

LEXSEE 1978 FTC LEXIS 375

In the Matter of HERBERT R. GIBSON. SR., et al.

DOCKET No. 9016

Federal Trade Commission

1978 FTC LEXIS 375

ORDER TAKING OFFICIAL NOTICE OF CERTAIN TELEPHONE DIRECTORY LISTINGS

May 3, 1978

ALJ: [*1]

Theodor P. von Brand, Administrative Law Judge

ORDER:

Complaint counsel move pursuant to Rule 3.43(d) of the Rules of Practice that official notice be taken of certain listings in the Dallas, Texas telephone directories in the period 1969-77. Respondents have filed an answer in opposition.

At the outset it may be noted the authenticity of the directories is not in dispute. Nor can there be any question that the listings which complaint counsel request be noticed in fact appeared in the directories in question.

Respondents urge that the Commission's Rules of Practice do not provide for the taking of official notice of adjudicative facts. The short answer is that 3.43(d) of the Commission's Rules does provide that initial or Commission decisions may rest upon facts officially noticed provided there is opportunity to disprove the noticed facts. Respondents further argue that official notice should not be taken because they would be deprived of cross-examination of the telephone company employees preparing the directories, and further that this procedure would unfairly shift the burden of proof. In addition, they urge that the motion should be denied because if such official notice [*2] were granted their defense would require time consuming discovery leading to delay.

Rule 803 of the Federal Rules of Evidence entitled "Hearsay Exceptions; Availability of Declarant Immaterial" n1/ provides that certain materials are not excluded by the hearsay rule even though the declarant is available as a witness. Among the exceptions are:

n1/ The Federal Rules of Evidence while not controlling in FTC proceedings frequently provide a useful guide to the resolution of evidentiary problems.

"(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."

The basis of trustworthiness underlying the rule is general reliance by the public or by a particular segment of it on such publications and the motivation of the compiler to foster reliance by being accurate. Weinstein's Evidence 803-49. The public generally uses and relies upon such directories in making use of the telephone. n2/ The material is accordingly within the exception of Rule 803(17) and the taking of official notice of such facts does not [*3] deprive respondents of their right to cross-examine.

n2/ Courts admitting such evidence have noted that "Telephone directories... are semipublic documents" and that such directories are constantly consulted [with] "Reliance... generally placed thereon" State v. McInerney, 182 P.2d 28, 34 (Wyo. 1947); see also In re Gilbert's Estate, 15 A.2d 111, 115 (N.J. 1940); Peoples Nat. Bank v. Manos Brothers, 84 S.E.2d 857 (S.C. 1954); Williams v. Campbell Soup Co., 80 F. Supp. 865, 868 (W.D. Mo. 1948); Harris v. Beech Aircraft Corporation, 248 F. Supp. 599, 601 (E.D. Tenn. 1965).

Nor does this procedure unfairly shift the burden of proof. Respondents are in the best position to rebut the facts noticed or the inferences which may be drawn therefrom. If, in fact, some of the listings were in error, respondents should be able to demonstrate that fact. Moreover, respondents, not telephone company officials, have command of the facts which may be introduced to rebut the inferences to be drawn from such listings. Finally, if, in fact, the listings in question did contain errors then respondents should be able to document their efforts to obtain corrections [*4] if such efforts were made. Under the circumstances, there is no need for time consuming discovery from telephone company officials or employees as respondents contend. Accordingly.

IT IS ORDERED that complaint counsel's motion to take official notice filed April 17, 1978, be, and it hereby is, granted.