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ORIGINAL

Decision No. 88180 DEC 06 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ad Visor Inc., a California corporation authorized exclusive agent for: Nowlin Fence and Garage Door Company, Complainant, vs. General Telephone Co. of California, Defendant.	Case No. 9861 (Filed January 16, 1975)

Fred Krinsky and Jack Krinsky, for Ad Visor, Inc., Agent for Nowlin Fence and Garage Door Company, complainant.

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

O P I N I O N

This is a complaint filed by Ad Visor, Inc. (Ad Visor), a California corporation, on behalf of Nowlin Fence and Garage Door Company (Nowlin), the real party in interest. It is alleged that defendant General Telephone Company of California (General) violated its headings and copy advertising standards by publishing a double-quarter column display advertisement for Daniel's Doors (Daniel's) under the classification heading of "door frames" rather than "doors", thus giving Daniel's a preferential advertising advantage over Nowlin because the "door frame" classification precedes the "door operating devices" classification under which Nowlin's ad appeared in the October 1973 and 1974 issues of the Downey directory yellow pages. Ad Visor alleges that the misclassification of the Daniel's ad diminished the value of the Nowlin ad.

It is further alleged that the violations of the advertising standards constitute a violation of Section 453 of the Code.1/

Ad Visor seeks full reparations on all monies collected from Nowlin for the 1973 and 1974 yellow page advertising in the Downey directory, and for telephone exchange service for the same period.

General's answer admits the publication of Daniel's advertisements; that the "door frame" classification immediately precedes the "door operating devices" classification; that Daniel's advertisements appear directly above Nowlin's advertisement; that Exhibit A to the complaint is a copy of General's heading standard in effect at the time; that Mr. Noble of General Telephone Directory Company (GTDC) stated at a meeting with Ad Visor that in his opinion the advertisement for Daniel's in the 1973 Downey directory

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1/ "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."

yellow pages was improper, and that it should be corrected for the next issue. No affirmative defenses were asserted.

On June 3, 1976 General filed its motion to dismiss on the grounds that the complaint involves an assignment of reparation claim in violation of Section 734 of the Code.[2/]

Hearings were held in Los Angeles on June 8 and 9, 1976 before Examiner Bernard A. Peeters. The matter was submitted upon oral argument on June 9, 1976.

Motion

The motion to dismiss on the grounds of an assignment of a reparation claim to Ad Visor has been made before.[3/] We denied the motion previously and will deny the motion here for the reasons cited in the prior cases.

The Issues

The only material issue is whether complainant's advertising and telephone service was diminished in value by defendant's misclassification of a competitor's display ad, and, if so, to what extent?

2/ "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 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."

3/ D.85334, C.9800; D.87240, C.9833, rehearing denied, D.87597; D.87239, C.9834, rehearing denied, D.87596.

Ad Visor presented its case through two witnesses (one called as an adverse witness under Section 776 of the Evidence Code), and twenty exhibits. General presented its case through two witnesses and fourteen exhibits.

Stipulation

The parties stipulated to the following advertising charges incurred by Nowlin:

Classification Headings	Downey Directory 1973	1974	1975
Door Operating Devices	$1,140*	$1,062**	$ 684
Doors	369	195	15
Doors, Repairing		15	15
Fence Contractors	711	1,056	699
Gates			36
Security Control Equip.			36
Alpha Bold Type	162		
	2,382	2,328	1,485

*Includes $105 for trade name listing under various manufacturer's names.

**Includes $36 for trade name listing under manufacturer's trade name.

Complainant's Evidence

Ad Visor's adverse witness was a former customer services representative for GTDC during part of the time involved in this complaint. His testimony was inconclusive with respect to the issue here.

The president of Ad Visor testified that Nowlin ordered and had published a triple-quarter column display ad under the classified heading of door operating devices in the 1973 and 1974 Downey directory yellow pages. This ad was the largest ad in the classification and would have dominated the heading by reason of its size and seniority position at the beginning of the classification. The effectiveness of Nowlin's ad was claimed to be diminished because General erroneously classified a double-quarter

column ad for Daniel's under "door frames". This classification immediately precedes door operating devices and thus Daniel's ad was placed on top of Nowlin's triple-quarter column display ad.

