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Decision No. 87958 OCT 12 1977

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AD VISOR, INC., a California Corporation, authorized exclusive agent for: Elmer's Van & Storage; Trans-World Van Lines; Torrance Van & Storage Co., dba S&M Transfer & Storage Co.; General Van & Storage, Co. Inc., and North American Van Lines Agency (Sierra Van & Storage), Complainant(s), v. GENERAL TELEPHONE COMPANY OF CALIFORNIA, Defendant.	Case No. 9936 (Filed June 26, 1975; amended July 23, 1975)

Fred Krinsky and Jack Krinsky, for Ad Visor, Inc., authorized agent for Elmer's Van & Storage; Trans-World Van Lines; Torrance Van & Storage Co., dba S&M Transfer & Storage Co.; General Van & Storage, Inc.; North American Van Lines (Sierra Van & Storage), complainants.

A. M. Hart, H. R. Snyder, Jr., Kenneth K. Okel, by Kenneth K. Okel, Attorney at Law, for General Telephone Company of California, defendant.

O P I N I O N

This complaint was filed by Ad Visor, Inc. (Ad Visor) against General Telephone Company of California (General) on behalf of its clients, the real parties in interest, Elmer's Van & Storage (Elmer's), Trans-World Van Lines (Trans-World), Torrance Van & Storage Co., dba S&M Transfer & Storage Co. (Torrance), and General Van & Storage Co., Inc. (and North American Van Lines Agency--Sierra Van &

Storage) (General Van). The complaint alleges that General violated its Tariff Schedule No. D-1 and its standards pertaining to yellow pages directory advertising by publishing certain specified display and trademark ads in its 1972, 1973, and 1974 Huntington Beach, and 1974 Laguna Beach directories in the classification "Moving and Storage Service".

As a result of these alleged violations, Ad Visor contends that the value of the complainants' advertising which appeared in some or all of the named directory issues was diminished in value. Therefore, Ad Visor seeks reparations from General equal to the amount paid by complainants for all of their advertising in these directory issues ($9,078.60 plus charges for telephone service). It was further alleged that these violations are continuing from which Ad Visor sought injunctive relief. The interim relief was denied in D.84723 dated July 29, 1975. It is also alleged that General's actions constitute a violation of Section 453 of the Public Utilities Code,[1/]

1/ All references are to the Public Utilities Code unless otherwise indicated.

"453. (a) 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.

"(b) 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.

"(c) No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations.

"(d) The commission may determine any question of fact arising under this section."

Section 2106[2/] of the Code, and Section 17500 of the Business and Professions Code; that defendants be found guilty of gross negligence, wilful misconduct, and that penalties be imposed pursuant to Sections 2107, 2108, 2109, and 2110[3/] of the code.

2/ "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.

"No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt."

3/ "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.

"2108. Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

"2109. In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility.

(Continued)

Concurrently with its answer, General filed several motions to strike portions of the complaint. The ground for one motion is that any alleged errors or omissions committed in the 1972 Huntington Beach directory are barred by the statute of limitations contained in Section 735 of the Code.[4/] Therefore, paragraphs 3.a, 3.b, 3.c, and 3.d of the complaint should be stricken for failure to state a cause of action.

Another motion requests that paragraphs 3.d, 3.j, 3.p, and 3.t of the complaint be stricken on the ground that the alleged violations of the "Moving and Storage Service--Household Goods Carriers" standard do not state a cause of action since the standard merely purports to state the regulations contained in Minimum Rate Tariff 4-B of this Commission relating to advertising by moving and storage companies, which the utility is not required to enforce.

3/ (Continued)

"2110. Every public utility and every officer, agent, or employee of any public utility, who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the Constitution of this State or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance in a case in which a penalty has not otherwise been provided is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

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."

General further moves that paragraphs 7 and 8 on pages 32 and 33 of the complaint be stricken since they contain a request that defendant be found guilty of gross negligence and wilful misconduct. The asserted ground is that the relief sought is beyond the jurisdiction of the Commission to grant.

In its answer General admitted publishing all the ads involved here; that the various advertising standards and tariff provisions attached to the complaint are the ones that were in effect during the various times involved; and denies that it violated any of its directory advertising standards found either in its Tariff Schedule No. D-1 or the Western Regional Sales Information (WRSI) of General Telephone Directory Company (GTDC), any law or statute; that it is continuing the offenses alleged; and that its actions constitute wilful misconduct or gross negligence. Three affirmative defenses are asserted: (1) the complaint fails to state a cause of action, (2) General conducts a reasonable investigation of a customer's status at the time the customer applies for yellow page advertising, and (3) any causes of action arising out of the acts of General which occurred prior to June 26, 1973 are barred by Section 735 of the Code.

Four days of hearings were held on March 30 through April 2, 1976 before Examiner Bernard A. Peeters in Los Angeles. The matter was submitted on the last day subject to the filing of concurrent briefs due 90 days after the filing of the last volume of the transcript. The time for filing briefs was subsequently extended by stipulation of the parties to and including August 18, 1976. The briefs have been timely filed and the matter is ready for decision.

The Issues

Ad Visor states that the real issue is whether advertising should be limited where one man is the owner of several businesses being conducted with common offices, equipment, personnel, and location.

On the other hand, General sets forth 10 different issues.

The material issues are:

1. Were the businesses for whom the alleged excessive advertising was published owned by one person and operated with a commonality of equipment, personnel, and locations?

2. If the answer to 1 above is yes, do General's tariff and advertising standards permit the selling of more than one display and one trademark ad to an advertiser conducting more than one business?

3. If the answer to 2 above is no, was General's interpretation of its tariff and advertising standards to permit display advertising and trademark advertising for each business entity reasonable under the circumstances?

