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ORIGINAL

Decision No. 90214 APR 24 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AD VISOR, INC., a California Corporation, authorized exclusive agent for THE STRIPPER, Complainant(s), vs GENERAL TELEPHONE COMPANY OF CALIFORNIA, Defendant.	Case No. 10029 (Filed December 22, 1975; amended November 12, 1976)

Fred Krinsky and Jack Krinsky of Ad Visor, Inc., for The Stripper, complainant.
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 case was filed by Ad Visor, Inc. (Ad Visor) on behalf of its client The Stripper[1/] to recover from General Telephone Company of California (General) all monies paid by The Stripper for advertising in General's 1975 Santa Monica, West Los Angeles, and Malibu directories' classified yellow page sections. Ad Visor contends that The Stripper is entitled to the refund because General materially altered The Stripper's advertising applications (contracts) after they were signed by complainant. Ad Visor bases its refund claim on the provisions of General's Tariff Schedule Cal. PUC No. D-1, 1st revised sheet 18, Special Condition 3.d, which provides that:

1/ The real parties in interest and therefore complainants are the partners Larry Price and Douglas Washington dba The Stripper.

> "If the Utility makes any material alteration in the Application after it has been signed by the customer, the Application will be considered void and the Utility shall not proceed to collect on such Application, but does reserve the right to proceed against the customer for the value of the services actually requested by the customer. However, in such case, the Utility will not refuse further advertising pending collection efforts."

Ad Visor contends that General made changes on The Stripper's contracts after they were signed by the customer without obtaining the customer's subsequent approval. Ad Visor also contends that General added to the contracts unrequested items of advertising and deleted therefrom the customer's free listing, also without approval contrary to the provisions of Special Condition 3.a of Tariff Schedule Cal. PUC No. D-1, 2nd revised sheet 17. In addition Ad Visor contends that General violated the provision of its Tariff Schedule Cal. PUC No. D-1, 2nd revised sheet 17, Special Condition 3.b (1) by not leaving with the customer completely filled-in copies of the three contracts at the time of the sales call by General Telephone Directory Company's (GTDC) sales representative. Special Condition 3.b (1) provides in relevant part that:

> ". . . A copy of the completed Application will be left with any customer who may be required to sign any such Application at the time such signature is requested. Said copy will be marked 'Application subject to acceptance by the Utility'. The Utility will indicate acceptance by sending a copy of the Application marked 'conforming copy' if no changes are made to make it conform to its Rates and Rules. When such changes are required a revised Application will be submitted to the customer, requesting a signature approving the changes.
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> "The Application will show the advertising items and detail of charges and the month and year of this first issue in which the advertising is to appear."

By its amendment Ad Visor makes the following allegations: that General made misrepresentations and misadvised complainant as to available viable alternatives of advertising and the cost thereof; that the contracts were not filled in completely at the time of signing, nor were any totals placed thereon and therefore complainant had no way to determine what he purchased; that a total price of $230 per month was quoted but it was actually $215.15 for the advertising published; however, it has been determined that the advertising alleged to be ordered would have cost only $102.45; and that the verbal contract was altered to provide custom trademarks (CTM), bold type listings, advertising under the classification Paint Removing, and bold type listings in the white pages rather than the trademark, regular type listings, and a free listing which was ordered. As a result of these alleged violations, Ad Visor requests that the Commission declare that the contracts are void and issue an order directing General to refund all monies collected for its 1975 advertising and all amounts collected for telephone exchange service during the period covered by the directory issues. Ad Visor also requests findings that General's alleged conduct constitutes willful misconduct and a violation of Public Utilities Code, Sections 532 and 2106. Complainant further requests that penalties be levied against General pursuant to Section 2107 et seq. Finally, Ad Visor requests that it be awarded attorney's fees and its costs of suit in bringing this action.

In its answer to the complaint General admits publishing the advertising for The Stripper shown on the contracts marked as Exhibit C-3B; that "MCL rejected" appears on General's copy of the 1975 Santa Monica application; that the customer's copies of the applications (Exhibit C-3A) were not completely filled in at the time of the sales call; and that the date and year of directory publication do not appear on the customer's copies of the contracts.

Except for these specific admissions General denied all of the material allegations of wrongdoing in the complaint. As affirmative defenses General alleged (1) that the complaint fails to state facts to constitute a cause of action against General; and (2) that on or about October 24, 1974, after complainant executed the three directory advertising applications, General sent to complainant a Quality Control letter with copies of the contracts showing the advertising that would appear in the directories; that complainant had until December 11, 1974 to cancel its program, but did not do so; that following the publication of the directories, complainant paid the charges for the advertising without protest for a period of six months; and that by these actions, complainant ratified the contracts and waived any right it may have had to refuse to pay for the program.