Ad Visor's president brought this discrepancy to the attention of General and GTDC's management on March 7, 1974. After various meetings and phone calls to different management personnel, involving more than the misclassified ad, it was admitted that Daniel's ad was misclassified. Some time in April 1974 a settlement of $1,200 was offered by General (Exhibit C-1-H). Nowlin refused the offer on the grounds that it had been injured to a far greater extent, and that its alternative was to file a lawsuit for damages. General also promised that the misclassified ad would be corrected in the 1974 issue. This was not accomplished.

Ad Visor alleges that Daniel's ad violates General's heading and copy standards, which constitutes a violation of Section 453 of the Code. It also seeks a finding that General violated Section 2106 of the Code.4/

4/ "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."

Questions were propounded to Ad Visor's witness to elicit facts regarding a basis for determining whether Section 453 was violated and the amount of reparations, if any, that were appropriate to compensate Nowlin for the diminished value of his ad. The responses to these questions were general in nature and based on the witness's long experience in the directory advertising field rather than on any specific knowledge of the particular operation of Nowlin's business.

Reparations are sought for diminished value of Nowlin's advertising in the amount of $2,382 for the 1973 directory advertising, $2,328 for the 1974 directory advertising; and the entire amount of the telephone service monthly exchange charge for the entire period covered by the 1973 and 1974 Downey directories, together with interest.

Ad Visor also seeks an award of the costs of this proceeding because they are substantial and, therefore, prevent complainant from obtaining complete justice as the injured party is forced to spend far more than the Commission in most cases can award.

Defendant's Evidence

General's first witness was the Custodian of Records of Nowlin produced under a subpoena duces tecum served upon Mr. Nowlin, owner. Mr. Fred Krinsky, executive vice president of Ad Visor, appeared as the custodian. The documents brought to the hearing covered the years of 1973 and 1974, and consisted of yellow page advertising contracts, copy sheets, and Nowlin's invoices for his services. Fred Krinsky was nominated as custodian by Nowlin for the special purpose of preparing studies and documentation for the legal action brought by Nowlin against General. The custodian made no attempt to show the volume of Nowlin's business in terms of dollars

or jobs. He could not, or would not, answer questions relating to the amount of business generated from the yellow pages, what the dollar volume was in 1973 and 1974 or other specific factual questions, stating that this required the personal knowledge of Nowlin who could determine it by sorting the invoices.

General's second witness was the division manager, West Los Angeles Division, of GTDC - Kenneth C. Noble. Noble handled Ad Visor's complaint about Daniel's ad when he was customer service manager.

Noble admits that Daniel's ad was misclassified and should have appeared under the "doors" classification. Noble also admitted that he promised Ad Visor that the matter would be corrected in the 1974 Downey directory. As customer service manager he could not take direct corrective action, and therefore notified the sales department in March or April 1974 of the situation. Sales overlooked the notice and the same ad was published again in the same position in the 1974 directory. The ad was corrected in the 1975 directory.

Two different adjustments were offered to Nowlin, at different times, by General. The first adjustment was in connection with his 1973 advertising charges. A $1,200 adjustment was offered at the suggestion of General's attorney to avoid Commission or court action. Nowlin did not accept this offer since he claimed he was damaged far more than the amount of the offer (Exh. C-1-H).

The second adjustment involved the 1974 advertising and amounted to $19.50 (Exh. C-1-J, C-1-P, and D-8). This offer was not accepted and this complaint was filed.

General confirmed the fact that Nowlin has filed an action in court for damages arising out of these matters.

Discussion

It is well settled that this Commission does not award damages, but rather only reparations for the diminished value of service. (Section 734, Public Utilities Code; Jones v PUC (1971) 61 CPUC 505.) While we may award reparations for the value of advertising paid for but not received, it is for the courts to award damages for any injury to the complainant, other than that inherent in not having received what it paid for, that are the consequence of an error or omission in the publication of directory advertising.

General while eager to accept this limitation of its exposure in a Commission proceeding nonetheless would require Nowlin to demonstrate the very type of injury which all parties and this Commission agree may not be compensated for in this forum. We reject this contention. Whether Nowlin has suffered a diminution in the value of its advertising depends not on what appears on Nowlin's financial statement but rather on what appears on the relevant pages of the Downey directory.

There is no justification for treating differently two subscribers who suffer the same wrong. That would be the effect of General's position. An advertiser in another classification may have suffered a similar hardship. Should the relative amounts of reparations depend upon which of the two has enjoyed the greatest success during the life of the directory? If we are truly only restoring money paid for the value of advertising not received, the answer must be no. The determination of reparations should be the same for each.