4. If the answer to 3 above is no, what tariffs, advertising standards, and laws were violated by General?

5. If General violated any tariff, advertising standard, or law, to what relief are complainants entitled?

Motions

During the hearing General moved to dismiss the complaint on the ground that it involved an assignment of a reparation claim which is prohibited by Section 734 of the Code.[5/] This motion has

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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."

been made in prior cases[6/] based on the same type of contract, and has been denied. We will not repeat our reasons here. General's motion will be denied.

With respect to General's motion filed concurrently with its answer we agree that the 2-year statute of limitations contained in Section 735 applies, since the tariff rate charged for the advertising is not challenged. Therefore, any cause of action arising out of General's conduct prior to June 26, 1973 is not only barred, (Cortez v PT&T Co. (1966) 66 CPUC 197) but the right itself is extinguished (Southern Pacific Co. (1959) 57 CPUC 328, 330, and cases cited therein; Pacific Mercury Television Mfg. Corp. v Cal. Water & Tel. Co. (1955) 55 CPUC 721, 725). The complaint in this case was filed on June 26, 1975. General's 1972 Huntington Beach directory was published on November 3, 1972 (Exh. D-1, p.2), more than two years prior to the filing of the complaint. Since the statute of limitations for complaints for directory errors and omissions begins to run when the directory is published, any claims based on the 1972 Huntington Beach directory are barred and extinguished. We will therefore grant General's motion to strike paragraphs 3.a, 3.b, 3.c, and 3.d of the complaint.

That portion of General's motion dealing with the striking of paragraphs 3.j, 3.p, and 3.t of the complaint will be dealt with in the body of this opinion when we discuss the reasonableness of General's interpretations.

With respect to that part of the motion dealing with the allegation of gross negligence and wilful misconduct, we agree with General that such relief is beyond our jurisdiction. To make such findings would go to the issue of consequential damages, not reparations. The Commission has repeatedly held that it has no

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6/ D.85334, C.9800; D.87240, C.9833; D.87239, C.9834; D. _____, C.9861; D. _____, C.9824.

jurisdiction to award damages for tortious conduct by a public utility towards its customers (Gheno v PT&T (1976) D.85464, C.9883; Sonnenfeld v General Telephone Co. of Calif. (1971) 72 CPUC 419, 421). Only a court has the power to award consequential damages as opposed to reparations (PT&T (1971) 72 CPUC 505). In view of our lack of jurisdiction to award consequential damages, it follows that it is not necessary to this decision, nor do we deem it advisable to make the requested findings of gross negligence and wilful misconduct. We will grant General's motion to strike paragraphs 7 and 8 on pages 32 and 33 of the complaint.

Discussion

The following table sets forth, by directory and year, the number and type of ads published in the "Moving and Storage" classification for the complainants, and for the companies whose ads allegedly violate General's tariff and advertising standards. These latter companies are: All American Van & Storage (All American); Balboa Transfer Co. (Balboa); United American Van & Storage (United); World Van & Storage (World); Harbor Storage and Moving of Orange County (Harbor); Office and Industrial Movers (O&I); Garden Grove Moving and Storage, Inc. (Garden Grove); Pan American Moving and Storage of Orange County (Pan American); Laguna Beach Van and Storage (Laguna Beach); and A-All American Van & Storage (A-All American), also referred to collectively as The Eytchison Companies. It is alleged that all of these companies are owned by one person, under common control and management using a commonality of personnel, equipment, and facilities; that such single ownership of the corporations and commonality violates General's advertising standards by permitting The Eytchison Companies to dominate the moving and storage classification of the yellow pages.

TABLE 1

1972 Huntington Beach

Complainants	No. & Type Of Ads	Alleged Violating Ads	
General Van page 370	1-2¼ col.*	All American	page 368
Elmer's page 371	1-2¼ col.		
Sierra page 376	1-2¼ col.**	Balboa	page 374
	1-2¼ col.	World	page 376
	1-3¼ col.***	United	page 375
General Van page 375	1-CTM****	All American	page 369
	1-CTM	Balboa	page 370

Total no. display ads - 31
CTM or TM ads - 20

* Double half column.
** Double quarter column.
*** Triple quarter column.
**** Custom trademark.

1973 Huntington Beach

General Van page 414	1-2¼ col.	All American	page 412
Elmer's page 415	1-2¼ col.	Balboa	page 418
Sierra page 418	1-2¼ col.	World	page 419
	1-2¼ col.	Harbor	page 421
	1-2¼ col.	O&I	page 421
	1-3¼ col.	United	page 423
General Van page 419	1-CTM	A-All American	page 412
	1-CTM	All American	page 413
	1-CTM	United	page 422

Total no. display ads - 41
CTM or TM ads - 26

(Continued)

TABLE I

(Continued)

1974 Huntington Beach

Complainants	No. & Type Of Ads	Alleged Violating Ads	
General Van page 479	1-2⅛ col.	All American	page 477
Elmer's page 478	1-2⅛ col.	Balboa	page 482
	1-2⅛ col.	World	page 483
	1-2⅛ col.	Harbor	page 483
	1-2⅛ col.	O&I	page 483
	1-2⅛ col.	Garden Grove	page 485
	1-3⅝ col.	United	page 487
Trans-World page 488	1-CTM	A-All American	page 476
Torrance page 487	1-CTM	All American	page 476
General Van page 486	1-CTM		

Total no. display ads - 43
CTM or TM ads - 28

1974 Laguna Beach

Sierra page 181	1-2⅛ col.	Harbor	page 180
	1-2⅛ col.	Pan American	page 181
	1-2⅛ col.	Laguna Beach	page 181
General Van page 184	1-CTM	A-All American	page 180

