

ORIGINAL

Decision No. 66406

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SAUL N. ROSS,

Complainant,

vs.

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,

Defendant.)

Case No. 7232

Melvin E. Cohn, for Saul N. Ross, complainant.
Arthur T. George and Maurice D. L. Fuller, Jr.
 by Maurice D. L. Fuller, Jr., for The
 Pacific Telephone and Telegraph Company,
 defendant.
Newman, Marsh & Furtado, by Manuel L. Furtado,
 for Ami G. Pellaton, Ken MacKenzie, R. P.
Surdez and Roscoe D. Carter, amici curiae
 herein and complainants in Case No. 7424.
C. Hayden Ames and Jensen and Underwood, for
Dr. R. K. Barnewolt, intervenor.
Paul Popenoe, Jr., for the Commission staff.

O P I N I O N

On November 20, 1961, complainant Saul N. Ross filed his complaint herein alleging that defendant The Pacific Telephone and Telegraph Company in breach of its contract with complainant and through negligence omitted complainant's name from the "Attorneys" listing in the classified section of its San Mateo County telephone directory for 1961. Complainant further alleged that as a result of said breach of contract and negligence he suffered damages through the loss of income from his professional practice in that prospective clients have been unable to locate his name in the Yellow Pages of said telephone directory and that said damages far exceed the charges made by said defendant for said professional

listing which constitute the amount complainant is entitled to receive as damages under the defendant's currently filed tariff. (Regulation 17(B)1.) He further alleged that after receiving notice of said omission, defendant failed to take steps to correct the omission by informing persons calling information of the telephone number of complainant but on the contrary informed such persons that complainant was not listed as an attorney at law.

Complainant further alleged that defendant without cause has omitted numerous other professional persons from the classified sections of its telephone directories and that said persons have been deprived by reason of said Regulation 17(B)1 from pursuing their remedy at law to recover reasonable and adequate damages for the negligence and breach of contract of defendant. He further alleged that it is in the public interest that said Regulation 17(B)1 be declared invalid and be revoked for the reason that it is unreasonable, unjust, and discriminatory, and it has not influenced defendant to use the care and skill required in the accurate compilation of its telephone directories. He further alleged that the elimination of said regulation would encourage defendant to adopt procedures which would ensure more care and skill in the publication of its directories and would reduce the number of errors and omissions.

Complainant requested this Commission to declare that said Regulation 17(B)1 is and was, at the time of the publication of the San Mateo County Directory in 1961, unreasonable and that said rule be annulled and declared void.

Defendant, on December 6, 1961, filed a motion to strike certain allegations from the complaint and on December 22, 1961, defendant filed a motion to dismiss the complaint and an answer

to the complaint. On January 16, 1962, the Commission issued Decision No. 63130, denying defendant's motion to strike, and on May 8, 1962, the Commission issued Decision No. 63659, denying defendant's motion to dismiss the complaint.

The matter was heard before Examiner Cline in San Francisco, on September 27 and 28, 1962. At the commencement of the hearings the petition of R. K. Barnewolt to intervene in support of complainant was granted. The matter was taken under submission on the filing of complainant's closing brief on January 10, 1963, and the reply of intervenor Barnewolt on January 11, 1963.

On February 5, 1963, the Commission issued Decision No. 64877 herein setting aside submission and permitting (1) the filing of an amicus curiae brief by the attorneys for complainants Ami G. Pellaton, et al., in Case No. 7424, which is a complaint against The Pacific Telephone and Telegraph Company similar to the complaint herein, and (2) the filing of an answer thereto by the parties to this proceeding. This matter was again taken under submission on March 12, 1963, upon the filing of the reply of The Pacific Telephone and Telegraph Company to the amicus curiae brief.

Defendant's Regulation 17(B)1 reads as follows:

"17. TELEPHONE DIRECTORIES, LISTINGS AND NUMBERS

* * *

"(B) Liability for Listings in Directories

"The Company is liable for errors or omissions in listings of its subscribers in the alphabetical and classified telephone directories in accordance with the following:

- "1. Listing furnished without additional charge: In amount not in excess of the charge for the exchange service (excluding the charges for messages in excess of those included in the minimum monthly rate) during the effective life of the directory in which the error or omission is made."

