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Decision No. 83272

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Roy M. Rick (dba) Rick Appliances,)

Complainant,)

vs.)

The Pacific Telephone & Telegraph
Company, a Corporation, John Does,
Jane Does, ET AL.,)

Defendants.)

Case No. 9636
(Filed November 28, 1973)

Roy M. Rick, for himself, complainant.
Michael J. Ritter, Attorney at Law, for
The Pacific Telephone and Telegraph
Company, defendant.

O P I N I O N

This is a complaint by Roy M. Rick (Rick), doing business as Rick Appliances, against The Pacific Telephone and Telegraph Company (PT&T), a corporation. A duly noticed public hearing was held before Examiner Arthur M. Mooney in Los Angeles on February 15, 1974, on which date it was submitted.

Rick complains of various practices of PT&T in connection with listings of businesses in the alphabetical white pages of its Los Angeles-Northwestern telephone directory (Northwestern directory). He seeks an order directing PT&T to include the following listing and telephone number in that directory and to furnish it to the directory assistance operator for the area covered by the directory prior to the next reissue thereof:

Frigidaire Authorized Sales & Service
4720 W Magnolia Brb. 842-8289

PT&T in its answer to the complaint asserts that Rick is not entitled to the relief sought and requests that the complaint be dismissed.

Background

The following undisputed facts are established by the record, and we find them to be such:

1. By letter dated January 21, 1972, Mr. D. L. Holtz of PT&T informed Rick that he had contacted the Admiral Corporation, Speed Queen, Frigidaire Corporation, and Gibson Refrigerator Sales Corporation regarding the use of their names as finding names in the white pages of the Northwestern directory and was informed by each that it did not approve such use of its corporate name by Rick. The letter further stated that O'Keefe & Merritt Company had advised PT&T that it had no objection to the following listing in the white pages on behalf of Rick:

O'Keefe & Merritt Co. Dealer -
Rick's Appliances
4720 W Magnolia Brb. 762-2934

Rick was requested to advise if he wished the listing authorized by O'Keefe & Merritt Company included in the next issue of the directory.

2. In accordance with Rick's request, the listing authorized by O'Keefe & Merritt for him was included in the next issue of the Northwestern directory.

3. Frigidaire Sales Corporation of Los Angeles has been franchised by the Frigidaire Division, General Motors Corporation, to conduct distributorship operations in connection with specified Frigidaire products and has responsibility for and is authorized to franchise other business enterprises to conduct such sales and/or service operations in connection with such Frigidaire products at approved locations in the area of its sales and service responsibility. The Frigidaire Sales Corporation has franchised Rick to conduct sales and service operations for specified Frigidaire products at Burbank

and other named surrounding communities and areas. The latest franchise is included in the Frigidaire Products Dealer Sales and Service Agreement dated July 1, 1972 between Frigidaire Sales Corporation and Rick. The photocopy of the agreement attached to the application includes a notation at the bottom thereof immediately above the signature of the Frigidaire Sales Corporation's Los Angeles zone manager requesting PT&T to insert in the directory white section the listing "Frigidaire Authorized Sales & Service" or "Frigidaire Authorized Service & Parts". There is nothing further in the copy of the agreement regarding such listings.

4. By letter dated April 19, 1972, Rick furnished PT&T a copy of his Frigidaire Products Dealer Sales and Service Agreement and requested that he be listed as "Frigidaire Dealer/Rick Appliances" in the white pages of the Northwestern directory.

5. On January 3, 1973, Rick visited the North Hollywood office of PT&T and requested the listing "Frigidaire Authorized Sales and Service" with the directory assistance operator and in the next issue of the Northwestern directory. The PT&T representative who took the order filled out Form K2111, Application for Listing or Joint User Service, for the requested business service listing. The order form was signed by the PT&T representative and Rick and was dated January 3, 1973. Form K2111 has printed thereon that the request is "subject to the Utility's published Rates and Rules on file with the Public Utilities Commission"; that applicant "agrees to hold the Utility harmless from any damage which may result from such insertion"; and that it is "understood that the Utility reserves the right to make such changes in the listing as may be necessary to bring it into conformity with its standard form of directory listing". The stated monthly charge is 75 cents, and the effective date of the listing is shown as January 5, 1973.