Total no. display ads - 15
CTM or TM ads - 15

General admits the publication of the above ads in its directory yellow pages, and does not dispute the single ownership by Arthur Eytchison, and the common control, management, equipment, and personnel of the complained of companies whose advertising is alleged to have violated Pacific's tariffs and standards. Ad Visor's vice president conducted an investigation of these companies, which developed, among other things, that Arthur Eytchison is the sole owner; that all of the companies use common personnel, equipment, and management; and that the numbers listed below represent this Commission's permit numbers for household goods carriers permits issued to the companies indicated along with the names under which they do business:

1. T-94553--Balboa Transfer & Storage, dba Office and Industrial Movers; Office and Industrial Moving Systems; and O and I Industrial and Office Movers.
2. T-98385--Harbor Storage & Moving of Orange County dba All American Van & Storage; Pan American Moving & Storage of Orange County and Garden Grove Moving & Storage of Orange County.
3. T-89373--Laguna Beach Van & Storage.
4. T-100856--United American Van & Storage, Inc., dba World Van & Storage and Sav-On Moving & Storage & Sales.
5. T-101785--Oporto, Inc. dba American Moving & Storage.
6. T-101786--Temple Terrace Inc. dba All American Moving & Storage.
7. T-102148--La Bore's Moving & Storage.
8. T-104794--Garden Grove Moving and Storage, Inc. (Ex. C-3, page 25; C-3-P; and D-5.)

We take official notice of the above permit files as requested by Ad Visor. Our review of these files confirms Ad Visor's allegation that the above companies are all owned by Arthur Eytchison, we also note that all of the above permits have been revoked at various times beginning with September 29, 1975 for nonpayment of fees and/or lack of insurance.

The record is clear from the above, plus Exhibits C-3-Q, R, S, T, U, V, X, Y, Z, and DD that Arthur Eytchison is the owner, and single advertiser, for all of the companies listed above, including A-All American.

The next issue to be determined is whether General's advertising standards pertaining to multiple display,[7/] and trademark or trade name[8/] ads, and its Tariff Schedule Cal. P.U.C. D-1[9/] permit more than one display and/or trademark ad to an advertiser conducting more than one business.

Generally, the standards and the tariff permit only one 2-½ column display, and one trademark or trade name ad to a single advertiser in the same classification.

Here we have multiple companies owned by a single person, but operated under common management and utilizing common personnel, equipment, and facilities. General's multiple display advertising standard provides, in part, the following:

7/ Generally, the standard limits a single advertiser to one D-½ column display ad, except under certain conditions where two D-½ column display ads, or their equivalent, may be had. (Exh. C-3-C and D-8.)

8/"Only one trademark or trade name service order, local or national, for the same product or service is acceptable under the same classification." (Par. 8 of standard dated November 1969--Exh. C-3-G.0.)

"Rearrangement of the normal sequence of words of a brand name for the same product or service for the purpose of providing an additional trademark or trade name service under the same classified heading is not acceptable.

"All requests for duplicate trademark or trade name service must be approved by the Division Manager." (Par. 8.2 and 8.3 of standard dated May 1974--Exh. C-3-M.)

9/"Only one trade name or trademark heading for a particular product or service will appear under a given classified heading." (Tariff Schedule Cal. P.U.C. No. D-1, 1st revised page 20, paragraph 3.o effective 11/23/70, and 2nd revised page 20 effective 3/29/74 Exh. C-3-F and L.)

"The purpose of this policy is to set forth the rules governing the acceptance of multiple display advertisements for a single advertiser under the same classification in any directory. This supersedes all previous instructions on the subject.

"Display advertising space under any single classified heading in the Yellow Pages of a directory for any one person, firm partnership, association, corporation, company or organization of any kind conducting a business or businesses under one or more names shall be limited to one 2-½ column display item. Except when any one or more of the following conditions exist, one, and only one, additional display advertisement is acceptable under the same classified heading." (Exh. C-3-C and D-8. Underscoring added.)

We considered this question in C.9834, D.87239 dated April 26, 1977 wherein General asserted that dentists employed by a Dental Group conducted their own separate dental practices and thus each dentist was entitled to his own display and trademark advertising rather than being limited to one each per dental group. We determined there that the dentists did not conduct separate and individual dental practices, but were employed by a business entity which was the single advertiser and thus limited to one 2-½ column display and one custom trademark ad. Here, we do have separate business entities. However, these separate entities are operated with a commonality of personnel, management, equipment, and facilities, as well as being owned by one person. Even though there are separate business entities involved General's advertising standard is clear in its purpose to limit a single advertiser to one 2-½ column display ad under the same classification even though he may be conducting a business or businesses under more than one name. (Berko v PT&T (1975) D.84068, C.9605.)

While the tariff and advertising standard pertaining to trademark and trade name service does not spell out, in the same detail as the multiple display standard, that such ads are limited to one per single advertiser in the same classification (Footnote 8 and 9 supra) it would not be logical to place an interpretation on this standard different from what is called for in the multiple display standard. To do otherwise would be to invite discriminatory practices. It is clear that only one trade name ad can be accepted for the same product or service. It follows logically that the same limitation should apply where a single advertiser is conducting a business or businesses under more than one name as The Eytchison Companies.

We turn now to the determination of whether General's interpretation of its tariff and advertising standards to permit each business entity to obtain the maximum advertising was reasonable.

General presented three witnesses who testified concerning the reasonableness of their interpretation of the multiple display advertising standards--Mr. McFaddin, Western Region Sales Manager (Exh. D-7); Mr. Noble, Division Manager, West L.A. Division (Exh. D-1); and Mr. Kunza, Sales Representative (Exh. D-6).

