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Decision 91-12-050 December 18, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Allied Temporaries, Inc., )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 AT&T Communications of California, Inc., )  
 )  
 Defendant. )

ORIGINAL

Case 90-10-051  
(Filed October 19, 1990)

ORDER DISMISSING COMPLAINT

Defendant has filed a Motion to Dismiss the Complaint on the ground that it fails to state a cause of action upon which relief may be granted. For the reasons hereinafter set forth, we grant the motion and dismiss the complaint with prejudice.

On October 19, 1990, complainant, through its president, Clarence Hunt, filed a complaint charging defendant with several specified acts which complainant alleged to be in violation of California Public Utilities (PU) Code §§ 8281 through 8285, commonly known as the Women/Minority Business Enterprise (WMBE) statute, California Public Utilities Commission General Order 156 (GO 156), which implements the WMBE statute, and "other applicable California law" (not further specified).

In its complaint, Allied asserted five principal actions by AT&T Communications of California, Inc. (AT&T) which it claims violate the above stated provisions of law or Commission General Order. As paraphrased in the Administrative Law Judge's May 24, 1991 Ruling Designating Issues to be Heard in this matter, those actions are as follows:

1. Defendant filed annual reports for the period 1988-90 with the Commission and with the State Legislature, which reports contained "fraudulent and unverified WMBE statistics with the intent of deceiving the

PUC and general public." (Complaint, paragraph 6.)

2. Defendant, though requested to do so, refused to give complainant "any information...to substantiate the validity and accuracy of [defendant's] WMBE statistics as represented in its 1988-90 annual reports thereby violating GO 156." (Complaint, paragraph 7.)
3. Failure of H. W. Burlington (sic), Senior Vice President of Human Resources Procurement (sic) to receive "any WMBE training regarding the implementation of GO 156 as required." (Complaint, paragraph 8.)
4. Failure of the Senior Vice President to conduct or attend "any officer level meetings as required by GO 156 to review and implement [defendant's] WMBE program in California." (Complaint, paragraph 9.)
5. "As a result of [defendant's] procurement policy of decentralized ordering Allied is being arbitrarily and racially discriminated against by [defendant's] line management in the selection of temporary agency providers." (Complaint, paragraph 10.)

Issues 1 and 2:

In his May 24, 1991 Ruling, which followed a prehearing conference held in this matter on May 13, 1991, the administrative law judge (ALJ) concluded that the first two issues, which involve the accuracy of statistical data filed by AT&T in its annual WMBE reports for 1988-90, are not cognizable in a formal complaint proceeding under Rule 10 of the Commission's Rules of Practice and Procedure or Section 5 of GO 156. Rather, as determined by the Commission in Decision (D.) 89-08-026, decided August 3, 1989, those issues must be addressed in the annual generic WMBE proceeding, rather than in an individual complaint action. The ALJ then directed that those issues would not be heard in this case,

but if the complainant desired to pursue those allegations, he could submit them in the generic proceeding, R.91-02-011, not later than June 17, 1991. The complainant thereafter filed a timely complaint in R.91-02-011, seeking resolution of those issues; however, the complaint was not verified as required in those type proceedings and was rejected. The complainant was given an opportunity to correct the deficiency in his complaint, but never did so. We thus assume that he did not intend to pursue the matter further, and we will not do so here.

We agree with the ALJ's rulings on issues 1 and 2, and adopt them as part of this decision. In our prior decision, D.89-08-026, we held that issues such as those set forth in issues 1 and 2, because they involve a matter (veracity and verification of a utility's annual WMBE reports) which is central to the success of the Commission's general WMBE program, affect all utilities and should be considered in the context of a generic proceeding. We know of no reason, nor has any been demonstrated, why we should now change our position on this point.

The ALJ's May 24, 1991 ruling designated the remaining three issues raised by Allied's Complaint to be heard. Further, since Allied's Complaint did not allege, as required by Rule 10 of the Commission's Rules of Practice and Procedure that this matter had first been brought to the Commission staff for informal resolution, the ALJ issued a further Ruling dated June 7, 1991, requiring the parties to meet with members of the Commission's WMBE staff in an attempt to resolve the remaining three designated issues informally.

Pursuant to the latter ruling, representatives of AT&T and Allied met with the Commission WMBE staff on July 24, 1991. The efforts to informally resolve the issues were unsuccessful and the outcome of that meeting was summarized in a filing by Mr. Philip Bremond, WMBE Program Manager, dated July 25, 1991. Subsequently, this matter was calendared for hearing.

Prior to the scheduled date of the hearing, AT&T filed a Motion to Dismiss the Complaint. The complainant, Allied, has not responded to the Motion which we now consider. Since we herein adopt the ALJ's previous ruling with respect to the first two issues of the complaint, we will examine each remaining issue in the context of the Motion to Dismiss.

Issue Three:

In this issue, Allied alleges a violation of the WMBE statute, GO 156, "or other California Law," by reason of the failure of H. W. Burlington (actually Burlingame), Senior Vice President of Human Resource Procurement (sic) to receive "any WMBE training regarding the implementation of GO 156 as required."

Neither the WMBE statute, nor GO 156, which implements the statute imposes any such requirement of involvement in AT&T's, or any other utility's, WMBE program of any particular officer or level of officer. Section 4.1 of GO 156 simply requires "[r]eview of WMBE program progress and results, and the development of future strategies, at officer level meetings..." Indeed, in D.91-08-027, dated August 7, 1991, we examined this section of GO 156 and stated:

"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 an attempt to designate, either by title, job description or officer level those responsible for furtherance of the goals of GO 156 and its implementation would be counterproductive.

We will look therefore at results...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... (D.91-08-027 at p. 5.)

