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ORIGINAL

Decision No. 85334

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AD VISOR, INC., a California Corporation, authorized exclusive agent for: DILDAY BROTHERS HUNTINGTON VALLEY MORTUARY, INC., a California Corporation, ENGINEERING MODIFICATION CO., a California Corporation, PRECISION AERO ENGINES PARTS & SUPPLY, a California Corporation, W K EQUIPMENT CO., a California Corporation,

CLAIMANTS,

VS.

GENERAL TELEPHONE COMPANY OF CALIFORNIA,

DEFENDANT.

Case No. 9800
(Filed September 24, 1974)

Norin T. Grancell, Attorney at Law, for complainant.
A. M. Hart, H. R. Snyder, Jr., Kenneth K. Okel, by Kenneth K. Okel, Attorney at Law, for defendant.
Patrick J. Power, Attorney at Law, for the Commission staff.

O P I N I O N

By this complaint, Ad Visor, Inc. (Ad Visor) alleges, on behalf of its clients Dilday Brothers Huntington Valley Mortuary, Inc. (Dilday), Engineering Modification Co. (Engineering), Precision Aero Engines Parts & Supply (Precision), and W. K. Equipment Co. (WKE), that they did not receive a free listing in the yellow pages of General Telephone Company of California (General) directories to which they were entitled pursuant to General's tariff Schedule Cal. P.U.C. No. D-1, page 17.[1/] It is specifically alleged that free listings were not provided, although they were requested, as follows:

1/ See Appendix A.

Dilday: 1971, 1972, and 1973 Huntington Beach directories.

Engineering: 1971, 1972, and 1973 Long Beach directories.

Precision: 1973 Long Beach directory.

WKE: 1971, 1972, 1973, and 1974 Ontario directories, and 1973 and 1974 Indio directories.

It is also alleged that General's sales representatives were fully aware that Ad Visor's clients were not going to receive the free listings although they were entitled to them; that this policy has continued for a number of years; and that General has perpetuated this practice by the willful omission of free listings.

Ad Visor further alleges that it has repeatedly requested General to rectify this situation by bringing these matters to General's attention and requesting adjustments in accordance with General's tariff Rule 26, limitation of liability provisions,[2/] and that offers of adjustment were made based upon a fictional minimum exchange service rate rather than the exchange service rate actually billed, exclusive of message unit and toll charges.

Ad Visor requests the following relief:

1. That General be required to abide by tariff Rule 26 and Commission Decisions Nos. 77406 and 75807;

2. That General be ordered to refund all exchange service charges, exclusive of message unit and toll charges, with interest;

3. That General be found guilty of gross negligence where the complained of act was perpetuated for more than one year;

4. That General be ordered to extend equal treatment to subscribers with the same problems to avoid arbitrary and unequal treatment; and

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2/ Exhibit 14 (see Appendix A).

5. That General be found to have violated Sections 453 and 2106 of the Public Utilities Code (Code), and that a fine be imposed in accordance with Section 2107.[3/]

In its answer, General admits:

1. That Dilday did not receive free listings in the 1971, 1972, and 1973 Huntington Beach directories' yellow pages;

2. That Engineering did not receive free listings in the 1971, 1972, and 1973 Long Beach directories' yellow pages; and

3. That WKE did not receive free listings in the 1971, 1972, 1973, or 1974 Ontario directories' yellow pages, or in the 1973 and 1974 Indio directories' yellow pages of General's telephone directories.

General also admits that it has made offers of adjustment in the telephone bills of certain of the complainants for the alleged omission of free listings from some of the named directories' yellow pages; and that the names of General's representatives who contacted Ad Visor's clients set forth in the complaint were or are present employees of General. General denies all other allegations and raises two affirmative defenses:

1. The complaint fails to state facts sufficient to constitute a cause of action, and

2. Any cause of action complainant may have had with respect to alleged errors and omissions in the 1971 and 1972 directories' yellow pages for Huntington Beach, Long Beach, Ontario, and/or Indio directories are all or in part barred by Section 735 of the Public Utilities Code.[4/]

3/ See Appendix A.

4/ See Appendix A.

Public hearings were held in Los Angeles on February 24 through February 27, 1975 before Examiner Bernard A. Peeters. The matter was submitted, subject to the filing of a late-filed exhibit (Exh. 29) and briefs. The last brief was due on July 3, 1975. The briefs and exhibit have been timely filed and the matter is ready for decision.

