

Decision 00-04-025 April 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Samuel Anderson, PRO Engineering and Oasis Nuclear, Inc.,

Complainants,

vs.

Pacific Gas & Electric Corp.,

Defendant.

Case 99-07-005
(Filed July 6, 1999)

OPINION

1. Summary

This decision dismisses the complaint due to failure to state a claim upon which this Commission should grant relief.

2. Background

On July 6, 1999, Samuel Anderson, PRO Engineering, and Oasis Nuclear, Inc., filed this complaint seeking unspecified injunctive relief and attorney fees against Pacific Gas and Electric Company (PG&E). In the complaint, Anderson alleged that certain actions by PG&E and its contractor, Corestaff, violated §§ 8281 to 8286,¹ which are commonly referred to as the Women, Minority, Disabled Veterans Business Enterprises (WMDVBE) statute. (Anderson also restated allegations against Corestaff and certain individuals that are pending before Superior Court.) Anderson stated that Corestaff terminated his employment because he complained about its violations of the statutes.

¹ All citations are to the Public Utilities Code unless otherwise indicated.

PRO Engineering alleged that it had an "understanding" with Black and Veatch, regarding subcontracts for services on a revenue metering contract with PG&E, and that Black and Veatch had failed to assign the subcontracts to PRO Engineering.

Oasis Nuclear, Inc., alleged that it had been improperly prevented from presenting potential contract staff to PG&E by Corestaff.

All complainants alleged that PG&E also was violating General Order (GO) 156, the Commission order which implements the WMDVBE statute, by abdicating its responsibility for a prime contractor outreach program to Corestaff.

On September 3, 1999, PG&E answered the complaint and moved to dismiss. PG&E stated the statute and GO 156 encourage utilities to increase the extent to which WMDVBEs obtain procurement contracts from the utility. PG&E stated that in 1998 it awarded 22.74% of all procurement contracts to WMDVBE firms, thus exceeding its Commission-established goal of 21.5%. PG&E concluded that to the extent any complainant objected to its compliance with the WMDVBE standards, the complainant should pursue those issues in the annual proceeding for that purpose, and that this complaint should be dismissed.

PG&E further stated that Anderson had no standing to bring the complaint because he is not a WMDVBE, nor had PG&E ever employed him. PRO Engineering and Oasis Nuclear also lack standing, according to PG&E, because they are disappointed bidders that have no recourse before this Commission. PG&E also noted that all complainants are currently pursuing actions against Corestaff and PG&E in Superior Court on these same issues.

On October 4, 1999, complainants responded to PG&E's motion to dismiss. Complainants stated that PG&E failed to meet the minority component of its 1998 WMDVBE goals, 15%, because it actually only awarded 12.81% of its

contracts to minorities. Complainants also stated that GO 156 requires companies competing for contracts with PG&E to have a goal of 15% minority participation for subcontracting. Complainants stated that they have standing because they have "necessary data" although they are "not directly interested" in the proceeding.

On October 12, 1999, PG&E replied to complainants' response. PG&E stated that complainants' allegations that Corestaff administers PG&E's diversity hiring were not true.

On November 5, 1999, complainants moved to consolidate this proceeding with the complaint against PG&E by California Personnel Resources, Case (C.) 99-09-024, due to "common issues of law and fact" and the convenience of the parties.

3. Standard of Review

The Commission may entertain complaints against public utilities where such complaints set forth "any act or thing done or omitted to be done . . . in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission." § 1702.

GO 156 Section 7 states in most relevant part that:²

"Complaints relating to this general order shall be filed pursuant to PU Code § 1702 and Article 3 of the Commission's rules and procedures.

² GO 156, Sections 7.2 and 7.3, establish specific procedures governing complaints concerning verification decisions of the contractor the Commission has engaged to review applications for verification of WMBE status. Because the clearinghouse contractor is not a public utility, and thus not subject to § 1702, it was necessary to develop a process by which clearinghouse decisions could be formally reviewed. Since the current complaint does not involve clearinghouse verification decisions, GO 156 Sections 7.2 and 7.3 are irrelevant.