On July 23, 1976 a prehearing conference was held at which the parties were able to stipulate to certain facts in order to simplify the issues to be resolved at the time of hearing. These stipulations are:

"1. Exhibit 'B' to the complaint consists of true copies of the directory advertising applications left with The Stripper by General Telephone Directory Company's (Directory Company) sales representative, Sam Edge, during the sales call for advertising in General's 1975 Santa Monica, West Los Angeles and Malibu directories.

"2. Exhibit 'C' to the complaint consists of true copies of the directory advertising applications for The Stripper showing the advertising that was actually published by General in its 1975 Santa Monica, West Los Angeles and Malibu directories.

"3. Exhibits 'B' and 'C' to the complaint are different copies of the same multicopy application.

"4. Exhibits 'B' and 'C' are the only signed applications for The Stripper's advertising in General's 1975 Santa Monica, West Los Angeles and Malibu directories. There were no subsequently signed applications.

"5. The Directory Company sent to The Stripper a letter with confirming copies of the three directory advertising applications on or about October 24, 1974. The three applications sent with said letter were identical to the applications attached to the complaint marked as Exhibit 'C'. A copy of the form letter accompanying said applications is attached hereto marked as Exhibit 'E' and is incorporated herein by this reference." (Exhibit C-3C.)

On November 4, 1976 a settlement conference was held in a further attempt to resolve the matter without the necessity of a formal hearing. No agreement was reached.

Following the settlement conference, Ad Visor filed an amendment to the complaint, the details of which are set forth above. In its answer to the amendment to complaint, General again admitted that the advertising contracts signed by The Stripper were not completely filled in during the sales call. Except for this admission, General denied all of the other allegations of wrongdoing.

On February 17, 1977 General filed a Motion to Dismiss.

The case was heard in Los Angeles before Administrative Law Judge Bernard A. Peeters on February 22, 23, and 24, 1977. On the last day of the hearing the matter was taken under submission subject to the filing of concurrent briefs, 45 days after the last volume of the transcript was filed with the Commission. The parties subsequently stipulated that the time for filing briefs could be extended to and including May 27, 1977.

The Issues

Ad Visor sets forth the issues as follows: (1) Did General violate the following tariff provisions contained in its Tariff Schedule Cal. PUC No. D-1, Special Condition 3.a, contained on 2nd revised sheet 17, which provides for a free listing? Special Condition 3.b(1) on 2nd revised sheet 17 provides that a completed copy of the contract be left with the customer at time of signing, and that no material alteration shall be made on the contract after signing without obtaining a subsequent signature approving any such change (Exhibits C-3D and D-23); (2) If General did violate the tariff provisions, are the contracts void pursuant to Special Condition 3.d contained on 1st revised sheet 18 of Tariff Schedule Cal. PUC No. D-1 (Exhibits C-3D and D-23)? (3) Whether the utility's directory salespersons have a duty to present all viable alternative advertising programs to a customer? (4) Whether General's directory salesperson made misrepresentations to The Stripper during the September 1974 sales call? (5) Did The Stripper reject its free listing in the 1975 Santa Monica Directory? (6) Should the Commission award damages, costs of suit, and attorney's fees and make a finding of willful misconduct and impose penalties pursuant to Section 2107 of the Public Utilities Code, as requested?

General's view of the issues are: (1) Whether a contract was entered into between The Stripper and General for yellow page directory advertising, and (2) assuming that an agreement was reached, whether it was materially altered by General after the time it was entered into in violation of Tariff Schedule Cal. PUC No. D-1, Special Condition 3.d?

The material issues are:

1. Whether a valid contract was entered into for yellow page advertising in General's Santa Monica, West Los Angeles, and Malibu directories between The Stripper and General?

2. If a valid contract was entered into, what was its subject matter?

3. Whether General violated its tariff provisions contained in Tariff Schedule Cal. PUC No. D-1, Special Conditions 3.a and 3.b(1) contained on 2nd revised sheet 17?

4. If the answer to Issue 3 is yes, do such violations cause Special Condition 3.d on 1st revised sheet 18 of Tariff Schedule Cal. PUC No. D-1 to become self-executing?

5. If the answer to Issue 4 is in the negative, to what reparations, if any, is The Stripper entitled?

6. Should a duty be imposed upon General's directory salespersons requiring the presentation of all viable yellow page advertising programs that may be available to a customer?

7. Whether the Commission should grant Ad Visor's requests set forth in its sixth issue above?

The Evidence

Ad Visor presented its case through four witnesses and 26 exhibits. General's case was presented through three witnesses and 25 exhibits. During the course of the hearing portions of the testimony in Exhibit C-3 and 10 exhibits (C-3E, C-3F, C-3G, C-3H, C-3I, C-3J, C-3K, C-3L, C-3R, and C-3S) were stricken from the record by the ALJ.

