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Decision No. 88129 NOV 22 1977

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.

OPINION ON REHEARING

Ad Visor, Inc. (Ad Visor) provides services for businessmen who use the telephone companies' classified directories to attract customers. It undertakes to assure its clients of the most effective coverage at lowest cost. It also represents its clients in disputes with telephone companies over directory charges or service.

In this case, Ad Visor claimed that several of its clients were entitled to additional listings in several of defendant's directories, but had not exercised their rights because defendant's employees failed to disclose that such listings were available without cost. It also claimed that utility employees had unilaterally changed service orders to indicate that the listings were waived. It sought substantial reparations for each of the clients.

Decision No. 85334 found that General had unlawfully failed to offer free listings; it also found that the applicable tariff rules should require additional procedures to avoid confusion and litigation over omitted free listings. The decision also held that reparations for omission of a free listing could not be awarded without a finding that the omission had diminished the value of other nondirectory telephone services. Since no adequate evidence had been adduced to demonstrate diminished value, reparations were denied.

Both parties challenged the decision. The defendant's petition argued that the requirements imposed by the new tariff rule were impractical and too burdensome. Ad Visor challenged certain conclusions concerning the statute of limitations and the Commission's power to impose penalties. However, its principal arguments were that the subscribers should be presumed to be entitled to substantial reparations, that the examiner had deterred proof of diminished value, and finally that adequate proof had been presented.

Decision No. 85624 granted rehearing without specifying the issues to be heard.

After formal and informal prehearing conferences, oral argument was held before Examiner Gilman in Los Angeles on October 8, 1976, and the rehearing was submitted on the receipt of additional documents.

Background

Defendant's tariff provides that a business subscriber is entitled, without extra charge, to a single regular-type listing in an appropriate yellow page classification. A subscriber who orders a bold-type listing pays an additional charge. Such a bold-type listing displaces the regular listing, which can then be used to obtain coverage under another classification heading. If the subscriber elects not to use the regular listing, it is not printed, but there is no reduction in either directory or exchange rate.

In a typical directory during the period we are concerned with, a subscriber could obtain an additional regular-type classified listing for $0.60 to $1.00 per month. Each bold-type listing would cost approximately $2.50 per month.

Discussion

This Commission has no general jurisdiction to award damages. (Section 734, Public Utilities Code; Jones v PT&T Co. (1971) 61 CPUC 505.) It can, however, award reparations, i.e., a refund of rates paid (Horwitz v PT&T Co. (1971) 72 CPUC 505).

We note that the value should not be measured by demonstrating the amount of profit the subscriber could have earned if the omission had not occurred. Lost profit is an element of a cause of action for damages; however carefully disguised, a Commission award intended to recoup even part of a subscriber's lost profits would be an incursion into the courts' jurisdiction over damage claims, and would hence be unlawful.

We are aware of language in prior decisions of this Commission which could be construed to require a subscriber seeking reparations to show some harm as a consequence of the omission other than the diminished value of service inherent in the omission itself. (See for example Mendence vs. P.T.&T. Co. (1971) 72 Cal PUC 563, 566-567.) Whether past decisions required such a showing has been the principal subject of controversy in this proceeding as well as others pending before this Commission. However, no one should be confused as to today's holding. We reject any requirement that a subscriber show injury resulting from an error or omission in order to be awarded reparations. To the extent that our prior decisions may be construed to provide for such a requirement they are overruled. Proof that the subscriber did not get what it bargained and paid for is sufficient to award reparations for the diminished value of service.

Here it has been shown that the subscribers did not receive a regular-type listing in an appropriate yellow page classification, as was included in the cost of telephone service. Such an omission relates only to the value of the telephone service and has no relation to advertising. Each subscriber is entitled to reparations as a result of the omission.

General contends that the measure of reparations should be connected to the amount of advertising subscribed for. Since the subscribers might have paid for an additional listing, General asserts that the appropriate measure is the cost of an additional listing. We reject this position as leading to gross discrimination

between those subscribers who purchase advertising and those who do not. General's position would penalize those who advertise. We find that all subscribers who have been deprived of similar service should be similarly treated, a principle fundamental to utility regulation.

Interpretation of Defendant's Tariff Rule No. 26

Defendant's Tariff Rule No. 26 provides:

> "Subject to the provisions of Section A-III of this Rule the Utility shall allow, for errors or omissions in telephone directories, an amount within the following limits:
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> "(1) For listings in telephone directories furnished without additional charge an amount not in excess of the minimum monthly charge to the customers for exchange service during the effective life of the directory in which the error or omission occurred." (Emphasis added.)

We note initially that this rule provides little or no guidance to us in determining the appropriate amount of reparations in this or any other listing omission type proceeding. It may be argued that the rule, by limiting the allowance to the amount paid for exchange service, does little more than restate the prohibition against the award of damages. The rule clearly permits a wide spectrum of awards that range from some nominal amount to the full amount of the minimum monthly charge. Equally clearly the rule sets no standards or tests for determining at what point in the spectrum the amount equal to the diminished value of service lies.

We will order an investigation into the whole field of directory errors and omissions which will explore, inter alia, possible modifications to Rule 26. For purposes of this proceeding, however, we must, within the confines of the present rule, seek to determine the proper amount of reparations due the claimant for the diminished value of the service provided by the defendant.

General contends that the term "minimum monthly charges... for exchange service" means the minimum amount that any customer must pay to obtain service, rather than the minimum amount charged for any specific customer. We disagree. The charge to the individual customer reflects that customer's perception of its need for telephone service. It is the value of the actual service that has been diminished.