"7.1. The Commission will not, however, entertain complaints which do not allege violations of any law, Commission rule, order, or decision, or utility tariffs resulting from such Commission action, but which instead involve only general contract-related disputes, such as failure to win a contract award."

As noted in the rulemaking on the Commission's own motion to revise General Order 156 [D.98-11-030] (1998) 1998 Cal. PUC LEXIS 1022, *25: "GO 156 does not confer any additional formal complaint rights other than those rights already set forth in PU Code § 1702. The WMDVBE Program does not have its own special set of CPUC appeal or complaint rights." (1998 Cal. PUC LEXIS 1022, *25.) Any complainant may file a complaint under GO 156 Section 7, regardless of the complainant's status as a WMDVBE.

The Commission has previously interpreted a utility's obligations under the WMDVBE statute and decisions:

"In the area of WMDVBE contracting, Public Utilities Code Sections 8281 through 8286,... and GO 156 which implements the statute, do not obligate a covered utility to award any particular contract to any particular vendor, WMDVBE or otherwise. They do not, indeed cannot, require that a WMDVBE vendor be given preference over non-WMDVBE vendors, nor does possession of WMDVBE status guarantee receipt of a contract for the provision of goods and services.

"The WMDVBE statute requires each utility subject to the statute to devise and implement a plan designed to increase participation by WMDVBES in the procurement of goods and services by the utility. GO 156 establishes various goals (not quotas or set-asides) for such participation. In short, GO 156 merely expresses the *desire* (not obligation) that of each utility's yearly total procurement dollar expenditures, certain percentages go to WMDVBES.

"With respect to any particular procurement effort, all that is required of the utility is that it create and maintain a 'level playing field' where all those competing for that procurement contract are

competing on as fair and equal basis as possible." (*Systems Analysis and Integration, Inc., dba Systems Integrated v. Southern California Edison Company*, [D.96-12-023] (1996) 69 CPUC2d 516, 523 (emphasis in original).)

4. Discussion

A. Anderson

This complainant is a former employee of a PG&E vendor, Corestaff. He has standing to bring this complaint before the Commission alleging PG&E's noncompliance with GO 156, subject to the GO 156 Section 7.1 limitation on complaints raising general contract disputes.

GO 156 and the statute applies to "electrical, gas, and telephone corporations with gross annual revenues exceeding twenty-five million dollars." Corestaff does not meet this definition; indeed, Corestaff is not any kind of public utility. Thus, GO 156 and the statute do not apply to Corestaff.³

Anderson makes nine allegations.

First allegation – violation of GO 156

Anderson claims that "PG&E has basically abdicated its responsibilities with regard to hiring, selection, and removal of auxiliary vendor contracts to a company that has no direct legal responsibility for compliance with [General Order] 156," and asks whether using the Corestaff subcontracting program as a replacement for PG&E's WMDVBE prime contractor award program violates the spirit, intent and substance of GO 156.

PG&E acknowledges that since approximately January 1996, it has had a master contract with Corestaff to provide and manage the temporary agency

³ PG&E, of course, remains responsible for complying with GO 156.

workforce PG&E needs from time to time to supplement its clerical and technical staff, and that this contract is part of its "Smart Spending" program to reduce its costs for goods and services by consolidating purchases through fewer vendors, thereby obtaining volume discounts and transactional cost savings. PG&E further acknowledges that after it entered into this contract, other vendor firms and individuals needed to associate with Corestaff or one of its subcontractors to receive PG&E business. PG&E states that as one of many approved vendors, Corestaff itself fills some job orders submitted by PG&E either directly or through its division, Corestaff Technology Group (CTG). Other orders are filed by referral to one or more of Corestaff's approved secondary vendors. PG&E avers that there is no legal or contractual requirement that all vendors on the secondary vendors list be contacted about all or any job orders. PG&E denies that it has in any manner abdicated its responsibilities under GO 156, filed incorrect reports about its WMDVBE achievements with the Commission, or in any other way violated either the spirit, intent, or substance of GO 156, or of any other law, rule or Commission policy.