Ad Visor presented Larry Price and Douglas Washington, partners, who owned and operated The Stripper during the period involved here. They generally testified to the type of business they operated; their recollection of the discussion they had with General's sales representative during his September 1974 sales call; that this call lasted approximately one and one-half hours during which time both partners were in and out of the office so that both were not present during the entire time of the sales call; that they just started operating the business which they had purchased and were

concerned about the total amount of money to spend for yellow page advertising; that they told the salesperson they wanted to advertise in the Santa Monica, West Los Angeles, and Malibu directories with the same program in each under specified headings; that they wanted ads containing their logo; that they discussed an advertising program which the salesperson wrote down, albeit in code, and a total cost for the program which was satisfactory to them and they ordered the program; that the ads as published were what they ordered; and that they paid for the advertising for six months when they were contacted by a representative for Ad Visor who showed them a less expensive program, at which time payment for the advertising was stopped upon advice of Ad Visor (Exhibit D-20).

Jack and Fred Krinsky both testified generally as to the application of the various tariff provisions involved here and their dealings with General prior to the filing of the complaint. Essentially their testimony shows the comparisons they made between The Stripper's copies of the contracts and those used by General from which they conclude and argue that material alterations were made thus voiding the contracts. General's motion to strike certain testimony of Fred Krinsky (Exhibit C-3) and certain exhibits pertaining to his testimony dealing with the character and habit of GTDC's salesperson was granted by the ALJ. We affirm this action. Jack Krinsky's testimony dealt primarily with the background on how Special Condition 3.d was developed in settlement of Case No. 9488.

General presented its defense through the deposition of Sam Edge (Exhibit D-1), the salesperson who sold the advertising to The Stripper; James A. Varon, GTDC's Western Region Legal Counsel (Exhibit D-15), and Charles L. Jackson, Rates and Tariffs Administrator in the Revenue Requirements Department of General (Exhibit D-21). Sam Edge's deposition shows that he testified in detail regarding

his sales contact with The Stripper. While his recall was not complete in every detail, it was sufficient to establish that, although Larry Price and Douglas Washington were in and out of the sales meeting a number of times, they knew specifically what they were ordering in the way of advertising because they pointed out the type of ads they desired and in fact repeated the total order and total price back to the salesperson (Exhibit D-1, pp. 13-15). Sam Edge stated that he completed only one set of documents at the time of the sales call and completed the rest back at the office in order to save the customer's time since he seemed to be in a rush, and that this is a customary practice, particularly where it is clearly understood what the customer has ordered (Exhibit D-1, pp. 46-47). Whether or not the customer understands the codes used to designate the different types of ads is not material according to Sam Edge, since in this case the customer definitely knew what he wanted and so told Sam Edge (Exhibit D-1, pp. 56 and 78-80). He did find out what the codes meant after he received his confirming copies by calling Sam Edge and inquiring (Exhibit D-1, p. 57). The white page listing was part of the advertising of the previous owner of The Stripper which was continued, and it is standard procedure to discuss the use of the free listing with the customer (Exhibit D-1, pp. 60-61 and 63). Mr. Varon testified that during the time he was Customer Service Manager for GTDC he investigated all Ad Visor complaints personally and particularly The Stripper's complaint. It is his testimony that all of the items shown on Exhibits C-3B and D-2, 3, and 4 were published in the Santa Monica, West Los Angeles, and Malibu 1975 directory yellow pages as shown in Exhibits D-16, 17, and 18. Mr. Varon pointed out that under the headings in which The Stripper advertised there were both regular and CTM ads and that the Santa Monica directory contained examples

of the various types of ads along with the corresponding codes (Exhibit D-20). On September 16, 1975 an agency authorization was received from Ad Visor dated September 8, 1975 advising that The Stripper account was now being handled by Ad Visor; that prior to the receipt of this notification no complaints had been received from The Stripper. Mr. Jackson's testimony essentially goes to his interpretation or application of Special Condition 3.d. He states that the language "If the utility makes any material alteration in the Application after it has been signed by the customer" in Special Condition 3.d does not apply to those situations where the company makes changes on the contract after it has been signed by the customer that do not reflect the advertising items desired by the customer, nor does it apply to the situation where a completely filled-in contract is not left with the customer at the time of signing, since these situations are covered by other provisions in the tariff. According to Mr. Jackson, the fact that the applications were completed at the salesperson's office rather than in front of the customer at the time of signing does not constitute a material alteration as contemplated by Special Condition 3.d when the customer receives the advertising he ordered as was the situation here.

Discussion

This case is the last in a series of cases[2/] brought by Ad Visor on behalf of its various clients against General and The Pacific Telephone and Telegraph Company (PT&T). In its brief Ad Visor vigorously exhorts us to make the following conclusions of law and orders in this case:

"1. General violated item 3.b(1) contained in Schedule Cal. PUC No. D-1, 2nd revised sheet 17.

"2. General violated item 3.d contained in Schedule Cal. PUC No. D-1, 1st revised sheet 18.

