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Decision No. 89717

DEC 12 1978

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ACTION REALTY and INSURANCE SERVICES, INC.)
& PROFESSIONAL CAPITAL AGENCIES, INC.,)

Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Defendant.)

Case No. 10557
(Filed May 2, 1978)

ORDER OF DISMISSAL

Complainants do business as Action the 3-1/2% Fee Realty. The Pacific Telephone and Telegraph Company (Pacific) printed complainants' ad in the yellow pages but refused to print complainants' fees^{1/} and rendered complainants' business name as Action the Three and One-Half Percent Fee Realty. (See Appendix A for a comparison of complainants' logo as ordered and as printed.) Complainants request that the Commission order Pacific to print their fees and to use their logo in all future ads placed in California yellow page directories. They also seek a credit of \$750 against their billing of \$950 for the Marin directory, due to Pacific's "disfigurement" of their logo in the directory.

In its answer, Pacific alleges that complainants' yellow page ad was revised to conform with Pacific's Standards for Yellow

^{1/} The complaint requests that Pacific be ordered to publish complainants' fee schedule. The body of the complaint does not disclose their fee schedule. However, a newspaper article attached to the complaint as Exhibit 2-B(a) indicates that three fees are possible: (1) the 3.5 percent fee, (2) the 4.5 percent fee, which includes multiple listing service, or (3) a 7 percent "gold seal service" fee, including "Polavision" which allows prospective buyers to view color movies of houses for sale.

Pages Advertising Content, the relevant portions of which are alleged to be as follows:

"PRICES

Copy containing price expressed in dollars and/or cents, percentages or in any manner including reproductions of coins, currency, bonds or stamps that could infer price as interpreted by the Telephone Company is unacceptable."

* * *

"LISTING NAMES

Listings which include price, reference to price or percent as a part of the firm name may be published in a classified directory subject to the following conditions:

"1. The listing must be clearly recognizable as a firm name and cannot be interpreted or construed as a price, price quotation or discount."

* * *

"2. Business is actually being conducted under the name to be listed.

"3. The price and/or percent will be spelled out in words. Figures and/or symbols are unacceptable."

* * *

"4. If the listing is used in a display advertisement the following additional regulations will be observed:

"a. The listing will be shown only in the lower portion of the display space.

"b. The listing must be subordinate to other copy in the display space and may not be featured in any way or used to infer a price quotation.

"c. Dollar and/or cent symbols are unacceptable as copy.

"5. In an informational the listing may not be repeated in the copy space and dollar and/or cent symbols are unacceptable.

"6. Dollar and/or cent symbols are unacceptable in extra line text if associated with listings in the category described above."

Pacific also alleges that the complaint fails to state a cause of action in that it does not set forth any act or thing done or omitted to be done which is claimed to be in violation of any specific provision of law or of any order or rule of the Commission. (Section 1702 of the Public Utilities Code.) Pacific requests that the complaint be dismissed.

On September 29, 1978, complainants filed an amendment to their complaint and a memorandum of points and authorities in opposition to the answer to the complaint and motion to dismiss and in support of the amendment to the complaint. The amendment to the complaint adds no additional factual allegations. Rather it contends that the facts as previously alleged constitute violations by Pacific of Sections 451 and 453 of the Public Utilities Code. In addition the amendment increases the prayer for reparations from \$750 to \$1,500. The memorandum of points and authorities filed concurrently with the amendment elaborates upon the contentions made in the amendment.

Discussion

The Commission has twice previously considered the question of price advertising in the yellow pages. In Frank Serpa, Jr. v Pacific Telephone and Telegraph Company, Decision No. 54355 dated January 8, 1957, in Case No. 5787 (17 P.R.R. 3d 378) the complainant had, prior to 1956, used prices in its yellow page ads. He filed his complaint when Pacific changed its policy thereby eliminating all prices and percentages from the yellow page ads of complainant and others. He sought an order directing Pacific to include in its next directory, prices, percentages, and discounts when and as requested

by complainant. The Commission held that Pacific's policy was reasonable and denied the relief requested. In reaching this result the Commission held:

"However, because the telephone company in publishing the directory is itself a party to any representations therein and to any practices carried on by advertisers therein, it has the duty as well as the right to see that the public is treated fairly and honestly. It must, therefore, be permitted a reasonable amount of supervision and the determination of proper policies as to the content of the advertisements published. These policies must be nondiscriminatory and fair."
(17 P.U.R. 3d at 380.)

Similarly, in Great Lakes Airlines, Inc. v Pacific Telephone and Telegraph Company (1957) 55 CPUC 553, the Commission dismissed the complaint of a Civil Aeronautics Board certificated air carrier which sought to continue publishing its air fares in the yellow pages. The Commission, relying upon the Serpa case, supra, refused to interfere with Pacific's policy of refusing to publish prices in its directories.

In the instant case, complainants have neither alleged facts which would cause us to vary from our holdings in the Serpa and Great Lakes cases, supra, nor are complainants' legal arguments convincing.

Complainants contend that Pacific, by refusing to accept and publish the ad exactly as submitted, is charging an unreasonable and unjust charge for the services rendered, in violation of Section 451. We disagree. Complainants receive services consistent with Pacific's advertising standards for which they pay the same rates as others receiving similar services. Pacific's rates are neither unjust nor unreasonable merely because complainants do not like the level or kind of service they and all other advertisers receive.