Mr. McFaddin testified as follows:

"Q. Are you familiar with the purpose of the limitations on display advertising contained in General Telephone Directory Company's multiple display standard?

"A. Yes, I am.

"Q. Could you explain that purpose?

"A. A number of years ago it became apparent that a few businesses would totally dominate a classification if permitted. The concern was that eventually other businesses would quit using the medium which would reduce its

value to the user. It was concluded that the value to the user would be maintained if limitations on number of ads accepted from a business were established.

"Q. Is that purpose met by allowing businesses with common ownership to have separate display advertising under the same classified heading?

"A. Yes. It was never intended to prevent display advertising by businesses, but only to prevent a few businesses from totally dominating a single classification. In this case I believe the intent of the standard has been met. Here, we are dealing with companies regulated by the Public Utilities Commission. In my opinion such businesses should be allowed to advertise independently under each permit issued by the Public Utilities Commission. To me that indicates we are dealing with separate businesses." (Exh. D-7, pp. 12 & 13.)

Mr. Noble agrees with Mr. McFaddin's testimony as evidenced by the following excerpt from his testimony:

"Q. Do you concur with his [McFaddin] testimony regarding how those standards [multiple display] were interpreted by the Directory Company in case of two or more businesses owned entirely or in part by the same persons?

"A. Yes. I have always understood that the Multiple Display Standard was not intended to prevent legitimate business entities from advertising, but rather to prevent one business from dominating a particular classified heading. It has always been my understanding that a corporation is a separate entity and can advertise separately from any other business conducted by its stockholders." (Exh. D-1, p. 7.)

Mr. Kunza testified as follows with respect to the multiple display advertising standard:

"Q. Under the standard then in effect, could several businesses owned by the same person or persons buy separate display advertising under a single classified heading?

"A. Separate businesses can buy separate ads under the same classification even though they are owned by the same people." (Exh. D-6, p. 12.)

Under cross-examination Mr. Kunza gave the following answer:

"Q. Mr. Kunza, do you know what the intent of the multiple display advertising standard is?

"A. I believe that I previously covered that. I have to go along with that statement that it is to make the directory, to balance the directory, give people an equal right to the advertising, the small businessman as well as the large businessman." (RT p. 347.)

Cross-examination of Mr. Noble produced the following answers:

"Q. Mr. Noble, what is the purpose or the intent of the multiple display advertisement standard?

"A. The purpose and intent is to keep one single company, association, corporation, from dominating a particular classification.

"Q. Why does your company want to prevent one firm from buying as much advertising as it would like?

"A. The reason is, and that is very difficult to answer, because we want to sell any customer as much advertising as they would like under our ground rules or rules contained in the WRSI."

* * *

"That clutters the directory and if it gets beyond reason, it would diminish, actually diminish the value of the yellow pages as an advertising medium.

"Like the present rule now allows the two ads, or I should say three ads is the maximum under any one classification to one company, partnership, corporation or whatever.

"So that it holds it down to where they don't put in a lot of phony ads or false and misleading information in the directory." (RT pp. 256 & 257.)

General recognizes that the purpose of the multiple display standard is to prevent the domination of a single classification in the yellow pages by a single advertiser. However, it rationalizes its interpretation of the standard to permit separate businesses owned by one person and operated with a commonality of personnel, equipment, and facilities by saying that each business is a separate entity, that it was never the intent of the standard to prevent separate businesses from obtaining display advertising; and that the company "wants to sell any customer as much advertising as they would like under our ground rules or rules contained in the WRSI." (RT p. 257.) It further avers that "It was never intended to prevent display advertising by businesses, but only to prevent a few businesses from totally dominating a single classification." (Exh. D-7, p. 13.) It is obvious from the above quotes from the direct testimony and answers on cross-examination that the witnesses understood the primary intent of the rule--to prevent domination of a single classification by one advertiser--but that it was interpreted so as to enable the sale of the maximum number of display ads possible.

As we stated in our opinion in C.9834, D.87239, General's position that it acted reasonably and that its interpretation of the standard was reasonable is untenable. In view of the clear and unambiguous language of the standard, which starts from the premise of a single advertiser, The Eytchison Companies were but one advertiser. General knew this at the time the advertising orders were taken since Mr. Eytchison told the salesman that he owned all the companies, and he signed the

majority of the advertising contracts (Exh. C-3-Q). If the language used is unambiguous, there is no room for construction; the provision must be applied in accordance with the literal meaning of the words used. (Chas. Brown & Sons v Valley Express Co. (1941) 43 CPUC 724, 728-729.)

General's reliance upon the fact that the Commission issued household goods carriers permits to each of the entities to support its interpretation of the standard is not well placed. The multiple display standard is concerned with the question of whether there is a single advertiser conducting a business or businesses under one or more names, not whether each business has a permit or not, and therefore a separate entity entitled to its own advertising. If it were otherwise, the public would be misled into believing that it was dealing with separate and independent advertisers with different personnel, equipment, facilities, locations, and policies rather than one advertiser operating with a commonality of personnel, equipment, etc. This would constitute a violation of the advertising standard prohibiting misleading advertising. (Exh. D-8.) We are therefore led to the same conclusion here, as in C.9834, that General's interpretation and application of its multiple display advertising standard was not reasonable.

General's motion to strike paragraphs 3.j, 3.p, and 3.t of the complaint will be denied. General contends that its advertising standard "Moving and Storage Service--Household Goods Carriers" merely purports to state standards contained in the Commission's Minimum Rate Tariff 4-B which General is not required to enforce. We agree. However, we note that the standard contains the following statement:

> "The Company rules and regulations governing the acceptance of listings and advertising copy for household goods carriers conform with the PUC tariff and are as follows: . . ." (Exh. C-3-N.)