This allegation by Anderson regarding the use of Corestaff does not state a cause of action under the WMDVBE statute or decisions. PG&E is free to contract with as many or as few vendors as it wishes, and need not offer contract opportunities to all those on Corestaff's secondary vendor list or to any other specific set of potential vendors. Recognizing that PG&E states that Corestaff is only one of many authorized vendors, we note that even if PG&E had contracted with Corestaff to replace its prime contractor award program with the Corestaff subcontracting program for all its procurement needs, such an arrangement would not on its face violate GO 156. There is nothing inherently unlawful about a utility's decision to engage a contractor to perform certain contract management functions the utility would otherwise perform directly.

Second allegation – Illegalities

Anderson alleges that Corestaff engaged in a number of illegal activities. Primarily, Anderson complains that he was ordered to strike a number of approved minority vendors from the secondary vendor list for non bona fide reasons,⁴ to refrain from telling such vendors that they had been stricken, and to refrain from giving job orders to minority vendors until CTG had at least 48 hours – and sometime several weeks – to fill the orders. Anderson also alleges that he complained about Corestaff to several employees at PG&E who did nothing in response.

PG&E states that it investigated Anderson's complaints and found them to be without merit.

We note that Anderson's Exhibits 3, 4, 5, 6, and 7, which he cites in support of the allegation that he was instructed not to give job orders to minority vendors until CTG had at least 48 hours to fill the orders, do not support the implied allegation that Corestaff treated WMDVBE vendors in an adverse manner. Exhibit 3, labeled "What to Do List – Job Order," which we will take for present purposes as accurately representing a portion of a Corestaff instruction manual or guideline for processing job orders submitted by PG&E, would indicate that CTG was given the first opportunity to recruit for jobs, but does not support any implied allegation that Corestaff had a mandate that WMDVBEs as a class be treated badly. The only relevant portions of Exhibit 3, namely, paragraphs 2 and 3, state:

⁴ Anderson alleges that one vendor was described as an angry racist, and that one was stricken on the grounds that the vendor had past problems with PG&E, even though that vendor had never been used before.



"2. Fax a copy of the Job Order to Maureen Glick at the main branch for her Technology Group. The CTG gets the first crack at recruiting for the position, unless you are ordered to send it to the secondary vendors ASAP! Enter into job order book.

"3. If a candidate is not found in a reasonable amount of time (48 hours) then send the Job Order out to the secondary vendors making sure that the minority vendors are logged as being sent."

On its face, Exhibit 3 shows no discrimination against WMDVBEs. The only difference in treatment is the emphasis on making sure that when job orders are sent to secondary vendors, "minority vendors are logged as being sent."

Exhibit 4 lists "AWM Technical Representative Responsibilities." The only portion of Exhibit 4 that mentions WMDVBE status is an item under the heading "Daily work:" that states: "4. Update job log, aging report, and WMDVBE report with each order activity."

Exhibit 5 is a series of e-mails. The series begins with a note Anderson sent to a company named Entor inviting Entor to offer candidates for a cost analyst position. Corestaff's Dougherty, who was sent a copy of the note, responded to Anderson with the following: "Entor is more bad news. I'd avoid them at all costs unless a supervisor specifically requests you call them. Have you reviewed your notes on the vendor list we went through when you first started?"

Anderson responded:

"Yes I did. I remember the info. that you gave me. What has happened is, I get a call from a vendor asking me are there any openings right now that I have sent out to vendors. I can not and will not lie about this. You have given me the new approved vendor list for PG&E and I had to make a judgment call on this issue yesterday."

Dougherty replied:

"Sam, If I tell you NOT to send orders out to a particular vendor, that is a direct order. If you cannot cope with this because you feel

you are LYING, then we need to talk. There is a lot going on here with 55+ vendors that I don't think you realize. I've been here long enough to witness their tricks and lying and back-dooring. When I or Kristine instruct you to, you will need to tell particular vendors that we've got a handle on everything if they call."

Exhibit 5 does not indicate whether Entor is a WMDVBE. From what we can gather from this series of notes, Dougherty liked some vendors on the secondary list better than others, and did not want Anderson sending job opportunities to vendors she didn't like. Even if Entor were a WMDVBE, all we could infer is that Dougherty does not like a WMDVBE named Entor. This exhibit does not show a pattern of discrimination against WMDVBEs.

