific Power Company)
- C.90-07-030 (GTE California Incorporated)

C.90-07-005 et al. ALJ/GEW/rmn

C.90-07-031 (Citizens Utilities Co. of California)
C.90-07-033 (U.S. Sprint Communications Company)

This order is effective today.

Dated January 15, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

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


NEAL S. SUSSMAN, Executive Director
AG