General contends that this advertising standard is advisory only and therefore is not enforceable by General. We cannot accept this argument. It appears to us that the above language constitutes an adoption of the Commission's rules, particularly in view of the adaptation of the rules to telephone company situations. Thus it becomes General's obligation to enforce its own standards.

The next issue is to determine what standards, tariffs, and laws have been violated by General.

It is alleged that General has violated its multiple display, trademark and trade name, columnar advertising, and moving and storage advertising standards; Tariff Schedule Cal. P.U.C. No. D-1; Sections 453 and 2106 of the Public Utilities Code, and that its conduct constitutes gross negligence and wilful misconduct. At the outset we must point out that the directory advertising standards published in WRSI do not attain the same standing as do General's tariffs, which have the force and effect of law. This is not to say that a violation of the standards may not result in a violation of some statutory provision. If the violation of a standard results in a practice over which we have jurisdiction, such as discrimination, or the giving of an undue advantage or preference to one customer over another, Section 453 is brought into issue.

General has admitted publishing all of the advertisements at issue. The record indicates that the published ads for The Eytchison Companies do not conform to the applicable tariff and advertising standards in that they exceed the number authorized a single advertiser, and were not cross-referenced to each other.

The effect of General's noncompliance with its tariffs and advertising standards is to have accorded The Eytchison Companies a preference and an advantage over complainants to their detriment.[10/] Preference and prejudice, to be unlawful, must be unjust or undue, and to be undue, the preference or prejudice must be shown to be a source of advantage to the parties allegedly favored and a detriment to the other parties (California Portland Cement Co. v U.P. RR Co. (1955) 54 CPUC 539, 542; Western Airlines, Inc. (1964) 62 CPUC 553, 562); and that the discrimination is the proximate cause of the injury (California Portland Cement Co. v U.P. RR Co. (1959) 56 CPUC 760, 766).

The record shows that these violations occurred not once, but several times in different directories for at least two consecutive years. Such repeated action in the face of having received a complaint concerning these matters is sufficient to find that General's actions were not only unjust, but undue in that the complained of advertiser received an undue advantage by dominating the yellow pages contrary to the purpose of the multiple display advertising standard to the detriment of complainants. Such action gave favored treatment to The Eytchison Companies and reduced the drawing power, and thus the value of complainants' ads. This action violated the provisions of Section 453.

10/ "He [Eytchison] verbally stated to me that he owned all these companies and because of all the business he gets by having all these ads in the yellow pages it affords him to live very well..." (Exh. C-4-A.)

Insofar as damages based on allegations of gross negligence, wilful misconduct, and violation of Section 2106 are concerned, we have repeatedly held that this is beyond our jurisdiction. (Sonnenfeld v General Telephone Co. of Calif. (1971) 72 CPUC 419, 421; Jones v PT&T (1963) 61 CPUC 674, 675.)

Where discrimination is found to have occurred, it may be corrected in one of two ways. A utility may be ordered to discontinue the preference or advantage or, to make it available to others similarly situated. We shall order General to discontinue the practice.

We turn now to the relief sought by complainants. Before reparations can be awarded, the claimant must show that there has been a violation by a utility of a duty imposed by one of the provisions in Section 734[11/] (Los Angeles Gas & Electric Corp. (1937) 40 CPUC 451, 455), and that he has been injured thereby (Mendence v PT&T (1971) 72 CPUC 563, 566).

Complainants seek reparations for the cost of their advertising and telephone service charges for the 1972, 1973, and 1974 Huntington Beach and the 1974 Laguna Beach directory periods. As pointed out previously 1972 is no longer in issue since any cause of action involving this period has been barred and extinguished pursuant to Section 735.

Ad Visor presented witnesses from two of the complainants to testify with respect to the results from their advertising in the yellow pages--Mr. Stadler, the vice president of Torrance, and Mr. Brooks, the vice president of General Van. Letters from Trans-World (Exh. C-3-BB) and Elmer's (Exh. C-3-CC) were introduced to show the effect of yellow pages advertising on their businesses.

11/ Footnote 5, supra.

Mr. Stadler of Torrance testified that his company has advertised in the yellow pages for many years for the Torrance location. Advertising was placed in the Huntington Beach directory for the first time in the November 1974 issue. Torrance relies to a considerable extent upon yellow page advertising for its business. Two kinds of jobs are handled--those for regular business accounts, and the private household goods moving jobs. The latter comprises 60 percent of the total business. For the first six months life of the 1974 Huntington Beach directory there was no response to the ad. In order to generate business from this area Torrance resorted to radio advertising, mail-outs, and calling upon leads. Records were kept at the Orange County office for the period January 1975 through the first two months of 1976 from which a chart was made showing the origin of the calls, i.e., whether they were generated from the yellow page ad, radio, or other means. This record was kept for the business done in the Orange County office only. It was determined that only six calls were generated from the Huntington Beach directory ad for the first 10 months of 1975. The chart was not introduced into evidence. It purports to show, however, that for the same period only 64 calls were generated from Orange County which, according to Mr. Stadler, is a very small amount. For comparison he points out that between January and March 1976 they have already had 20 calls, and this is a slow period in the business. The absence of the unfair ads from the 1975 directory is given as the reason for the business upturn, yet Torrance had canceled its advertising in the 1975 directory except for a small listing. Mr. Stadler thinks that it is obvious that the more ads that appear in a classification, the smaller share of the market each of the ads will receive.