We recently had occasion to discuss this principle in another proceeding involving a dispute between Ad Visor and General. In Decision No. 88120 in Case No. 9800 (November 22, 1977), we stated that:

> "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."

In a literal sense Nowlin did get exactly what it paid for. Nowlin paid for ads for several years in order to establish seniority within the classification "door operating devices." In the 1973 and 1974 Downey directory Nowlin received the senior position of all display ads anchored to listings in the classification "door operating devices."

In making the decision to purchase directory advertising, however, Nowlin had the right to assume that other display ads would be correctly placed. He had the right to expect that the value of the senior position within the classification would be protected by General's proper classification of other display ads. (The testimony

of Ad Visor's witness as to the value of the senior page position would seem to be corroborated by both the existence of the seniority system as a practice of the directory company and the efforts of Daniel's, which both parties admit to be successful, to circumvent that system.) Nowlin's ad did not receive this protection and hence its value was diminished.

Not every misclassification will necessitate the award of reparations. Had the misclassified immediately preceding ad been for "dog groomers" rather than "doors", we would have difficulty finding a resulting diminished value in other than some nominal amount even though complainant could argue that it had been deprived of domination of the page (as opposed to the classification). In the instant proceeding, however, the misclassified ad was an ad for garage doors. We have no difficulty, therefore, in determining that some diminution in the value of Nowlin's ad resulted.

Determining the extent of that diminution is no simple matter. As we noted in Decision No. 88120, General's Rule 26 provides us with little or no guidance (Decision No. 88120 at Mimeo p. 5).[5/] General points out that the Daniel's ad in both the 1973 and 1974

5/ "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."

directories is for aluminum garage doors and contains no copy referring to door operating devices. Thus General contends that no diminution in the value of Nowlin's ad occurred since potential purchasers of door operating devices would not be attracted to the Daniel's ad. Ad Visor asserts that General's argument is faulty since many potential customers for all types of doors and related products and services tend to simply turn to the first page of the yellow pages where any type of door ads appear. Ad Visor contends that the customers then immediately start phoning the numbers that appear in the display ads appearing therein in order to determine whether particular advertisers can provide the product or service they desire. In both the 1973 and 1974 directories the first page of the door related listings (Door Closers & Checks, Door Closers & Checks - Repairing, Door Frames, Door Operating Devices and Doors) that contains display ads is the page containing the Daniel's ad on top of the Nowlin ad. Daniel's, according to this theory, was therefore in the premium position to receive inquiries for all types of door related products and services including door operating devices which Daniel's, in fact, sold and serviced.

Further, Ad Visor asserted that aluminum garage doors are lightweight, easy to lift, and, therefore, somewhat competitive with automatic garage door openers.

We are unable to completely accept either of the parties' positions. Ad Visor's characterization of typical directory use requires us to assume that potential customers do not read a display ad with any care before dialing. Given the number and complexity of

directory classifications within some product areas, a matter we shall take up later, it is reasonable to assume that many potential customers behave in the manner described by Ad Visor. However, the record before us does not support a conclusion that this type of directory use is so widespread that the full reparations sought by Ad Visor are justified. Nor are we able, based on the record, to give more than minimal consideration to the contention that the sales market for aluminum garage doors and automatic garage doors overlap. Based on all the facts before us and with a full awareness that precision is likely to elude us in making determinations under the present rules, we will find that Nowlin's ad in the door operating devices classification was diminished in value by 40% for both the 1973 and 1974 directories by the misclassification of the Daniel's ad. We will award reparations in the amount of 40% of the charges paid by Nowlin for advertising under the heading "door operating devices" in those two directories.

There is nothing in the record to support reparation of charges paid for advertising under other directory classifications. General at one point offered the complainant reparations based on charges for 1974 advertising under the "doors" classification (Exhibit C-1-J). This offer was rejected by the complainant. No allegation with regard to diminution in value of the "doors" advertising appears in either the complaint or the prepared testimony of Jack Krinsky (Exhibit C-1). Nor was any diminution in the value of that advertising developed at the hearing.