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Case No.	Defendant	Nature of Complaint	Decision No.
9800	General	Free Listing	88120; Writ of Rev. den. SF 23752 4/13/78
9823	General	Multiple Display	86091 - Order of Dism. 86396 - RH den.
9824	PT&T	Multiple Display	88993
9833	PT&T	Multiple Display	87240; 87597 - RH den. & modifies 87240
9834	PT&T	Multiple Display	87239; 87596 - den. - RH & Mod. 87239; 87921 - RH den.
9837	General	Altered Contract	88460
9848	General	Free Listing) Multiple Display)	89320
9853	General	Free Listing) Multiple Display)	
9858	General	Multiple Display	86091 - Order of Dism.; 86396 - RH den.
9861	General	Misclassification	88190
9900	General	Overcharge	85379 - Order of Dism.
9931	PT&T	Multiple Display	87959
9936	General	Multiple Display	87958
9973	General	Multiple Display	85243 - Order of Dism.
10054	General	Free Listing	89311 - Order of Dism.
10064	General	Multiple Display	88700 - Order of Dism.
10277	PT&T	NYPS Contract	88582 - Order of Dism.

"3. General violated item 3.a contained in Schedule Cal. PUC No. D-1, 2nd revised sheet 17.

"4. The 1975 Santa Monica, West Los Angeles and Malibu directory advertising applications for The Stripper are void.

"5. General failed to abide by its duty to properly advise the complainant of the viable alternatives available to him, and thereby violated Decisions 75807 and 85142 and 77406 of this Commission.

"6. General violated Section 532 of the Public Utilities Code by overcharging for the items actually ordered by the complainant and quoting rates far in excess of those contained in the tariffs.

"7. General acted in a fraudulent manner towards this complainant.

"8. General is guilty of wilful misconduct towards this complainant.

"9. The defendant shall not proceed to collect on the 1975 Santa Monica, West Los Angeles and Malibu directory advertising application for The Stripper.

"10. The defendant shall immediately refund to The Stripper $1291.00, which represents the amount paid to date by The Stripper on these contracts, to The Stripper, together with interest at the appropriate legal rate.

"11. The defendant shall pay to The Stripper the sum of $190.05 which represents the amount of his basic monthly exchange service charge, due to the violation of the tariff concerning The Stripper's right to the use of the 'listing without additional charge', pursuant to the requirements of Tariff Rule 26, the limitation of liability rule, together with interest at the appropriate legal rate.

"12. The defendant shall in addition pay to the complainant reasonable costs and fees in the amount of $10,000.

"13. This Commission shall fine the defendant pursuant to authority under Sections 2104 and 2107 of the PU Code.

"14. This Commission shall reopen the investigation under its own motion to ensure that the defendant abides by its tariffs and standards in the future.

"15. This Commission is imposing a 2% rate of return penalty on defendant until such time as it shows its goodwill and intention to abide by its tariffs and rules.

"16. Hereafter, General shall be required to have all directory advertising contracts written in layman's language and the use of codes should be avoided.

"17. The defendant shall cease and desist its bad business practices in dealing with its customers, and shall fully implement all sections of the tariffs and standards in a strict and non-discriminatory manner."

We take note of Jack Krinsky's testimony (Exhibit C-4) wherein he points out that part of the service Ad Visor performs for a client is to request three years yellow page advertising records

from the client and a similar request is made of the telephone company. These records are then compared with the published advertising. Claims are then filed on any discrepancies found or asserted. We also note that The Stripper was apparently satisfied with its advertising until advised by Ad Visor, some six months after the advertising ordered was published, that its proposal (Exhibit C-3N) would result in a lesser cost. Ad Visor argues from this fact that The Stripper did not obtain the advertising it ordered and that the subsequent completion of the contracts by the salesperson constitutes material alterations. How Ad Visor makes the quantum leap from the fact that The Stripper pointed out to the salesperson the kind of ads it wanted, and received, to the claim that its proposal is what The Stripper ordered is not explained. The only rational explanation would be that after the fact Ad Visor convinced The Stripper that its proposal is what would have been ordered given the experience of the results of the advertising (Exhibit C-2, pp. 34-35). Both Larry Price and Douglas Washington admitted to faulty memories regarding the details of their meeting with GTDC's salesperson, especially after such a long period of elapsed time. They even had difficulty remembering when they became Ad Visor's clients (Exhibit C-2, pp. 36, 38, and 42-43; RT 20, 26, 31, 50, 52-53, 121, 128, and 133). On the other hand they were very specific about the use of their logo and the classifications under which they wanted it to appear (RT 135 and 138), and that they wanted a white page listing (RT 139).

