

ORIGINAL

Decision No. 68482

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

OXNARD VAN LINES, a sole
proprietorship, owned by
Christopher J. Duarte,

Complainant,

vs

THE GENERAL TELEPHONE COMPANY,
a corporation, and GENERAL
TELEPHONE DIRECTORY COMPANY,
a corporation,

Defendants.

Case No. 7830
(Filed January 30, 1964)

OXNARD VAN & STORAGE, INC.,
a California corporation,

Complainant,

vs

THE GENERAL TELEPHONE COMPANY,
a corporation, and GENERAL
TELEPHONE DIRECTORY COMPANY,
a corporation,

Defendants.

Case No. 7835
(Filed February 4, 1964)

A-1 OXNARD MOVING & STORAGE, a
sole proprietorship owned by
Marjorie Duarte,

Complainant,

vs

THE GENERAL TELEPHONE COMPANY,
a corporation, and GENERAL
TELEPHONE DIRECTORY COMPANY, a
corporation,

Defendants.

Case No. 7840
(Filed February 7, 1964)

Donald Murchison, for complainants.
A. M. Hart and E. Ralph Snyder, Jr.,
by H. Ralph Snyder, for defendants.
Jackson W. Kendall, for Bekins Van & Storage
Company, interested party.
Robert O. Lamson, for the Commission staff.

O P I N I O N

After two continuances granted upon request of complainants, these matters were heard on a consolidated record with Case No. 7800^{1/} before Examiner Patterson in Los Angeles on July 13, 14 and 16, 1964.

The matters were submitted on the latter date and are now ready for decision. A separate decision has been issued in Case No. 7800 (Decision No. 68450 dated January 12, 1965).

The record shows that Christopher J. Duarte and Marjorie Duarte, husband and wife, are engaged in operating a complex of moving and storage businesses based principally in Oxnard, California. Many of these businesses are listed under fictitious names and the services offered have been advertised for a number of years in the classified section of defendants' Oxnard telephone directory.

Complainant in Case No. 7830 is Christopher J. Duarte, doing business under the fictitious firm name of Oxnard Van Lines, with principal place of business at 1505 Pine Street, Oxnard, California.

Complainant in Case No. 7835 is Oxnard Van & Storage, Inc., a corporation, with principal place of business at 1505 Pine Street, Oxnard, California. Marjorie Duarte is president of this

^{1/} Case No. 7800, Oxnard Van & Storage, Inc., a California corporation, vs. General Telephone Company of California, a corporation.

corporation and is the sole shareholder of all outstanding shares. Christopher Duarte is operations manager.

Complainant in Case No. 7840 is Marjorie Duarte, doing business under the fictitious firm name of A-1 Oxnard Moving & Storage, with principal place of business at 330 Calle Jazmin, Thousand Oaks, California. This complaint is signed by Marjorie Duarte, owner, 1505 Pine Street, Oxnard, California.

The allegations raised by complainants and supported by their testimony may be summarized as follows:

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In 1957, Oxnard Van & Storage, a sole proprietorship of Marjorie Duarte, had display advertising in first position in defendants' Oxnard telephone directory under the classification of "Storage."

In 1958, Christopher J. Duarte purchased the storage business of Oxnard Van & Storage, advised defendants of the acquisition and alleged he was assured that he would acquire the "right to preferred position" in display advertising in later issues of the directory. With publication of the 1958 directory the two separate classifications of "Moving Service" and "Storage" were combined under a single classification of "Moving & Storage Service." The Oxnard Van Lines advertisement was placed in 10th position in that directory, 10th in 1959, 7th in 1960, 6th in 1961, 6th in 1962, and 10th in 1963.

With respect to the numbering of advertisement positions, the record shows that if a page or two facing pages are divided into four quarters, No. 1 position is considered to be the upper left; No. 2 position the upper right; No. 3, the lower left;

and No. 4, the lower right.