The Evidence

Ad Visor

Ad Visor's case was put in through four witnesses, one of whom was an adverse witness called under Section 776 of the Evidence Code. Twenty-five exhibits were introduced, consisting of copies of the "Application for Directory Advertising" (contract) entered into by Ad Visor's clients with General Telephone Directory Company (Directory); letters between General and Ad Visor pertaining to offers of adjustment on the omission of free listings; and copies of the agency contract between Ad Visor and two of its clients, Dilday and WKE.

The adverse witness (collection administrator for General) stated that the offers of adjustment were based upon 35 percent of the minimum monthly exchange service charge, as defined in General's tariff Rule 26 (Exh. 14). The minimum monthly exchange service charge was interpreted to be the charge for basic telephone service only, excluding gongs, pushbutton, extensions, etc.

The secretary-treasurer general manager of WKE testified to the circumstances surrounding his contacts with directory company salesmen; the volume of his company's yellow page advertising, and annual business. WKE places yellow page advertising in 10 directories of General; 3 directories of Pacific Telephone and Telegraph Co. (PT&T), and 2 directories of Continental Telephone Co. of California; that he handled all directory advertising until 1974 when Ad Visor was engaged to perform this function; and his experience with directory advertising salesmen was that they always seemed to be in a rush, spent about 30 minutes time going over the advertising program, never left a copy of the signed contract, but mailed one at a later date; was not aware that a free listing was available to him

in the 1971, 1972, 1973, and 1974 Ontario directories; and that he found out about this only after engaging Ad Visor in 1974. He stated that he never turned down a free listing knowingly such as the listing under Scaffolding in the 1973 Indio directory which was a free listing that was canceled during a period when the advertising budget was being reduced; a free listing under any viable heading would be valuable to him; that he was not informed by the salesman that he was losing a free listing when the Scaffolding item was canceled, nor was another free listing offered under another viable heading; he was advised by the salesman that a bold type (BT) was required to anchor an ad and was not informed that a regular type (RT) would be sufficient and less expensive; and he would have kept an RT listing if he knew it was less expensive. His company has 47 employees and does $3 million business annually. He also stated that directory salesmen are continually trying to increase their advertising. Every year they came up with new headings to advertise under, until it got too expensive and he had to start cutting back. Since employing Ad Visor, he basically has the same advertising program, but at less cost.

Dilday's president testified substantially as follows: He advertises in the yellow pages of the Huntington Beach, Long Beach, and several other smaller telephone directories of General and also in some PT&T directories; that the directory salesmen are usually in a hurry and at times he has signed contracts for yellow page advertising in blank; that he received a completed contract at a later time; generally he xeroxes the salesman's materials so that he will have some record for comparison purposes when he receives the completed contract; and he did not recall signing the contract for advertising in the 1973 Huntington Beach directory (Exh. 4), nor

that the phrase "MCL rejected" (free listing) was on the contract, nor was he aware of the availability of free listings. He also stated that his signature on Exhibit 4 is crossed out.

Ad Visor's president testified substantially as follows: That by comparing Dilday's Long Beach contract (Exh. 23) with the Huntington Beach contracts (Exhs. 2, 3, 4, and 10), it can be seen there were viable headings available for the free listing which Dilday did not receive; that the phrase "MCL rejected" on Exhibit 23 is in longhand and followed by the signature of Bill Corsaro, Directory's Long Beach division manager; with respect to Engineering, Ad Visor's president testified that unilateral changes were made by Directory's salesmen on Engineering's contract (Exh. 24) after it was signed; and that both of Engineering's contracts (Exhs. 24 and 25) contain the notation "MCL rejected" which is alleged to be one of the unilateral actions since Engineering informed Ad Visor that it had not rejected any free listings. Ad Visor, in turn, informed General of this fact (Exh. 26). Ad Visor's president stated that Exhibit 15 (38-page document showing General's charges to Ad Visor's clients involved here) is a subpoenaed document and does not show Engineering therein because Engineering is a joint user with Precision. General objected strongly to the testimony concerning Engineering on the grounds that no witness from Engineering, with firsthand knowledge, was presented and made available for cross-examination. The objection was overruled.

Ad Visor's president also testified that in his opinion it is the telephone company's responsibility to see that the customer is informed of all viable headings under which he could have a free listing and that the customer should be informed when he is actually giving up a free listing. It was also his opinion that the minimum monthly service rate, as used in Rule 26, means the amount of the

exchange service charge billed monthly to the customer, exclusive of toll and message unit charges. He stated that this charge is not broken down to show separate charges for gongs, pushbutton, extensions, etc. He further stated that Ad Visor's claim on behalf of its clients is for omissions and errors on the part of General and that General should be ordered to comply with its Rule 26, and Decisions Nos. 75807 and 77406.