It has been held that this regulation is a legal limitation upon the liability of defendant in a judicial proceeding for damages based on negligence. (Cole v. Pacific Tel. & Tel. Co., 112 Cal. App. 2d 416; Riaboff v. Pacific Tel. & Tel. Co., 39 Cal. App. 2d 775.)

The issue to be decided by the Commission in this proceeding is whether said Regulation 17(B)1 is and was, at the time of the publication of defendant's San Mateo County Telephone Directory in 1961, unjust and unreasonable and therefore should be annulled and declared void.

Saul N. Ross, complainant herein, was admitted to practice law in December of 1941 and has maintained a law office for the general practice of law in San Bruno since approximately the first part of 1947. His name was first listed in the San Mateo County telephone directory upon commencement of practice in 1947 and has been continuously listed therein until the omission of his name from the attorney section of the Yellow Pages of the directory in April of 1961. He has paid his telephone bills in full promptly and has never requested a discontinuance of his telephone service. On April 11, 1961, Mr. Ross notified the defendant of the omission of his name from the Yellow Pages by letter in which he requested an explanation and inquired what the defendant proposed to do about the omission. Some weeks later he received a telephone call advising that his name had been omitted as the result of an error and that such mistakes occur occasionally. Still later, he received a

letter from the law firm of Pillsbury, Madison & Sutro explaining the limited liability of defendant and advising that he could receive the amount of the charge for the listing and that would be the sole and exclusive remedy. A subsequent letter from the complainant resulted in a communication by telephone from a representative of the telephone company advising that the information operator would give any inquiring person complainant's telephone number.

Clients, judges, the court clerk, and various attorneys informed defendant they had difficulty in locating him because of the omission. One prospective client informed complainant that he had engaged another attorney because he had been unable to obtain complainant's telephone number from the classified section of the directory.

The omission of the listing of Mr. Ross occurred because an order had been received to remove the listings for Rosellini, Vallegara & Mitchell and the listings for Roth, Almon E. which were, respectively, before and after the listing for Mr. Ross. The clerk of defendant, when she ruled out the listings above and the listings below Mr. Ross' listing, inadvertently also ruled out Mr. Ross' listing, although she had no order to do so. Two different clerks handled the removal of the listings and the second clerk made the same mistake. Their supervisor made only spot checks of their work, and a third clerk checked to see that the two checks of the first two clerks had been placed beside the listings to be removed from the directory.

The personnel who perform this work are special clerks, Group 2, whose salaries range from \$62.50 to \$89 per week. Their average salary would be \$75 a week or \$325 per month. Defendant tries to hire high school graduates for these positions and most

such personnel are high school graduates. Before they are hired defendant's employment office gives them certain numerical tests and tests to determine their ability to detect alphabetical sequences of letters.

In the alphabetical section of the San Mateo County telephone directory of April 1961, there were .24 customer reported errors and .33 company discovered errors, or a total of .57 errors, per thousand listings. This compares with a total of .52 errors per thousand listings in defendant's Northern California alphabetical directories as a whole.

In the yellow section of the San Mateo County telephone directory there were 1.34 customer reported errors and 1.02 company reported errors, or a total of 2.36 errors, per thousand listings. This compares with a total of 2.79 errors per thousand listings in defendant's Northern California classified directories as a whole.

Of the total number of errors in the Northern California directories, 21.9 percent were omissions.

Mr. Ross' name has never been omitted from defendant's information records. After the complaint, Mr. Ross' name was listed in the San Francisco information records as well as the San Mateo information records. Defendant offered Mr. Ross the basic monthly exchange service for one year, which is \$37.95 a month or about \$455, as an adjustment for the omission of his name from the classified section of the telephone directory.