6. The requested listing did appear on page 267 of the March 1973 issue of the Northwestern directory.

7. By letter dated March 29, 1973, Mr. W. R. Shelton, advertising manager of Frigidaire Sales Corporation in Dayton, Ohio, advised its Pacific Region manager in Los Angeles that he could inform the dealers in his region by letter that the home office had advised that it is now permissible for dealers to be listed under Frigidaire in the white pages of telephone directories provided the listing, which is subject to local telephone company regulations, complies with the following format:

Frigidaire Authorized Dealer
Dealer Name
Address
Telephone Number

8. Rick met with representatives of PT&T on various occasions regarding the question of whether the listing "Frigidaire Authorized Sales and Service" should continue to be listed with the directory assistance operator and included in the next issue of the Northwestern directory.

9. By letter dated June 7, 1973, Mr. D. J. Nydam of PT&T informed Rick that after reviewing the listing in issue, it was the company's decision that it violates its tariff on file with the Commission governing telephone directories. The letter states that the tariff provides that customers are entitled without additional charge to primary service listings in the white pages, and a business service customer is also entitled without additional charge to a listing under the appropriate heading in the classified telephone directory; that PT&T may require the customer to furnish evidence satisfactory to it that it is conducting business under the name to be listed; and that if PT&T refuses to accept a listing, such refusal is subject to review by the Commission. The letter asserts that the

white pages are intended to be used by people who are looking for a specific person or business where the person using the directory knows the name of the person and is seeking to determine the telephone number; that where an additional listing is used to secure preferential publicity or position by the use of a brand name or by other means, such listing is not acceptable unless the customer actually conducts business under the name to be listed; that the finding line of the listing "Frigidaire Authorized Dealer Rick Appliances" is the trademark of goods to be sold; that it does not reflect the subscriber's business; that such a listing, even with the concurrence of the trademark proprietor, is not acceptable because it violates the directory tariff; and that the proper place to put such a listing is under the various classified headings which people are accustomed to look for. PT&T's directory tariff was attached to the letter.

10. By letter dated July 6, 1973 to Rick, Mr. N. J. Phillips, assistant vice president of PT&T, affirmed the utility's position stated in Mr. D. J. Nydam's letter of June 7, 1973. The letter stated that the requested listing is in reality a line of advertising and, therefore, cannot be included in the white pages unless Frigidaire Sales Corporation were to allow him to use its corporate name and he in fact did business under that name. The letter states that the reason there is not a single heading "Appliance Dealers" in the classified yellow pages is for the convenience of the public. It states that by having separate headings for particular types of appliances such as air-conditioning or refrigeration products and services, the directory user can go directly to the product or service heading he is interested in rather than wading through countless unwanted listings and advertisements to find the wanted firm if a general heading were used for all appliances. Furthermore, it states

that, if the general appliance heading were used, the businessman would be required to purchase advertising stating what he does and could not rely on the heading itself to define his business.

11. On September 17, 1973, Rick filed with the Los Angeles county clerk his proof of publication as required by Section 2015.5 of the Code of Civil Procedure to do business under the fictitious name "Frigidaire Authorized Parts and Services".

12. By letter dated October 31, 1973, Mr. O. B. Ward of PT&T informed Rick that it had been brought to his attention that there is a listing "O'Keefe & Merritt Co. Dealers - Rick Appliances" in the white pages of the March 1973 issue of the Northwestern directory and that, for the reasons for disallowing the Frigidaire listing in the white pages, an order has been issued to remove the O'Keefe & Merritt listing.

13. By letter dated February 7, 1974, Mr. William R. Shelton, advertising manager of Frigidaire, informed PT&T that the listing "Frigidaire Authorized Sales and Service" for Rick in the white pages was not acceptable to it; that the only method satisfactory to it for listing Frigidaire dealers in the white pages is the format set out in his letter of March 29, 1973 to Frigidaire's Pacific Region manager; and that the company will not tolerate the unauthorized use of the Frigidaire name or trademark.

14. The Los Angeles area has been divided into sections by PT&T with various telephone directories for each. Burbank is included in the Northwestern directory which does not have a yellow page classified section. The classified yellow pages for Burbank are in the Burbank-Glendale-La Crescenta Directory. The listing "Rick Authorized Dealer Frigidaire Service" is included in the white pages of both directories and also under a Frigidaire listing under various appliance headings, including Refrigerators & Freezers and Air-Conditioning Equipment - Room, in the yellow page classified section of the latter directory.

15. Rules and rates governing listings in the alphabetical white section of PT&T telephone directories are set forth in its Schedule Cal. P.U.C. No. 17-T. The following rules in the tariff relate specifically to the acceptability by PT&T of requests for the listing of business names:

"SPECIAL CONDITIONS

1. GENERAL

a. PURPOSE

Listings in the alphabetical (white) section of the directory are intended solely for the purpose of identifying subscribers' telephone numbers as an aid to the use of telephone service.

b. EVIDENCE OF CONDUCTING BUSINESS

The Company may require the subscriber to furnish evidence satisfactory to the Company that the business of the subscriber or joint user is being conducted under the names to be listed. If, upon request of the Company, the subscriber for any reason does not furnish such evidence, the Company may refuse to list the name or refuse to continue a listing of the name. Such acceptance or refusal of the Company of the listing of a name is subject to review by the California Public Utilities Commission.