Cross-examination of Mr. Stadler developed that Torrance's 1973 gross revenue approximated $450,000; 1974, around $500,000; and in 1975 it was $1,300,000. He attributes the 1975 increase

to the interstate operations since they had changed to a new agency. Sixty percent of the business in 1975 was interstate. It was much less in 1974. It was revealed that a net profit was made in 1973, a loss in 1974, and a profit again in 1975; that the advertising budget for 1973 and 1974 was between $30,000 and $40,000; that it increased by $10,000 or $15,000 in 1975; and that Torrance expanded its operations into the Orange County area in August of 1974. It was admitted that the economic recession had an impact on 1974 business for Torrance. When pressed for further specific information to show the diminution in value of yellow page advertising, Mr. Stadler could not answer the questions without the aid of financial and other information in the company's records which he did not have with him, nor was an offer made to produce them.

Mr. Brooks of General Van testified that he was forced to discontinue advertising in the Huntington Beach directory because they were getting no results from the yellow page ads. He attributes the lack of calls to the large number of unfair ads in the moving and storage classification. Advertising in the Laguna Beach directory was not suspended. He stated that response from yellow page advertising showed a steady growth from 1969 to 1972 in the Orange County and Huntington Beach directories. He noticed a decline in early 1973 which continued until the November 1975 Huntington Beach directory was published. The response from both the Orange County and Huntington Beach areas showed a marked increase in calls after the publication of the 1975 directory. He attributes this increase to the removal of the excessive number of display ads of The Eytchison Companies. The transportation of household goods comprises approximately 70 percent of the business done by General Van and is very dependent upon yellow page advertising. An attempt to recover the fall-off in

response from the yellow pages was made in 1973 by resorting to mail-outs and door-to-door canvassing. This was not entirely successful. Approximately $5,000 per year was spent on the mail-outs, which is still being done. He claims that General Van lost $13,307 in 1975 in the Orange County and Huntington Beach areas. He attributes this loss to the appearance of the excessive number of ads published for The Eytchison Companies. He also pointed out that General Van purchased the Laguna Niguel location of Sierra Van & Storage in April, 1974. The following statistics were presented to substantiate the claimed loss caused by the unfair advertising:

TABLE II

	January - October			
	1972	1973	1974	1975
No. of local moves	23	19	12	8
No. of long-haul moves*	N/A**	N/A	23	9
Total yellow page moves	23	19	35	17
Avg. cost per local move	$ 103.92	$ 159.63	$ 242.87	$ 263.44
Avg. cost per long-haul move	N/A	N/A	983.38	1,337.78
Revenue from local moves	2,390.16	3,032.97	2,914.44	2,107.52
Revenue from long-haul moves	N/A	N/A	22,617.74	12,040.02

* Interstate.

** Stated he has the records but did not know why the figures were not available.

(Exh. C-2.)

Letters from Trans-World and Elmer's (Exh. C-3-BB and CC) show that the owner and partner of these household goods movers were not able to attend the hearing and requested Ad Visor to present the information provided.

Trans-World indicates that its business has picked up since the publication of the 1975 Huntington Beach directory. It believes that since one advertiser was allowed so many ads more than anyone else they drew a considerable amount of business away which Trans-World would have received.

Elmer's compiled some figures which were obtained by going through every bill of lading from November 1972 to February 1976. They picked out those that came from the Huntington Beach directory and excluded those from that area which came from former customers and referrals. The resulting figures present the results from yellow page advertising. The compilation is for comparable periods in 1973, 1974, and 1975, i.e., November-October. The results are: 1973 - 53 jobs; 1974 - 38 jobs; and 1975 - 10 jobs. As a result of the decline in the number of jobs received from the Huntington Beach area yellow page advertising was cut back in the November 1975 Huntington Beach directory. The advertising cost was over $1,000 per year and the jobs received from it were not returning the cost.

Ad Visor seeks the following specific amounts of reparation for the complainants:

TABLE III

Directory and Year	Elmer's	Gen'l. Van	Sierra	Trans-World	Torrance
Hntgtn.Bch.					
1972	$1,038.00	$1,038.00	$ -	$ -	$ -
1973	1,110.00	1,440.00	-	-	-
1974	1,149.00	1,284.00	66.00	216.00	1,170.00
Laguna Bch.					
1974	-	25.20	542.40	-	-
Totals	3,297.00	3,787.20	608.40	216.00	1,170.00

(Exh. C-6.)

In addition to the above advertising charges, full reparations on the telephone service for the periods involved are sought, plus interest on both amounts. $1,136.40 for Trans-World's telephone service is specifically sought. The other complainants' telephone charges were not available and will be stipulated to with defendant.

In accordance with our ruling above on General's motion, any claims based on actions before June 26, 1973 will not be considered.

In considering whether or not to award reparations, "[I]t is essential that the Commission carefully scrutinize the proof in support of the complaint and determine that the proof shall measure up to the relief sought, lest by awarding reparations, it sanction what in substance and effect may constitute a rebate and result in unlawful discrimination." (Richardson Co. of Cal. v Pacific Motor Trucking (1965) 64 CPUC 398, 403.)

It is clear from the record that The Eytchison Companies' ads were published in violation of the tariff and advertising standards; that they dominated the moving and storage classification in the yellow pages; and that this domination was a factor in causing the decline in complainants' business. Therefore, we must now examine the record to see if the proof measures up to the relief sought.

