

Decision 98-07-024 July 2, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The CMS Group, Inc.,

Complainant,

vs.

Pacific Bell,

Defendant.

ORIGINAL

Case 95-12-001
(Filed December 1, 1995)

O P I N I O N

Procedural History

On December 1, 1995, The CMS Group, Inc. (CMS or complainant), a verified Women, Minority, Disabled Veteran Business Enterprise (WMDVBE), filed the complaint in this proceeding alleging that Pacific Bell (PacBell or defendant) engaged in contracting practices that discriminated against it as a WMDVBE in violation of Public Utilities (PU) Code § 453, Commission General Order (GO) 156, and the August 24, 1982, Modification of Final Judgment (MFJ), in *United States v. American Telephone and Telegraph Company, et al.*, Civil Actions Nos. 741698, 82-0192 (U.S.D.C., D.C.).

On January 18, 1996, defendant filed an answer wherein it alleged that the complaint fails to state a cause of action cognizable by this Commission in that it merely alleges breach(es) of contract and/or commission of acts for which no remedy is or should be available from the Commission; that defendant has met or exceeded its WMDVBE goals for the years covered by the complaint; and that defendant has not discriminated against complainant in its award of contracts for goods and services. In addition, the answer sets forth seven separate affirmative defenses to the allegations of the complaint.

On April 26, 1996, defendant filed a motion to dismiss the complaint, to which complainant filed a response on May 13, 1996. Oral argument on defendant's motion to dismiss was held before the assigned Administrative Law Judge (ALJ) on August 22, 1996. Post argument briefs were neither requested by the ALJ nor filed by either party. For the reasons which follow, we grant defendant's motion and dismiss the complaint with prejudice.

Background

CMS, was founded as a sole proprietorship by Carl Olson sometime around 1980 when Olson, then a PacBell employee, left PacBell and started CMS. Subsequently, CMS was incorporated with Olson as sole shareholder. After CMS was established, Olson married and his wife thereafter went to work for CMS. Subsequently, Olson transferred at least 51% of the shares of CMS to his wife and hired a number of workers who had many years experience as PacBell employees. In approximately 1985, Olson returned to work for PacBell and has continued to work for PacBell to at least the date of the PHC. Olson has worked on and off for PacBell for approximately 17 years.

In 1994, CMS was verified as a WMDVBE by the Cordoba Corporation, the company then under contract to the Commission to conduct background investigations of entities applying for WMDVBE status and to grant such status in appropriate cases.

CMS is engaged in the business of information systems engineering and consulting which, among other services, provides assistance to local exchange telephone companies (also known as Local Exchange Carriers or simply LEC's) in converting subscriber telephone lines/numbers from old or obsolete LEC switches to current technology replacement switches newly installed in the LEC's central offices. Defendant is a LEC.

According to the complaint, when a LEC decides to replace a central office switching system, actual installation of the switch (commonly undertaken by the switch vendor--AT&T or Northern Telecom) necessitates performance of additional or ancillary functions, including building preparation, wiring frame installation, cabling, power systems, and software conversion. Complainant alleges, and defendant denies,

that software mapping is a "stand alone" function and that as software conversions increasingly became more complex, complainant found it could offer "highly competitive" services assisting LECs in migrating their databases successfully to new switching systems.

Complainant further alleges that since 1989, it has converted two million telephone lines in at least nine states across the country, and has done switch conversions in six of PacBell's seven operating divisions.

Commencing in 1995, PacBell implemented new contracting practices for switch conversion projects as part of what it describes as the "Statewide Optional Services" (SOS) project. Complainant alleges that PacBell's stated intention was to use a primary contractor to integrate all central office site conditioning needs, including switch installations and related software conversions; but in spite of that stated intention, the effect of SOS has been to funnel all of PacBell's switch conversions to its two switch vendors--AT&T and Northern Telecom. In addition, complainant alleges that despite defendant's stated intention, in implementing SOS to use a primary contractor to integrate all central office site conditioning needs, subsequent to the implementation of SOS, defendant awarded contracts to individual vendors for discrete elements of central office site conditioning projects, including contracts awarded to Reliance Telecom for power system services.