* * *

g. RESPONSIBILITY OF CUSTOMER

The customer assumes full responsibility concerning the right to use any name or address in a directory listing and agrees to hold the Utility free and harmless of and from any claims, loss, damage, or liability which may result from the use of such listing. The Utility does not undertake to determine the legal, contractual, or other right to the use of a name or address to be listed in a telephone directory. The customer shall notify the Utility of any change of non-service address in writing.

* * *

2. BUSINESS SERVICE LISTINGS

a. ~~BUSINESS SERVICE~~ PRIMARY LISTINGS (INCLUDING JOINT USER SERVICE LISTINGS)

Business service primary listings shall consist of a name, designation, address and telephone number in accordance with the following:

(1) Name

The name must be the name under which the customer or joint user is conducting business and may be either the name of an individual, firm, company, corporation or association. A fictitious name may be used when the customer's or joint user's business is conducted under that name.

(2) Designation

A designation descriptive of the business or profession may be included in the listing only if the name does not indicate the nature of the business.

* * *

b. ALPHABETICAL SECTION BUSINESS SERVICE ADDITIONAL LISTINGS

Business service additional listings shall consist of a name, designation, address and telephone number in accordance with the following:

(1) Name

(a) The name may be that of:

an individual engaged in a business or profession,

an employee, officer or member of a firm, company, corporation or association,

a branch, department or division of the same business,

another individual, firm, company, corporation, or association represented by the customer when the use of the name to be listed is authorized by the owner of the name, or,

a fictitious name by which the customer or joint user is known or desires to be known.

Listings to secure preferential publicity or position by the use of a brand name or by other means are not accepted unless the customer or joint user actually conducts business under the name to be listed.

Additional listings may include a reference to the name shown in a primary, additional or joint user service listing."

16. The Lanham Trade-Mark Act of July 5, 1946 prohibits the unauthorized use or publication of trademarks. (See 15 USCA Sec. 1114.)
Issue

The sole issue for our determination in this proceeding is whether PT&T should be directed to list "Frigidaire Authorized Sales and Service" together with complainant's address and the appropriate telephone number with its directory assistance operator and to include such listing in its next issue of its Northwestern directory.

Position of Complainant

It is Rick's position that when PT&T accepted his application for listing "Frigidaire Authorized Sales and Service" with its directory assistance operator and in the March 1973 issue of Northwestern directory and in fact did so that a binding contract existed between the parties and that PT&T had no reasonable grounds

on which to terminate this agreement. He contends that, by reason of his franchise from the Frigidaire Sales Corporation, he is entitled to use the name in issue and have it listed with the directory assistance operator and in the white pages of the directory and that he has legally established his right to use the name "Frigidaire" by his action in filing it as a fictitious business name with the Los Angeles county clerk and complying with the publication requirements.^{1/}

Testimony on behalf of Rick was presented by the district manager of O'Keefe & Merritt Company and the district manager of the Gibson and Kitchenaid appliance divisions of Sues, Young, and Brown. The representative of O'Keefe & Merritt Company stated that his company had informed PT&T in 1972 that it had no objection to the listing "O'Keefe & Merritt Co. Dealer - Rick's Appliances" in the white pages of the Northwestern directory; that Rick requested this listing; that his company has not changed its position in this matter; and that such listings in the white pages are vital to businessmen. The Gibson representative testified that he agreed to the listing "Gibson Showroom Appliance Headquarters" by Rick in the white pages and so informed PT&T and that he was not aware that the Gibson Refrigerator Sales Corporation had informed PT&T that it would not approve the use of its corporate name as a finding name in the white pages of the Northwestern directory.

^{1/} The name Rick seeks to have included in the directory is "Frigidaire Authorized Sales and Service"; whereas, the name he has registered with the Los Angeles county clerk is "Frigidaire Authorized Parts and Service" (emphasis added). While there is a difference between the two names, it is Rick's position that the registration authorizes him to use the word "Frigidaire" in the listing even though the names are not identical.

Complainant argued that it is his right under the public laws and the Constitution as a free, enterprising businessman to have his business name listed in the white pages; that it is an invasion of an individual's right of privacy when PT&T contacts a manufacturer regarding his use of a particular business name; that since the tariff provides that the customer assumes full responsibility concerning his right to use any name, it is the duty of the utility to publish the requested business listing, and it is liable to the customer when it does not do so; that if the listing in issue is in violation of any contract or law, it is for the courts to determine and not PT&T; and that Frigidaire is a product and not a trademark subject to the Lanham Act.