An analysis of the evidence in support of the reparations sought reveals certain inconsistencies, failure to produce all available evidence, and general conclusionary statements regarding the loss of business without the underlying supporting facts. For example: Torrance compiled a chart from its Orange County office records showing which advertising media generated calls during the period January 1975 through February 1976. The cards for the Huntington Beach area were segregated. This segregation showed that only six

calls were generated from yellow page advertising in the Huntington Beach directory for the 10-month period January-October 1975. Torrance did not see fit to produce the study, or the chart, for the record, but produced instead only its conclusion. The evidence shows that Torrance first advertised in the Huntington Beach directory in the November 1974 issue. Torrance tells us that it lost money in 1974; that it expanded its business into the Orange County territory in August of 1974; and it is claiming reparations in the amount of $1,170 for its advertising in the 1974 Huntington Beach directory. First, if it lost money in 1974, we are required to presume the calendar year is meant, since this statement is not qualified. If that is the case, we cannot see how the loss can be attributed to the excessive number of The Eytchison Companies' ads, since Torrance first advertised in the November 1974 issue of the Huntington Beach directory. At most, only two months would be involved. Secondly, the gross revenues, profits, and loss testified to do not indicate whether they pertain to the total company operations or only the Orange County operations. It would appear that any loss sustained by the Orange County operations in 1974 would be due primarily to start-up costs and getting established in the area. Any loss that could be attributed to yellow page advertising would necessarily be limited to the months of November and December 1974. In 1975 during which the directory issue was effective for 10 months, the testimony is that there was a considerable increase in revenues and the company made a profit.

Mr. Stadler stated that he resorted to mail-outs, radio, and having salesmen call upon leads to overcome the poor response from the yellow page advertising. Having just expanded into the area, it would seem that the use of all the media possible to introduce the service would be a natural action, and that yellow page advertising would not reach its full potential immediately. It

is stated that only six calls were received from the Huntington Beach directory yellow page advertising for the first 10 months of 1975. It would appear that this is a relatively low response under any circumstances, and that the excessive advertising of The Eytchison Companies was a factor causing this result. General agrees that the amount of advertising exposure would have an effect on the amount of business generated.[12/]

The only witness appearing on behalf of Trans-World and Elmer's was the executive vice president of Ad Visor who presented their letters in evidence. (Exh. C-3-BB and CC.) Trans-World's letter primarily contains conclusionary statements to the effect that the excessive number of ads drew business away which Trans-World would have otherwise received. If Trans-World were the only other advertiser in the classification, this would probably be true. However, as noted in Table I there were 43 display and 28 custom trademark and trade name ads in the moving and storage classification of the 1974 Huntington Beach directory. While we recognize that the excessive number of ads had some effect on the business of other advertisers, we cannot rely upon this evidence as support for the total amount of reparations sought.

Elmer's, on the other hand, presented some figures as a result of having examined every bill of lading from November 1972 to February 1976. The results of this examination show a steady

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12/"Q. And would the amount of advertising exposure have an effect on the business response of the other advertisers in the classification?

"A. Absolutely. The exposure, the more a firm is advertised, no matter where it advertises, the exposure of the company name and type of advertising that they put forth would diminish any other same type of businesses response to theirs if they did not compete equally in everything that its competitor did. Yes." (RT pp. 290-291.)

decline in jobs performed in the Huntington Beach area, from 53 in 1972 to 10 in 1975. It is also stated that 7 jobs were performed out of the Huntington Beach area during the four months, November 1975-February 1976, a normally slow period. Once again, a study was made, but only the conclusionary results were presented.

Ad Visor argues that it is not necessary to prove damages in order to be entitled to reparations, citing a number of Commission cases for this proposition. It also argues that the quantum of proof required should not be the same as would be required to sustain a claim for consequential damages, and that to do so would prevent any complainant from obtaining reparations. While it may be true that in some situations the injury may be obvious from the violation, such as where an erroneous telephone number is placed in an ad, and full reparations on the ad and telephone service probably would be warranted; however, there is nothing wrong with the ad, and the injury is claimed because of unfair competition from excessive ads by a single advertiser, the extent of the injury is not so obvious, and it is therefore necessary that the claimant adduce sufficient proof to sustain his claim. Thus, Ad Visor's argument that it is not necessary to prove damages is erroneous notwithstanding the cited cases. Also, its argument that if there is diminished value in the advertising there is also diminished value in the telephone service is erroneous. Diminished value of telephone service will depend upon the individual circumstances and must be proved. No evidence was produced to show diminished value of telephone service.

Complainant states that it has made studies which support its conclusion that the claimants are entitled to full reparations, yet it did not produce any of these studies so that the validity of the conclusions could be tested. It is not unreasonable to expect that the same diligence and effort put forth in proving the violations be expended in providing a sufficient quantum of proof to substantiate the amounts claimed for reparations.

Having considered the evidence in support of reparations, we are of the opinion that excessive numbers of ads for a single advertiser in the same classification of the yellow pages do result in harm to other advertisers in that classification in that some of the business they could expect from their ad is drawn off by the single advertiser. However, the quantum of proof in support of the sought reparations does not justify an award of full reparations for advertising and telephone service.

Findings of Fact

1. General's motion to dismiss the complaint on the grounds it constitutes an assignment of a reparation claim should be denied.

2. General's motion to strike paragraphs 3.a, 3.b, 3.c, and 3.d of the complaint should be granted.

3. General's motion to strike paragraphs 3.j, 3.p, and 3.t of the complaint should be denied.

4. General's motion to strike paragraphs 7 and 8 on pages 32 and 33 of the complaint should be granted.

5. Balboa Transfer & Storage; Harbor Storage & Moving of Orange County; Laguna Beach Van & Storage; United American Van & Storage, Inc.; Oporto, Inc.; Temple Terrace, Inc.; La Borc's Moving and Storage; and Garden Grove Moving and Storage, Inc. were all owned by Arthur Eytchison and operated under a common management with a commonality of personnel, equipment, facilities, and location.