Complainant alleges that starting in 1958 and during each year since that time he has suffered a substantial loss of business by reason of failure of defendants to place his advertising in position of first place, and that such loss has been occasioned by the tendency on the part of the public to believe that firms in the first part of a directory listing are more reliable and better qualified than those appearing later in a listing. Testimony was presented by stipulation in support of this belief by an individual who has used moving services in the Oxnard area.

Complainant testified that he offered to pay in advance \$400 which would cover the full cost of his display advertising for Oxnard Van Lines in the 1964 directory. He also requested a separation of billing by entities for 1963 advertising so that he could determine whether or not there was a delinquency for Oxnard Van Lines. Defendants refused to accept his 1964 advertising and prepayment, and refused to give him the separated billing, informing him that the entire amount due as billed to Oxnard Van & Storage, Inc., for all the entities for advertising prior to 1964 would have to be paid. Complainant refused to make such payment and as a consequence he did not obtain any display advertising in defendants' 1964 directories.

Complainant also testified that in the 1963 directory defendants wrongfully inserted in his display advertising that complainant was general agent for Martin Van Lines and Rocky Ford Moving Vans whereas in fact complainant was agent for Ford Van Lines and that such error on the part of defendants created a hardship on complainant, resulting in substantial monetary loss.

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Complainant, Oxnard Van & Storage, Inc. alleged that in 1952 Marjorie Duarte doing business under the fictitious name of Oxnard Van & Storage placed an order with defendants for display advertising in the Oxnard directory and, although the advertising should have been placed in second position, it was wrongfully placed in third position. The Oxnard Van & Storage advertising continued in third position in all subsequent issues of the Oxnard directory through the year 1960. It is alleged that in 1960 the corporation Oxnard Van & Storage, Inc. acquired all the business and assets of Oxnard Van & Storage. In 1961 the Oxnard Van & Storage, Inc. advertising replaced the predecessor entity's advertising in third position and continued in that position in the 1962 directory. In the 1963 directory the corporation advertising dropped to 11th position. The record shows that the corporation also had advertising in the 1963 directory in 12th and 13th positions. Complainant contends that in each year from 1952 to the present it has suffered substantial loss of business through the inferior placement of its advertising.

Complainant's manager, Christopher Duarte testified that he offered to pay in advance the entire cost of display advertising to be placed in various 1964 directories but defendants refused to accept such advertising on the basis that complainant had not paid certain sums for advertising charges in various directories in the previous years. Mr. Duarte testified that he did not believe complainant owed defendants any money for the past years as the losses suffered by complainant as a result of errors made by

defendants exceeded the amount claimed to be due.

The record shows that complainant did not obtain any display advertising in defendants' 1964 directories.

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Complainant, Marjorie Duarte, doing business as A-1 Oxnard Moving & Storage, alleged that the entire cost of display advertising that she wanted published in the 1964 directory was tendered to defendants but they refused to accept the advertising, demanding that complainant first pay certain advertising charges billed by defendants to Oxnard Van & Storage, Inc. The record shows that the actual offer of the payment of charges in advance for complainant, Marjorie Duarte, was made by the sales manager of Oxnard Van & Storage, Inc.

Complainant refused to pay charges for Oxnard Van & Storage, Inc. and as a consequence did not obtain any display advertising in defendants' 1964 directories.

Defense

Defendant, The General Telephone Company of California made a motion to dismiss the complaint as to defendant General Telephone Directory Company on the basis that said company is not a utility and is not under the jurisdiction of the Commission. Since General Telephone Company alone is responsible for all phases of telephone utility service rendered to its subscribers, including directory service, said motion will be granted.

Defendant presented its defense in all three complaints

generally upon the basis that complainants have received directory advertising under various business names over the past several years and in each instance the responsible party for said advertising was Christopher Duarte. Defendant contends that all charges for said advertising have been rendered pursuant to its filed tariffs and that since an outstanding balance remains due on said advertising its refusal to accept further advertising from complainants until the outstanding charges are paid is proper under its filed tariffs.