Exhibit 6, a subset of the e-mail notes in Exhibit 5, offers nothing new. Exhibit 7 is another series of e-mail notes. Anderson invited California Personnel Resources (a WMDVBE and a complainant in C.99-09-024), to send resumes for cost schedule analysts, especially those with nuclear experience. Dougherty received a copy of this note, and responded:

"Sam,

"You are not to call ANY new orders to California Personnel per my email dated 1/7 in which you replied '10-4.'

"Do not submit any CPR resumes if they respond. Also, do not tell them you were told not to call orders out to them or to not submit their candidates.

"I will let you know if and when we decide to do business with them again.

"It is very important to pay attention to vendor issues such as these.

"Julia"

So far, all we can tell from what Anderson has alleged and provided in exhibits is that Anderson and Dougherty sometimes disagreed on which secondary vendors should receive job opportunities, and that another entity,

which may or may not be a WMDVBE, is "more bad news." We also know that Dougherty thought she knew more about the 55+ vendors on the secondary vendors list than Anderson did. Even accepting the factual allegations as true, nothing we know or can fairly infer from them suffices to make out a cause of action against PG&E based on discrimination by Corestaff against WMDVBEs.

Third Allegation – Stealing Candidates Submitted by WMBEs

Anderson's third allegation reads in its entirety:

"Additionally, Anderson alleges that he is aware of numerous instances in which candidates who had been supplied by the few remaining vendors on the WMBE list where [sic] actually 'stolen' from the vendors. The scheme ran along the following lines: CTG would call the candidate after receiving the resume from Corestaff and tell the candidate that the name came to CTG 'off the Internet.' PG&E or other outside sources would then pay the commission to CTG and the WMBE vendor would get nothing for its efforts."

Anderson provides no supporting exhibits, nor does Anderson allege that CTG singled out WMDVBE vendors in seeking to 'steal' candidates. Thus, this allegation also fails to state a cause of action against PG&E that the Commission should entertain. In so holding, we do not condone the alleged business practice, we merely note that in the absence of discrimination on the basis of WMDVBE status, the theft of employees is a matter properly litigated in civil courts.

Fourth Allegation – Vendor Mark-up Information

Anderson alleges that Corestaff apparently dictated what mark-up secondary vendors could charge PG&E (presumably for overhead and similar expenses), and then out-competed such vendors by offering candidates to PG&E for the same jobs at lower mark-ups. Again, without condoning the alleged business practice, we note that in the absence of evidence of discrimination on

the basis of WMDVBE status, this allegation raises legal issues properly litigated in civil courts.

Fifth Allegation – Safe Harbor Provision

Anderson alleges that until 1996, there was a law, which he does not cite, which required technical workers to be employed by entities known as “safe harbor” companies before they could work for PG&E. Anderson claims that even though Corestaff became aware in 1996 that the law no longer required safe harbor treatment for information technology workers, and even though Corestaff discussed with PG&E the fact that \$1 million could be saved if the safe harbor program were dropped, Corestaff continued to insist that candidates go to work for Pinnacle Staffing, the only PG&E safe harbor company receiving new employees. Anderson further alleges that Pinnacle Staffing charged PG&E a mark up for providing safe harbor services that was about 10% higher than the norm, that no other WMBE was allowed to bid to provide safe harbor service, and that PG&E Director of Supply Diversity Bonnie Wells e-mailed an associate, Joyce Chan, that it was very important that Pinnacle Staffing receive WMBE verification.

Exhibit 12 sets forth a series of e-mails on the subject of Pinnacle Staffing’s verification status. First, an e-mail from Joyce Chan to Bonnie Wells states that: “I spoke with the WMBE Clearinghouse on Pinnacle. While Pinnacle is 100% owned by a woman, it will probably not meet the requirement of “direct management” if they work out of Corestaff’s office and their Comptroller is Corestaff.” Wells responded: “What does “probably not” mean – is there a window where they might be certified – we need to be very clear on the answer and obviously this is very important.” Chan then sent an e-mail to Kristine Vaaler-Kennedy: “Please have someone from Pinnacle call Raymond Lee of the

WMBE Clearinghouse to discuss the verification requirements. Without all the information, Raymond Lee said they probably would not qualify. ...”

