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Decision 92-01-022 January 10, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Allied Temporaries, Inc. and Other Similarly Situated Companies,

Complainant,

vs.

MCI Telecommunications Corporation,

Defendant.

ORIGINAL

Case 90-07-009
(Filed July 3, 1990)

Clarence Hunt, for Allied Temporaries, complainant.
Mark E. Brown, Attorney at Law, for MCI Telecommunications Corporation, defendant.

O P I N I O N

Background

Defendant MCI Telecommunications Corporation (MCI) has filed a Motion to Strike Paragraphs 24 and 25 of the complaint on the ground that said paragraphs fail to state a cause of action, and has also filed a Motion to Dismiss the complaint in general on the ground that it fails to state a cause of action. For the reasons hereinafter set forth, we grant both of defendant's motions.

On July 3, 1990, Allied Temporaries, Inc. (Allied), a qualified Women/Minority Business Enterprise (WMBE), on its own behalf and ostensibly on behalf of "Other Similarly Situated Companies," filed a complaint charging MCI with several specified acts alleged to be in violation of "the equal protection provision of the California (C)onstitution, Article I/7, or PUC Section 453(a), and PUC-G.O. 156." (Complaint, Paragraph 6.)

On August 9, 1990, MCI filed a Motion to Strike Paragraphs 24 and 25 of the complaint on the ground "that the allegations contained therein are irrelevant, constitute surplusage, do not support the cause of action purportedly plead therein, and on their face are not actionable." We take this to mean that the facts alleged in those paragraphs fail to state facts sufficient to constitute a cause of action. We agree.

Paragraph 24 alleges that MCI's president "has not analyzed, studied, or received WMBE training, sufficient enough to properly guide MCI's compliance with the rules of GO 156." As we made clear in Decision (D.) 91-08-027, Women and Minority Business Enterprise Advocates, Inc. v. Pacific Bell (C.90-08-056), Commission General Order (GO) 156 does not require that any particular level of corporate officer be trained in and responsible for the implementation of the provisions of GO 156. We stated:

> "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 counter-productive.... 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."

We reaffirm that statement and hold that Paragraph 24 of the complaint fails to state facts sufficient to constitute a cause of action. MCI's Motion to Strike that paragraph of the complaint should be granted.

Paragraph 25 of the complaint alleges that MCI's president "allowed potentially fraudulent or unaudited MCI WMBE utilization statistics to be published in MCI's 1989-90 Annual Reports. This unverified information was also provided to the CPUC

[California Public Utilities Commission] and the California State Legislature."

In D.89-08-026, Implementation of PUC Sections 8281-8285 Relating to Women and Minority Business Enterprises, (R.87-02-026), and again in D.91-08-027, supra, we held that the proper forum to review and investigate WMBE policies, practices, procedures, and costs pursuant to GO 156 was a generic proceeding, and that a complaint proceeding was not the proper vehicle for resolution of issues involving such matters. Since the allegations of Paragraph 25 challenge the veracity of MCI's annual WMBE compliance filing, they are not cognizable in this type of proceeding, and should be dismissed. To repeat, such charges will not be heard in this type of proceeding, but only in a generic proceeding.

In its answer to the complaint, MCI entered general and specific denials, and also interposed four affirmative defenses. In addition, on January 8, 1991, MCI filed a motion for leave to file an amendment to the answer previously filed by it. By Ruling dated April 19, 1991, the presiding administrative law judge allowed the amendment.

Stripped to their essentials, the remaining allegations of the complaint set out seven basic charges:

1. That though Allied had, upon request for such by MCI, provided MCI with information concerning Allied's billing rates and had requested MCI to furnish information about contracting opportunities at MCI, MCI failed to provide such information;

2. That MCI failed to establish a centralized bidding procedure for the selection of temporary services;

3. That MCI failed to hold a pre-bidding conference;

4. That MCI failed to respond to a February 5, 1990 written request for contract, and refused to contract with Allied, which is a verified WMBE;

5. That despite the fact that Allied was a responsive and competitive bidder, MCI arbitrarily discriminated against Allied, and rejected each of Allied's requests for contract on the basis that its president is an African-American;

6. That MCI failed to provide any "external outreach" to Allied or other minority companies; and

7. That MCI has not awarded any temporary clerical and programming service contracts to African-Americans, Hispanics, Asians, or Native Americans.

Discussion

From a review of the complaint in this case, it appears that Allied is laboring under the gross misapprehension that all utilities subject to the WMBE statute and to GO 156 must have a formal, centralized bidding process; must hold pre-bidding conferences; and because Allied is a verified WMBE, all utilities must answer all correspondence from a WMBE; and must award a contract to Allied simply because it submits a bid. None of the above is true.

In D.91-05-025, Allied Temporaries, Inc. v. Southern California Gas Company, Reh. den. D.91-08-034, we held that no pre-bid conference, formal bidding process, or even competitive bidding is required by either Public Utilities Code Sections §§ 8281-8285 or GO 156. (See also, D.91-06-024, Allied Temporaries v. Pacific Bell.) The complaint contains no factual allegation that would cause us to reconsider that holding. This holding disposes of Paragraphs "2" and "3" above.

Likewise, in D.91-01-012, Lam Securities Investment v. San Diego Gas & Electric Company, et al., (Case (C.) 90-07-005, et al., we held that neither the WMBE statute nor GO 156 requires a utility to deal with or hire any particular vendor seeking a contract; it need only establish a level playing field for all

vendors. That holding, which we now reaffirm, disposes of the claims set forth in Paragraphs "1" and "4" above.

Allied's claim of racial discrimination is one which has appeared in each of the many complaints filed by Allied or one of its several branches, divisions or affiliated companies against various utilities under the WMBE statute and/or GO 156. Here, as in each of the several other complaints, Allied merely makes a bald assertion of racial discrimination without stating or making reference to a single fact which would support such a charge or from which even an inference of racial discrimination may be drawn. In the absence of factual assertions of sufficient specificity and clarity to allow some degree of credence to be given to the assertion, we will not grant a hearing on this assertion. If Allied wants a hearing on its charge of racial discrimination, it must set forth some <u>facts</u> supporting that charge. Our holding on this point disposes of the claim of racial discrimination contained in Paragraph "5" above.

The claims paraphrased in Paragraphs 6 and 7 above may be treated collectively. These claims basically allege a failure by MCI to provide "external outreach" and a failure to award contracts to African-Americans, Hispanics, Asians, or Native Americans.

The fact alleged by Allied that MCI, under its WMBE program, requested information from Allied concerning Allied's rates for the provision of temporary services demonstrates that MCI conducted "external outreach" efforts. Allied's complaint is, in reality, not that MCI did not have an "external outreach" effort, but that the "outreach" did not reach Allied in the form of a contract. We have said all that needs to be said on that issue. This disposes of the claims paraphrased in Paragraph "6" above.

At the hearing on defendant's motion to dismiss, complainant objected to the filing of defendant's fifth affirmative defense in which defendant set forth, as a defense, the recent award of a contract to an organization named "Act 1," a verified

WMBE. Complainant does not challenge Act 1's status as a verified WMBE. Indeed, complainant readily and clearly acknowledged that Act 1 is a verified WMBE (TR. p. 51). Complainant likewise does not challege that Act 1 was, in fact, awarded a contract by defendant. Instead, complainant attempted to argue that Act 1 is a fraudulently structured company or a "front," presumably for a nonminority or nonwomen-owned enterprise, and as such does not qualify as a WMBE.

As the ALJ noted in the record (TR. pp. 50-51), Act 1 has been verified as a WMBE by the WMBE Clearinghouse. As such, we will not allow that status to be attacked collaterally in this proceeding in which Act 1 is not a party and has no standing to defend itself. If complainant wishes to challenge Act 1's status, it may certainly do so, but not in this forum.

Neither the WMBE statute nor GO 156 requires that a contract be awarded to any specific ethnic or racial minority category. They require only that contracts counted toward achievement of a utility's WMBE goal be awarded to verified WMBEs. Defendant has complied with this requirement as Act 1 is a verified WMBE.

The award to Act One makes the allegations paraphrased in paragraph "7" above moot.

Findings of Fact

1. MCI's Motion to Strike Paragraphs 24 and 25 of the complaint has merit and should be granted.

2. The allegations paraphrased in Paragraphs "1" through "4" above have been considered and rejected in prior decisions of this Commission and should not be reconsidered in this case.

3. The allegations paraphrased in Paragraph "5" above do not allege facts which would support a charge of racial discrimination in the operation of MCI's WMBE program.

4. MCI contacted Allied and requested Allied's rates for providing temporary services.

5. MCI has awarded a contract for temporary services to Act 1, which has been verified as a WMBE.

Conclusions of Law

1. MCI's Motion to Strike Paragraphs 24 and 25 of the complaint is granted and said paragraphs are struck from the complaint.

2. The allegations paraphrased in Paragraphs "1" through "5" in the body of this decision fail to state facts sufficient to constitute a cause of action upon which the relief requested may be granted.

3. The complaint fails to state facts sufficient to constitute a cause of action based on racial discrimination.

4. MCI engaged in "external outreach" in furtherance of its WMBE program implementation when it contacted Allied and requested Allied's rates for providing temporary services.

5. The allegations paraphrased in Paragraph "7" in the body of this decision are moot and must, therefore, be dismissed.

O R D E R

IT IS ORDERED that:

1. Paragraphs 24 and 25 of the complaint filed in this cause are stricken.

2. The remainder of the complaint is dismissed without prejudice.

This order is effective today.

Dated January 10, 1992, at San Francisco, California.

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

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

NEAL J. SHULMAN, Executive Director