The evidence shows that the parties clearly intended to, and did enter into a contract for advertising in General's 1975 Santa Monica, West Los Angeles, and Malibu telephone directory yellow pages. All of the men who participated in the contract negotiations presented testimony in this proceeding that such was their intention and that an agreement had in fact been reached. Prior to the sales call Douglas Washington and Larry Price had agreed that they wanted to use their logo in their yellow page advertising (RT 28-29 and 45-46). They also knew under which directory classifications they wanted to place this logo (Exhibit C-2, pp. 19-21 and RT 43-44). The evidence shows that Douglas Washington and Larry Price wanted their logo insignia to appear under the yellow page classifications "Antiques--Dealers", "Antiques--Repairing & Restoring", and "Furniture Repairing & Refinishing". The ads were subsequently published under these headings (Exhibit C-3B; Exhibit D-16, 17, and 18). The evidence further establishes that they wanted the same advertising program to appear in all three directory issues (Exhibit D-1, pp. 31, 35-36, and 62-63; C-1, pp. 3-4; RT 63; Exhibit C-2, pp. 19-23, 27, and 137). Larry Price and Douglas Washington gave to the salesperson the top half of one of their business cards which contained their logo insignia. They told the salesperson to duplicate the logo in their trademark advertisements (RT 46-48, 70, and 153; Exhibit C-2, pp. 19 and 23-24). The salesperson attached the business card to one of the copy sheets and wrote below it the textual material that the complainant wanted to have appear (Exhibit D-1, pp. 16-19; RT 140). He then had Douglas Washington sign this copy sheet. He also had Douglas Washington sign separate copy sheets for each of the other trademark ads which were not then completely filled in, assuring him that each would be conformed to duplicate the ad shown on the completed copy sheet (Exhibit D-1, pp. 16-19; RT 46-48). The salesperson did complete the other copy sheets as promised. At the same time the salesperson

had Douglas Washington sign the directory advertising applications (contracts) for each of the three directories (Exhibit C-3A and C-3B are different copies of the same multicopy document). General admits that these contracts were not complete at the time of signing (Exhibit C-3C; compare Exhibit C-3A with C-3B). However, the salesperson used the Malibu contract as the master document to list everything that The Stripper wanted to appear in the directories. He later merely copied on to the Santa Monica and West Los Angeles applications the items listed on the Malibu contract (Exhibit D-1, pp. 62-63). General subsequently published in all three directories the advertising program shown on the signed Malibu application that was left with The Stripper (Exhibit C-3A; Exhibit D-1, pp. 35-36; Exhibit D-15, pp. 2-5). Ad Visor stipulated that the items of advertising shown on the customer's copy of the Malibu contract and those shown on General's copy, from which the advertising was subsequently published, are the same (RT 224-225). The only other item of advertising published by General was complainant's alphabetical bold type listing in the Santa Monica directory. This listing had appeared in the previous issue of that directory and was the only item of advertising from the previous year that was not deleted from the Santa Monica application during the sales call (Exhibit C-3A, p. 1). While the salesperson had not written the cost of each individual item of advertising, nor the total thereof, on the contracts at the time of signing, Larry Price and Douglas Washington were not then interested in the cost of individual items; instead, they were only interested in knowing what the total cost would be (RT 168). The salesperson told them that the total cost would be approximately $230 per month. They indicated to the salesperson that this sum was acceptable (RT 62-63). The Stripper was advised during the sales call that GTDC would send conforming copies of the contracts which would be

completely filled in (RT 63-65; Exhibit D-1, pp. 30-31). When the conforming copies were received, Larry Price looked them over to see if the total cost agreed with what they had been verbally told by the salesperson. He found that it was slightly different, but was not shocked and was satisfied (Exhibit C-2, pp. 31-32). When the directories were published, Larry Price examined them. He found the ads to be what they ordered. Although he was unhappy with the fact that two of the advertisements appeared on the same directory page, he found nothing wrong with the advertisements themselves (Exhibit C-2, pp. 33-36; RT 141). It is clear from the evidence that a valid oral contract was entered into between the parties and memorialized in writing by the Malibu contract (Exhibits C-3A and C-3B) which was completed insofar as the specific items of advertising were concerned, at the time of signing by the customer at an agreed upon price. All of the elements necessary to create a binding contract are present. The parties were capable of contracting, the object of the contracts (the purchase of yellow page directory advertising) was lawful, there was sufficient consideration, and there was mutual consent to the program actually published. This last element is clearly demonstrated by the signed customer's copy of the Malibu contract (Exhibit C-3A). Ad Visor's contention that what the customer ordered is shown in Exhibit C-3N is an attempt to modify an oral agreement memorialized in writing, by parol evidence. A contract may be partly written and partly oral. Where there has been a partial integration, parol evidence is admissible to prove that part of the contract that has not been reduced to writing, but it is not admissible to vary or contradict the part which has been reduced to written form. (Masterson v Sine (1968) 68 Cal 2d 222, 225; American Ind. Sales Corp v Airscope, Inc. (1955) 44 Cal 2d 393, 397; Schwartz v Shapiro (1964) 229 Cal App. 2d 238, 248-250.) Thus we cannot accept Ad Visor's testimony

that Exhibit C-3N represents what The Stripper ordered initially. The answer, therefore, to the first issue, as to whether a valid contract was entered into, is yes. With respect to the second issue, the contents of the agreement are memorialized in the Malibu contract.