6. The companies listed in Finding 5 operated under valid household goods carriers permits during the periods involved here.

7. The companies listed in Finding 5 did business under the following names: Balboa, dba Office and Industrial Movers; Harbor, dba All American Van & Storage, Garden Grove Moving & Storage, Inc., and Pan American Moving and Storage of Orange County; United, dba World Van & Storage, and Sav-on Moving & Storage & Sales; and Temple Terrace, Inc., dba All American Moving & Storage.

8. General has admitted that it violated its directory advertising standards by publishing three custom trademark ads using the "United American" logo insignia in its 1973 and 1974 Huntington Beach directories and that only one such should have appeared in each of those directory issues.

9. General admitted publishing the ads listed in Table I for The Eytchison Companies.

10. General's multiple display advertising standard limits a single advertiser to one D-½ column display ad, or its equivalent in space, in the same classification, except under certain conditions not relevant here.

11. Arthur Eytchison is a single advertiser as contemplated by General's multiple display advertising standard.

12. General's Tariff Schedule No. D-1, and its trademark and trade name service advertising standard provide for only one trademark or trade name ad under the same classification per product or service.

13. General's trademark and trade name service advertising standard prohibits the use of the letter "A" in combination with other letters or names if it is not the actual business name of the company or if it is designed to gain preferential listing.

14. The name A-All American Moving and Storage was not registered as a corporate or fictitious firm name and was not the actual name of any business entity.

15. The name A-All American Moving and Storage is an alternate listing name for All American Moving and Storage. As such it was used to gain a preferential listing.

16. General's directory advertising standards prohibit the selling of a trademark ad on an alternate or additional listing.

17. The ads listed in Table I for The Eytchison Companies exceed the number authorized by General's tariff and advertising standards.

18. General's interpretation of its multiple display advertising standard results in a discriminatory practice by permitting a single advertiser to dominate a yellow page classification contrary to the stated, and admitted, purpose of the standard.

19. Torrance, General Van, Trans-World, and Elmer's suffered undue detriment and prejudice as a result of General's actions in that the value of their advertising was diminished by 50 percent.

20. There is insufficient evidence with respect to how much, if any, telephone service was diminished in value.

21. General should be ordered to cease and desist its discriminatory practices.

Conclusions of Law

1. General violated its multiple display, trademark and trade name service, and moving and storage service--household goods carriers advertising standards, and its Tariff Schedule No. D-1. Such violations constitute a discriminatory practice in violation of Section 453 of the Public Utilities Code.

2. Torrance is entitled to reparations in the amount of $585.00 for the 1974 Huntington Beach directory yellow page ads, plus interest. Torrance is not entitled to reparations for telephone service charges.

3. General Van is entitled to reparations in the amount of $1,374.60 for the 1973 and 1974 Huntington Beach and 1974 Laguna Beach directories yellow page ads. It is also entitled to the reparations claimed for Sierra in the amount of $304.20 for the 1974 Huntington Beach and Laguna Beach directories since it

purchased North American Van Lines Agency, formerly known as Sierra Van & Storage located at Laguna Niguel in April of 1974. General Van is entitled to interest on the advertising charges. General Van is not entitled to reparations for telephone service charges.

4. Trans-World is entitled to reparations in the amount of $108.00 for the 1974 Huntington Beach directory yellow page ads plus interest. No reparations should be awarded Trans-World for telephone service charges.

5. Elmer's is entitled to reparations in the amount of $1,129.50 for the 1973 and 1974 Huntington Beach directories yellow page ads, plus interest. Elmer's is not entitled to reparations for telephone service charges.

O R D E R

IT IS ORDERED that:

1. General Telephone Company of California's Motion to Dismiss the complaint is denied.

2. General Telephone Company of California's motion to strike paragraphs 3.j, 3.p, and 3.t of the complaint is denied.

3. General Telephone Company of California's motions to strike paragraphs 3.a, 3.b, 3.c, 3.d, and paragraphs 7 and 8 on pages 32 and 33 of the complaint are granted.

4. General Telephone Company of California shall pay to Torrance Van & Storage Co., dba S&M Transfer & Storage Co., reparations as follows:

> $585.00, with interest at the rate of 7 percent per annum from the end of the life of the 1974 Huntington Beach directory to date of payment.

5. General Telephone Company of California shall pay to General Van & Storage Co., Inc. and North American Van Lines Agency (Sierra Van & Storage) reparations as follows:

> $720.00, with interest at the rate of 7 percent per annum from the end of the life of the 1973 Huntington Beach directory to date of payment.
>
> $675.00, with interest at the rate of 7 percent per annum from the end of the life of the 1974 Huntington Beach directory to date of payment.
>
> $283.80, with interest at the rate of 7 percent per annum from the end of the life of the 1974 Laguna Beach directory to date of payment.

6. General Telephone Company of California shall pay to Trans-World Van Lines reparations in the amount of $108.00, with interest at 7 percent per annum from the end of the life of the 1974 Huntington Beach directory to date of payment.

7. General Telephone Company of California shall pay to Elmer's Van & Storage reparations in the amount of $1,129.50, with interest at the rate of 7 percent per annum from the end of the life of the 1974 Huntington Beach directory to date of payment.

8. General Telephone Company of California shall cease and desist its discriminatory practices in applying its tariffs and advertising standards.

9. All other requests for relief are denied.

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

Dated at San Francisco, California, this 12th day of OCTOBER, 1977.

Robert Batinovich
President
William Symons Jr.
Vernon L. Sturgeon
Richard D. Gravelle
Claire T. Dedrick
Commissioners