Complainant further asserted that many people when looking for a particular business or service use the white pages of a directory only and do not check the yellow classified pages; that there are separate and numerous headings for each type of appliance in the yellow pages, and an appliance dealer would have to list and advertise under all headings for the products he handles; that he had been receiving over 150 calls per day for his parts department before the listing for it was removed from the white pages; that this has resulted in a severe loss for his parts department; and that this action by PT&T has severely jeopardized his livelihood.

Position of Defendant

It is the position of PT&T that complainant's request that it be ordered to publish the listing "Frigidaire Authorized Sales and Service" in the alphabetical white section of the Northwestern directory be denied.

Testimony on behalf of defendant was presented by its supervisor of marketing and service representatives in its North Hollywood Business Service Center and by its staff manager-directory. The supervisor testified that Rick's business account has been under her general supervision since 1970; that while his postal address is Burbank, he is located in the North Hollywood-Magnolia Central Office serving area; that his current telephone service consists of two North Hollywood business lines and one Los Angeles and one Burbank foreign exchange line; that Rick's request for inclusion of the listing in issue in the 1973 directory was accepted by the Glendale Business Office; that it was published in the 1973 Northwestern directory; that she was notified by the directory department that this listing was not in accordance with legal requirements, and on April 23, 1973 issued an order removing the listing from directory assistance and future customer directories; and that Rick was notified of this action by telephone and by correspondence.

The staff manager-directory testified that, among other duties, his responsibilities include the review and approval of directory sales practices and procedures. He stated that the reasons the Directory Department had notified the North Hollywood Business Service Center to take action to remove the listing in issue were the Lanham Trade-Mark Act and the provisions and requirements of tariff Cal. P.U.C. No. 17-T. He pointed out that the Lanham Trade-Mark Act provides that an owner of a brand name may prohibit a publisher from printing the brand name unless permission has been given and that Frigidaire Sales Corporation had specifically informed PT&T that it would not authorize the listing "Frigidaire Authorized Sales and Service". The witness also explained that paragraph 2.b.(1)(a) of the tariff provides that the name may be that of another individual, firm,

company, corporation, or association represented by the customer when the use of the name to be listed is authorized by the owner of the name and that listings to secure preferential publicity or position by use of a brand name or by other means are not accepted unless the user actually conducts business under the name to be listed. He asserted that the listing in issue is not Frigidaire Sales Corporation's name; that it is therefore a product or service listing and does not serve the sole purpose of identifying Frigidaire Sales Corporation's telephone number; that PT&T is not challenging Rick's claim that he is conducting business under the name "Frigidaire Authorized Sales and Service", but that since the owner of the name Frigidaire has not given permission for its use in this manner, the listing is not acceptable. He further stated that the format approved by Frigidaire Sales Corporation, "Frigidaire Authorized Dealer" followed by the dealer's name, address, and telephone number, was likewise not an acceptable listing. He stated that this listing was a brand name listing and was advertising. He testified that to be acceptable the full name of the company, Frigidaire Sales Corporation, would have to be used in the listing, otherwise it would be brand name advertising. The witness testified that a listing including Frigidaire Sales Corporation's full name with the qualifying word dealer followed by the dealer's address and telephone number or if there were more than one dealer, followed by each dealer's name, address, and telephone number would be acceptable. However, he pointed out that this method had not been approved by Frigidaire Sales Corporation.

Counsel for PT&T argued that two conditions must be met if a business listing which includes another company's brand or trade name is to be published in the white pages. He stated that the first condition is that consent must be obtained from the owner of the name and that the second condition is that the publication cannot be the equivalent of an item of trademark advertising. He asserted that the listing in question meets neither condition. He further argued that since the listing approved by Frigidaire Sales Corporation is in effect a brand name advertising, it belongs in the classified yellow pages; that the white pages are intended solely for the purpose of listing names of individuals and businesses for the purpose of identifying their telephone numbers and as an aid to the use of telephone service as set forth in paragraph 1.a. under Special Conditions in tariff Cal. P.U.C. No. 17-T; and that the public interest is best served by the two-directory system, the white pages restricted to identifying a subscriber's telephone number, and the yellow pages which serve as a locator for products and services.