In support of its defense defendant presented Exhibit 4, a summary of outstanding advertising charges in various directories for the years 1961 to 1963. The exhibit includes copies of applications for advertising in defendant's directories and, although the advertising appears to encompass several different entities, it is clear that the party who placed the order or signed for the advertising in each instance was Christopher Duarte. The balance due as indicated in the exhibit is \$1,371.21.

A witness for defendant testified that starting in 1963 the advertising for Mr. Duarte's various business entities was handled under contract with the National Yellow Pages Service. This was explained as a system whereby the directory companies may contact a subscriber for his advertising in all telephone directories whether they be General Telephone or Pacific Telephone directories. This tends to simplify the arrangements with the subscriber so that he has only one contract and one bill. Said

contract, Exhibit 5, shows the purchaser to be Oxnard Van & Storage, Inc., by Chris Duarte. The details of the advertising shown on the supplemental data sheets which form a part of the contract include advertising for many separate entities including Oxnard Van & Storage, Inc., Oxnard Van Lines, and A-1 Oxnard Moving & Storage. The charges billed under this contract for the year 1963, as shown in the exhibit, total \$5,507.68. Complainants were allowed an adjustment of \$480.00 for misplaced advertising in the Oxnard directory, leaving a balance due of \$5,027.68.

The record shows the details of the \$480.00 adjustment to be as follows: For the Oxnard Van & Storage, Inc. advertisement which dropped from 3rd to 11th place in the 1963 directory - an allowance of \$240.00 out of the total annual billing of \$360.00; for the Oxnard Van Lines advertisement which dropped from 6th to 10th place, an allowance of \$120.00 out of the total annual billing of \$360.00; and for the Oxnard Van & Storage, Inc. advertisement which dropped from 11th to 13th place, an allowance of \$120.00 out of the total annual billing of \$360.00.

The record disclosed that this latter advertisement also had a transposition of the Thousand Oaks and Oxnard telephone numbers, an error which had not previously been called to the attention of the defendant.

The propriety of complainants' claim concerning the improper agency affiliation which appeared in all three of the advertisements for which positioning error adjustments were

allowed was denied by defendant's witness, who testified that the agency affiliation as printed in the advertisements was proper according to the advice secured from a representative of the Commission staff's Field Section.

Complainants made no claim that advertising service was not furnished or that the charges were not assessed in accordance with the applicable filed tariffs. The allegations were that errors had been made in positioning of the advertising and in their textual content and that billings for the advertising of the three complainants should be considered and treated separately as each was a separate entity.

Defendant's Schedule No. D-1 relates to telephone directory advertising service. Special Condition No. B-7 (Revised Cal. P.U.C. Sheet No. 7259-T) provides as follows:

"7. A listing shall be established for the applicant, on the basis or at the rate applicable, under each classified heading where the applicant orders a display advertisement. No specific position for display advertising is guaranteed."
(Emphasis added.)

Special Condition No. B-4 of that schedule (Revised Cal. P.U.C. Sheet No. 7081-T) provides as follows:

"4. In case of error in or omission of an advertisement, the extent of the Company's liability shall be limited to a pro rata abatement of the amount to be paid to the Company to the extent that the error or omission affects the entire advertisement, except, however, that such liability shall not exceed the amount charged for the advertisement during the period of the active life of the directory issue from which the advertisement was omitted or in which the advertisement in error appeared."

Special Condition No. A-4 of the tariff schedule (Revised Cal. P.U.C. Sheet No. 6866-T) provides as follows:

"4. An applicant or advertiser who has failed to pay charges for advertising service in the current or a preceding directory in accordance with Condition No. 3 above may be refused further advertising or may be required, prior to the closing date of the subsequent directory, to pay the amounts which had been previously billed, and also to pay in full for all advertising desired in such subsequent directory."

