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Decision 91-08-027 August 7, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Women and Minority Business
Enterprise Advocates, Inc.,

Complainant,

vs.

Pacific Bell (U. 1001 C),

Defendant.

ORIGINAL

Case 90-08-046

(Filed August 20, 1990)

OPINION

On August 20, 1990, complainant, which has not been verified¹ as a Women/Minority Business Enterprise (WMBE) pursuant to the provisions of Public Utilities Commission (PUC) General Order (GO) 156, filed a complaint against Pacific Bell (defendant or PacBell) charging it with several acts allegedly in violation of California Public Utilities (PU) Code §§ 8281-8285, GO 156, and "other applicable California law" (without further specificity). In response to the complaint, defendant filed an answer containing general and specific denials of the material allegations of the complaint, as well as several affirmative defenses. In addition to its answer, defendant also filed a motion to dismiss the complaint on several grounds.

¹ The terms "verified", "verification" and derivatives thereof are terms of art utilized in GO 156 to refer to the process of certifying that a corporation or similar entity is actually a women- or minority owned or controlled business enterprise.

On May 10, 1991, a prehearing conference was held before Administrative Law Judge Robert L. Ramsey at which conference counsel for defendant argued in support of the motion to dismiss and complainant's president, Clarence Hunt, argued in opposition thereto. After considering the arguments both in support of and in opposition to the motion to dismiss, we are of the opinion that the motion to dismiss is well taken and should be granted and the complaint dismissed. Because the granting of the motion to dismiss will result in the termination of this proceeding, we deem it appropriate in this instance to indicate, on a paragraph to paragraph basis, the reasons supporting our decision. Our ad seriatim explanation in this case should not be interpreted as requiring such a format in any case in the future.

1. The complaint is composed of seventeen separate paragraphs sequentially numbered 1 through 15 and 17 through 18. There is no Paragraph 16.

2. Paragraphs 1 and 2 of the complaint are jurisdictional in that they set forth the name and address of the complainant and defendant respectively.

3. Paragraph 3 of the complaint describes the complainant as a minority owned business and as a "Women or Minority Business Enterprise (...WMBE) as defined by Section 8281 of the California Public Utilities Code." Presumably, this statement is included to allege standing to bring this action to enforce the provisions of GO 156 and to seek to obtain the relief demanded. As previously noted, complainant has never been verified as a WMBE by the Women/Minority Business Enterprise Clearinghouse (CHS), the entity established pursuant to GO 156 to investigate and evaluate the qualifications of applicants for designation as WMBE's and to designate as such those who meet the specified criteria.

The issue of whether a self-proclaimed WMBE must be officially verified as such by the CHS as a condition precedent to having standing to bring an action seeking to enforce GO 156 has

never been decided by this Commission. Because we dismiss the present complaint herein on other grounds, it is not necessary to now address that issue and we decline to do so. Our refusal to consider this legal point is not to be interpreted as either an approval or a rejection of that proposition.

4. Paragraph 4 of the complaint, which merely describes the defendant as a public utility, is jurisdictional only.

5. Paragraph 5 of the complaint alleges that later described acts of the defendant constitute a violation of "jointly and/or severally, PUC GO 156, AB3678, and other applicable California law." This allegation is not self-supporting and has no efficacy in the absence of sustainable factual allegations.

6. Paragraph 6 of the complaint alleges that defendant filed with the Commission and the California legislature annual WMBE reports which contained "fraudulent or unverified WMBE statistics with the intent of deceiving the PUC and the public." We conclude that a complaint proceeding is not the proper vehicle for consideration of this issue.

7. In Decision (D.) 89-08-026, dated August 3, 1989, this Commission considered the question of which type of proceeding, a rate case or generic proceeding, was better suited for addressing WMBE issues. We concluded "that the generic proceeding is the more appropriate forum to review and investigate WMBE policies, practices, procedures, and costs pursuant to GO 156 and to achieve the objectives of WMBE legislation in PU Code §§ 8281-8285."

8. Since the date of D.89-08-026, we have instituted a general investigation (I.) 90-02-044 involving the utilities' efforts and accomplishments regarding WMBE requirements. During that investigation, all aspects of the WMBE program were considered and many suggestions made for expansion of the utilities' compliance efforts. Upon the conclusion of that investigation, a new rulemaking proceeding (R.) 91-02-011 was instituted pursuant to the Order Instituting Rulemaking (OIR) which concluded the

investigation. Under the terms of the OIR, progress in the WMBE program is to be monitored and any necessary corrective action taken. The statistical submissions of the utilities in connection with the WMBE program are subject to examination during those proceedings. That being the case, we will not duplicate our work by examining the accuracy or validity of a utility's WMBE submissions in any context other than a WMBE investigation or WMBE rulemaking proceeding. To hold otherwise would encourage disappointed or disgruntled WMBE vendors, verified or unverified, to file individual complaints instead of participating in WMBE investigations or rulemaking proceedings. The result would be increased costs to the Commission and the utilities by diversion of assets away from positive WMBE efforts to defense against attack.

9. It may well be that errors may appear in the utilities' WMBE submissions; however, the vehicle for resolving questions concerning the bona fides of a utility's WMBE submissions is the investigation/rulemaking procedure and not the complaint procedure.

10. Paragraph 7 of the complaint alleges that although requested by complainant, defendant has failed or refused to provide information to substantiate the validity and accuracy of defendant's WMBE submissions. Defendant claims this information has been furnished to complainant in defendant's response to complainant's third request for data.

11. If the data has been furnished as alleged by defendant, this paragraph of the complaint is moot. If the information has not been furnished by defendant, this is not, as stated above, the proper proceeding for the resolution of that conflict.