In addition, complainant alleges that because it occupies a "unique niche" as a provider of "stand-alone" switch conversion services and therefore cannot qualify as a primary contractor for an entire central office site conditioning project under the SOS program, defendant has systematically denied CMS the opportunity to compete to provide stand-alone switch conversion services at lower costs and more effectively than either AT&T or Northern Telecom.

The Complaint

In its complaint, CMS alleged three separate and distinct causes of action against PacBell: (1) Discrimination in violation of Public Utilities (PU) Code § 453; (2) Violation of § 8.11 of Commission General Order (GO) 156; and (3) Violation of Modification of

Final Judgment (MFJ) entered on January 24, 1956, in *United States v. American Telephone and Telegraph Company, et al.*, Civil Actions Nos. 74-1698, 82-0192 (U.S.D.C., D.C.). At the oral argument on the motion to dismiss the complaint held in this proceeding on August 22, 1996, counsel for complainant stipulated that the cause of action alleging violation of the MFJ of the U.S. District Court for the District of Columbia be dismissed with prejudice (PHC Tr. pp.26-27, 29). In furtherance of counsel's stipulation, the third cause of action alleged in the complaint is dismissed with prejudice and is no longer before us for consideration.

Discussion

For ease of discussion, we will consider the motion to dismiss the two remaining alleged causes of action in inverse order to that set forth in the complaint.

Violation of GO 156

The purpose behind the so-called WMDVBE statute [PU Code §§ 8281-8286] and its implementing regulation, GO 156, is to encourage covered utilities [electric, gas and telephone companies having annual gross revenues in excess of \$25 million] to award a portion of each utility's annual procurement contracts for goods and services to vendors, contractors, and subcontractors who are, or are owned and controlled by, women, minorities, or disabled veterans. For the past several years, the numerical goals for awards to the groups covered by the WMDVBE statute have been 5% to women and 15% to minorities. In 1995, a temporary goal for procurement awards to disabled veterans was set at 1.5%. In 1997, that figure was adopted as the long-term goal for award of procurement contracts to disabled veterans. We hesitate to denominate that goal as "permanent" as opposed to "temporary" as previously used in GO 156 because we note that the figure should be flexible and change upon presentation of facts justifying such a change. Thus, at all times relevant to this case, under the Commission's WMDVBE program, covered utilities were encouraged to award 15% of their total annual procurement contracts to minorities or companies owned and operated by minorities, 5% to women or companies owned and operated by women, and 1.5% to disabled veterans or companies owned and operated by disabled veterans.

Since the inception of the WMDVBE program, the stated percentage goals have been understood to be yearly goals, and experience has shown that attempts to measure compliance on a shorter term basis is neither practical nor accurate. Therefore, the Commission requires each covered utility to report its WMDVBE procurement efforts and achievements on an annual basis on a form prescribed by the Commission.

As we have pointed out on numerous occasions, the WMDVBE statute envisions voluntary compliance, and for that reason contains no provisions for the imposition of penalties or other sanctions on utilities for failure to meet the statutory goals as expressed in GO 156.

GO 156 implements the provisions of PU Code §§ 8281-8286, and having that purpose, contains specific provisions designed to convert the aspirations expressed in the statute into everyday practice. The specific provision of GO 156 which complainant contends PacBell has violated is § 8.11, which reads:

8.11 "Each utility shall make special efforts to increase utilization and encourage entry into the marketplace of WMDVBES in product or service categories where there has been low utilization of WMDVBES, such as legal and financial services, fuel procurement, and areas that are considered technical in nature."

This provision must be read in conjunction with § 6.2 which sets forth various actions utilities are encouraged to take to develop and/or increase contact with WMDVBES that may not be aware of the opportunities offered by a particular utility for such WMDVBES to participate in its goods and services procurement program. § 8.11 expands on § 6.2 and is designed to encourage utilities to utilize WMDVBES in the procurement of those types of goods or services not traditionally available from WMDVBES, such as legal and financial services, fuel procurement, and goods and services of a technical nature. In this way, the utility seeks to involve WMDVBES in satisfying a broader range and larger portion of the utility's procurement needs, and thus achieve the [numerical] goals discussed above. In short, the outreach program outlined in §§ 6.2 and 8.11 is informational in nature and strives to make WMDVBE contractors and vendors aware of opportunities that are available to them to participate