Discussion

We are of the opinion that the relief requested should be denied. Frigidaire Sales Corporation is the owner of the name Frigidaire. It has specifically informed PT&T that it does not authorize or approve the use of its name in the manner set forth in the listing in issue. The fact that Rick has filed the fictitious name "Frigidaire Authorized Parts and Service" with the Los Angeles county clerk is irrelevant. It certainly cannot be considered authorization to Rick to use the name "Frigidaire" in the listing in issue when the owner thereof has specifically declined to approve such use. We will not require PT&T to do that which is prohibited by federal law.

Additionally, we agree with PT&T that business listings, if they are to be included in the white pages of directories, must comply with the regulations and conditions set forth in its tariff Cal. P.U.C. No. 17-T. We have carefully reviewed the specific tariff rules involved herein, which are set forth above in Finding 15 under the heading Background, and are of the opinion that they are reasonable regulations and not arbitrary, capricious, or discriminatory. The purpose of the white pages, as the tariff states, is to identify subscribers' telephone numbers and to aid in the use of telephone service. As provided in Rule 2.b.(1)(a) a fictitious name may be included in the white pages. However, this rule also provides that the use of the name of another corporation may be included only when such use of the name is authorized by the owner thereof. Reading both provisions together, this would certainly prohibit the use of a name owned by another corporation in a fictitious name listing.

It is noted that Rule 1.g. of tariff Cal. P.U.C. No. 17-T provides that the customer assumes full responsibility concerning his right to use any name and agrees to hold PT&T free of any liability which may result therefrom and that PT&T does not undertake to determine the legal, contractual, or other right to the use of the name. However, once PT&T has been placed on notice by the owner of a name that it does not authorize the use of its name in the manner and format requested to be listed by another in the white pages, the party requesting the listing cannot rely on this rule as its right to have the listing published. Furthermore, it is not a violation of an individual's right to privacy or any other constitutional rights when PT&T contacts the owner of a name to determine whether the owner authorizes the use thereof by the individual in a business listing. We concur with PT&T that Frigidaire is a product or trade name and not the name of a company and that the listing "Frigidaire Authorized Dealer" followed by the dealer's name, address, and telephone number is a line of product advertising and should not be listed in the white pages.

As to whether or not the listing "O'Keefe & Merritt Co. Dealer - Rick Appliances" would or would not comply with applicable tariff and legal requirements is not an issue in this proceeding and need not be considered herein.

There has been no showing in the record before us that PT&T has harassed complainant in any manner whatsoever in connection with business listings in the white pages. Any listings to be included in the white pages must comply with the applicable tariff rules.

Findings

In addition to the above 16 facts established under "Background", the Commission further finds as follows:

17. The rules in PT&T tariff Cal. P.U.C. No. 17-T referred to in Finding 15 are reasonable.

18. The name "Frigidaire" identifies products sold by Frigidaire Sales Corporation and belongs to and is owned by it.

19. Although the fictitious name "Frigidaire Authorized Parts and Service" was filed by Rick with the Los Angeles county clerk, Frigidaire Sales Corporation had not given permission to him to use the name "Frigidaire" in the white pages of the Northwestern directory in this manner or in the sought listing "Frigidaire Authorized Sales and Service", and the tariff provisions referred to in Finding 15 specifically prohibit the listing of the name of another when authorization for so doing has not been obtained.

20. The use of a product name in a fictitious business listing in a telephone directory is in effect an advertisement of the product, and such a listing should be included in the yellow page classified section and not in the white pages.

21. It is in the public interest that the white pages of a telephone directory be limited solely to identifying subscribers' telephone numbers and that advertising and names that are in effect product advertising be excluded therefrom.

22. PT&T did not violate Rick's right to privacy or other constitutional rights or its tariff Cal. P.U.C. No. 17-T by contacting Frigidaire Sales Corporation to determine whether it authorized the use of the word "Frigidaire" in the listing in issue. PT&T had reasonable grounds for such action because of the legal requirements regarding the use of the name of one company by another.

23. The provisions in application Form K2111 for telephone listings that PT&T reserves the right to make such changes as may be necessary are reasonable and place the applicant on notice that if the listing is subsequently determined not to be in conformity with applicable tariff or legal requirements, it will be removed from subsequent issues of the directory.

24. PT&T did not act in an arbitrary, capricious, or discriminatory manner by its action in removing the listing "Frigidaire Authorized Sales and Service" from being listed with its directory assistance operator or from subsequent issues of the Northwestern directory.

Conclusion

The Commission concludes that the relief requested should be denied.

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 6th
day of AUGUST, 1974.

Vernon L. Stanger
President
William S. Jones Jr.
William S. Jones Jr.
Shaw Van
Commissioners

Commissioner D. W. Holmes, being
necessarily absent, did not participate
in the disposition of this proceeding.