Ad Visor's counsel made an offer of proof regarding gross negligence, willfulness, and fraud on the part of General, and he orally amended the complaint to conform to any proof which went beyond the scope of the original pleadings.

General

At the outset, General moved to strike all testimony pertaining to the years 1971 and 1972 on the ground that the two-year statute of limitations provided in Section 735 is applicable here. General also moved to dismiss the complaint on the grounds that there is an assignment of reparation claims involved here which is in violation of Section 734.[5/] General made a further motion to dismiss Section 4C of the complaint, which pertains to Precision, on the ground that no proof was made that Precision was denied a free listing. The motions were taken under submission.

General's case was presented through three witnesses: the Long Beach division manager of Directory; the quality control manager of the Western Region of Directory; and the customer services manager of Directory's Western Region. Three exhibits were introduced by General, one of which was subsequently withdrawn (Exh. 30). General jointly sponsored Exhibit 29 with Ad Visor, as a late-filed exhibit. This exhibit sets forth the amount of reparations being sought by Ad Visor and the amount of the minimum monthly exchange service charges as computed by General.

5/ See Appendix A.

The division manager testified that in addition to being a sales representative in the past, he had been sales training director for Directory. As such, it was his duty to coordinate the initial sales training program for the four regions of Directory so that they would all be similar. He described the three-week sales program given each new salesman, which consists of company orientation on policies, fringe benefits, product knowledge, and basic selling skills and techniques. As a salesman he always discussed the free listing with the customer, that he has had experience where a customer would reject a free listing because he did not want nuisance calls resulting from advertising under a heading that was a small part of the business, or where all headings were exhausted because of having sold advertising under them and there was no viable heading left for a free listing. He stated that it was advantageous to discuss free listings with a customer because it leads to more opportunities for the salesman to sell advertising. At one time he did have the customer initial the phrase "MCL rejected" when it was put on the contract, although this was not a company policy. He no longer follows this practice nor does he require his salesmen to do it.

With respect to the Dilday account, the division manager stated that he worked on it because it was a large dollar volume account; that he kept special records and spent twenty hours preparation time on the account; and that on his initial call on Dilday he spent two hours with the customer. He did not leave a copy of the contracts (Exhs. 4 and 23) with Dilday at the time of signing. Rather, he stated, the procedure is to return the contract to the customer after it has been audited for correctness by Quality Control. He did leave a copy of his work papers with Dilday (Exh. 32). With respect to the signature on Exhibit 4, the division manager stated that it appears to be crossed out, and is illegible because he

had both Dilday brothers sign the document in the same place in his presence. His reason for having both brothers sign was because of some prior litigation involving the Dilday family in connection with advertising.

As to the availability of viable headings for a free listing on the Dilday account, the division manager stated there were such headings available, that he reviewed some and some he did not review with Dilday; that where he did review them, Dilday either did not want a listing under the particular heading, such as vaults-burial, or the division manager felt the heading was not appropriate, such as caskets, which is a manufacturer's classification and not suitable for a mortuary. Another such classification was "Cemetery, Memorial Parks," which Dilday rejected since he stated that he was not permitted to advertise under this heading. With respect to the phrase "MCL rejected" on Exhibit 4, the division manager stated that this was not on the contract at the time of signing, but that he authorized it being put on at a later time, when checking over the account. A month after signing, Dilday requested that he be listed under the heading "Limousine Service" in the Long Beach directory. The closing date for this directory had passed, but the division manager was able to get this listing for Dilday. At the time he also tried to sell Dilday a listing under "Auto Renting and Leasing", but this was rejected. Although there was no place left for a free listing in the 1973 Huntington Beach directory, Dilday was not advised specifically that he would not be receiving a free listing. He also stated that Dilday was aware he was entitled to a free listing because, at the time the Huntington Beach directory advertising was being discussed, the question of whether to advertise under the name of Brothers Funeral Directors or Dilday Brothers Huntington Valley Mortuary came up. It was decided to use the Dilday

name rather than Brothers because of the competitive advantage. Thus, the Brothers name was reduced to anRT and Dilday was given a BT listing. The RT listing thus became the free listing. A later change by Dilday resulted in a change of the primary listing from Brothers to Dilday and the additional listing from Dilday to Brothers. The result was to eliminate the free listing under Brothers. It would have been necessary to purchase a BT or RT under Brothers to obtain a free listing, which Dilday did not want to do.