One solution, therefore, would be to simply award the claimant herein one-half of the minimum monthly charge for exchange service since the claimant only received one-half of the listings to which it was entitled. The value of the claimant's service, however, does not rest on the provision of listings alone. In view of all the circumstances, we find that an award of 20% of the minimum monthly charge approximates[1/] the diminished value of service resulting from the omission.

1/ Uncertainty must be associated with any allocation of the minimum monthly charge to the various components of that service. Further, it is clear that for certain types of business, such as certain regulated utilities, the provision of a directory listing comprises only a miniscule element of the value of exchange service. In other types of businesses the listing forms the underlying basis for the value of the rest of the service. One of the goals of our investigation will be to formulate reparation rules which consider the different magnitudes of importance associated with directory listings in different types of business.

Other Factual Issues

During rehearing, Ad Visor requested that certain additional findings be made, because there is a Superior Court action pending between itself and defendant arising out of some of the transactions considered herein. It contended that the court might refuse to try certain issues of fact, on the authority of Dollar-A-Day Rent-A-Car Systems v PT&T Co. (1972) 26 Cal App 3d 454. It urged therefore that we make findings on those issues.

We think Ad Visor has misinterpreted Dollar-A-Day. That opinion merely reaffirmed the long-standing rule that it is the Commission, not the courts, which must exercise the quasi-legislative power to make regulatory policy concerning utilities. The Dollar-A-Day court was careful to distinguish that case from others, where courts have been held to have jurisdiction to interpret and enforce tariffs, regulations, and statutes affecting public utilities. (Calif. Adj. Co. v Atchison, Topeka & Santa Fe Ry. Co. (1918) 179 Cal 140; Atchison, Topeka & Santa Fe Ry. Co. v R.R. Comm (1931) 212 Cal 370; and Vila v Tahoe Southside Water Utility (1965) 233 Cal App 2d 469.)

The California decisions can best be viewed as paralleling a larger body of precedent which includes Federal "primary jurisdiction" cases. (Cf., e.g., Texas & Pacific Ry. Co. v Abilene Cotton Oil Co. (1907) 204 US 426; Great Northern Ry. Co. v Merchants Elevator Co. (1922) 259 US 285; and T.I.M.E., Inc. v U.S. (1959) 359 US 464.)

Both lines of authority establish principles to be used in determining whether an issue which involves a regulatory problem should be tried by a court or whether the court should stay its proceedings and refer the issue to the appropriate administrative tribunal. Both jurisdictions have adopted the general principle that it is the court, not the administrative tribunal, which is always responsible for determining which issues to refer. We have found no authority which suggests that an administrative tribunal should forestall such a determination by unilaterally selecting and deciding issues pending in a court case. Such an action would indicate that the administrative tribunal lacks confidence in the ability of the court to correctly decide the scope of its own jurisdictional responsibilities.

We hold that we have no authority to determine whether issues in a proceeding pending in a Superior Court should be referred to us for determination. We will, therefore, reject Ad Visor's proposal. We will consider such issues if referred to us by the court.

Tariff Changes

By stipulation between the parties, that portion of Decision No. 85334 which specifies new tariff items is to be permanently stayed, subject to the condition that defendant file its own proposed form of tariff to accomplish the objectives set

forth in Findings 8 and 9 of the decision.[1/] Advice letter 4004 was filed on February 18, 1977 and was subsequently withdrawn because of objections by the Commission staff. A substitute filing is expected in the near future.

Findings

1. All of the claims originally made herein, except the following, are barred by the statute of limitations, or unsupported by any evidence:

Subscriber	Directory
Dilday Brothers Huntington	1972 Huntington Beach
Valley Mortuary, Inc.	1973 Huntington Beach
W K Equipment Co.	1973 Ontario
	1974 Ontario
	1973 Indio
	1974 Indio
Engineering Modification Co.	1973 Long Beach

2. Each of the subscribers is entitled to reparations in the amount of 20% of the minimum monthly charge to each customer for exchange service for the lives of the directories.

3. Based on Exhibit 29, the reasonable amount of reparations for each complainant is:

Dilday Brothers Huntington	$681.30
W K Equipment Co.	478.24
Engineering Modification Co.	344.62

1/ "8. General's tariff 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."

Conclusions

1. The omission of a listing furnished without additional charge diminishes the value of telephone service.

2. Each of the subscribers suffered diminished value in the amounts found reasonable in Finding 3.

3. Decision No. 85334 should be stayed insofar as it ordered defendant to make specific changes in its tariffs, until and unless defendant fails to file an acceptable proposed tariff change to accomplish the purposes set forth in that decision.

ORDER ON REHEARING

IT IS ORDERED that:

1. General Telephone Company of California shall pay reparations as set forth in Finding 2 with interest at 7 percent per annum from the date of publication of each directory.

2. Defendant shall file by December 31, 1977 its own proposed form of tariff to accomplish the objectives set forth in Findings 8 and 9 of Decision No. 85334.

3. Decision No. 85334 is stayed until December 31, 1977 insofar as it orders defendant to make specific changes in its tariffs.

4. If defendant does not file tariffs pursuant to Ordering Paragraph 2 by December 31, 1977 then the stay of Decision No. 85334 is dissolved and defendant shall comply with that decision.

5. If defendant does file then the stay is made permanent.

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

Dated at San Francisco, California, this 22nd day of NOVEMBER, 1977.

I will file a dissent.
William Symons, Jr.

Robert Batinovich

President

Commissioners