"Obviously, someone having supervisory procurement responsibility 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." (D.91-08-027 at p. 5.)

For the foregoing reasons, the third issue raised in the Complaint (paragraph 8), fails to state a cause of action upon which relief may be granted in this case.

Issue Four:

This issue of the Complaint alleges violations of the WMBE statute, Commission GO 156, "and other California law" by reason of the failure of the Senior Vice President (presumably Mr. Burlingame) to conduct or attend any officer level meeting as required by GO 156 to review and implement defendant's WMBE program.

This issue must also be dismissed for failure to state a cause of action upon which relief may be granted. The reasons stated for dismissing issue 3 above apply with equal force to this issue, and we adopt that reasoning in support of our dismissal of issue 4.

Issue Five:

The fifth issue raised by Allied's Complaint is that as a result of AT&T's procurement policy of decentralized ordering, Allied is being arbitrarily and racially discriminated against by AT&T's line management in the selection of temporary agency providers. Allied demands that "AT&T be compelled to centralize all procurement activity in the provision of temporary personnel services thereby removing subjective, arbitrary, and discriminatory procurement practices and biased employment procedures."

(Complaint, Prayer for Relief, paragraph 6.) In short, it appears Allied would have AT&T adopt or this Commission order AT&T to adopt a centralized order distribution system under which orders for temporary service personnel are distributed, presumably on an equal

basis, among all vendors with whom AT&T has temporary service contracts or among all vendors who have applied for a certain contract or series of contracts.

Nothing in the law or in GO 156 requires any utility to so structure its procurement activities. The purpose of GO 156 is to increase participation by WMBEs in all categories of procurement by utilities. GO 156 requires the utilities to set short-, mid- and long-term numerical goals for WMBE procurement and to implement an outreach program to inform and recruit WMBEs to apply for procurement contracts. Neither the law nor GO 156 requires a utility to adopt a centralized order process or to guarantee any given or certain percentage of its business to any particular WMBE, i.e., quotas. In fact, were AT&T to adopt such a program, it would be contrary to the letter and spirit of PU Code §§ 8281 through 8285 and GO 156.

Specifically, rather than centralize procurement activities, Section 4.1.2.3 of GO 156 requires the utility to adopt "[p]rograms to train and encourage employees involved in procurement activities to break apart purchases and contracts as appropriate to accommodate the capabilities of WMBEs" (emphasis added). Further PU Code § 8283(b) and § 1.3.12 of GO 156 make it expressly clear that quotas are not contemplated nor permitted as part of the WMBE programs established by the utilities. It seems ironic that AT&T's refusal to do precisely and only those two things (i.e., to centralize its order process for temporary personnel services and allocate a certain percentage of its temporary services procurements to each WMBE vendor) is the basis for Allied's contention that AT&T violates PU Code §§ 8281 through 8285 and GO 156. Once again, these allegations simply fail to state a cause of action upon which relief may be granted and issue 5 must be dismissed.

Further, in addition to alleging violations of PU Code §§ 8281 through 8285 and GO 156, Allied's Complaint alleges that

AT&T "by doing the acts and omissions herein complained of," violated "other applicable California law." Once again, however, Allied fails to assert any legal or factual allegations upon which this Commission may act.

First, Allied fails to cite which other specific laws, rules or orders AT&T is alleged to have violated.

Second, a review of the factual allegations of the Complaint reveals none which state a cause of action for discrimination. At the heart of Allied's Complaint is the contention that AT&T's use of a decentralized procurement process for temporary services is discriminatory and has resulted in Allied receiving no orders for the provision of temporary services, despite having actually received such contracts in 1990 and 1991. (See declaration of Primo Ramos attached as Exhibit 2 to AT&T's Motion to Dismiss the Complaint.) In short, AT&T's adoption and use of a decentralized procurement process for temporary services violates no law, Commission rule or order; and Allied's claim that it has received no orders under its contract with AT&T is false.

Finally, with respect to the charge of racial discrimination, we find no factual allegations in the Complaint upon which any such charge can be based.

Findings of Fact

1. Complainant filed a deficient complaint in the current generic WMBE proceeding regarding issues 1 and 2.
2. Complainant, after notice, failed to correct the deficiencies in the complaint filed in the generic WMBE proceeding.

Conclusions of Law

1. The ALJ's May 24, 1991 ruling with respect to issues 1 and 2 should be adopted.
2. The issues involving utilities' annual WMBE submissions should be considered in the annual generic WMBE proceeding rather than in individual complaint cases.

3. We should not consider issues 1 and 2 in the generic proceeding, R.91-02-011, because of complainant's failure to correct deficiencies in his complaint filed in that proceeding after being given the opportunity to do so.

4. The remainder of the complaint (issues 3, 4, and 5) should be dismissed with prejudice for failure to state a cause of action upon which relief may be granted.

5. Since the complaint fails to state a cause of action, the following order should be effective immediately.

ORDER

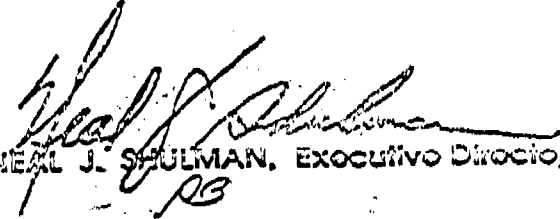
IT IS HEREBY ORDERED that the complaint is dismissed.

This order is effective today.

Dated December 18, 1991, at San Francisco, California.

PATRICIA M. ECKERT  
President  
JOHN B. OHANIAN  
DANIEL Wm. FESSLER  
NORMAN D. SHUMWAY  
Commissioners

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

  
NEAL J. SHULMAN, Executive Director