The salesmen's incentive pay plan was explained. The salesmen get a basic salary with fringe benefits. A two week quota of sales is set and incentive pay is based on the amount of sales over the quota. If sales are less than the quota, there is no incentive pay, and the amount of the deficiency is added to the next two weeks' quota. The deficiencies are cumulative.

The quality control manager described the audit procedure of Directory with respect to applications for directory advertising. The audit consists of investigation and verification of all items appearing on the directory advertising application and copy sheet, guided by reference material such as the salesmen's handbook, "Western Region Sales Instructions", rate schedules, and brand name control classified heading structures. Twenty-four personnel are directly involved in the audit procedure under the supervision of the quality control manager. They are qualified through an on-the-job training program. Approximately 24,000 applications are processed monthly based upon the most recent five months. For the year 1974, the average is 22,300 per month. There is a practice in the audit procedure whereby the audit clerk is supposed to make a second review of every contract to determine if an MCL (free listing) has been offered, or an MCL has been rejected. If an error is detected with

respect to an MCL, the audit clerk is supposed to send the application back to the salesman, if there is time before the publishing date. If there is no time, the salesman is called on the telephone to clear up the error. The audit clerk accepts the salesman's answer, or notation on the application if it was sent back to the salesman. When an application is returned, it goes through a complete audit again. The audit clerk puts nothing on the application without the approval of the salesman. All contacts for information are made with the salesman. The customer is contacted only when the salesman cannot be reached and deadlines are such that there can be no delay. With respect to Exhibit 4 where the signature appears to be either crossed out or a scribble, the audit procedure would accept this as a signature. They have no way of determining whether a contract has been signed in blank or not, and cross checking with the customer is not done.

Directory's customer service manager testified that he was a sales representative for approximately three years, that he always discussed the free listing with the customer, and that it was advantageous to do so because it increases the possibility of more sales. He indicated that as a salesman he received the same training as was outlined by the Long Beach division manager. Part of the duties of his present position is the processing of complaints. For 1974 there were 218,308 separate advertisers in the Western Region out of which 6,630 filed complaints, or 3 percent, in 1974. He pointed out, however, that not all were complaints; some were in the nature of inquiries. Adjustments were given to 2,493 accounts because of errors or, 1.1 percent of the total advertisers. Out of the total number of advertisers in 1974 only .14 percent involved main class listing complaints (free listing) of one nature or another.

It was stipulated that the sales representatives who contacted WKE for the 1973 and 1974 Indio and the 1971, 1972, 1973, and 1974 Ontario directories are no longer employed by Directory. It was also stipulated that the salesman who handled the Dilday account for the 1971 Huntington Beach directory is no longer employed, and that Mr. Camras, who initially handled the 1972 Huntington Beach directory advertising application is no longer employed by Directory.

In addition to being responsible for customer complaints, the customer service manager stated that he is also responsible for holding sessions with new sales trainees for the purpose of relating to them the different danger areas of handling applications and the importance of MCL's. During his experience as a salesman, he found that many advertisers object to having a listing in any other heading that did not relate to their main classification because they did not want to be bothered with "junk" calls.

The Issues

1. Does the complaint state facts sufficient to constitute a cause of action against General?

2. Does the complaint constitute an assignment of a reparations claim?

3. If there is no assignment, does Ad Visor have standing to bring this action?

4. Are the causes of action limited by the two-year or three-year statute of limitations under Sections 735 and 736?

5. Are claimants entitled to a free listing in General's directory yellow pages?

6. If so, did claimants reject such free listing?

7. If claimants are entitled to and did not reject a free listing, are they entitled to reparations under Section 734?

8. If claimants are not entitled to reparations, has General discriminated against them to their damage?

9. If errors and omissions are found on the part of General, were such errors and omissions the result of gross negligence, willfulness, and fraud?

10. If so, should a penalty be assessed against General in accordance with Section 2107?

Discussion

We will dispose of General's motions first. As to the first issue, Section 1702[6/] provides that any corporation may file a written claim with the Commission alleging, among other things, any act omitted by a public utility which is in violation of any provision of law. Here the facts allege a violation of General's tariff which provides for a free listing in the yellow pages. The law charges a public utility with strict compliance with its published and effective tariffs. Therefore, the complaint states facts sufficient to constitute a cause of action, and General's motion to dismiss the complaint on this ground will be denied.