in the provision of the utility's needs. In this regard, the Commission has never attempted to prescribe the manner in which a utility is to fulfill its outreach obligations, relying instead upon the utility's knowledge of its own needs, its internal maintenance and development programs, its vendor community and upon its results [contract award figures] to evaluate effectiveness of the utility's outreach program. The Commission believes the utility is in the best position to know what its needs are, who manufactures and/or sells the products it needs to acquire and the sources from which those products and services are available, and we will not interfere with the functioning of that process unless and until the utility's WMDVBE goals are not met.

Because of Olson's continuing long-time personal employment with PacBell and in view of the fact that CMS has in the past been awarded numerous contracts by PacBell for software and software applications, we are of the opinion that CMS was not ignorant of either PacBell's outreach efforts or programs to contract with WMDVBE vendors and contractors. Since CMS has admittedly been the recipient of several PacBell contracts for the procurement of goods and services of a technical nature, it is unrealistic to say that PacBell has violated either the language or spirit of § 8.11 of GO 156. In this instance, it appears from the pleadings that complainant was well aware of and attempted to obtain one or more contracts under the SOS program, but was unsuccessful in those efforts. That is a far cry from being unaware of the opportunities sought to be afforded by § 8.11.

In passing, we have pointed out on several prior occasions that the submission of a proposal or bid by a WMDVBE, like a submission by any other bidder, is no guaranty that that particular bidder will be awarded the contract. Being a WMDVBE or having WMDVBE status gives no special privileges or advantages insofar as contract awards are concerned. The purpose of the WMDVBE program is to "level the playing field" so

as to give minority vendors and contractors knowledge of and a fair opportunity to compete for the provision of goods and services to covered utilities. It does not guarantee success in the effort to obtain a contract.

Violation of PU Code § 453

PU Code § 453, commonly referred to as the "anti-discrimination" provision, broadly sets forth those actions and/or practices in which public utilities are prohibited from engaging. More specifically:

"(a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

"(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status. A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorneys fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees.

"(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

"(d) No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, state-wide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state, or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations.

"(e) The commission may determine any question of fact arising under this section."

being the case, the remaining question is whether the facts alleged in the complaint, if true, are sufficient to constitute a violation of subsection (a) of § 453.

Subsection (a) is the omnibus or "catch all" provision of the anti-discrimination statute. After reviewing this section, it is difficult to imagine any act that could not conceivably come within its terms. The wording of this provision is so broad that virtually any allegation of wrongdoing on the part of a utility could give rise to a claim of discrimination. That does not mean, however, that every statement of facts legally sufficient to constitute a cause of action under PU Code § 453(a) will actually be recognized as a prosecutable claim by this Commission. Such is the case here.

It has long been Commission policy not to entertain complaints brought to enforce the terms of a contract, to establish the existence of a contract, or to compel a contract. Here, the gravamen of this action is that the effect of PacBell's method of implementing its SOS program "has been to funnel all of PacBell's switch conversions to PacBell's two switch vendors, AT&T and Northern Telecom" (complaint, para. 11) and "subsequent to its implementation of SOS, [PacBell has awarded contracts to individual vendors for discrete elements of central office site conditioning projects, including contracts awarded to Reliance Telecom for power system services" (complaint, para. 12).

Such allegations basically complain of CMS's failure to obtain a contract for services which it believes it is best qualified and equipped to provide, and complain of PacBell's chosen method of soliciting for and contracting to upgrade or modernize its facilities. With changes in technology, it is inevitable that the goods and services offered by some contractors may no longer be desired or necessary, or that the services offered by one vendor can be combined with functions performed by other contractors, thus eliminating the need for one or more contractors in accomplishing the upgrade. We will not attempt to second guess how PacBell chose to fulfill its needs. Conflicts concerning such matters are for another forum.

