

Decision 97-03-043 March 18, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

John J. Wheeling, dba)
 Services Systems,)
)
 Complainant,)
)
 vs.)
)
 Southern California Edison)
 Company (U-338-E),)
)
 Defendant.)

Case 92-10-034
(Filed October 26, 1992,
amended February 16, 1993)

ORIGINAL

OPINION DISMISSING COMPLAINT

On October 26, 1992, John J. Wheeling, a Native American, doing business under the name of Service Systems (complainant), who has been verified as a Women/Minority/Disabled Veteran/Business Enterprise (WMDVBE) pursuant to the provisions of Public Utilities (PU) Code §§ 8281 - 8285, filed a complaint against Southern California Edison Company (Edison or defendant) and certain named employees, generally charging Edison and the named employees with violation of Commission General Order (GO) 156 by failing or refusing to purchase wind generated electric power from Service Systems; by failing or refusing to register his name [presumably meaning both his personal and business names] in Edison's energy supplier data base; and failure to develop a WMBE (now WMDVBE) outreach program.

On November 24, 1992, the assigned Administrative Law Judge (ALJ) issued a ruling referring the complaint to the Commission's WMDVBE staff for informal resolution pursuant to Rule 10 of the Commission's Rules of Practice and Procedure.

By letter dated January 20, 1993, complainant amended his complaint to include an additional charge of "bad faith in the lack of any attempt to identify WMBE power contractors, or outreach to any known WMBE developers, which are qualified, and known to SCE existence (sic)." On February 16, 1993, complainant filed a "Rule 13 Amendment", in which he alleged the existence of a Federal Energy Regulatory Commission (FERC) designated Native American Minority Qualified Facility (QF) in Warm Springs, Oregon, and argued that [since he had shown the existence of a minority owned QF] the burden pursuant to GO 156 Section 6.5 (now 8.5) was on Edison to prove an exclusion of electric generators from the coverage of GO 156.

On February 26, 1993, the WMDVBE Program Manager filed a document dated February 16, 1993, advising that attempts at informal resolution had been unsuccessful.

On March 26, 1993, Edison filed its answer and a Motion to Dismiss the complaint against the named employees of Edison, and against the company as well. By ruling dated, issued, and filed May 4, 1993, the assigned ALJ dismissed the complaint against the named individual employees of Edison, and further ruled that a hearing on the motion to dismiss against Edison would be scheduled. We hereby ratify dismissal of the complaint against such individual employees of Edison. Thereafter, by notice dated May 27, 1993, a hearing on the motion was scheduled for June 24, 1993.

By letter dated May 14, 1993, and received by the ALJ on June 1, 1993, complainant furnished the name and address of an additional Native American owned or operated QF, of which Edison allegedly had knowledge, and reiterated that the burden was on Edison to show that power contracts were subject to exclusion from WMDVBE guidelines.

By letter to the ALJ dated May 30, 1993, complainant forwarded an article from the April 19, 1993 edition of Fortune magazine, describing business activities of Native Americans,

including ownership of a power plant in Warm Springs, Oregon, by the Confederated Tribes of the Warm Springs Reservation. The purpose behind the submission of this article is not stated, but is presumed to be to show the existence of QF generated power owned by WMDVBE's and available to Edison.

On June 22, 1993, at the joint request of the parties, the June 24, 1993 hearing on the Motion to Dismiss was cancelled.

On July 16, 1993, complainant submitted for filing a Response to the Motion to Dismiss. This document was rejected for filing by the Commission's Docket Office because it was not accompanied by a certificate of service as required by Commission rules, showing service on Edison. Under date of July 28, 1993, a letter was sent to complainant by the Commission's Docket Office explaining the process for resubmission. This letter was returned by postal authorities bearing the notation "unknown". No response to Docket Office's letter was received; the discrepancy was never corrected; nor was the Response ever resubmitted for filing. In view of the fact that the complainant is appearing pro se, for the purpose of the motion only, the response which he attempted to file is being considered.

Under date of August 20, 1993, complainant sent the ALJ ten pages of miscellaneous documents indicating complainant's application to the FERC for determination of Electric Wholesale Generator (EWG) status; a letter from Hillary Rodham Clinton acknowledging receipt of a letter from complainant to candidate [now President] Bill Clinton regarding Native American Sovereignty Rights; acknowledgement from the U.S. Department of Commerce indicating issuance of a Trade Export Certificate of Review to complainant; and letter from Sen. Daniel K. Inouye, Chairman of the Senate Select Committee on Indian Affairs, acknowledging receipt of a letter from complainant concerning [then] President Bush's statements to Indian leaders with regard to a government-to-government relationship between the United States and Indian tribal

governments. In addition, complainant enclosed with the foregoing documents, 12 copies of a letter to the ALJ requesting the ALJ to consider [presumably as evidence] complainant's FERC application.