With respect to the third issue, the answer is yes; General did violate specified tariff conditions, as it admitted; however, such violations do not cause Special Condition 3.d to become self-executing with the result that all the contracts involved herein are void. Under the facts of this case, such a result would be against public policy. To follow such a line of reasoning disregards specific provisions in the tariff. The general rule of tariff interpretation is that a specific provision will take precedence over a general provision. Here Special Condition 3.b(1) of the tariff specifically covers the fact that a completed contract will be left with the customer - Special Condition 3.d deals generally with material alterations after a contract is signed. The danger of accepting Ad Visor's contention that a tariff violation automatically triggers Special Condition 3.d would result in the tying up of a considerable portion, if not all, of the advertising revenue upon the mere allegation of a tariff violation. The law does not favor interpretations that lead to absurd results. Furthermore, the customer received the advertising that he ordered and was satisfied with it. It was only after he was contacted by Ad Visor, which then put together a less expensive advertising program after the ordered program was published that the customer became dissatisfied. Therefore, the fact that there was a tariff violation committed in connection with the advertising contract here does not automatically cause Special Condition 3.d to become operative because there were no material alterations of the agreement reached by the parties. The answer to the fourth issue therefore must be no.

Since General did violate certain of its tariff provisions, does this fact entitle The Stripper to any reparations? In the past we required the complainant to show economic harm as a consequence of the error or omission of a utility before reparations would be awarded. We rejected that principle by Decision No. 88120 dated November 22, 1977 in Case No. 9800 Ad Visor, Inc. v General Telephone Company of California (RPI Dilday Bros. et al.), wherein we stated:

> "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 the evidence shows that The Stripper received the advertising that it bargained and paid for; therefore, it is not possible to make a finding that there was diminished value of the advertising, or telephone service as a basis for the award of reparations. The answer to the fifth issue then is no. The admitted violations of a tariff provision are not relevant nor material to the central issue here. However, we shall admonish General to strictly comply with its tariff provisions in the future.

Does General have a duty to require its directory salespersons to explore and communicate to the customer all possible viable alternative yellow page advertising programs? We believe that such a duty does not exist, nor should one be imposed. The amendment to the complaint alleges that the salesperson made intentional misrepresentations to complainant regarding the advertising it would be receiving by writing on the contracts items of advertising not specifically discussed with it during the sales call, or by failing

to inform complainant of "viable" alternative advertising programs that would have satisfied its express advertising needs. The evidence previously discussed covers the intentional misrepresentation and shows that The Stripper received the advertising that was agreed upon. We shall confine our discussion here to the alleged duty. Ad Visor relies upon our decision in Walker v PT&T Co. (1969) 69 CPUC 579. The facts of this case show that complainant was seeking to be absolved from paying for certain telephone installation charges associated with a telephone system that had been installed based on the recommendation of one of defendant's communication consultants on the grounds that the system did not meet the customer's needs. In that case we found that:

> "In the complex field of communications, no layman can be expected to understand the innumerable offerings under defendant's filed tariffs. When defendant sends out one of its communication consultants to a customer's place of business for the explicit purpose of discussing telephone service, the consultant should point out all alternative communication systems available to meet the customer's needs. This is a duty owned by defendant to its customers..." Walker v PT&T Co., supra, at 582.

At the outset we note that while we have jurisdiction over the rates for and the conditions applicable to directory advertising (California Fireproof Storage Company v Brundage (1926) 199 Cal 185), we have recognized that "The furnishing of the classified portion of the directory is less vital to the primary purpose of the telephone service." (Warren v PT&T Co. (1956) 54 CPUC 704, 706.) Therefore, the obligations imposed on the utility regarding the sale of directory advertising need not be the same as those imposed in connection with the provision of telephone communication systems. Furthermore, it is reasonable to assume that customers may be more knowledgeable about directory advertising than they are about telephone communication systems. They have available to them, and in their possession, directories which contain examples of

the many types of advertising offered by General. Some directories, such as the Santa Monica directory, which is involved in this proceeding, even contain a page with samples of some of the different types of advertising offered by General along with the code symbols therefor (Exhibit D-19). Thus, by merely opening a directory and glancing at the advertisements, the customer is in an excellent position to judge which advertisements are appealing to the eye and attract one's attention. Furthermore, when the directory sales representative calls to sell a customer advertising, the directory is again available so that the customer can see exactly what is available and how the advertising items recommended by the representative compare with other items in the directory. In the case of the telephone communication systems there is no comparable situation, the customer is totally dependent upon the utility's communication expert's advice. The salesperson testified that he could not sell a customer unless he opened the directory and showed the customer what the advertisements under discussion look like and compares them to something else. In other words, the customer will not buy unless he has a full and complete understanding of what he is going to receive. This also is true in the communication systems area; however, when it comes to determining whether the customer has been sold a program that meets his advertising needs, the methods to evaluate the situation are less objective than in the communication systems area. In connection with an unsatisfactory communication system we are able to evaluate objectively whether the utility's consultant performed his job. At the outset the customer admittedly has an inadequate system at the time of the consultant's first visit. This provides a factual base from which to objectively compare the results of the consultant's recommended system. This plus the fact that there are other systems available from the utility that would eliminate the existing inadequacies provides the objective evidence from which to conclude that the consultant did not properly perform the duty owed by the utility.

On the other hand, in the directory advertising field there are no such objective standards. It is not possible to guarantee that one kind of advertising program will be better than another because of the subjective qualities involved and the customer's whims. Thus it would not be possible to conclude that one advertising program sold by the salesperson was inadequate and not as effective as some alternative program and therefore a utility duty had been breached. In the field of yellow page advertising, it is conceivable that after a customer had ordered and had published a particular program, he could find a less expensive program and then claim that the utility had breached its duty to advise him of all possible viable programs and therefore he should have his advertising costs refunded. We believe that to establish such a duty would be to open a Pandora's Box and create more problems than would be solved, which would not be in the public interest.

The last issue to be discussed is the request of Ad Visor that we award damages to The Stripper, costs of suit, and attorney's fees and make a finding of willful misconduct and impose penalties on General. Ad Visor has consistently made these requests, even after it has been advised through our decisions[3/] that we do not have the power nor jurisdiction to grant its requests. The requests are denied. We also wish to point out that Ad Visor did not advise The Stripper to deposit payments on the disputed bill with the Commission as provided in Rule 12 of General's Tariff Schedule Cal. PUC No. D&R 4th revised sheet 40. Ad Visor is aware of such rules as evidenced in Decision No. 88582, Case No. 10277.

3/ D.85334, C.9800; D.88993, C.9824; D.87240, C.9833; D.89320, C.9848; D.88190, C.9861; and D.87959, C.9931. The question of jurisdiction to grant attorney's fees is pending in the California Supreme Court. (Consumers Lobby Against Monopolies v PUC, S.F. No. 23863; TURN v PUC, S.F. No. 23868.)

Findings of Fact

1. Larry Price and Douglas Washington purchased and began operating The Stripper in June 1974 and are the real parties in interest. Douglas Washington sold his interest in the partnership September 1, 1975.

2. At all times referred to in the complaint, complainants were engaged in the business of antique sales, antique repair, furniture stripping, and furniture refinishing.

3. On September 25, 1974 GTDC's sales representative Sam Edge called on complainants for the purpose of selling yellow pages directory advertising.

4. During the sales call Sam Edge met with Larry Price and Douglas Washington. Both men were very busy and each left the meeting on several different occasions to attend to customers.

5. During the sales call Larry Price and Douglas Washington indicated that they wanted to purchase advertising containing The Stripper's logo insignia in General's Malibu, Santa Monica, and West Los Angeles 1975 directories under the classifications "Furniture--Repairing & Refinishing", "Antiques--Repairing & Restoring", and "Antiques--Dealers". They also agreed to purchase a bold type listing under the classification "Paint Removing" in each directory and an alphabetical white pages listing in the Santa Monica directory. The total program in the classified section of each directory was to be the same.

6. Larry Price and Douglas Washington were not interested in the price of each item of advertising that they purchased; instead, they asked the salesperson for and were provided with the estimated total cost of $230 per month for the program. They agreed to the price for the program that was offered to them. Included in the total cost was a charge for artwork associated with preparing a CTM for publication.

7. During the sales call the salesperson prepared a copy sheet for one of The Stripper's CTM advertisements to which he attached a portion of complainants' business card showing its logo insignia. The salesperson was instructed to duplicate in the advertisement the logo insignia. The text was also agreed on that should be printed below the logo insignia.

8. After preparing one copy sheet completely, it was signed by Douglas Washington. Douglas Washington also signed incomplete copy sheets for the other CTM's which the salesperson promised would be identical to the advertisement shown on the completed copy sheet. The CTM's that were subsequently published by General all appeared in the directories exactly as shown on the completed copy sheet.

9. Douglas Washington also signed directory advertising applications for all three directories. The applications signed by the customer were not complete.

10. All of the items of advertising requested by the customer were listed on the Malibu contract. The salesperson used the Malibu application as the master application when he later completed the Santa Monica and West Los Angeles applications back at his office.

11. Following the sales call, the three applications were completely filled in. Confirming copies of the applications, which were identical to those used by General to publish complainants' program, were mailed to complainants on or about October 24, 1974. Larry Price examined these applications and saw that the total cost of the advertising ($215.15) agreed approximately with the charge quoted to him during the sales call and did not question the difference.

12. When the 1975 Malibu, Santa Monica, and West Los Angeles directories were published, the yellow pages program that appeared in each directory was identical to the program shown on the customer's copy of the Malibu application.

13. After the directories were published, complainants examined their advertisements in each of the directories and were satisfied that the program appeared as ordered.

14. General admitted that the artwork charge ($2.50) included on the Santa Monica contract was improper. In all other respects the published program in each directory fully complied with the contract between General and complainants.

15. Complainants made no complaint to General regarding its program until September 1975, six months after the directories were published, when it first became a client of Ad Visor.

16. Exhibit C-3A consists of true copies of the directory advertising applications left with The Stripper by GTDC's sales representative during the sales call for advertising in General's 1975 Santa Monica, West Los Angeles, and Malibu directories.

17. Exhibit C-3B consists of true copies of the directory advertising applications for The Stripper showing the advertising that was actually published by General in its 1975 Santa Monica, West Los Angeles, and Malibu directories.

18. Exhibits C-3A and C-3B are different copies of the same multicopy applications.

19. Exhibits C-3A and C-3B are the only signed applications for The Stripper's advertising in General's 1975 Santa Monica, West Los Angeles, and Malibu directories. There were no subsequently signed applications.

20. General's Tariff Schedule Cal. PUC No. D-1, Special Condition 3.b(1) on 2nd revised sheet 17, requires that a completed contract be left with the customer showing the advertising items and detail of charges, and the month and year of the directory in which the advertising is to appear, among other things.

21. General's Tariff Schedule Cal. PUC No. D-1, Special Condition 3.a on 2nd revised sheet 17, provides for a regular type listing in the classified section at no additional charge.

22. General's Tariff Schedule Cal. PUC No. D-1, Special Condition 3.d on 1st revised sheet 18, considers an advertising application void if the utility makes any material alteration on it after it has been signed by the customer and the utility will not proceed to collect on such application. The right is reserved by the utility to proceed against the customer for the value of the services actually requested by the customer.

23. The Stripper's copy (Exhibit C-3A) of the 1975 Santa Monica directory advertising application does not contain rates and charges, nor a total of such charges; it does contain the signature of Douglas Washington. General's copy (Exhibits C-3B and D-2) shows, on page 1, the notation "MCL Rejected". This does not appear on The Stripper's copy. Also four items appear which are not on The Stripper's copy. Among these is an art-work charge at $2.50, and a bold type listing under the Paint Removing classification at $2.75 per month. A total monthly price of $103.25 is shown. The salesperson's name and date of September 25, 1974 are shown, and the signature Douglas Washington (owner) appears.

24. The Stripper's copy (Exhibit C-3A) of the 1975 West Los Angeles directory advertising application consists of one page, with two illegible new advertising items added for which no charges are shown, nor is a total charge shown. It does contain the signature of Douglas Washington. General's copy (Exhibits C-3B and D-3) consists of two pages, has six items of advertising on page 2, and shows a total charge of $81.50. The salesperson's name, date of September 25, 1974, and the signature Douglas Washington (owner) appear thereon.

25. The Stripper's copy (Exhibit C-3A) of the 1975 Malibu directory advertising application does not contain the rates and charges, nor a total thereof for the advertising items. It does contain the signature of Douglas Washington. General's copy (Exhibits C-3B and D-4) shows item rates, a total charge, the salesperson's name, and date of September 25, 1974, and the signature of Douglas Washington (owner).

Conclusions of Law

1. General violated its Tariff Schedule Cal. PUC No. D-1, Special Condition 3.b(1), by not leaving completely filled in copies of the signed directory applications with the customer at the time of the sales call.

2. General did not violate Special Condition 3.d since the completed contracts contained the advertising agreed upon by the complainant. A contract is materially altered according to Special Condition 3.d only when an item of advertising is added to the contract after the sales call which was not originally ordered by the customer. There is not a material alteration when the sales representative, as here, merely completes the applications later by writing down the items actually ordered by the customer.

3. General did not make any material misrepresentations, intentional, or otherwise to complainant, regarding the advertising available in General's telephone directories.

4. While General's sales representative should be familiar with the items of advertising available in General's directories and should be prepared to discuss them with the customer where appropriate, General's representatives are not required to discuss with an advertiser each and every possible kind of advertising and advertising combination available.

5. Since The Stripper received the advertising it ordered, there is no basis for the award of reparations for the violation of Special Condition 3.b(1). General, however, should refund all monies erroneously collected from complainant for artwork.

O R D E R

IT IS ORDERED that:

1. The Motion To Dismiss made by General Telephone Company of California is denied.

2. General Telephone Company of California shall refund the artwork charge, plus interest at 7 percent per annum.

3. Larry Price, owner of The Stripper, shall pay to General Telephone Company of California the monies for advertising charges withheld.

4. In all other respects the complaint is denied.

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

Dated at San Francisco, California, this 24th day of APRIL, 1979.

President

Commissioners