Ad Visor requests us to award it the costs of this proceeding. The general rule with respect to the award of costs and attorney's fees

has been codified in Section 1021 of the Code of Civil Procedure.[6/] Costs have been defined by the courts as meaning those fees and charges which are required by law to be paid to the courts, or some of their officers, or an amount which is expressly fixed by law as recoverable costs (Gibson v Thrifty Drug Co. (1959) 173 CA 2d 554). Our rules do not provide for any fees or charges for the filing of a complaint, nor does the Public Utilities Code. Therefore, no costs will be awarded. Furthermore, we have consistently refused to award the payment of attorney's fees and costs, Application of PG&E, A.54279, D.84902 dated September 16, 1975; review denied, SF No. 23395 dated October 28, 1976, and cases cited therein. Ad Visor's request will be denied.

Ad Visor's request for a finding that Section 2106 of the Code has been violated will be denied. To make such a finding could be prejudicial to the court action which has been instituted by Nowlin and, in any event, is a matter for the court to determine. However, this denial should not be construed as a lack of concern on our part with the handling of Nowlin's 1974 advertising. General's failure to correct the error after it was pointed out to them and acknowledged by the company to be a mistake is appalling. Their irresponsibility is augmented in our eyes in view of the fact that they must have been aware that Nowlin's decision to buy a triple-quarter column display ad in the 1974 Downey directory was predicated on the assurances

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6/ "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided."

by General that the 1973 misclassification of the Daniel's ad would not be repeated.

On November 22, 1977, we issued an investigation into the whole field of directory advertising, OII No. 5. General and all other telephone utilities named as respondents in that proceeding are placed on notice that the Commission views "heading jumping" as a serious problem that will receive our fullest attention in that proceeding.

Further we will look at the present myriad classifications to determine whether their exactitude is really in the public's best interest. Is a classification such as "door frames" really necessary? We note that the consolidation of all the door related products and services into one classification would have prevented this dispute. If the public benefit from such precise headings is illusory, as we may infer from some of the testimony in this proceeding, perhaps broader classifications should be mandated by this Commission.

Findings of Fact

1. General misclassified and published a double-quarter column display ad for Daniel's under the "door frames" classification in its 1973 Downey directory yellow pages.

2. General republished the same ad in the same position in its 1974 Downey directory yellow pages.

3. General published a triple-quarter column display ad for Nowlin in its 1973 and 1974 Downey directory yellow pages under the classification of "door operating devices".

4. Daniel's display ad was placed on top of Nowlin's display ad in the 1973 and 1974 Downey directory yellow pages.

5. The content of the Daniel's ad was directed toward aluminum garage doors; Nowlin's 1973 ad was directed toward automatic garage door devices and garage doors; Nowlin's 1973 ad was directed toward automatic garage door devices.

6. The publication of Daniel's ad under the "door frames" classification does not comply with General's heading and copy standards.

7. Nowlin also advertised under the "doors" and "fence contractors" classifications in the 1973 and 1974 Downey directory yellow pages. The value of these ads was not diminished.

8. But for the misclassification of the Daniel's ad, the Nowlin ad would have dominated the first page in which door products and services display ads appear in both the 1973 and 1974 Downey directories.

9. The misclassification of the Daniel's ad diminished the value of the Nowlin ads referred to in Finding No. 3 by 40%.

10. It has not been shown that General's misclassification error resulted in a violation of Section 453 of the Code.

11. General's Rule 26 (Limitation of Liability) provides for an abatement of advertising charges for errors in such degree as the error affected the advertisement.

12. Based on Finding No. 9, the reasonable reparation for the errors is $880.80.

Conclusions of Law

1. General did not violate Section 453 of the Code.

2. Nowlin is entitled to a partial abatement of its advertising charges in the amount of $880.80 for General's misclassification error.

O R D E R

IT IS ORDERED that:

1. The motion to dismiss of General Telephone Company of California is denied.

2. General Telephone Company of California is ordered to pay Nowlin Fence and Garage Door Company $456.00 with interest from the date of publication of the 1973 Downey directory to date of payment, $424.80 with interest from the date of publication of the 1974 Downey directory to date of payment.

3. Ad Visor, Inc.'s request for costs of this proceeding is denied.

4. Ad Visor, Inc.'s request for a finding that Section 2106 of the Public Utilities Code was violated is denied.

5. Nowlin Fence and Garage Door Company is entitled to no other relief in this proceeding.

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

Dated at San Francisco, California, this 6th day of DECEMBER, 1977.

I will dissent.
William Symons Jr

Robert Batinovich

President

Commissioners