12. Paragraphs 8, 9, and 10 of the complaint generally allege that certain named officers of the defendant, from the Chief Executive Officer down to those at the vice president level, have not received WMBE training, and have not conducted or attended officer level meetings where GO 156 or its implementation have been discussed.

13. Section 4.1.2.1 of GO 156 requires that GO 156, its implementation and progress be discussed at officer level meetings. At no point, however, does GO 156 require that any particular officer or level of officer be so involved. We interpret this requirement to mean that a utility must insure that the goals of GO 156 are discussed and promoted by those in positions of authority within the utility. Because of vast differences in corporate structure and lines of authority, we believe any attempt to designate, either by title, job description or officer level those responsible for the furtherance of the goals of GO 156 and its implementation would be counterproductive. We will look, therefore, at results. Compliance with GO 156 can be measured by a company's WMBE efforts, such as program initiation, dollar expenditure in WMBE information distribution, training programs, awareness programs, percentage and value of contracts awarded to WMBE's, and the like. We are of the opinion that compliance with the requirements of GO 156 can be measured more accurately by results than by attempting to designate who or what level of corporate officer should have training in and be responsible for compliance with WMBE requirements. Obviously, someone having supervisory procurement responsibility should be knowledgeable in WMBE requirements and responsible for the company's efforts at compliance, but the choice of who that person or persons should be is best left to the company concerned.

As noted above, results of a company's WMBE efforts are more appropriately reviewable in an investigation or a rulemaking proceeding. For that reason, we will not undertake such a review in a complaint proceeding.

14. Paragraph 11 of the complaint alleges that certain named corporate officers allowed fraudulent or unverified WMBE statistics associated with their respective departments to be published in defendant's 1988-1990 annual reports with the intent of deceiving the Commission.

Once again, these allegations go to issues involving WMBE program implementation and, as such, are not cognizable in this type of proceeding.

15. Paragraph 12 of the complaint alleges that a named officer of the defendant "arbitrarily and without justification terminated all WMBE contracts on or about July 1989, thereby violating GO 156."

In *Allied Temporaries vs. Pacific Bell* (Case 90-03-035), the complainant, whose president is also president of the complainant herein, made the same allegation against PacBell, which is also the defendant herein. In our decision in that case (D.91-06-024), we held that PacBell did not violate GO 156 by cancelling its WMBE master contracts. The contract(s) between the complainant and defendant in that case are the same contracts that are the subject of Paragraph 12 of the instant complaint. Having once decided that issue, we decline to revisit that claim.

16. Paragraph 13 of the complaint alleges that defendant did not offer any external outreach to WMBEs or encourage WMBE participation in its 1990-1991 procurement process. Further, complainant alleges that defendant "intentionally overlooked Allied Temporaries, Inc., a WMBE, in its external outreach programs as a result of complaints raised by Allied regarding PacBell's WMBE program."

The allegation that defendant did not offer any external outreach to WMBE's or encourage WMBE's participation in its 1990-1991 procurement process is belied by the contents of defendant's Exhibit 1 admitted without objection at the May 10, 1991, hearing on defendant's motion to dismiss the complaint. We credit the exhibit over the allegations of Paragraph 13 of the complaint. No more need be said on that point.

17. The allegation that defendant "intentionally overlooked Allied Temporaries, Inc. in its outreach program" fails to state a

claim upon which relief can be granted. Allied Temporaries, Inc. is not a party to this suit and has no standing herein.

18. Paragraph 14 of the complaint alleges that "PacBell's lack of verified WMBE statistics has the effect of creating an uncertainty, and frustrates the Legislative and Commission goals of promoting WMBE contracting pursuant to GO 156, and PUC § 8281, et seq., the net effect of which was to arbitrarily and racially discriminate against WMBE's."

Once again, the allegations of this paragraph of the complaint go to the substance of the submissions of the defendant pursuant to GO 156, and are, therefore, not cognizable in this type of proceeding. Issues involving WMBE submissions pursuant to GO 156 are to be considered in an investigation or rulemaking proceeding.

19. Paragraph 15 of the complaint alleges that "an internal appeal hearing was held with PacBell management. A resolution of our concerns was not achieved." This allegation merely indicates that complainant has exhausted its within-utility remedies and has done all it can to resolve the matter informally. It is a jurisdictional statement only and constitutes no independent basis for relief by this Commission.

20. There is no Paragraph 16 in the complaint.

21. Paragraph 17 of the complaint alleges in general that defendant's president and executive officers do not believe that GO 156 requires submission of accurate and audited WMBE statistics to the PUC and the State Legislature.

Again, this type of allegation goes to the question of the accuracy of the WMBE submissions required by the terms of GO 156. Such issues are to be addressed in an investigation or rulemaking proceeding.

22. Paragraph 18 of the complaint alleges that all acts complained of have damaged WMBE's "in their reputation, contracting opportunities, profit, and experience" and that such were the

"direct and proximate result" of acts of the defendant's president and vice presidents.

This is not a class action suit. Complainant does not speak for all WMBE's. It speaks only for itself. Since all of the preceding paragraphs have been found not to form the basis of anyone's liability cognizable in this type of proceeding, this paragraph is meaningless.

Conclusions of Law

1. The complaint fails to state a cause of action cognizable in this type of proceeding.

2. The motion to dismiss the complaint was well taken and should be granted.

ORDER

IT IS THEREFORE ORDERED that the complaint filed in this cause be, and the same hereby, is dismissed. This order is effective today.

Dated August 7, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President

G. MITCHELL WILK
JOHN B. OHANIAN
NORMAN D. SHUMWAY

Commissioners

Commissioner Daniel Wm. Fessler, being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director