Anderson apparently thinks that complaints may be used as a discovery mechanism. He conclude with a series of questions such as: “Is ‘Safe Harbor’ still being used for IT workers? Why was ‘Safe Harbor’ not put out for bid to other vendors, especially WMBE vendors? Why did Bonnie Wells insist that Pinnacle get WMBE certification when it was clear that she knew that they were not qualified?”

Nowhere can we see any claim that PG&E violated the WMDVBE statute or GO 156, or any other order or decision of the Commission. We have previously held that neither the statute nor GO 156 requires competitive bidding. (*Allied Temporaries, Inc. v. MCI Telecommunications Corporation* [D.92-01-022] (1992) 43 CPUC2d 114, 1992 Cal. PUC LEXIS 22, *5-6.) Thus, even if PG&E did refrain from accepting bids for the safe harbor program, it not violate the statute or GO 156. There is nothing in this allegation or Exhibit 12 from which we might infer that Wells acted improperly in desiring to follow up concerns over Pinnacle Staffing’s WMBE status. Being aware of the possibility that Pinnacle Staffing might not be verifiable, she asked her staff to investigate further. We see no misconduct or evidence of misconduct here.

Sixth Allegation – Sexual Harassment by Dougherty

Anderson alleges that he was sexually harassed by Corestaff Supervisor Dougherty.

PG&E responds that Anderson was employed by Corestaff, not PG&E, and that even if Anderson had been employed by PG&E, his claim should be heard by the State Department of Fair Employment and Housing or the Equal Employment Opportunities Commission, rather than by this Commission.

We understand that Anderson was an employee of Corestaff rather than PG&E. Regardless of whether PG&E may somehow be legally accountable for actions of contractors such as Corestaff, we decline to consider this allegation further. As we state in *Robert A. and Lorecia Brown v. Southern California Gas Company* [D.96-07-022] (1996) 66 CPUC2d 764, the Commission generally leaves the "enforcement of employment claims, including sexual harassment claims, to the courts or appropriate state and federal agencies...."

Seventh Allegation – Failure to Investigate and/or Respond

Anderson alleges that his written complaints to Corestaff management were never acknowledged, and that PG&E did not take proper action regarding (1) the sexual harassment taking place on Corestaff's premises, (2) his complaints of Corestaff fraud, or (3) his indication (to PG&E employee Pam Qualls) that he was not sending job orders to all WMBE vendors. He further notes the "Core Ethics Values" section of PG&E's Policy Handbook states that "maintaining a safe, productive, and harassment-free work environment is important to our success." (Exhibit 27.) Finally, Anderson alleges that he was terminated by Corestaff in February, 1999 for complaining about violations of GO 156 and the sexual harassment.

PG&E responds that: "Anderson's allegation of contractual WMDVBE discrimination by CORESTAFF was investigated by PG&E's Internal Auditing Department and likewise found to be without merit."

These allegations all relate to the circumstances of Corestaff's termination of Anderson's employment at Corestaff. The propriety of that termination is pending before the Superior Court. Whatever the merits of that lawsuit, these allegations, even if true, do not state a cause of action against PG&E that the Commission should entertain. As we have already concluded, Anderson has not made out a cause of action for improper discrimination against WMDVBEs, nor

do the allegations we have just summarized make out a cause of action against PG&E for failure to investigate in response to the suspicions or accusations communicated to PG&E by Anderson. Finally, as noted earlier, we defer consideration of employment-related claims to the courts and appropriate state and federal agencies.

Eighth Allegation 8 – Corestaff Irregularities

Anderson alleges that PG&E terminated Roberta Enterprises some time in 1995-1996, and he would like to know why PG&E did this and what steps PG&E took to ensure the earlier problems did not recur. This allegation does not assert that PG&E violated any laws, or rules, orders, or decisions of the Commission. Indeed, this allegation is not an allegation at all, but a series of questions. We will not consider it further.