General's motion to dismiss the complaint on the ground that it is an assignment of a reparation claim is without merit. No evidence was introduced that clearly shows Ad Visor's clients assigned all or any part of a possible recovery from this complaint. Exhibits 8 and 11 are copies of the contracts of WKE and Dilday with Ad Visor. The contracts are in two parts. One part is entitled "Agency Contract" and provides, in the case of Dilday, that Ad Visor is to be compensated for its advertising services at the rate of 10 percent of the current advertising billings. In addition to the advertising services to be provided, the fee also includes an annual audit and review of the client's billings. The contract then

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6/ See Appendix A.

provides that one-half of any refunds or credits received from the advertising media due to an error or omission in the advertising program will be paid, in addition, to Ad Visor.

This language refers to adjustments negotiated with the utility, not to reparations resulting from a formal proceeding. Finally the contract provides that if legal proceedings become necessary to collect any unpaid amount on the contract, the purchaser agrees to pay such sum as the court may determine as attorney's fees, or if the contract is placed with an attorney or a collection agency, the purchaser agrees to pay reasonable attorney fees and collection costs. We do not agree with General's argument that the sharing on a 50-50 basis of any refunds or credits given to the client for errors or omissions discovered through Ad Visor's audit procedure constitutes an assignment of a reparation claim. Such provision is for the reimbursement of the additional work involved in the audit. This arrangement is not unlike that long established in the field of transportation where traffic consultants undertake to advise shippers on the most economical methods for shipping their freight and at the same time undertake an audit of past freight bills for overcharges or undercharges for a percentage of the recovery. In the transportation field, if an action is brought for reparations, it is generally brought in the name of the shipper who receives the entire amount of any reparations awarded. The only difference we see in the Ad Visor arrangement is that this action is brought in the name of Ad Visor on behalf of its clients. Insofar as an assignment of reparations is concerned no facts have been adduced to convince us that there is such an assignment. Furthermore, Ad Visor's general counsel stated that it is not interested in the reparations, and that if such are awarded the Commission should order payment direct to the client.

We will therefore deny General's motion for dismissal on this ground. General's motion to dismiss Section 4C of the complaint (regarding Precision) will be granted.

Since the real parties in interest here are clients of Ad Visor's, the question of Ad Visor's standing arises. Ad Visor, Inc. is not a professional law firm. It is apparently in the capacity of an agent that they appear since the second part of Exhibits 8 and 11 is an agency authorization signed by the client. Under this authorization Ad Visor is designated not only as the exclusive agent for the client in placing advertising matter, but also, among other things, to represent the client before the Public Utilities Commission of California. We find nothing in the statutes administered by us nor in our rules of procedure which prohibits Ad Visor from bringing this action.[7/] However, since Ad Visor is not the real party in interest here, we will not consider it as a complainant. For the future, Ad Visor should file complaints in the name of its client or clients.

We turn now to the question of the statute of limitations. Ad Visor argues that the three-year statute of Section 736 is controlling here.[8/] It claims that the omission of a free listing is a violation of Section 532,[9/] because General's tariff provides for a free listing which is included as part of the basic business telephone service to business subscribers.

7/ See Appendix A.
8/ See Appendix A.
9/ See Appendix A.

On the other hand, General argues that the two-year statute of limitations in Section 735 is applicable. General contends that it is clear from a reading of Section 532 that its provisions were only intended to apply to cases where the utility charges a rate for a service other than the applicable rate in its filed tariffs. No allegation is made that the complainants were not charged the applicable rate contained in General's tariff. These rates charged are applicable to all business customers even those who clearly have rejected their free listing in the yellow pages to which they are entitled.

We agree with General that the two-year statute of limitations is applicable here. The tariff in question makes no differentiation in rates whether a free listing is given, rejected, or omitted. In fact the tariff provides the customer with an option, which he may elect to take or not. The rate charged for his minimum exchange service remains the same under either situation. Therefore, where a free listing has been omitted, or rejected, such action, under the circumstances here, cannot be considered as the charging of an unreasonable or excessive amount, as contemplated by Section 734. The option is with the customer. However, the customer should be given the clear opportunity to exercise this option by either taking a free listing or specifically rejecting it.