The intervenor, R. K. Barnewolt, is a dentist who has been practicing in Modesto during the past 10 years. All during that time he has been a subscriber to defendant's telephone service, and the name, address and telephone number of his dental office

have continuously appeared in the white section of defendant's Stanislaus County telephone directory. The name, address and telephone number of his dental office also appeared in the classified section of that directory from 1954, when he commenced practice, until the February 1962 issue, when it was omitted. Dr. Barnewolt has never failed to pay promptly for telephone service or the directory listing of his dental office. Since the publication of the Stanislaus County directory for 1962 in which his name was omitted from the classified section, Dr. Barnewolt has noticed a reduction in his patient load. A representative of defendant in San Francisco called Dr. Barnewolt to advise he would not be charged because of the error made by defendant in the listing.

Dr. Barnewolt is associated with three other persons, all of whom have one telephone number with an overload number. The records of the defendant show that Dr. R. L. Ehrke is the main subscriber to telephone service on LA 4-4762 and that Dr. R. K. Barnewolt and Dr. J. J. Gerber and the Modesto Dental Building are joint user subscribers to telephone service on LA 4-4762. The names of joint user subscribers appear in the alphabetical section only and not in the classified section. The telephone representative failed to arrange for the type of service which was desired by Dr. Barnewolt, who left the details to such representative.

Charles B. Snow is an attorney who has been engaged in the practice of law in Newark since 1953. From 1953 to 1960 his name was continuously listed in the yellow section of the telephone directory, and he has regularly paid his telephone bills. He has never requested a discontinuance of service, but his name was omitted from the yellow section of the defendant's telephone directory published in September or October of 1960. Mr. Snow

attempted to negotiate a settlement of his claim arising out of the omission of his name from the classified section. He was informed that the maximum defendant would allow was one half the basic rate for the period of the listing, but on checking further Mr. Snow found that under the rules of defendant he could be paid the full basic rate for the period of the listing. Since he did not want to put forth the effort to make new law, he settled with defendant at the basic rate.

In order to make sure that his name was to be listed in the Yellow Pages of the 1961 telephone directory, Mr. Snow wrote a letter dated May 17, 1961, setting forth his request. Representatives of the defendant called Mr. Snow to double check and to make sure the listing was correct. Nevertheless, Mr. Snow's name, the firm name Snow and Dennis, and the name of his associate, Daniel Dennis, were omitted from the classified section of defendant's 1961 telephone directory, so that for the second consecutive year a Mr. Milani had the exclusive listing in the attorney section of defendant's Yellow Pages for Newark. Mr. Snow settled his claim for the second year on the basis of the basic rate for the period of the listing in the directory.

For the next year Mr. Snow signed a request for service with the clause limiting defendant's liability for omission of his name from the directory stricken, but he was advised that such a request was not acceptable to defendant.

Mr. Snow's settlement for 1960 amounted to \$412 and that for 1961 to \$495.72.

The defendant's records do not show why Mr. Snow's name was omitted from the Yellow Pages the first time. The second time, Mr. Snow's record inadvertently became attached to the back of another customer's record. Consequently, defendant's employees did

not make the check which would have been made if this had not occurred. The employees who were handling this matter are Group 4 clerks in the public office who receive over \$400 per month. Two persons in the public office should have checked Mr. Snow's listing the second time.

At the time Mr. Snow's listing was omitted for the second time defendant did not make the correction in the final pages of the directory until the customer's claim against the defendant had been settled. The present practice is to make the correction immediately, whether the claim has been settled or not.

Mr. Snow's request for listing in the forthcoming telephone directory of defendant has received special checks, and defendant has assured that all three of Mr. Snow's listings will appear in the directory as he has requested them.

There have been other situations where a customer's name has been twice omitted from the directory.

Melvin E. Cohn is an attorney who has engaged in the practice of law in San Carlos since late 1946, and since that time, his name has been continuously listed in the Yellow Pages of the telephone directory. In 1950 there were two law firms in San Carlos, one under the name of Aaronson and Cohn and another under the name of Waldier and Truce. Either in 1950 or 1951 the firm of Waldier and Truce was listed in the Yellow Pages with the telephone number of Aaronson and Cohn. During the period of mistake in the listing of the telephone number, Aaronson and Cohn received calls intended for Waldier and Truce at the rate of 10 to 15 a week, which somewhat cluttered up the telephone lines of Aaronson and Cohn but did give them some free advertising at the expense of Waldier and Truce.