Although the tariffs do not guarantee specific positions for display advertisements, the record shows that under any particular listing defendant endeavors to maintain said advertisements in reasonably proper sequence as determined by the dates on which such advertisements have been placed. The adjustment of \$480.00 which was allowed complainants for misplaced advertising in the 1963 Oxnard directory is a partial abatement of the charges reflecting defendant's failure to place certain of complainants' display advertisements in reasonably proper positions. With respect to complainants' claims concerning misplaced advertising prior to 1963, we find that complainants failed to establish that such advertising was misplaced to a degree which would warrant any adjustment of the advertising charges for those prior years. The amount due, therefore, for the period prior to 1963 is \$1,371.21.

In regard to the 1963 year, we find that the errors made in complainants' advertising, in addition to positioning errors, require a further abatement of charges in the amount of \$600.00. This will result in an adjusted amount due under the 1963 National Yellow Pages Service contract of \$4,427.68.

With respect to complainants' claim of separate entities the record clearly shows that the three complainants involved herein are owned, operated and managed by Christopher Duarte and/or Marjorie Duarte, with effective control of all operations being

exercised from the principal place of business at 1505 Pine Street, Oxnard. We find that the operations of the three complainants are so commingled that they cannot be considered as separate entities.

O R D E R

IT IS ORDERED that:

1. The complaint is dismissed as to General Telephone Directory Company.
2. Defendant General Telephone Company shall reduce the billing to Oxnard Van & Storage, Inc., for National Yellow Pages Service advertising in the 1963 directories by an additional \$600.00.
3. In all other respects the relief sought by complainants is denied.

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

Dated at San Francisco, California, this 13th day of JANUARY, 1965.

Frederick G. Heloboff
 President

John S. [unclear]

George H. [unclear]

 Commissioners

DISSENT

BENNETT, William M., Commissioner, Dissenting Opinion:

This decision is less than a model of clarity. It is unintelligible for the most part, but, insofar as it purports to award damages, it is erroneous.

On page 10 of the instant decision, an adjustment of \$480.00 is allowed—apparently for an alleged improper position of complainant's advertisement in the telephone directory. This adjustment is allowed despite the language of the opinion that "...the tariffs do not guarantee specific positions for display purposes ..."

Yet in the next sentence it is stated in the decision "the adjustment of \$480.00 which was allowed complainants for misplaced advertising in the 1963 Oxnard directory is a partial abatement of the charges reflecting defendant's failure to place certain of complainants' display advertisement in reasonably proper positions".

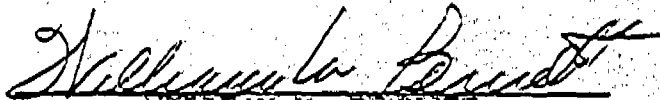
If the tariffs do not guarantee a specific position, it cannot follow that an adjustment of \$480.00 is due as a matter of law.

In addition, on the same page of the decision, a further rebate in the amount of \$600.00 is allowed. Apparently, this \$600.00 is based on the tariff provision set forth on page 9 which provides that such abatement "...shall be limited to a pro-rata abatement of the amount to be paid the Company to the extent that the error or omissions affected the entire advertisement." There is a complete lack of required findings of the proportional extent that the error or omissions affected the entire advertisement. The \$600.00 is arbitrary and unsupported by other portions of the decision. Frankly, any reader of the opinion will be unable to determine the basis for such sum.

Another great difficulty with the opinion is the fact that it clearly states that complainant has neither paid its

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telephone bills, nor has complainant deposited such amount, if disputed, with this Commission as our procedure provides. Had this been done, then jurisdiction to order proper reparations could have been invoked. (P.U. Code Sec. 734.) The present order, because of the procedural manner in which it has been approached, is beyond our jurisdiction and is patently unfair to the creditor utility herein.



WILLIAM M. BENNETT
Commissioner

San Francisco, California
January 14, 1965