

AP/cmm \*

Decision No. 82189

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DENNIS B. GINTHER, dba  
ALL RAY-X SOLAR GLASS TINTING COMPANY,

Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY  
YELLOW PAGE DIRECTORY DIVISION,

Defendant.

Case No. 9505  
(Filed February 2, 1973)

D. B. Ginther, for himself, complainant.  
Richard Siegfried, Attorney at Law, for  
The Pacific Telephone and Telegraph  
Company, defendant.

#### O P I N I O N

Complainant, Dennis B. Ginther, dba All Ray-X Solar Glass Tinting Company, seeks from defendant, The Pacific Telephone and Telegraph Company, the full and maximum credit allowance provided in tariff rules for wrongful insertion of yellow page directory advertisement plus the \$10,000 maximum damages allowable for gross negligence under defendant's Tariff Rule No. 14.

Public hearing was held before Examiner Johnson at Los Angeles on September 17, 1973 and the matter was submitted on September 25, 1973 upon receipt of the transcript.

#### Complainant's Position

Complainant testifying on his own behalf stated:

1. He met with defendant's representative, Mr. Jerry Strom, on July 25, 1972 to discuss the insertion of advertisements in the yellow pages of Pacific's Orange County and South Orange Coast directories. (The advertisement in the Orange County directory is the subject of this complaint.)

2. He was dissuaded from placing quarter-page advertisements on the basis that such advertisements would provide more business than he could adequately handle.

3. He signed an agreement for a quarter-column advertisement (\$33.25 a month) in the Orange County directory with the understanding that (a) if the location of the advertisement could not be guaranteed on the first page of the listing, Mr. Strom was to immediately notify him so that he could place an alternate size advertisement that would insure the desired location, and (b) that a proof of the display advertisement would be submitted to him for verification and acceptance prior to the final insertion date.

4. A competitor's similar size advertisement appearing on the first page of the listing in the Orange County directory resulted in an average of 13 telephone responses a day as compared to his total of five responses during an 11-month period.

In further support of his position complainant presented a business acquaintance who testified that:

1. He arrived at complainant's office while complainant and Mr. Jerry Strom were discussing the insertion of a yellow page display advertisement and was asked by complainant to participate in the conference in an advisory capacity.

2. During the meeting he repeatedly voiced his opinion that because complainant was starting a new business it was mandatory that the advertisement appear on the first page of the listing exactly as proposed by complainant.

3. He confirmed complainant's assertion that Mr. Strom was informed that if the Orange County directory advertisement would not appear on the first page of the listing complainant should be notified so that he could substitute a larger advertisement that would appear on the first page of the listing.

4. The advertisement that actually appeared in the Orange County directory was, in his opinion, misleading, poorly placed and displayed, and different than the advertisement complainant had originally proposed.

Defendant's Position

Defendant presented testimony through its sales representative, Mr. Jerry Strom, who testified that:

1. Pacific places display advertisement in its classified directories on the basis of size (largest advertisements are placed first) and seniority (within a size, the advertisements that were placed for the longest continuous time are placed first).
2. The tariffs and contract specifically provide that advertisement location cannot be guaranteed, and he made no guarantee as to location of the advertisement. He did not discuss notifying complainant if the advertisement was not located on the first page of the listing.
3. He would have received a larger commission for a quarter-page advertisement than for the one that was actually placed so that it was unlikely that he would have dissuaded complainant from placing the larger advertisement.
4. Proofs were furnished as a courtesy to the subscriber only and not for the approval of the advertiser.
5. In his opinion the advertisement in question was a generally satisfactory one in spite of the fact he was unable to persuade complainant to make some minor modifications to the proposed advertisement (such as replacing the company name "Ray-X" with the type of business).
6. Complainant contacted him only after the Orange County directory was published and his primary complaint about the advertisement appeared to be the size of the print rather than its contents or location.
7. The South Orange Coast directory advertisement utilized larger print than the disputed Orange County directory advertisement, indicating modifications to this undisputed advertisement subsequent to the placement of the original orders.

Discussion

The record indicates that for a display advertisement to be of substantial benefit to complainant in starting his new business it should be conspicuously located and written in an informative, attention attracting manner so as to induce a prospective customer to contact complainant. The advertisement that actually appeared, being at the bottom of the second page of the listing, is not in an advantageous position to successfully compete with the generally larger first-page advertisements of complainant's competitors. In this case the second-page listing is further disadvantaged by being on the reverse side of, rather than opposite, the first page of the listing.

At the time of ordering his display advertisement, complainant was obviously aware of defendant's established policy of advertisement placement in accordance with size and seniority. Consequently, it was not unexpected that a relatively small advertisement for a newly established business appear last in the listing. Whether or not a larger advertisement appearing on the first page of the listing would have overcome complainant's competitive disadvantage of starting a new business is highly speculative.

The record indicates that defendant's sales representative, Mr. Strom, had sufficient experience to assist complainant in the preparation of a satisfactory advertisement. His effectiveness would be limited to some extent if his customer was unwilling to accept his suggestions. The fact that the later advertisement appearing in the South Orange Coast directory had larger print would indicate that the disputed advertisement was subject to improvement in the eyes of complainant but not necessarily that the original advertisement was poorly devised.

A statement on the proofs requests that the advertisements be checked for accuracy of name, address, telephone number, spelling, and correct classification. Obviously, such a request would be

meaningless if it was not intended that the proofs be delivered to the subscribers in sufficient time prior to the publication of the directory to effect necessary changes. The record indicates that the Orange County directory proof was mailed September 7, 1972 but that complainant did not receive it. It is noted, however, that the disputed advertisement was correct with respect to name, telephone number, spelling, and classification (no address shown).

Complainant made no attempt to offer evidence supporting his claim for \$10,000 damages. However, were such a showing attempted it would have been irrelevant to this proceeding as such matters as the awarding of legal damages as such are outside the jurisdiction of this Commission. (Vila v Tahoe Southside Water Utility (1965) 233 CA 2d 469, 479.)

Findings

1. Defendant has an established policy of placing display advertising in its classified directories on the basis of first, size, and then seniority. The disputed advertisement was placed in accordance with this policy.

2. Defendant's agent did not guarantee the location of the advertisement nor did he agree to notify complainant if complainant's advertisement was not placed on the first page of the listing.

3. Proofs of the advertisement in question were mailed on September 7, 1972 but were not received by complainant.

4. The advertisement that appeared was correct as to name, telephone number, spelling, and classification.

5. Defendant's present practice is reasonable because the customer is willing to pay more for a large advertisement that gives him a favorable position; the rule is well defined, easily understood, and easy to explain; customers can make an intelligent choice when buying display advertising.

6. Complainant did not prove that the disputed display advertisement was inconspicuous and uninformative nor that such defects, if any, resulted from indifference, incompetence, or negligence on the part of defendant's representative.

Conclusions

1. The complainant did not prove that any defects which might exist in the disputed display advertisement resulted from the indifference, incompetence, or negligence on the part of the defendant's representative; therefore, the complaint should be dismissed.
2. The Commission does not have authority to award damages.

O R D E R

IT IS ORDERED that the relief requested is denied.

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

Dated at San Francisco, California, this 4<sup>th</sup>  
day of DECEMBER, 1973.

James L. Steiger  
President  
William J. Murphy Jr.  
B. H. Morris  
Stan M. Miller  
Commissioners