Oliver C. Sass was engaged in the rug cleaning business in San Mateo County in 1960-61. His name and advertisement appeared in the classified section of the 1960 San Mateo County directory, but they both were omitted from the classified section of the 1961 San Mateo County directory even though he had paid his bills promptly. Following the omission of his name and advertisement, Mr. Sass canceled his lease and terminated his business in that location and commenced carrying on the business out of his own basement. At the time of the omission Mr. Sass was a joint user with a telephone answering service. The telephone answering service with whom Mr. Sass was associated sold its business to another firm before the issuance of the directory in question. After the transfer, Mr. Sass' telephone answering service was handled through the new firm. Mr. Sass was not listed as a joint user by the new firm, and consequently, defendant could not sell him advertising listing the telephone number of the telephone answering service.

The defendant takes letters of complaint seriously, and such letters together with the back-up material are kept in a special file in defendant's public office. Complaints are acknowledged by telephone within 24 hours. As defendant is in the telephone business, it tries to do as much business by telephone as possible.

Defendant's Northern California headquarters has jurisdiction over 38 directories, of which one is in Nevada. In 1961 there were approximately 900 complaints regarding errors made in the classified sections of the 37 directories covering customers in Northern California. There were a total of 1,788 company-detected and customer-reported errors, of which 392 were errors of

omission. During this period there were approximately 698,625 classified directory listings and advertisements in the 37 directories; thus there were .89 omissions per 1,000 listings.

To prevent errors from recurring defendant reviews with the printer the errors for which the printer is responsible, and defendant's supervisors review clerical errors with the clerks who have made them. In some of the clerical groups the personnel turnover may run as high as 40 to 50 percent per year. Defendant has also developed training material which the advertising sales managers review with the salesmen where they are involved. Various methods of proofreading are used by the clerks, and some of them who make too many mistakes are given special training. Before such clerks are permitted to work they are given four weeks of training and they also have retraining sessions. The personnel who perform this work are rotated among the different sections and units to give them variety. No special check over and above normal procedure is made to make sure that professional listings are correct. Omissions are corrected by putting them in information service. The defendant does not reconfirm a request for deletion of a listing by having one of its clerks call the party on the telephone. Defendant does not send out proofs of listings, but it does send out proof for advertisements in the classified section. The steps taken by defendant do not eliminate all errors. The work is of a routine nature and requires constant concentration. The slightest distraction can result in an error. Even though a great deal of care is used in the compilation and publication of telephone directories, complete freedom from errors and omissions is a practical impossibility.

The defendant has not explored the possibility of publishing an addendum to a directory to be issued a month after the

regular directory is issued in order to inform all subscribers of any errors that may have occurred in the original directory. Within two months after issuance defendant probably discovers 50 percent of the errors, including subscriber reported errors, in the directory listings.

Charges for service are in part dependent upon defendant's rules and regulations, including the regulation limiting liability for errors and omissions in its directories. The rule has enabled defendant to provide its service to the public at a lesser cost than would be the case if the rule permitted greater liability for errors and omissions. In the Northern California region, defendant's gross revenue from directories amounted to 22 million dollars in 1962, and its direct directory expenses were in the neighborhood of 11 million dollars.

The rule limiting defendant's liability for errors or omissions in telephone listings has been in effect for about 37 years. It was first filed with this Commission July 1, 1924. Since 1924 the rule has been amended but the substance of the rule and its limiting provisions have remained substantially the same for about 37 years. In 1956 this Commission found that the rule is reasonable. (Warren v. Pacific Tel. & Tel. Co., 54 Cal. PUC 704, 708. See also O'Donnell v. Pacific Tel. & Tel. Co., Decision No. 48668, dated June 1, 1953, Case No. 5447; Sommer v. Pacific Tel. & Tel. Co., 55 Cal. PUC 84, 86.) Similar rules have been filed with this Commission by about 45 other telephone companies which operate within California, including General Telephone Company of California, California Water and Telephone Company, and California Interstate Telephone Company.