There is no dispute with respect to the issue of whether claimants are entitled to a free listing. In fact General has admitted in its answer that Dilday, Engineering, and WKE did not receive their free listings and that offers of adjustments for these omissions occurred. Thus,General recognizes that claimants are entitled to a free listing in the yellow pages as a business subscriber. However, General argues that Dilday rejected its free listing in the 1971, 1972, and 1973 Huntington Beach directories,

and that WKE rejected its free listings for the 1973 and 1974 Indio directories as well as for the 1971, 1972, 1973, and 1974 Ontario directories. There is conflicting testimony with respect to these rejections. The witnesses for Dilday and WKE both testified that if they had known they were entitled to free listings they would have used them. On the other hand, General's Long Beach division manager of Directory testified that he personally handled the Dilday account and that there were viable headings available for a free listing, some of which he reviewed with Dilday and some of which he did not. He also testified that Dilday was aware he was entitled to a free listing as a result of a discussion with respect to a convoluted change in the use of BT's and RT's for the two different names under which Dilday advertises. He also stated that in some of the headings mentioned, Dilday did not want to advertise under them. No direct evidence was presented by General with respect to WKE, Engineering, or Precision regarding whether or not they rejected their free listings. On the other hand, Ad Visor did not present any witnesses from Engineering or Precision. The testimony and exhibits for those two complainants were introduced through Ad Visor's president. It was pointed out that those two companies were joint users of the same telephone service. The only evidence pertaining to Precision is a letter from Ad Visor to General pointing out that Precision did not receive a free listing in the Long Beach directory (Exh. 17). Exhibits 16, 18, and 19 were also letters advising General that Ad Visor's other clients did not receive free listings. These letters are nothing more than self-serving statements.

Our review of the exhibits containing the contracts of the various claimants indicates that they are unclear in many respects. They contain typewritten, handwritten, deleted, and added material with no clear-cut delineation as to when, how, and who changed the contract. General's directory quality control manager testified that they have to rely completely upon what the salesmen present to them. They have no way of knowing when the customer signed the contract, or when he rejected a free listing or not, except what the salesmen tells the quality control auditors. The sales procedure described by General's witnesses does not convince us that the directory salesmen always inform customers that they are entitled to a free listing as required by company instructions. Nor are we convinced that the salesmen inform customers that when other viable headings are sold out the customer has, in fact, given up his free listing. The practices and contracts here are not unlike those in Penaloza v PT&T (1965) 64 CPUC 496, where the Commission stated:

> "In passing, we feel justified in observing that defendant's practice of crossing out figures on such contracts has contributed to the difficulties of this proceeding, is poor business practice, and should be discontinued." (64 CPUC at page 502.)

The evidence also indicates that it is the practice not to leave a copy of the signed contract with the customer at the time he signs it contrary to tariff rules. There is also evidence that sometimes the customer is requested to sign a blank contract. These facts, combined with the practice of making changes on the contract after it has been signed, coupled with the pressure upon the salesman to increase his sales efforts, are conducive to creating the problems raised in this case. We therefore reiterate what we said in Penaloza, and will require General to change its tariff, pursuant to Section 490 to the effect that it be mandatory upon the directory salesmen to inform the customer of his entitlement to a free listing,

and that if he rejects such listing, the salesmen shall be required to have the customer initial such action on the face of the contract, whether the rejection is because there are no other headings under which the free listing could be placed, or whether the customer simply does not want a free listing. We do note that under Special Conditions 3.b.(1) second sentence, on page 17 of Schedule D-1 the language: "A copy of the completed Application will be left with any customer who may be required to sign any such Application at the time such signature is requested," is ambiguous. The discretion is left with General whether or not to ask for a signature. Such tariff language is not in conformity with clear and unmistakable tariff construction. It creates confusion and invites litigation. We shall require correction of this.

The right of recovery in a reparation proceeding is derived from Section 734 alone, and the claimant must show that there has been a violation by the utility of a duty imposed by one of those provisions referred to in that section. Once it is determined that the charge exacted was in accordance with the rate filed and in effect at the time, as required by Section 734, there can be no recovery without proof that the charge was inherently unreasonable, excessive, or discriminatory. Except where violations of Sections 494 and 532 are shown, a person seeking reparation should be required to show, not only that he has paid an excessive or discriminatory amount, but that the payment of such amount has resulted in damage to him and that the payment of such reparation will not result in discrimination. (In re L.A. Gas & Electric Corp. (1937) 40 CPUC 451; Golden State Milk Products Co. v So. Sierra Power Co. (1929) 33 CRC 83; Steiger T.C. and Pottery Works v S.P. Co. (1915) 7 CRC 288.)