Also during the week of August 20, 1993, complainant forwarded the ALJ a copy of a 399-page report dated October 1, 1992 entitled "Annual Qualifying Facilities Report", published by FERC, containing "A Cumulative List of Filings Made for Small Power Production and Cogeneration Facilities" for Fiscal Year 1980 through Fiscal Year 1992. A hand written note on the cover directed attention to page 191. Examination of that page indicated the highlighted name "QF81-33 Confederated Tribes of Warm Springs, OR", with abbreviations which seem to indicate those Tribes to be the collective operator of a 19,600 kilowatt capacity hydro-electric generation facility. In addition, complainant, at that time, forwarded the ALJ a copy of the December 1993 edition of "Independent Energy", the independent energy producer industry's business magazine, with several page numbers in the Table of Contents circled. Reference to those pages revealed lists of names of those involved in certain activities, without indication of what names the complainant intended to call to the attention of the ALJ or the significance of any or all of said names. Presumably, the intent was to show that several minority firms are engaged in some form of power generation and distribution.

By letter to the ALJ dated November 12, 1993, complainant advised that Edison disputed complainant's status as an EWG, and for that reason had rejected complainant's electric power bids in contravention of GO 156. In addition, complainant contested the legality of Edison's challenge to complainant's status as an EWG.

By notice dated February 23, 1994, oral argument on Edison's Motion to Dismiss was scheduled for March 24, 1994. By letters dated March 1 and 7, 1994, complainant indicated that the parties had previously agreed not to have oral argument on the motion, but would have the ALJ decide the matter on the basis of

the pleadings and other papers in the file, and that he desired that agreement to stand. Thereafter, the parties indicated that they wished to waive oral argument on the motion. By notice dated March 18, 1994, oral argument on the motion to dismiss was cancelled.

Abeyance

At the time defendant's motion to dismiss came on for consideration, the Commission's investigation in Edison's Biennial Resource Planning Update (BRPU) proceeding (I.89-07-004) was in progress. Since defendant argued in its motion that its power purchase requirements were established in the BRPU, consideration of the motion was held in abeyance pending the completion of that proceeding.

By ruling dated April 2, 1996, subsequent to the completion of the BRPU, the assigned ALJ directed the complainant to advise whether in his individual or business capacity he was a bona fide QF, and directed defendant to advise whether it offers or has offered to purchase electricity from complainant under a Standard Offer 1 (SO 1) or Standard Offer 3 (SO 3) contract available to QFs.

By letter dated April 18, 1996, Edison responded to the ALJ ruling and stated that it had advised complainant of the availability of SO 1 and SO 3 contracts, but that complainant expressed interest only in a contract with prices above avoided cost.

Complainant did not respond to the ALJ ruling or to defendant's submission.

Because of complainant's failure to respond to the ALJ's ruling of April 2, 1996, the ALJ, on August 12, 1996, issued a ruling directing complainant to file a written response postmarked not later than August 23, 1996, showing cause why the ALJ should not recommend to the Commission that this case be dismissed with prejudice for failure to respond to the ALJ's April 2, 1996 ruling.

By letter dated November 7, 1996, complainant advised the ALJ that complainant has moved frequently over the time this case has been pending, but that the Commission has not kept up-to-date on his address changes, with the result that mail to him has been delayed. Contrary to complainant's allegations, we note that the Commission's Process Office has promptly updated complainant's address when notified of a change of address, but that complainant has been remiss in keeping the Commission advised of his latest change of address. As an example, it was not until the ALJ received complainant's letter of November 7, 1996, that he knew complainant had once again moved. At any rate, complainant's frequent change of address has resulted in no harm; it has merely kept this proceeding open far longer than necessary.

In his November 7, 1996 letter, complainant denies that Edison ever offered any "written" contract "as required by [the ALJ's] order" or any verbal offer, and that complainant "personally never received, nor [sic] doubt that one was ever offered, at any price?" [sic]. Further, in his letter, complainant requests time "to prove his qualifications." We deny any additional time for that purpose.