A similar rule or a more restrictive rule has been made applicable through appropriate filings by every Bell Telephone Company and many independent telephone companies throughout the United States. In New York, New Jersey, Michigan and Illinois, the rule is more restrictive because it provides there is no liability for errors in or omissions of listings furnished without charge. In many cities the limit of liability is one half of the charge for exchange service during the life of the directory.

This Commission is the only state public utilities commission which regulates the rates for display advertising in telephone directories.

For errors in an advertisement, magazines generally limit their liability to running the advertisement correctly for the same period of time that was originally contracted for. Television companies have a similar limitation of liability; they reshow the advertisement correctly.

The basic limitation of liability for damages resulting from errors in Western Union telegrams is \$500 on a nonrepeated message rate. At the repeated message rate the limitation of liability is increased to \$5,000.

The Commission staff, in its closing statement, urged that Rule 17(B) be amended by substituting the following paragraph for paragraphs 1, 2 and 3:

"Listings furnished with or without additional charge in the alphabetical or classified telephone directories: In an amount not to exceed \$2,000 during the effective life of the directory in which the error or omission is made. Claims under this rule must be made to the Company in writing within 30 days after the delivery date of the telephone directory. Where the Company issues an errata sheet as provided herein which contains the correct listing of the subscribers whose listing was incorrect in or omitted from the original directory, the liability of the Company for such error or omission will not exceed \$500 during the effective life of the directory in which the error or omission is corrected."

The Commission staff also suggested that the following paragraph be added to Rule 17:

"If after 30 days beyond the issuance of a directory, errors or omissions in listings have been discovered in such directory, an errata sheet with adhesive strip shall be published and supplied to each subscriber who originally received a copy of the telephone directory in question. In addition, each additional directory furnished to subscribers after the issuance date of the errata sheet shall have such errata sheet included therein."

The Commission staff points out that under the present Rule 17(B) if a listing in the directory is made at an additional charge, the maximum liability of the defendant is the amount of the charge for the listing, which in the case of a single-line additional listing is 75 cents per month. If a listing is furnished without additional charge, as in the case of the basic listing of a subscriber in connection with a business service, the company will make an adjustment not to exceed the charge of the exchange service excluding excess message charges during the effective life of the directory in which the error or omission is made. The staff urges that in the event the rule is revised there appears to be no reason to provide for increased directory advertising rates until it is shown the operation of the revised liability rule will, in fact, increase respondent's expenses by an unusual amount.

Defendant in its closing statement points out that the proposals of the Commission staff were not advanced until after the close of hearings in this proceeding, and consequently the defendant did not have an opportunity to introduce evidence respecting these proposals. This Commission does not have a full and complete record respecting these proposals.

The complainant urges that the proposals of the Commission staff are amply supported by the record but that they do not go far enough. The intervenor suggests that an errata sheet, mailed with a subscriber's telephone bill, would help in minimizing the

damage to those whose names have been omitted. The amici curiae suggest that the errata sheet would be beneficial but that a limitation of liability to \$2,000 would be harsh in some cases, and they urge that the complainant's prayer be granted.

Upon consideration of the evidence in this proceeding the Commission finds:

1. By formal, written and published decision, issued April 3, 1956, this Commission found that defendant's Rule 17(B) is reasonable. (Warren v. Pacific Tel. & Tel. Co., 54 Cal. PUC 704, 708.) Said finding has not since been altered or rescinded and has not been superseded by any inconsistent finding by this Commission.

2. Defendant's Rule 17(B) may be unreasonable for the future.

3. The method presently used by defendant to mitigate damages resulting from directory errors and omissions is to provide its appropriate information operators with corrected listings to which they make reference pending the issuance of a new directory. The public interest may require additional reasonable measures to mitigate damages resulting from such errors and omissions.