Ad Visor conceives its demand to be one for recovery of an overcharge on the theory that the omission of a free listing constitutes a lesser service than what the customer is paying for. It is not claimed that the rate, or amount charged, is unreasonable or that it is other than the rate that was published and in effect at the time. Ad Visor does argue that General has a duty to abide by its tariffs and that the omission of a free listing is a violation of that duty and therefore this brings the action within the ambit of Sections 532, 734, and 736.

Ad Visor relies quite heavily on Frost v PT&T (1965) 63 CPUC 801. That decision was rescinded by the Commission, 64 CPUC 441, and therefore does not constitute citable authority.

We have already determined, under the statute of limitations discussion, that Section 532 is not applicable. Therefore, if Ad Visor is to prevail it must show a violation of Section 734 and that its clients suffered an injury, or damage, before reparations can be awarded. Under the facts presented on this record we do not reach the question of whether the amounts charged were excessive or discriminatory as a result of the omission of the free listing because Ad Visor has not offered specific proof of resulting injury to its clients. We do not reach the question as to the measure of damages, nor whether General is complying with its tariff Rule 26, or the requirements of Decisions Nos. 77406 and 75807.

Ad Visor asks us to find that General's conduct toward its clients was willful, grossly negligent, and fraudulent and to impose penalties against General in accordance with Section 2107. In this connection we need only point out that such action, as requested, is beyond the powers of this Commission. Section 2106 vests such power in the courts, not the Commission.

Findings of Fact

1. The complaint alleges facts sufficient to state a cause of action.

2. There is no assignment of a reparation claim.

3. The real parties in interest are the true complainants.

4. The two-year statute of limitations governs this matter.

5. General admitted it did not provide free listings to Ad Visor's clients, as alleged, except for Precision.

6. Complainants are entitled to a free listing in General's directory yellow pages.

7. Complainants, except Precision, did not reject their free listings. No proof was offered with respect to Precision.

8. General's tariff rule on directory advertising pertaining to free listings should be amended to provide a mandatory requirement that the customer be advised of his entitlement to a free listing and that if a free listing is not given, or rejected, the salesman must so note on the contract, at the time of signing, with the reason therefor and have the customer initial such notation.

9. General's tariff rules on directory advertising should be amended to clarify and make certain that the salesman leaves a completed copy of the signed contract with the customer at the time of signing.

10. Ad Visor failed to prove that complainants suffered injury or damage as a result of General's omission of a free listing in the directory yellow pages.

11. Complainants are not entitled to reparation.

12. Complainant is not the proper party and the Commission is not the proper forum to bring an action for penalties under Section 2107.

Conclusions of Law

1. An award of reparations can only be made when it is shown that a utility has charged an unreasonable, excessive, or discriminatory amount for any product or commodity furnished or service performed, and that the person paying such amount has thereby been injured, except where the violation is of Sections 494 or 532 where it is not required that injury or damages be shown.

2. The imposition of penalties provided in Section 2107 is beyond the scope of the Commission's powers.

O R D E R

IT IS ORDERED that:

1. The complainants are not entitled to any relief herein.

2. General Telephone Company of California shall amend its Schedule Cal. P.U.C. No. D-1, page 17 as set forth in Appendix B hereto.

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

Dated at San Francisco, California, this 13th day of JANUARY, 1976.

President

Commissioners

I abstain
Leonard Ross
Commissioner

I dissent
Robert Batinovich
Commissioner

1/ "3. CLASSIFIED

"a. If a directory has a classified section, each business listing furnished under Rate A.1. or each initial listing provided under Rate A.1. of Schedule No. D-3 may appear in regular type one in the classified section at no additional charge."

2/ RULE NO. 26

LIMITATION OF LIABILITY

A. Liability

1. The provisions of this rule do not apply to errors and omissions caused by willful misconduct, fraudulent conduct, or violations of laws.

2. In the event an error or omission is caused by the gross negligence of the Utility, the liability of the Utility shall be limited to and in no event exceed the sum of $10,000.

3. Except as provided in Sections 1 and 2 of this rule, the liability of the Utility for damages arising out of mistakes, omissions, interruptions, delays, errors, or defects in any of the services or facilities furnished by the Utility (including exchange, toll, private line, supplemental equipment, directory, and all other services) shall in no event exceed an amount equal to the pro rata charges to the customer for the period during which the services or facilities are affected by the mistake, omission, interruption, delay, error, or defect, provided, however, that where any mistake, omission, interruption, delay, error, or defect in any one service or facility affects or diminishes the value of any other service said liability shall include such diminution, but in no event shall the liability exceed the total amount of the charges to the customer for all services or facilities for the period affected by the mistake, omission, interruption, delay, error, or defect.