Complainants also argue that Pacific's services are inadequate, unjust, and unreasonable, and its rules are unjust and unreasonable in violation of Section 451. This argument is directed at the rule forbidding numbers or percentages indicating price from appearing in a firm name. This rule is but an exception to the general rule prohibiting the publication of prices and fees in the directory. If the general rule were strictly applied, no business could use for directory purposes a firm name including, either in numbers or words, a price. Such a strict policy would be sensible, for it is potentially more misleading to allow the publication of a single price appearing in a firm name than to allow the publication of a range of prices or fees. However, rather than restrict the freedom of businesses in the selection of their firm names, Pacific has reasonably adopted a policy of deemphasizing prices and fees when they appear in a firm name. Accordingly, such prices are allowed to be printed only in words, and when the firm name is used in a display advertisement the listing may be shown only in the lower portion of the display space and must be subordinated to other copy.

No violation of Section 451 is involved with the adoption of such rules and policies, nor with their application to complainants.

Complainants also argue that such rules have not been uniformly applied and that they have been discriminated against in violation of Section 453. No facts are cited in the complaint or in the amendment thereto which would support such a contention. However, complainants attached to their memorandum of points and authorities copies of directory ads wherein it contends that the advertisers have been allowed to use dollar symbols (\$) and percentage signs (%) in violation of Pacific's own standards.

With one exception the examples are irrelevant to this proceeding since they do not involve prices or prices in firm names.^{2/} No violation of Section 453 is thus disclosed by the pleadings.

The rules and standards by which complainants claim to be aggrieved are not arbitrary exercises of Pacific's power, but foster legitimate public purposes. First, with inflation information conveyed by such prices or percentages may become quickly obsolete^{3/} and therefore misleading to the consumer. "Motel 6" is a classic example of this phenomenon. Second, such firm names have the potential to foster bait and switch schemes, whereby customers lured to a place of business by the "come-on" of an attractive firm name are, upon arrival, made aware of other, more expensive goods and services.

2/ Pacific admits that one of the examples, Exhibit B to the memorandum, contains copy devoting "50% saving", which was published in error in the 1977 Oakland Directory. Pacific alleges that the phrase does not appear in the 1978 issue. (Answer to Amendment and Response to Memorandum of Points and Authorities, p. 4, filed October 30, 1978.)

3/ The Commission has stated in an earlier directory advertising matter:

"There are various reasons why PT&T may desire to enforce high standards of advertising in its yellow pages. Aside from lending support to a public policy calling for truth in advertising, it is to PT&T's advantage to require high copy standards. To the extent the yellow pages are relied upon and utilized by consumers, additional advertising revenues will likely be generated for PT&T. Furthermore, the life of a directory is approximately 12 months. Advertising which appears therein is not as transitory as that which appears in certain other media. As a practical matter, a misleading advertisement is not correctable for the life of a directory. PT&T may adopt reasonable standards for advertising copy which appears in its yellow pages. Such standards must be applied equally, to all advertisers, without arbitrariness or discrimination." (Angel Appliance v PT&T (1974) 76 CPUC 646, 651.)

Complainants further allege that Pacific, "by refusing to allow us to advertise fees in our yellow page ad, is tacitly conspiring to restrain trade and to maintain real estate fees at their present levels." No facts are alleged to support this conclusion, and the only authority cited is a one sentence quotation from an article in the May 1977 issue of the Stanford Law Review. The article is an economic analysis of the real property conveyancing industry in California and does not support complainants' conclusion that Pacific's yellow page advertising standards constitute a conspiracy in restraint of trade. Complainants are free to use any other form of advertising they choose to promote their real estate services and fees.

Complainants finally contend that "the refusal of a public monopoly to allow us the right to advertise our fees is an infringement of our rights under the First Amendment." Again, this contention is unsupported by factual allegations or citations of authority. It is clear that no violation of the First Amendment is involved in this case, as the following citations demonstrate: Avins v Rutgers (1967) 385 F 2d 151, 153, cert. denied, 88 S Ct 855; Werta v Alameda-Contra Costa Transit Dist. (1967) 68 C 2d 51, 57; Martin v Pacific N.W. Bell Telephone Co. (9th Cir. 1971) 441 F 2d 1116, 1118, cert. denied, 404 US 873; Jackson v Metropolitan Edison (1974) 419 US 345, 350, 42 L ed 2d 477, 483, 95 S Ct 499.

Findings and Conclusions

1. Pacific's policy of refusing to publish prices in the yellow pages is reasonable.

2. The standard which requires a price or percentage in a firm name to be spelled out is a reasonable exercise of Pacific's discretion to determine the content of the yellow page ads it publishes.

3. Sections 451 and 453 of the Public Utilities Code have not been violated in the publication of complainants' ads or in the application of Pacific's advertising standards to complainants.

4. The complaint fails to state facts constituting a cause of action in that it does not set forth any act or thing done, or omitted to be done, by Pacific which is contrary to any statute, rule, or order of the Commission.

5. The complaint should be dismissed.

IT IS ORDERED that the complaint is dismissed.

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

Dated at San Francisco, California, this 12th day of DECEMBER, 1978.


Robert B. Burtman
President
William S. Brown
Richard C. Howell
Paul L. DeBorja
Commissioners

APPENDIX A

Complainants'
Logo as Ordered


Ad Showing
Complainants'
Logo as Printed

C-10557 dcp




ACTION
The **3 1/2** % FEE
REALTY

**WHY PAY MORE TO
SELL YOUR PROPERTY**
WE DISCOUNT OUR FEE
NOT OUR SERVICE


REALTOR®
MLS

MEMBER
MARIN BOARD
OF REALTORS
&
THE MULTIPLE
LISTING SERVICE

A POLAVISION REALTOR
NEW-GOLD SEAL SERVICE
ASK ABOUT IT

 **ACTION**
THE THREE AND ONE HALF PERCENT FEE
REALTY

San Rafael 479-6555 Corte Madera 924-7711 Novato 892-4683
San Francisco 863-6142

Home Office: 44 N. San Pedro Rd. San Rafael