4. The public interest may require that Rule 17(B) be amended to permit subscribers to subscribe to telephone service under special contracts which (a) will provide that defendant shall be absolutely liable for a specified amount or schedule of amounts for directory errors and omissions or (b) increase defendant's present limit of liability for damages for directory errors or omissions in accordance with a specified schedule. The public interest may require that Rule 17(B) be otherwise amended, canceled or replaced.

5. The record herein is not sufficient to determine the reasonableness or unreasonableness, for the future, of defendant's Rule 17(B).

6. Rule 17(B) is not a rule of absolute liability, but is rather a rule limiting liability for damages for defendant's directory errors or omissions resulting from its negligence to an amount which in some instances is less than the actual damages sustained by defendant's subscribers.

7. The directory errors which form the basis of the complaint herein occurred in 1961.

Based upon the foregoing findings, the Commission concludes that:

1. With respect to defendant's directory errors or omissions which have heretofore occurred and which occurred after April 3, 1956, this Commission may not grant relief inconsistent with defendant's Rule 17(B). (Arizona Grocery Co. v. A.T. & S.F. Ry., 284 U.S. 370, 389, 52 S.Ct. 183, 76 L.Ed. 348, 355; American Cement Corp. v. P. G. & E. Co., 59 Cal. PUC 453; Pacific Cement etc. v. P. G. & E. Co., Decision No. 61716, dated March 21, 1961, in Case No. 6678, 58 Cal. PUC 600.)

2. No relief may be granted to complainant herein with respect to directory errors that have already occurred.

3. On that part of the complaint which involves a determination that Rule 17(B) is unreasonable for the future, further hearings should be held.

4. The Commission should institute an investigation of defendant's Rule 17(B) to determine what reasonable rules should be approved or adopted for the future with respect to directory errors and omissions, liability therefor, and measures to mitigate damages resulting therefrom.

5. Complainant herein should be permitted to participate in such investigation and Cases Nos. 7232 and 7424 should be consolidated therewith.

Concurrently with the issuance of this decision, such an investigation is being instituted by the Commission.

O R D E R

IT IS ORDERED that:

1. Submission of Case No. 7232 is hereby set aside, and said Case No. 7232 is hereby consolidated (a) with Case No. 7796, the Commission investigation on its own motion into the practices, rates, charges, contracts, rules and regulations of The Pacific Telephone and Telegraph Company pertaining to (1) the limitation of liability for telephone directory errors and omissions and (2) measures to be taken by defendant to mitigate damages to its subscribers resulting therefrom, and (b) with Case No. 7424, entitled Ami G. Pellaton, Ken MacKenzie, R. P. Surdez, Roscoe D. Carter vs. Pacific Telephone and Telegraph Co.

2. Further hearing in this matter and in Cases Nos. 7424 and 7796 shall be held before Commissioner Grover and/or Examiner Cline in the Commission Courtroom, State Building, 350 McAllister Street, San Francisco, California, at 10 a.m., January 22, 1964.

3. Further proceedings in Case 7232 shall be limited to considering (a) whether or not defendant's Rule 17(B) is, for the future, reasonable; (b) what limitations, if any, on defendant's liability for directory errors or omissions are, for the future, reasonable; (c) what measures should reasonably be required of defendant in the future to mitigate damages to subscribers resulting from directory errors or omissions; (d) whether or not defendant's Rule 17(B) should, for the future, be continued, modified, or repealed; and (e) whether or not defendant's Rule 17(B) should, for the future, be replaced by some other rule or rules

relating to directory errors and omissions, liability therefor and/or measures to be taken to mitigate damages therefrom.

A copy of this order shall be served upon all appearances herein, upon Newman, Marsh & Furtado, Attorneys at Law, 926 A Street, Hayward, California, and upon Neal C. Hasbrook, Secretary, California Independent Telephone Association, 760 Market Street, San Francisco 2, California.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 3rd day of DECEMBER, 1963.

William W. Sevens
President

Walter O. Page

George T. Grover

Fredrick B. Holshoff
Commissioners

Commissioner Peter E. Mitchell
present but not voting.