B. Credit Allowance - Services other than Directory

* * *

C. Credit Allowance - Directory

Subject to the provisions of Section A.3 of this rule the Utility shall allow, for errors or omissions in telephone directories, an amount within the following limits:

1. For listings in telephone directories furnished without additional charge, an amount not in excess of the minimum monthly charge to the customer for exchange service during the effective life of the directory in which the error or omission occurred.

2. For listings and lines of information in alphabetical telephone directories furnished at additional charge, as set forth in Schedule No. D-1, an amount not in excess of the charge for that listing during the effective life of the directory in which the error or omission occurred.

3. For listings, additional lines of information and advertisements in classified directories, in accordance with Schedule No. D-1, an amount based upon pro rata abatement of the charge in such degree as the error or omission affected the advertisement, listings, or additional lines of information.

4. For listings in information records furnished without additional charge, an amount not in excess of the minimum monthly charge to the customer for exchange service during the period the error or omission continued.

5. For listings in information records furnished at additional charge, an amount not in excess of the charge for the listing during the period the error or omission continued.

6. For listings in telephone directories furnished in connection with mobile telephone service, an amount not in excess of the guarantee and fixed charges for the service during the effective life of the directory in which the error or omission occurred.

3/ "453. No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

"2106. Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person."

"2107. Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense."

4/ "735. If the public utility does not comply with the order for the payment of reparation within the time specified in the order, suit may be instituted in any court of competent jurisdiction to recover the payment within one year from the date of the order, and not after. All complaints for damages resulting from a violation of any of the provisions of this part, except Sections 494 and 532, shall either be filed with the commission, or where concurrent jurisdiction of the cause of action is vested by the Constitution and laws of this State in the courts, in any court of competent jurisdiction, within two years from the time the cause of action accrues, and not after."

5/ "734. When complaint has been made to the commission concerning any rate for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an unreasonable, excessive, or discriminatory amount therefor in violation of any of the provisions of this part, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection if no discrimination will result from such reparation. No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable, and no assignment of a reparation claim shall be recognized by the commission except assignments by operation of law as in cases of death, insanity, bankruptcy, receivership, or order of court."

6/ "1702. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service."

7/ See Footnote 6, supra, and Rule 9 of the Commission's Rules of Practice and Procedure.

8/ "736. All complaints for damages resulting from the violation of any of the provisions of Sections 494 or 532 shall either be filed with the commission, or, where concurrent jurisdiction of the cause of action is vested in the courts of this State, in any court of competent jurisdiction within three years from the time the cause of action accrues, and not after. If claim for the asserted damages has been presented in writing to the public utility concerned within such period of three years, such period shall be extended to include six months from the date notice in writing is given by the public utility to the claimant of the disallowance of the claim, or of any part or parts thereof specified in the notice."

9/ "532. Except as in this article otherwise provided, no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time, nor shall any public utility engaged in furnishing or rendering more than one product, commodity, or service, charge, demand, collect, or receive a different compensation for the collective, combined, or contemporaneous furnishing or rendition of two or more of such products, commodities, or services, than the aggregate of the rates, tolls, rentals, or charges specified in its schedules on file and in effect at the time, applicable to each such product, commodity, or service when separately furnished or rendered, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals, and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

APPENDIX B

SCHEDULE CAL. P.U.C. NO. D-1
3d Revised Sheet 17
Cancelling 2d Revised Sheet 17

TELEPHONE DIRECTORY SERVICES

SPECIAL CONDITIONS - Continued

3. CLASSIFIED

a. If a directory has a classified section, each business listing furnished under Rate A.1. or each initial listing provided under Rate A.1. of Schedule No. D-3 may shall appear in regular type once in the classified section at no additional charge. The customer shall be specifically informed of this entitlement. If advertising is sold under all viable headings, the customer shall be informed that he has in effect rejected his free listing, and the Application shall be noted "MCL REJECTED" in the presence of the customer who shall be required to initial the notation at the time of signing the Application, with the reason therefor. If the customer specifically rejects his free listing, the above procedure will be followed.

b. (1) Charges for advertising in accordance with rates as set forth in this schedule will be covered by an Application For Directory Advertising. A copy of the completed Application, including prices and a total thereof, ~~will~~ shall be left with ~~any customer who may be required to sign any such Application at the time such signature is requested.~~ the customer at the time of signing the Application.

Stricken material is deleted.
Underscored material is added.