Ninth Allegation – Statistical Reporting Issues

Anderson notes that PG&E reports to the Commission annually regarding its procurement activities with WMDVBEs, and alleges that Corestaff mis-stated 1998 statistics, re-using statistics from an earlier, more favorable, year. Anderson supports this allegation with Exhibit 24, a Corestaff Minority Vendor Report which indicates total spending with MBEs to be 8.9%. Anderson again asks questions, e.g., what Corestaff's explanation is, and whether there will be a correction., but does not allege that PG&E violated a law or any rule, order, or decision of the Commission.

Viewing this allegation in the light most favorable to Anderson, we will assume that Corestaff reported incorrect WMDVBE subcontracting results to PG&E. In the absence of an allegation that PG&E intentionally incorporated incorrect WMDVBE results in its annual reports to the Commission, we conclude that the complaint again fails to state a cause of action against PG&E.

There being no cause of action properly before the Commission based on the Anderson portion of the complaint, that portion should be dismissed.

B. PRO Engineering

PRO Engineering alleges that it had an "understanding" with Black and Veatch regarding subcontracts for services, and that Black and Veatch failed to perform. Seen its most favorable light, this is a contractual dispute between a utility contractor and subcontractor. In GO 156, Section 7.2, we stated that we would not consider this type of dispute. Accordingly, the PRO Engineering portion of this complaint is dismissed.

C. Oasis Nuclear, Inc.

Oasis Nuclear, Inc., alleges that Corestaff improperly prevented it from presenting potential contract staff to PG&E. Again, Corestaff is not a public utility subject to the jurisdiction of this Commission. Oasis' status as a WMDVBE does not confer jurisdiction on this Commission to consider Oasis' claims against Corestaff. Those claims are currently pending before the Superior Court. This portion of the complaint should be dismissed.

5. Monitoring PG&E Compliance with GO 156

The Commission monitors PG&E's compliance with GO 156 through PG&E's annual reports. To the extent complainants wish to address PG&E's overall compliance with GO 156, they are free to review these concerns with the Commission's WMDVBE staff, in accord with Ordering Paragraph 3 of D.95-12-045, *supra*, 63 CPUC2d at 216.

6. Motion to Consolidate

All portions of this complaint are dismissed. The request to consolidate the complaint with C.99-09-024 is moot.

7. Article 2.5 of the Commission's Rules of Practice and Procedure

No hearing is necessary to resolve the issues raised in this complaint. Accordingly, pursuant to Rule 6.1 of the Commission's Rules of Practice and Procedure (Rules), Article 2.5 of the Rules ceases to apply to this proceeding.

8. Comments on Draft Decision

The draft decision of ALJ Bushey in this matter was mailed to the parties in accordance with Section 311(g) of the Public Utilities Code and Rule 77.1 of the Rules of Practice and Procedure. No comments were filed. Nonsubstantive revisions to the draft decision were made to provide more background and discussion regarding GO 156, improve format, and correct typographical errors.

Findings of Fact

1. Corestaff is not a public utility.
2. Anderson is not a WMDVBE; he is a former employee of Corestaff.
3. Anderson's issues with Corestaff center on his employment termination.
4. The complainants have cases pending in Superior Court against Corestaff and PG&E regarding the same issues raised in this complaint.
5. PRO Engineering and Oasis Nuclear, Inc., are WMDVBEs.
6. PRO Engineering alleges a contractual dispute with Black and Veatch.
7. Oasis Nuclear, Inc., alleges a contractual dispute with Corestaff.
8. The Commission reviews each utility's compliance with §§ 8281- 8286 and GO 156 annually, and summarizes these reports in a report to the Legislature.
9. No hearing is necessary.

Conclusions of Law

1. Pursuant to GO 156, the Commission does not entertain complaints regarding general contractual disputes between WMDVBEs and utilities.
2. PG&E is responsible for ensuring that its procurement efforts comply with §§ 8281 – 8286 and GO 156.

3. Complainants have failed to state a claim upon which this Commission should grant relief.
4. All complaints should be dismissed with prejudice, effective immediately.
5. Article 2.5 of the Commission's Rules ceases to apply to this proceeding.

O R D E R

Therefore, **IT IS ORDERED** that this complaint, in its entirety, is dismissed with prejudice, and this proceeding is closed.

This order is effective today.

Dated April 6, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners.