

ORIGINAL

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Decision No. _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ESCONDIDO SAND & GRAVEL WORKS,)
Complainant,)

vs.

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

Case No. 10811
(Filed December 6, 1979)

John T. Dailey, for Escondido Sand & Gravel Works,
complainant.

Stanley J. Moore, Attorney at Law, for The Pacific
Telephone and Telegraph Company, defendant.

O P I N I O N

This is a complaint by Escondido Sand & Gravel Works (Escondido) against The Pacific Telephone and Telegraph Company (PT&T). Escondido seeks reparation of \$1,147.20 for an allegedly misplaced yellow page advertisement. This complaint was filed prior to the effective date of Section 728.2 of the Public Utilities Code.

A duly noticed public hearing was held in this matter before Administrative Law Judge Donald B. Jarvis in Los Angeles on May 13, 1980 and it was submitted on May 20, 1980.

Most of the facts are not in dispute. The Commission makes the following findings.

Findings of Fact

1. Escondido was founded in 1910 and has continuously been in business in the city of Escondido since that time.

2. Escondido was the first advertiser to have a quarter-page display ad in the San Diego North County Directory under the heading "Contractors - Paving". Pursuant to PT&T's tariff and rules Escondido is entitled to have its quarter-page display ad positioned as the first ad under the heading "Contractors - Paving".

3. In 1978, Escondido ordered a quarter-page display ad under the heading "Contractors - Paving" which was to appear in the October, 1978 San Diego North County Directory (Directory).

4. At the time of the events here under consideration, PT&T's Schedule California P.U.C. No. 39-T, Fourteenth Revised Sheet 5, paragraph 11 provided that:

"No specific position for display advertising is guaranteed in any issue, and the Utility reserves the right to place such advertising in any position either on any page on which appears the heading with which such advertising is to be associated or on any page opposite any such page."

5. The position of display ads for the Directory was computer-programmed.

6. The listing "Contractors - Paving" followed the listing for "Contractors - Masonry" in the Directory. The listing "Contractors - Masonry" begins at the bottom of column 1 of page 278 and ends approximately one-fourth of a page down from the top in column 4 of page 278. The "Contractors - Paving" listing utilizes the remaining three-fourths of the fourth column of page 278. Page 279, which is opposite page 278, contains four quarter-page display ads. The Escondido ad is not one of the four ads on page 279. It appears in columns 2 and 3 of page 278 at the bottom of the page. Above the ad, to its left, are listings for "Contractors - Masonry". Abutting the ad to the right are listings for "Contractors - Paving".

7. PT&T has a review group which examines directory in advance of publication to determine if there are any errors. That group did not change the position of the ad here under consideration.

Discussion

The president of Escondido testified that when he first received the Directory he could not locate the ad and thought it had been omitted. He finally found it through happenstance. He testified further that:

"So I started to run a little test in my office. I called our people in as they came to me during the normal course of their business day and said, 'There's the new telephone directory, look up our ad under "Contractors-Paving"'. "

"Without exception, some 20 people ran that little test and could not locate our ad under 'Contractors-Paving' as you could not the first time and you passed through the telephone directory.

"I then called several prestigious business people of the City of Escondido, the vice-president and general manager of the main branch of the bank, First National Bank of San Diego County, and others of equal intelligence and business acumen, and mentioned to them that I had a quarter-page ad in the new Yellow Pages, would they kindly look up my ad and tell me what they thought of it.

"And, without exception, as I waited on the telephone, or seated at their desk, they could not locate my ad.

"So it became obvious to me that my ad was so poorly placed as to have zero value." (RT 6-7.)

At the beginning of the hearing Escondido's president handed the entire Directory^{1/} to the bench and asked the presiding Administrative Law Judge to find the ad under "Contractors - Paving".

^{1/} Exhibit 2, which was received in evidence contains only pages 278 and 279. It does not contain all the listings under "Contractors - Paving".

The presiding ALJ read through the entire listing without finding the ad, then returned to the beginning and found it on page 278. (RT 4-5.)

Escondido's president also testified that:

"In the United States, as your Honor very well knows, in the reading of English, we read from top to bottom and from left to right. And that's the way most of us are taught to read in this nation.

"And anyone coming to the phone book looking under 'Contractors-Paving' will simply not come over here and see my ad as your Honor did not." (RT 7.)

PT&T's defense is that the placement of the ad complies with the definitions in its tariff and rules.

It is well settled that PT&T may not apply a valid tariff provision in an unjust or arbitrary manner. (Casselberry v PT&T (1972) Decision No. 80679 in Case No. 9273; Viviani v PT&T (1968) 69 CPUC 158.) If it does so, reparation may be awarded for the damage caused by the error or omission. (Waters v Pacific Telephone Co. (1974) 12 C 3d 1; Casselberry v PT&T, supra; Faia v PT&T, Decision No. 75379 in Case No. 8647 entered March 4, 1969; Beckman v PT&T (1964) 63 CPUC 305.)

The Commission makes the following additional findings and conclusions.

Findings of Fact

8. Under the particular facts of this case the placement of Escondido's ad display with respect to the listing of "Contractors - Paving" in the Directory was unreasonable.

9. Because of the unreasonable placement of its display ad with respect to the listing of "Contractors - Paving", Escondido received no benefit from the ad.

10. The total charges assessed by PT&T for Escondido's yellow page advertising for the term of the Directory were \$3,259.80. The charges assessed by PT&T for Escondido's display ad under the classification "Contractors - Paving" for the term of the Directory were \$1,147.20.

11. No discrimination will result from the payment of interest on reparation in this matter.

Conclusions of Law

1. Escondido is entitled to a credit allowance or reparation in the amount of \$1,147.20.

2. If the amount of \$1,147.20 has not been collected by PT&T, it should be ordered to credit Escondido's account by that amount and to cease and desist from attempting to collect it.

3. If the amount of \$1,147.20 was paid by Escondido to PT&T it should be refunded to Escondido with interest at 7 percent per annum commencing October 1, 1979.

O R D E R

IT IS ORDERED that Escondido Sand & Gravel Works (Escondido) is entitled to reparation from The Pacific Telephone and Telegraph Company (PT&T) in the amount of \$1,147.20. If the amount has not been collected, PT&T shall credit Escondido's account by that sum and cease and desist from any attempts to collect it. If the sum of \$1,147.20 was collected by PT&T it shall refund that amount to Escondido with interest at 7 percent per annum from October 1, 1979 to the date of payment.

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

Dated SEP 18 1980, at San Francisco, California.

John E. Guyan
President
William L. Thurman
Richard D. Swale
Charles T. Dwyer
James M. Smith
Commissioners