Findings of Fact

1. Complainant is a verified woman owned and operated Women, Minority, Disabled Veteran Business Enterprise (WMDVBE) within the meaning of PU Code §§ 8281-8286 (the WMDVBE statute) and its implementing regulation, GO 156.
2. In its complaint, complainant alleges three causes of action against defendant: (a) Discrimination in violation of PU Code § 453; (b) violation of § 8.11 of GO 156; and (c) violation of MFJ entered on January 24, 1956, in *United States v. American Telephone and Telegraph Company, et al.*, Civil Actions Nos. 74-1698, 82-0192 (U.S.D.C., D.C.).
3. On August 22, 1996, counsel for complainant stipulated that the cause of action alleging violation of the MFJ be dismissed with prejudice.
4. For the past several years, the annual numerical goals for award of contracts for the procurement of goods and services by utilities subject to the WMDVBE statute and GO 156 have been 15% to minorities and 5% to women. In 1995, a temporary annual goal for award of contracts to disabled veterans was established at 1.5%. In 1997, that figure was adopted as a long-term annual goal.
5. The purpose of the WMDVBE statute and program is to encourage covered utilities to voluntarily pursue and annually achieve the goals established in GO 156, and in this way make contracts for procurement of goods and services by utilities available to WMDVBES.
6. The covered utilities report their WMDVBE contract award achievements to the Commission on an annual basis.
7. Section 8.11 of GO 156 directs covered utilities to make special efforts to increase utilization of WMDVBES in product or service categories where there has been low utilization of WMDVBES.
8. The Commission has historically used contract awards as one indication of a utility's outreach efforts, assuming that if a utility achieves its WMDVBE contract award goals, its outreach efforts were effective.
9. During the time periods referred to in the complaint, PacBell met or exceeded its annual WMDVBE goals.

10. Since 1989, CMS has done telephone switch conversions in six of PacBell's seven operating divisions.

11. CMS's founder's continuing long-time personal employment with PacBell and CMS having previously being awarded numerous contracts by PacBell for software and software applications, indicates that CMS was not ignorant of either PacBell's outreach efforts or programs to reach WMDVBE vendors and contractors.

12. Commencing in 1995, PacBell implemented new contracting practices for switch conversions which CMS claims has resulted in it not being awarded any contract as for portions of switch conversions.

13. The purpose of the WMDVBE program is to "level the playing field" so as to give minority vendors and contractors knowledge of and a fair opportunity to compete for the provision of goods and services to covered utilities on the same terms and conditions as non-WMDVBE vendors and contractors.

14. Under the WMDVBE statute, submission of a proposal or bid by a WMDVBE is no guarantee that the particular bidder will be awarded the contract.

15. Subdivisions (b), (c), and (d) of PU Code § 453 deal with subjects not here involved and have no application to the matter before us.

16. The wording of subdivision (a) of § 453 is so broad that virtually any allegation of wrongdoing on the part of a utility could give rise to a claim of discrimination; however, that does not mean that every statement of facts legally sufficient to constitute a cause of action under PU Code § 453(a) will actually be recognized as a prosecutable claim by the Commission. Such is the case here.

17. It has long been Commission policy not to entertain complaints brought to enforce the terms of a contract, to establish the existence of a contract, or to compel a contract.

18. The allegations of the complaint basically raise contract questions relating to PacBell's chosen method of soliciting for and contracting to upgrade or modernize its facilities, and under Commission policy do not give rise to a prosecutable claim.

Conclusions of Law

1. At all times pertinent to the complaint, CMS was and presently is, a duly verified WMDVBE.

2. By stipulation of complainant, the cause of action alleging violation of the Modified Final Judgment in *United States v. American Telephone and Telegraph Company, et al.*, Civil Actions Nos. 74-1698, 82-0192 (U.S.D.C., D.C.), is dismissed with prejudice.

3. The facts alleged in the complaint fail to state an actionable claim for violation of § 8.11 of GO 156.

4. The facts alleged in the complaint if proven true, fail to establish an undue preference or an actionable claim for discrimination under Public Utilities Code § 453.

5. This is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in Public Utilities Code § 1757.1.

6. The complaint should be dismissed with prejudice.

O R D E R

IT IS ORDERED that:

1. The complaint in this proceeding be dismissed with prejudice.
2. This proceeding is closed.

This order is effective today.

Dated July 2, 1998, at San Francisco, California.

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