For the purpose of this dismissal, we do not challenge complainant's qualifications nor his status as either a WMDVBE or as having QF status, but assume arguendo, such status. However, neither assumption precludes dismissal of the complaint for failure to state a cause of action as discussed below.

Discussion

Designation as Energy Wholesale Generator

Any issue involving complainant's alleged designation as an EWG and/or Edison's challenge to that designation or status is beyond the jurisdiction of this Commission. Such a designation is allegedly made by FERC. If such designation is a fact, presumably it was made after complainant had satisfied some requirements established by FERC for that purpose. The Commission does not

grant such a designation, and while the Commission might, in appropriate circumstances, take official notice of the fact that FERC has granted such a designation, we are not required to do so, and for the purposes of deciding this motion, it is not necessary for us to do so.

GO 156

Complainant alleges that since he has shown the existence of minority owned and operated QFs engaged in electric energy generation, it is the obligation of Edison under the WMDVBE statute to offer contracts for the purchase of electricity by Edison to WMDVBE's, unless Edison can affirmatively demonstrate an exception from such obligation pursuant to Section 8.5 of GO 156. Complainant is in error, and the complaint must be dismissed as failing to state a claim upon which relief may be granted.

The purchase of electric power by a regulated utility from a QF is not like the purchase of personnel services or office supplies. In Edison's case, aside from the compulsory purchase of electricity from a QF pursuant to SO-1 and SO-3 contracts which complainant has refused, Edison's resource planning and acquisition process is regulated by the Commission in Edison's BRPU proceeding, (I.89-07-004). That proceeding establishes the amount of generation Edison must add to its system, the amount of generation Edison must procure from QFs, and the contract terms for those purchases. All issues concerning the purchase of such power, including qualifications of bidders and the bidding process, as well as the resolution of disputes arising thereunder, are resolved within the context of that proceeding. Accordingly, aside from the requirement to purchase electricity from QFs pursuant to SO 1 and SO 3 contracts, Edison's BRPU proceeding regulates Edison's acquisition of new generation, and a QF that desires to provide power to Edison other than pursuant to SO-1 and/or SO-3 contracts, must participate in, and make its case in the BRPU proceeding.

Findings of Fact

1. Complainant, a Native American and a verified WMDVBE, filed a complaint and several supplemental documents generally alleging that Edison and certain of its employees violated GO 156 by: (1) failing or refusing to purchase wind generated electric power from complainant; (2) failing or refusing to register complainant's name in its energy supplier data base; (3) failure to develop a WMBE (now WMDVBE) outreach program; and (4) bad faith in failing to identify WMDVBE power contractors.

2. Informal resolution efforts pursuant to Rule 10 of the Commission's Rules of Practice and Procedure were unsuccessful.

3. Though not filed of record, complainant's response to Edison's Motion to Dismiss has been considered for purposes of the motion.

4. By ruling filed May 14, 1993, the presiding ALJ dismissed with prejudice the complaint against Edison's employees in their respective individual capacities. We hereby ratify that dismissal.

5. The parties waived oral argument on the motion to dismiss and consented to resolution of the motion based on the written documentation in the file.

6. Between March 1993 and November 1996, complainant provided information concerning the existence and identification of WMDVBE's engaged in electric energy generation.

7. Complainant alleged that Edison disputes complainant's designation by the FERC as an EWG.

8. Edison states and complainant denies that complainant has been offered SO 1 and SO 3 contracts by Edison, but has refused to provide power to Edison pursuant to those contracts.

9. With the exception of SO 1 and SO 3 contracts, Edison's resource planning and acquisition process is regulated by the Commission in Edison's BRPU proceeding I.89-07-004.

Conclusions of Law

1. The Commission lacks jurisdiction over FERC's designation of entities as EWGs and, for the purposes of this motion, we need not take official notice of such designation.

2. With the exception of SO-1 and SO-3 contracts, Edison's energy acquisition program is directed by the Commission through Edison's BRPU, and is not independently subject to the requirements of GO 156.

3. Edison has offered to purchase power from complainant under SO-1 and/or SO-3 contracts; however, complainant has refused those offers.

4. The allegations set forth in the complaint fail to state a claim upon which the relief demanded may be granted.

5. The complaint should be dismissed with prejudice.

O R D E R

IT IS HEREBY ORDERED that:

1. Southern California Edison Company's motion to dismiss the complaint is hereby granted.

2. The complaint is hereby dismissed with prejudice.
This order is effective today.

Dated March 18, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners