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Decision 91-01-016 January 15, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THE REUBEN H. DONNELLEY CORPORATION, a corporation, and DUN & BRADSTREET INFORMATION RESOURCES, a division of DUN & BRADSTREET, INC., a corporation, Complainants, v. PACIFIC BELL (U1001C), a corporation, Defendant.	ORIGINAL Case 88-06-031 (Filed June 21, 1988)

Robert N. Lowry and Theodore C. Whitehouse, Attorneys at Law, for The Reuben H. Donnelley Corporation and Dun & Bradstreet Information Resources, complainants.

Christopher L. Rasmussen and Tim Dawson, Attorneys at Law, for Pacific Bell, defendant.

Kenneth K. Okel, Richard E. Potter, and Robert N. Herrera, Attorneys at Law, for GTE California Incorporated; and John K. Roedel, Attorney at Law, for Association of North American Directory Publishers; Cindi Rosse, Attorney at Law, and Tom Lew, for Division of Ratepayer Advocates, intervenors.

I N D E X

O P I N I O N

Summary

This case is about access to business subscriber information in Pacific Bell's (defendant) possession. The issues tried in this complaint proceeding involve published tariffs of defendant. Defendant's interpretation and application of these tariffs are challenged by The Reuben H. Donnelley Corporation and Dun & Bradstreet Information Resources, a division of Dun & Bradstreet, Inc. (complainants). The three tariffs are: the List Rental Service Tariff, Section 12.1.1 of Schedule Cal. PUC No. A12 (List Rental Tariff); the Telephone Directory Reproduction Rights Tariff, Section 5.7.4 of Schedule Cal. PUC No. A5 (Reproduction Rights Tariff); and the Release of Credit Information and Calling Records Tariff, Section 2.1.35 of Schedule Cal. PUC No. A2 (Credit Tariff or Rule 35). Certain non-tariffed subscriber information is available to PBD and priced under transfer pricing agreements outside the tariffs.

At hearing, testimony was taken on complainants' allegations that defendant provides more complete, more frequently updated, and more readily useable subscriber information to Pacific Bell Directory (PBD), a wholly owned subsidiary of defendant, than it provides to complainants and that this conduct is unfair, discriminatory and in violation of defendant's tariffs and amounts to a failure to render just and reasonable service. Testimony was also received regarding complainants' assertions that defendant provides subscriber information to PBD, under transfer pricing agreements, at costs and on terms and conditions which are not contained in defendant's tariffs and that PBD has access to private and confidential subscriber information which should be available only to defendant under the terms of its Credit Tariff. Defendant's testimony asserted that some information was not given to PBD while other information was available to PBD, due to

internal operational conditions, but was not used by PBD to produce yellow pages. Testimony was also taken that some subscriber information available to PBD was barred from release outside the Bell network due to the terms of the Credit Tariff but other tariffed information was received and paid for by PBD under the tariffs. Other information sought by complainants was claimed as proprietary to PBD and, therefore, not subject to release by defendant. Post hearing offers of proof were made as to issues sought to be further litigated in a second phase of this proceeding.

Complainants seek an order requiring defendant to provide PBD only that subscriber information available to independent customers under the terms of its tariffs and to cease to apply the Bell Company exception to nondisclosure of confidential customer credit information to PBD. They also seek a determination that the confidential credit information, barred from release by the Credit Tariff, is only residential subscriber information and does not include business subscriber information.

This Commission finds that: (1) Defendant has complied with its current Reproduction Rights, List Rental and Credit Tariffs, as they are presently filed and approved by this Commission; (2) Defendant has properly interpreted the terms and conditions of these tariffs; (3) Defendant has properly made available some subscriber information to PBD outside these tariffs under transfer pricing agreements, while other information alleged to be provided is not given PBD; and (4) Complainants have failed to carry their burden of proof that they were competitively injured by defendant's conduct. We conclude the offers of proof do not support a second phase of this proceeding. Therefore, we deny the complaint.

This decision resolves Donnelley's complaint under the applicable rules and tariffs as they exist. We acknowledge that changes to them may be needed to comport our policies regarding

directory listings to the principles of the new regulatory framework as promulgated in D.89-10-031. In particular, we opened I.90-01-033 (List OII) to affirmatively review our policies in light of the alleged competitive changes in the nature of the directory listings market. While we do not prejudge the outcome of that review, we believe it possible that our policies could be changed as a result.

Since D.89-10-031, the overall regulatory framework has changed significantly. Pending Commission proceedings are considering the impact of such changes on present Commission policy. The allegations raised by complainants herein are subject to an ongoing Commission investigation, I.90-01-033, in which complainants' subsidiary, Donnelley Information Publishing, Inc. (Donnelley), is participating. In I.90-01-033, we are considering, on a generic utilitywide basis, whether to alter the present practices to which defendant has been properly adhering and to allow defendant to alter its tariffs to satisfy the new demands of Donnelley and other information users and publishers. The Commission welcomes Donnelley's participation in those proceedings and encourages its continued vigorous participation before us in the List OII.

We also recognize that this complaint case has taken far longer than we would have wished to complete. In part, this delay was engendered because the generic issues it raised encouraged us to open the List OII. We see no reason to delay further the application of the principles of the new regulatory framework to the directory listings market, and we will expedite the List OII accordingly.

I. Procedural Background of the Complaint and Related Proceedings

In order to place this complaint proceeding in its proper regulatory perspective, a review of its procedural history and that of related regulatory matters is necessary.

On January 2, 1986, Donnelley made its first letter request for business subscriber information from defendant. It stated:

> Donnelley requests the terms and conditions upon which the following information will be made available: current subscriber names, addresses, telephone numbers, business classification, primary business listing, billing authority, customer contact identification, credit information, directory distribution information and service and equipment (including related, associated and foreign telephone numbers) as well as update service reflecting service order activity affecting directory. Such service order activity updates would include, new connects, disconnects, changes in name, address, telephone numbers, primary business classification and billing authority at a minimum.

A response by January 17, 1986 was demanded, with the letter proposing that an agreement be reached by January 31, 1986. The letter then declared that defendant's failure to adhere to these dates would be construed as a deliberate refusal to deal. This request appeared to deal only with printed directories. On March 4, 1986, more information was requested by Donnelley for purposes of a telephonic business classified directory service. Weekly updates were requested. The information was requested in a computer-readable media, magnetic tape, if available. Defendant responded by furnishing copies of its tariffs, which provided only paper lists for purposes of publishing printed directories. Throughout 1986, complainants raised their concerns with defendant's provision of directory information to competitors and defendant discussed possible accommodations of their requests.

On February 13, 1986, defendant filed Advice Letter 15049 to authorize it to rent lists of customer names, addresses, and telephone numbers under a List Rental Tariff. Due to the substantial number of complaints from residential customers, the

Commission requested defendant delay implementation, pending a potential Order Instituting Investigation. On April 11, 1986, defendant voluntarily withdrew the residence listing portion of the tariff, but retained the business listing portion. This was approved by Resolution T-11036 on May 7, 1986.

On March 4, 1986, GTE California Incorporated (GTEC) filed Advice Letter 4999, for purposes of GTEC's provision of intrastate interLATA directory assistance service in competition with Pacific Bell in five Southern California number plan areas where GTEC and Pacific Bell use merged data bases. Protests were filed and the advice letter was converted into I&S Case (C.) 86-06-004 on June 4, 1986. Pacific Bell already had been using the merged data bases to provide interLATA directory assistance services to interexchange carriers but had not been compensating GTEC for use of GTEC's listings within the merged data bases. Both Pacific Bell and GTEC sought compensation for the other's use of its respective listings within the merged data bases. I&S C.86-06-004 has been ongoing throughout the course of this complaint proceeding.

On October 5, 1987, Dun & Bradstreet Information Resources (D&B-IR) made its first request for defendant's subscriber information, stating:

> "While The Dun & Bradstreet Corporation owns a telephone directory publisher, neither Dun & Bradstreet, Inc., or its sister corporation, Dun's Marketing Services, Inc., publishes telephone directories, but rather they purvey information regarding businesses; in many forms and formats, for credit, insurance and marketing purposes. Dun's Marketing Services, Inc. uses the information gathered by Dun & Bradstreet Information Resources to compile and purvey, in hard copy and on-line, mailing and telemarketing lists and information to its customers. Dun & Bradstreet, Inc. uses the information primarily to compile and purvey information relevant to the granting of commercial credit and insurance, and provides

such information in hard copy, on-line and over the telephone.

"Dun & Bradstreet Information Resources maintains a commercial database of over ten million records which support the business information products and services of Dun's Marketing Services, Inc. and Dun & Bradstreet, Inc. The quality of the products produced and delivered to the customers of the units we serve from this file requires that the data in it be as accurate and current as possible. Essential to this operation is the identification of new, moved or discontinued business locations and telephone numbers, which must be changed immediately in our files. The documentary source for this information is uniquely in the possession of your company as a result of its local exchange telephone monopoly franchise. Currently your company routinely and continuously makes this information available to your affiliated telephone directory publisher as well as to independent publishers.

"Dun & Bradstreet Information Resources requests the terms and conditions upon which information similar to that already provided to other publishers will be made available to us. We are particularly interested in the following for current subscribers and billing: names, addresses, telephone numbers, business classification, primary business listing, billing authority, customer contact identification, and associated telephone numbers. We also require continuous updates to the above."

Ensuing discussions between the parties culminated in defendant's response of November 23, 1987, in which it referred D&B-IR to defendant's List Rental and Reproduction Rights Tariffs, which were furnished to D&B-IR. Based on the applications cited in the request, defendant opined that the List Rental Tariff was most appropriate. But defendant stated that "The information provided under this tariff may not lawfully be resold or compiled into publication for distribution to third parties."

Further discussions followed which resulted in D&B-IR's letter of December 16, 1987, in which it stated that it believed D&B-IR's request fell within defendant's List Rental Tariff for the purposes of data base reconciliation and List Upgrade Service. D&B-IR stated the subscriber information would be used specifically to:

> "1) Verify / correct business name construction and spelling.
>
> "2) Verify / correct / add physical business address (as compared to mailing address) including street number, directional, street name, city and zip code.
>
> "3) Verify / correct / add business telephone number.
>
> "4) Periodically ensure that the above mentioned data elements remain accurate.
>
> "5) Code those records in our file were [sic] the businesses listed appear to no longer be in business.
>
> "6) Identify businesses, as a starting point for additional Dun & Bradstreet investigation, as new businesses are established."

D&B-IR requested a quotation for use of the defendant's entire business subscriber information file plus monthly charges to it, along with record layout and data element descriptions.

Defendant responded on January 18, 1988, by furnishing tape output specifications and data descriptions for defendant's List Rental Tariff.

The letter then stated that:

> "I feel comfortable in making Business List Rental Service available to you for the multiple applications that you cite, so long as these various uses adhere to the regulations in Schedule CAL. P.U.C. No. A12. However, information on businesses that are not contained in your current databases, or that

> are newly established, may only be used for purposes agreed to in advance and in writing by Pacific Bell. This information may be used no more than three times in a multiple use application. If a bona fide relationship has not been established with the business customer, the information shall be completely erased from all storage forms and/or devices upon which they reside as specified in Section 12.1.1.C.7. of the List Rental Service tariff."

A pricing schedule was enclosed. Defendant's representative then offered to meet with D&B-IR.

Informal resolution, with staff assistance, of complainants' requests for defendant's subscriber information was next attempted. In early 1988, staff suggested to complainants that they attempt to raise the issues of alleged discriminatory treatment in I.87-11-033, this Commission's three-phase investigation into alternative regulatory frameworks for local exchange companies.

On January 29, 1988, at the prehearing conference on Phase I of I.87-11-033, complainants requested that the Commission address, in Phase I, the specific issue: "To fix the terms and conditions under which subscriber information is to be made available to affiliates of local exchange carriers and to other non-affiliated third parties." The Administrative Law Judge (ALJ) explained to complainants that Phase I was to determine which telecommunications services were monopolistic and which were competitive. Although the ALJ agreed the preparation of the yellow pages itself was competitive, she observed that the provision of customer information by Pacific Bell to directory publishers was in fact a monopoly service and no one in I.87-11-033 had asserted it was competitive. Therefore, she ruled that complainants' issue would not be addressed in Phase I. She noted that it might arguably be raised in Phase II, which was to look at potential regulatory changes for monopoly services, although she still felt its inclusion there might be questionable. However, ALJ Ford

stated that complainants could raise the issue at the Phase II prehearing conference.

A petition to modify Phase II of I.87-11-033 was filed by complainants on February 24, 1988. In the petition, complainants requested that the issues to be addressed in Phase II encompass the local exchange carriers' policies and practices regarding use and availability of telephone companies' subscriber data for directories, business lists and other information services.

On February 16, 1988, defendant filed Advice Letter 15348 to revise its Reproduction Rights Tariff to provide business subscriber listings on magnetic tape, in sorted form, and to include, ultimately, new connect, disconnect, and change order activity. Users were given the choice to receive listings for businesses or residences separately and by specific community or telephone prefix. Monthly updates were offered. On March 28, 1988, defendant's revisions to its Reproduction Rights Tariff were effective. These tariff revisions resulted from discussions with complainants and staff during the course of the informal resolution process. The magnetic tape update service remained developmental for approximately one year in order to add additional listings and captions. Within three months of the tariff revision's filing, defendant made a test tape available to complainants.

On June 21, 1988, before completion of Phase I and any ruling on complainants' petition to modify Phase II of I.87-11-033, complainants filed their original complaint in this proceeding. They requested this Commission order defendant (1) to cease provision of business subscriber information to its affiliates and other non-affiliated third parties except upon the charges, terms, and conditions in filed tariff schedules; (2) to not condition the availability or use of nonconfidential business subscriber information in any way favoring defendant's affiliates or restraining competition among users of the information; (3) to remove from its tariffs restrictions (a) on the end uses of

business subscriber information and (b) on access to subscriber information by specified categories of users; and (4) to reform its pricing and licensing scheme to eliminate allegedly improper and anticompetitive bundling of information elements and services tying the purchases of certain information and services to others allegedly not needed or desired by a purchaser. Various antitrust violations and violation of Public Utilities (PU) Code § 532 were alleged. Complainants admitted that defendant had modified its Reproduction Rights Tariff as a result of discussions between the parties, but asserted that the modifications failed to address all issues raised in the complaint.

On August 8, 1988, defendant filed its answer which admitted that PBD received more complete information than that licensed under tariff with some at prices other than as listed in its tariffs, but denied complainants' allegations that such conduct was illegal. Defendant agreed to provide complainants and any other third party, under terms set forth in appropriate tariffs, all the data and information complainants sought in their complaint, as long as the information did not violate State or Federal law, defendant's filed tariffs or individual privacy rights. Defendant stated that it would make available all subscriber information complainants sought, provided this Commission modified its rules and allowed defendant to furnish business subscriber billing name and address and to eliminate various restrictions currently in defendant's tariffs. Thus, defendant asserted that the only issues remaining to be resolved concerned the pricing of the data to be released.

As an affirmative defense, defendant alleged it had not engaged in unlawful conduct, but had instead complied with its published tariffs on file with the Commission and under the PU Code and all decisions and orders of this Commission. For its second affirmative defense, defendant asserted that it would release all

the information requested by the complainants upon this Commission's approval.

On August 24, 1988, GTEC filed a petition to intervene in this complaint case. GTEC is a wireline local exchange telephone company, affiliated by ownership and contract with General Telephone Directory, which publishes telephone directories, including yellow pages, in California areas where GTEC provides telephone service. GTEC contended that the issues herein raised were similar to those in its pending I&S C.86-06-004, as to its shared directory information data bases with Pacific Bell.

On September 14, 1988, the Division of Ratepayer Advocates (DRA) filed a petition to intervene in this case, in order to protect the interests of the ratepayers in the revenue streams from directory publishing activities of PBD on behalf of defendant.

On September 28, 1988, this Commission issued D.88-09-059, on Phase I of I.87-11-033, the alternative regulatory framework proceeding. Shortly thereafter, Phase II proceedings commenced.

In a ruling issued November 3, 1988, the ALJ granted DRA and GTEC's petitions to intervene in this complaint case "on the condition neither intervenor may broaden or delay this proceeding." A schedule to resolve discovery disputes was set, as were schedules for briefing and service of written testimony, culminating in evidentiary hearing dates.

On November 15, 1988, complainants filed an amendment to their complaint. The four demands remained the same as in the original complaint, except for the removal of the reference to restraint of competition in demand 1 and the reference to anticompetitive bundling in demand 4. Complainants also dropped references to the bundling practices as illegal tying under antitrust laws and charges of violations of State and Federal antitrust laws.

Defendant answered the amendment to complaint on December 15, 1988. Defendant reiterated its original answer's contents, but added that it planned to file revisions to its Reproduction Rights Tariff in order to make available virtually all of the subscriber information complainants sought, which defendant could legally provide. Defendant alleged that once this Commission approved such tariff revisions, publishers of electronic directories, including complainants' Talking Yellow Pages, would be able to obtain subscriber data from defendant, with weekly and daily updates available. Defendant argued complainants' unfairness allegations were moot because defendant was currently seeking Commission authority to revise its tariffs on licensing of subscriber information, which would provide the information complainants requested.

Defendant contended that complainants' assertions that the information should be provided by defendant at marginal cost amounted to challenges to the reasonableness of rates and charges in defendant's current tariffs which were not the proper subject of a complaint proceeding. The amended answer asserted that the proper price would be at least the data's highest fair market value and should take into account the ratepayer subsidy provided by PBD.

On December 30, 1988, the defendant's new proposed revisions to the Reproduction Rights and Credit Tariffs were submitted to the Commission's staff for preliminary review as Proposal No. 88120. Proposal No. 88120 provided for both daily and weekly update service for business listing information and release of customer name, address, telephone number and zip code, billing name and address of business subscribers, SIC codes and defendant's classified list headings. The revisions permitted electronic and talking yellow pages applications. Market pricing was proposed. Complainants were furnished a copy of Proposal No. 88120. Proposal No. 88120 was pending at the time of hearing of this complaint.

Thereafter, communications from the parties to ALJ Bennett requested that she refine the scope of the complaint before making any ruling on the pending discovery disputes. On January 24, 1989, the ALJ issued a ruling on both the scope of the proceeding and the discovery disputes. After analyzing the pleadings, the ALJ declared:

> "The complaint and its amendment allege facts which are related to three distinct issues: violation of existing tariffs (Reproduction Rights, Credit Data, and List Rental Service); reasonableness of the tariff restrictions, conditions and rates contained in defendant's existing tariffs; and MFJ violations.
>
> "The answer and its amendment raise a fourth issue: the implications of granting complainants' request: alleged loss of revenues." (Ruling at pages 2-3, footnote omitted.)

The ALJ then ruled that, under PU Code § 1702, the complainants could assert violations of tariffs but had not met the § 1702 standing requirements, which were a prerequisite to any challenge to the reasonableness of defendant's rates and charges. The ALJ found the allegations that (1) the use restrictions in the Reproduction Rights Tariff were unfair and should be removed, (2) the subscriber information should be sold by defendant at marginal cost and (3) provision of List Rental Service information should be reformed, all amounted to challenges to the fairness or reasonableness of existing tariffs and requests for modifications to them. Thus, these allegations were declared impermissible in this complaint proceeding and their removal was required. The ALJ then observed that defendant's allegations of revenue loss were ratemaking issues which could not be explored in this complaint case. Finally, the ALJ declared that the allegations of modified final judgment (MFJ) violations were outside the scope of this Commission's jurisdiction and could not be raised herein. ALJ Bennett then ruled:

"Accordingly, all allegations other than those of tariff violations are outside the scope of this proceeding. Discovery and testimony may be introduced on the issue of tariff violations, interpretation, and application, including but not limited to the following:

"1. Has defendant violated or complied with its Reproduction Rights, List Rental, or Credit Tariffs?

"2. Has defendant properly or improperly interpreted the terms and conditions contained within these tariffs?

"3. Has defendant properly or improperly refused to apply these tariffs?

"4. What relief should be granted if tariff violations, misinterpretations, or improper application of tariffs has occurred?" (Ruling at page 5.)

On March 6, 1989, the Association of North American Directory Publishers' (ANADP) petitioned to intervene in the complaint proceedings. ANADP is a non-profit trade association, whose members are publishers of city directories, telephone directories (including classified yellow pages directories), and special interest directories containing business listings and advertising within geographical areas or designated fields of business activity. Some ANADP members purchase subscriber listing information from local exchange carriers such as defendant. Complainants supported the motion to intervene, while defendant opposed it.

On February 27, 1989, complainants submitted the prepared direct testimony of Ralph D. Hillman (Hillman), president of Donnelley, a subsidiary of complainant The Reuben H. Donnelley Corporation. The prepared direct testimony of Jerry M. Abercrombie (Abercrombie), a director in Product Marketing for defendant, was submitted by defendant on February 27, 1989. On March 21, 1989, defendant served the prepared rebuttal testimony of Abercrombie. There was no rebuttal testimony by Hillman. Each side filed

motions to strike portions of the other's prepared testimony. The motions to strike were based mainly on the ALJ's January 24, 1989 ruling which defined the scope of this case.

On March 22, 1989, this Commission issued Decision (D.) 89-03-051, on Pacific Bell and GTEC's I&S C.86-06-004. D.89-03-051 authorized GTEC to file revised tariff sheets, as set forth in Advice Letter 4999, for purposes of GTEC's provision of intrastate interLATA directory assistance service in competition with Pacific Bell in five Southern California number-plan areas where GTEC and Pacific Bell used merged data bases. This Commission declined, in D.89-03-051, to consider the compensation issues as to Pacific Bell and GTEC for competitive usage by each utility of the other's proprietary listing information in the merged data bases. Instead, this Commission said that it would defer these issues to a subsequent overall examination of policies regarding access to local telephone company listings. Because Pacific Bell had not been paying GTEC for its usage of GTEC's data in the merged data bases, the decision permitted GTEC, on an interim basis, to use Pacific Bell's data without paying compensation to Pacific Bell.

Shortly thereafter, this case was reassigned to ALJ Steven A. Weissman, with the evidentiary hearing reset to April 1989.

On April 10, 1989, Pacific Bell applied for rehearing of D.89-03-051. Also on April 10, 1989, defendant filed its motion to dismiss this complaint proceeding, based on D.89-03-051. Defendant contended that, because the Commission deferred issues of compensation for competitive usage of proprietary listing information to a subsequent overall examination of policies regarding access to local telephone company listings, the instant complaint proceeding should be dismissed in favor of such generic proceedings.

On April 17, 1989, ALJ Weissman held a hearing to resolve all outstanding motions in this complaint case prior to commencement of evidentiary hearings on April 20, 1989. The

petition to intervene on the part ANADP was granted. The defendant's motion to dismiss was denied. Portions of each motion to strike were granted while other portions were denied. GTEC and DRA confirmed that neither would submit written testimony in the proceedings, but would instead cross-examine complainants' and defendant's testimony.

During the course of the arguments on the motions to strike, it became apparent that confusion still existed regarding the interpretation of the previous ALJ's ruling defining the scope of this complaint proceeding. Complainants alleged that they were not presenting testimony going to the reasonableness, under PU Code § 451, of the nonprice tariff rules under the Reproduction Rights Tariff and the List Rental Tariff due to the January 24, 1989 ruling. For this reason, they sought to strike portions of Abercrombie's prepared direct testimony which defended the reasonableness of the tariffs. It became clear that the parties were still confused about whether PU Code §§ 451 and 453 raised permissible prejudicial treatment issues regarding defendant's tariffs. All parties agreed that questions as to the appropriateness of the price stated in defendant's tariffs were clearly excluded under PU Code § 1702.

ALJ Weissman then clarified the interpretation of the prior ALJ's January 24, 1989 ruling. He stated that this complaint proceeding was not a forum to rewrite tariffs. But he found "it is possible to determine whether or not a violation of the tariff has occurred or whether or not applicable laws have been violated without rewriting the tariff or resolving any kind of complex policy issues concerning the ratepayers' interest in continued flow of revenues from Pacific Bell Directory or any issues concerning right to privacy." ALJ Weissman further declared that: "The [January 24, 1989] ruling does recognize and protect complainants' rights under Section 1702. And Section 1702 is a good bit broader than simply a forum for determining whether or not a tariff violation has occurred." ALJ Weissman also permitted portions of

the testimony dealing with the Credit Tariff's alleged prejudicial effect to remain in the record.

On the first day of hearing, April 20, 1989, the parties asked to place in the record offers of proof on the reasonableness issues which the parties had believed were precluded by the January 24, 1989 ruling. Based on the offers of proof, a decision could be made whether the proceedings would be later reopened for new evidence. Two days of hearings ensued.

On May 1, 1989, defendant added to its update service under the Reproduction Rights Tariff the specific identification of new connects and disconnects. Formerly, the update indicated only add or delete, which could also include other types of changes.

The complainants filed their post hearing offer of proof on May 17, 1989. Defendant filed its offer of proof on May 24, 1989. Complainants' offer of proof concerned the unlawfulness of the Reproduction Rights Tariff because of: (1) unreasonable classification of and restrictions upon potential users, (2) unreasonable restrictions upon use of the tariffed service, (3) inadequate content of data provided, (4) timeliness of the information provided under tariff, and (5) its overall unreasonable effect. It also alleged the unlawfulness of the List Rental Tariff because of: (1) unreasonable restrictions on its use and (2) inadequate content of the data provided. Finally, it addressed the unreasonableness of the Credit Tariff. Defendant's offer of proof dealt with privacy concerns, the ratepayer subsidy provided by PBD, the state of current competition, reasonableness of commercial practices, and efficiency of current PBD and defendant computer linkages.

The last briefs in this proceeding were filed on June 27, 1989.

On July 6, 1989, the Commission entered D.89-07-032, which granted a limited rehearing of D.89-03-051 in I&S C.86-06-004 "for the sole purpose of considering the appropriate compensation to Pacific [Bell] for GTEC's use of the merged data base in a

competitive context." Also to be considered by the Commission was the reciprocal issue of the appropriate compensation to be paid to GTEC by Pacific Bell. The rehearing was to be consolidated with a future case considering "the broader issues of competitive access to local listings."

On July 17, 1989, defendant filed A.89-07-030, its application for authority to adopt a tariff for a Business Directory File to offer to third parties business subscribers' information allegedly not presently available. The application disclosed that the Business Directory File complements the List Rental and Reproduction Rights Tariffs for use by companies which offer products competitive with defendant's. "The most notable example is in the directory industry, where, according to the claims of one independent yellow page publisher, the Business Directory File will be used to produce more complete and more accurate yellow page books, as well as to canvass more effectively for yellow page advertising." (Application at pp. 5-6.) The application provided for daily change order activity on business subscribers with certain detailed listing and customer account-level information obtained by defendant as a result of service order activity on business listings. The information included billing telephone number, billing name and address, service order number, service address, and transmittal codes which identify new connects, disconnects, service location changes and supersedures. The information is generated by a COBOL program and was to be provided initially on magnetic tape. Market value pricing was proposed, with Commission monitoring and reevaluation of the new offering in future rate cases. Defendant stated the most likely users of the product were GTEC and The Reuben H. Donnelley Corporation and possibly TRW and Dun & Bradstreet. The proposed Schedule Cal. PUC A12.2 was annexed to the application.

In A.89-07-030, defendant also requested a modification of the Credit Tariff to permit the release of the customer account information contained in the proposed Business Directory File

tariff. Defendant asked to add to the Credit Tariff's Section d, excepting from the non-release restrictions a Bell Company and Bell Operating Company, an exemption when "the requester is licensing the information pursuant to Schedule Cal. PUC No. A12.2." The application requested that the Commission consolidate the limited rehearing of D.89-03-051, on directory listing compensation issues, with the application.

Five protests to the application were filed. GTEC, Donnelley, and DRA all protested the consolidation of the limited rehearing of D.89-03-051. On July 25, 1989, Donnelley moved to dismiss defendant's application on various grounds. Defendant responded to the motion on September 11, 1989.

On October 17, 1989, this Commission issued its D.89-10-031 on Phase II of I.87-11-033. In the discussion of yellow page directory services, we recognized that:

> "Historically, these services were developed at ratepayer expense and in return have provided substantial contribution to basic rates ($365.4 million in 1987 for Pacific Bell). At the same time, some amount of competition is beginning to develop, particularly in niche markets. While the extent of competition was hotly debated in the record, no concrete evidence was introduced which would allow us to draw conclusions about either the amount of existing competition or the likely inroads which may be made in the future to the local exchange carriers' market share.
>
> "PU Code § 728.2 largely deregulates directory advertising services, but instructs the Commission to 'investigate and consider' their revenue and expenses in setting rates for other services. Given this legislative mandate, we agree with GTEC and DRA that the revenue indexing mechanism should not be applied to these services. However, consistent with the statute, we conclude that they should continue to provide a substantial contribution to basic rates."

* * *

> "Parties disagree regarding the level of profits which can be expected in the future from directory advertising services. While growing competition could limit profits from these services, such a trend could be more than offset by efforts by the local exchange carriers to expand the scope of directory advertising services.
>
> "It is uncontested that local exchange carriers continue to enjoy significant market power in the directory advertising market. We see no reason why shareholders should receive the full benefit of what may largely be monopoly profits. Further, since their directory advertising services are well established, we believe that local exchange carriers will retain sufficient incentives to vigorously pursue this market, even if excess profits are shared with ratepayers. Because of the existence of significant market power and because efficiency incentives would not be seriously compromised, we conclude that Yellow Pages directory services revenues should be subject to a revenue sharing mechanism." (Decision at pp. 201-203.)

Thus, the revenues and costs from yellow pages continue to be part of the rate setting process for telephone utilities.

As a result of this complaint proceeding, the defendant's tariff proposals, the limited rehearing of D.89-03-051, and the decisions made in Phase II of I.87-11-033, the Commission decided to commence a generic proceeding on policy and legal issues surrounding yellow pages competition and access to customer list information. On January 24, 1990, the Commission issued its Order of Investigation into the matter of competitive access to customer list information, I.90-01-033 (List OII). Its purpose is to permit this Commission to decide, on a comprehensive basis rather than by a patchwork of individual decisions, important issues concerning the dissemination of customer list information possessed by public utilities in California. The List OII consolidated two pending proceedings: A.89-07-030, defendant's tariff application for the Business Directory File tariff and a revision to the Credit Tariff,

and the limited rehearing of D.89-03-051 to resolve issues of compensation to GTEC and Pacific Bell for each's use of the other's proprietary listing information. The List OII remains pending.

This complaint proceeding was not consolidated with the List OII because an evidentiary hearing had already been conducted and all briefs had been filed. However, the List OII declared that the complaint case would "remain open, with a final decision reserved until comments are received in this Investigation" or "until we have made sufficient progress in this Investigation to address the broader issues raised in C.88-06-031."

On March 16, 1990, complainants filed, in this complaint proceeding, a Motion to Require the Designated ALJ to Issue and File a Proposed Decision and, Thereafter, for the Commission to Issue its Decision Consistent with Section 311 of Public Utilities Code. Also on that date, Donnelley filed a petition to modify the List OII and asserted that the decision in this complaint case should not be deferred pending the outcome of the List OII.

On June 8, 1990, ALJ Ann Watson issued a ruling in the List OII and all consolidated proceedings, I.90-01-033, A.89-07-030, and I&S C.86-06-004. Her ruling interpreted the List OII not to conclusively require that this complaint case have its decision deferred pending the final outcome of the investigation. Instead, ALJ Watson stated once all comments and reply comments in the List OII were filed and analyzed, a decision would be made by ALJs Watson and Weissman, whether the List OII still necessitated further deferral of a decision in this case.

This complaint case was transferred to ALJ Watson. On November 6, 1990, a ruling of ALJ Watson granted the motion filed by complainants in C.88-06-031 and the portion of Donnelley's petition for modification of the List OII requesting the issuance of a decision in C.88-06-031. Attached to the joint ruling was a copy of the proposed decision in this complaint case. On that same day, the proposed decision was issued under PU Code § 311.

II. Arguments of the Parties

A. Complainants

Complainant The Reuben H. Donnelley Corporation (R. H. Donnelley) is a Delaware corporation, all of the stock of which is owned by The Dun & Bradstreet Corporation. R. H. Donnelley, through its Donnelley Directory division (Donnelley Directory), acts as sales agent for the yellow pages directories of various telephone companies outside California. It also publishes yellow pages directories of its own in competition with local telephone company directories. Donnelley, a subsidiary of R. H. Donnelley, publishes and manages approximately 18 independent yellow pages telephone directories serving approximately 200 communities in southern California. R. H. Donnelley, through another division, provides a telephonic classified directory service, called The Talking Yellow Pages.

In their directory publishing operations, R. H. Donnelley and its affiliates compete with numerous companies, including local exchange telephone companies and their various unregulated affiliates. R. H. Donnelley's California businesses include the sale of advertising for publication in classified telephone directories printed by R. H. Donnelley and distributed free of charge in areas covered by the directories. In this activity, R. H. Donnelley asserts it is in direct competition in the yellow pages market with PBD.

Complainant D&B-IR is an unincorporated division of Dun & Bradstreet, Inc., a Delaware corporation which is, in turn, a subsidiary of The Dun & Bradstreet Corporation. D&B-IR maintains a commercial database of over 10 million records to support the mailing and telemarketing list business of its affiliate, Dun's Marketing Services, Inc., and the commercial credit information business of its parent, Dun & Bradstreet, Inc.

The complainants contend that the primary issue in this case is whether the defendant is entitled to discriminate among

customers of the same class based upon whether or not those customers are affiliated by ownership with the defendant. Complainants also assert that the two other related issues are: (1) whether the defendant can provide by contract to one member of a customer class, services unavailable on any terms to any other member of that class and (2) whether the defendant has correctly interpreted and applied its Credit Tariff. Complainants contend that defendant's provision of more information to PBD than it provides to other directory publisher competitors violates PU Code §§ 451, 453, and 532.

The complainants admit that they do not meet the standing requirements of PU Code § 1702 and, therefore, admit they do not challenge in this proceeding the reasonableness of defendant's tariffed rates.

Complainants contend the defendant confers an undue preference or advantage on PBD by its treatment of PBD outside its tariffs, which is a violation of § 453(a). They argued that, although discrimination can be permissible under § 453 when justified by differences in costs of provision of service or operating conditions, these sections are not applicable when defendant prefers its affiliate. As a basis for this argument, complainants cite cases in which § 453 has been found to prohibit utilities from establishing rules or providing services that are preferential to their shareholders, subscribers or parent companies.

The complainants note that, in December 1986, defendant, with this Commission's approval, transferred its directory and related assets to PBD. Then defendant and PBD entered into a contract which made PBD a vendor assuming defendant's regulatory obligation to publish and deliver alphabetical white pages and street address directories to its telephone subscribers. Complainants contend that defendant is incorrectly also applying this contract to yellow page classified directories.

Complainants also argue that for purposes of producing yellow pages, PBD is neither a vendor nor a subcontractor to defendant and that defendant cannot justify the preferential treatment in favor of PBD in the production of yellow pages on this basis. The complainants allege that all directory publishers except PBD must take subscriber information from defendant under its Reproduction Rights Tariff. They complain that this tariffed information is only useful for an alphabetical white pages type section in a classified directory and is not valuable for production of a traditional classified directory.

By contrast, complainants allege that PBD obtains, outside defendant's tariffs, several classes of information useful for the production of a classified yellow pages directory, updated on a daily basis, under transfer pricing agreements between PBD and defendant. They assert such information should be available to all competitors at its marginal cost to defendant. Complainants contend whether PBD uses the information is immaterial.

Complainants also assert they are disadvantaged by defendant's bundling of a free white pages type listing in its yellow pages as part of the basic telephone service charge for businesses while refusing to release to anyone but PBD the classified directory list heading selected for the free listing by each business. Complainants contend the failure of defendant to release this information makes it hard for them to compete by also giving a free listing under the proper heading to businesses whether or not the businesses advertise by display ad in their classified directories.

Complainants argue that, by refusing to provide them the information they want, in the format they want, and with the timeliness they want, defendant has failed to provide just and reasonable service under PU Code § 451.

A violation of PU Code § 532 is also asserted, based on defendant's failure to require PBD to comply with the Reproduction Rights Tariff and defendant's use, instead, of the transfer pricing

agreement outside its tariffs to provide more subscriber information to PBD at the transfer prices. Thus, complainants argue that defendant has failed to adhere to its tariffed rates and has instead used a contract not regularly and uniformly extended to all.

Complainants contend that defendant has violated its Credit Tariff because it interprets the exclusion for a "Bell Company" to apply to PBD. Complainants assert that the credit information deemed confidential under the Credit Tariff can only be used for purposes which are directly related to the provision of telephone service. They declare that PBD does not use the information for such purposes and does not come within the tariff's Bell Company exception.

Complainants also argue that the information specified as confidential under the Credit Tariff applies to residential customers only, because the tariff refers to such items as social security and drivers' license numbers rather than to any information peculiar to businesses, like federal employer identification numbers. Therefore, the complainants allege that defendant has misapplied its Credit Tariff by interpreting it to cover both residential and business subscriber information.

Complainants also contend that the enactment by the legislature of PU Code § 2891 is simply a codification of the Commission's Rule 35 policies embodied in the Credit Tariff. Complainants reason PU Code § 2891 only applies to residential subscribers, therefore, the Credit Tariff is only meant to so apply.

Finally, complainants allege that due to the provisions of PU Code § 728.2, the Commission cannot exercise jurisdiction or control over classified telephone directories. For this reason, complainants contend the Commission cannot permit the alleged preference or advantage, enjoyed by PBD, to continue.

The complainants also argue that they have not been offered an adequate opportunity to present evidence and testimony

on all issues properly raised by their amended complaint due to a misunderstanding of the ALJ's January 24, 1989 ruling narrowing the scope of this proceeding. Therefore, the complainants assert that this Commission should decide now those issues ripe for decision in this case and simultaneously set for hearing, in a Phase II proceeding, the remaining issues raised by the post hearing offers of proof.

As relief, complainants request the Commission to order defendant: (1) to stop providing to PBD's classified directory business any subscriber information service which is not offered in the Reproduction Rights Tariff; (2) to require full compliance by PBD with the rules and procedures of that tariff; (3) to apply its Credit Tariff to PBD; and (4) to cease and desist providing any of the confidential information covered by the Credit Tariff to PBD. Complainants also ask that the Commission declare that any Rule 35 tariff, such as defendant's Credit Tariff, cannot be construed to apply to business subscriber information, but only to residential subscriber information.

B. Defendant

Defendant, Pacific Bell, is a California local exchange company. PBD is the successor to defendant's directory publishing division and is a wholly owned subsidiary of defendant.

Defendant contends that PU Code §§ 453 and 532 only apply with respect to public utility services that are offered by a utility to the general public. It alleges that these sections do not apply to a utility's use of its own assets to create and furnish a product which it offers to the public, such as a telephone directory. Defendant argues that the Commission's D.89-05-020 (the second interim decision on defendant's enhanced services application) supports this contention. Defendant asserts D.89-05-020 only orders defendant's enhanced services operations to pay tariff rates for the use of tariffed services, but does not prevent its enhanced services division from developing products

with assets that are not offered under tariff, nor does it require the division to use only services furnished to it under tariff.

Defendant argues that the PU Code sections are analogous to 47 U.S.C.A. § 202(a), which prevents unjust or unreasonable discrimination and undue or unreasonable preference or advantage and undue or unreasonable prejudice or disadvantage by telephone utilities. It posits that the FCC, under § 202(a), does not require that utilities purchase their resources for deregulated product only under tariff. Such an interpretation of the PU Code by this Commission is urged.

Defendant also contends that it and PBD are a single integrated entity for purposes of the PU Code. It argues that the directory business is only partially deregulated by PU Code § 728.2. Defendant declares that the assets of PBD are still in its rate base and PBD revenues continue to be imputed to defendant for ratemaking purposes. Defendant alleges that, in essence, this Commission has complete regulatory control over PBD because we may impose ratemaking penalties on defendant if we find PBD's operations are generating either inadequate revenues or excessive expenses. Defendant also noted this Commission's concern during audits of Pacific Telesis subsidiaries that publishing opportunities for PBD not be transferred to PacTel Publishing, which is the unregulated Pacific Telesis publishing affiliate. Thus, defendant argues that the corporate boundaries between PBD and defendant should be, and are properly, disregarded.

Defendant's second argument why disparate treatment of PBD is not illegal, under the PU Code's various discrimination rules, is that PBD is a subcontractor to defendant. Therefore, defendant contends that PBD is entitled to use all defendant's resources which defendant could use, were defendant to develop the product in-house. Defendant notes that complainant R. H. Donnelley receives the same information which PBD receives in those regions where R. H. Donnelley acts as a subcontractor for the local telephone company. Defendant argues that nothing in this

Commission's D.85-12-065, which authorized defendant's transfer of the directory operations to PBD as a separate subsidiary, requires PBD to alter the operations as conducted in-house or to purchase subscriber information from defendant under its tariffs.

Defendant also alleges that, when PBD needs subscriber information which is available under the Reproduction Rights or List Rental Tariff, PBD does pay the tariffed rates. Defendant asserts this is done in compliance with FCC transfer pricing rules concerning transactions between affiliates.

Defendant argues that PU Code § 451 does not apply to the facts of this case. It contends that § 451 is not a remedy for use by competitors of utilities which are injured by the regulated utility's conduct. Assuming, arguendo, that § 451 were to apply, defendant contends the proper mode of analysis to apply is that found in antitrust law. Defendant contends such case law supports denial of any § 451 recovery. Indeed, defendant declares that this complaint proceeding is an antitrust case improperly cloaked in the disguise of PU Code §§ 451, 453 and 532.

Defendant asserts that it has correctly applied the Credit Tariff to business customers and that its interpretation is consistent with this Commission's D.89-05-020, which prohibited defendant from releasing billing name and address of electronic mail services customers, which are primarily businesses. Defendant contends that PBD is a "Bell Company" subject to that Commission mandated exception in the tariff. And, defendant also argues that, even were PBD not subject to the Bell Company exception, it would still be able to take information outside the Credit Tariff because it is a subcontractor of defendant which is clearly a "Bell Operating Company" under that Credit Tariff exemption. Since the Commission, in D.92860 (5 Cal. PUC 2d 745 (1981)) directed the exact wording in defendant's Credit Tariff, defendant asserts no discrimination has occurred which had not been expressly sanctioned by this Commission.

Defendant contends that since its subscriber information is not a public asset but is instead its proprietary information, defendant is not required to release it to all competitors. Defendant asserts its assigned classified list headings (CLHs) fall in this class. In addition, defendant asserts that the CLHs which businesses select on customer calls by PBD, as opposed to ones assigned by the defendant's sales representative at initiation of business service, are PBD's business information and the result of PBD's calls on customers. Thus, defendant asserts these CLHs are not obtained in connection with its franchise monopoly and that complainants want a free ride at PBD's expense. Defendant contends requiring PBD to release its CLHs would be both anticompetitive and anti-consumer. It also insists that complainants can obtain accurate CLHs through their own customer calls. Defendant observes that its revised Reproduction Rights Tariff Proposal No. 88120 would provide the defendant's CLHs to licensees, but not PBD's. Defendant declares that the sale of list assets is tantamount to a sale of surplus assets, which Commission decisions require to be sold at fair market value, rather than at the lower wholesale price complainants seek.

Defendant also alleges that the complainants have not carried their burden of proof that they were prejudiced by defendant's actions in regard to its interpretation of the tariffs and release of information to PBD. Defendant asserts that information furnished to PBD is not used in the solicitation of defendant's yellow pages ads. Instead, it is furnished PBD because the computers of the two entities are linked, a situation defendant contends would be costly to rectify. Defendant also states that it has gone through Commission channels to attempt repeatedly to revise its tariffs to make the information sought by complainants available in a format suitable to complainants and to remove the objectionable prohibitions against use in other than printed media. Defendant asserts complainants' competitive disadvantage arises

through its failure to use effectively the information currently available to it.

Because of the costs associated with severing any computer link between PBD and defendant, defendant contends that any relief granted to complainants should take the form of this Commission's initiation of a subsequent proceeding to revise Rule 35 tariffs, in general, to permit independent directory publishers to have access to the pieces of billing and credit information which the Commission feels is essential to operating a successful independent directory publishing business and which cannot be obtained elsewhere.

C. The Intervenors

GTEC, as an intervenor, alleges that the whole purpose of the Reproduction Rights Tariff is to grant a publisher a license to publish a general directory for general public use and distribution as a printed directory. It argues that complainants are trying to use the Reproduction Rights Tariff and the associated List Rental Tariff for other purposes which were not contemplated at the time the tariffs were filed and accepted. It asserts that, in 1986, defendant properly denied complainants' request that defendant furnish business and listing information for telephonic business classified directory service, since electronic directory services were not an authorized publication under the Reproduction Rights Tariff. GTEC also contends defendant was correct in denying complainant D&B-IR's request for information under the Reproduction Rights Tariff for mailing and telemarketing lists and granting of commercial credit and insurance. Therefore, GTEC states that complainants' arguments are merely a cover for its attempt to obtain the information permitted under the tariffs for business uses which are not permitted by the tariffs. It asserts that, since the information and the purposes for which it is sought are outside the scope of the tariffs, defendant acted properly to deny complainants' requests.

GTEC notes that the yellow pages revenues are contributions to telephone rates and that PU Code § 728.2 recognizes their importance as such. It argues this is a basis for finding that the alleged preferential treatment is not a violation of the tariff or PU Code § 453.

DRA, as an intervenor, cites the fact that the functional relationship between PBD and defendant is similar to an operating division. Also, DRA expresses concerns about the fact that revenues and expenses of all directory operations of PBD are considered in setting defendant's rates and that the PBD's positive contribution to defendant directly supports basic service to ratepayers. It notes that, because of the misconceptions regarding the January 24, 1989 ALJ ruling limiting issues in the proceeding, insufficient information regarding the possible reduction in revenues from directory operations and its impact on ratepayers were not addressed in the evidentiary hearings. For this reason, DRA asserts that, at most, the relief granted should be a decision whether defendant should apply its tariffs to PBD and that any broader ruling requires further hearings to protect ratepayers' interests.

Intervenor ANADP did not participate in the evidentiary hearing and filed no briefs in this proceeding.

III. Discussion

This case concerns defendant's treatment of its wholly owned directory publication subsidiary, PBD, and the interaction between defendant's computer systems with those of PBD. An understanding of the functioning of these systems and PBD's relation to defendant is crucial to a determination of the merits of complainants' claims. Only after analyzing the technological capabilities of defendant's computer system and its linkages can an assessment of complainants' assertions of undue prejudice and discrimination, allegedly arising out of PBD's disparate treatment, be made.

While the white pages directory is a franchise obligation of defendant, the yellow pages classified telephone directory is not. Instead, it is defendant's historical publication within the public's expectation, based on that history. Complainants seek to have defendant apply its tariffs, and only its tariffs, to any transfers of information between it and PBD. Defendant admits that some information not available to complainants is, for operational and technological reasons, available to PBD, but asserts it is not necessarily used by PBD. Complainants argue that availability, rather than use, is a ground to support their claims. Other information is asserted not to be given to PBD or to be PBD's proprietary information which cannot be released by defendant.

Defendant has refused complainants' requests to provide them with billing name and address, customer contact (can-be-reached number), credit, directory distribution, service and equipment, and new connect and disconnect information. Defendant based its refusals on Rule 35 confidentiality, the fact some information sought is not tariffed, and some uses proposed by complainants are not permitted by the tariffs. However, proposals of defendant to modify its tariffs to provide the information sought remain pending before the Commission.

A. Operations

An understanding of the contractual and corporate relationship between defendant and PBD, the regulatory framework within which the two entities operate and the internal operating conditions and ties between them is essential to assessing the propriety of defendant's treatment of PBD.

1. Corporate Relationship Between Defendant and PBD

PBD began operations as defendant's directory division. However, in D.85-12-065 (December 4, 1985), we approved the spinoff of PBD as a wholly owned subsidiary of defendant. Thus, PBD is not a Pacific Telesis subsidiary affiliated with defendant, but is instead a wholly owned subsidiary of defendant, a regulated entity. Our approval of the transfer of the directory operations was conditioned on the requirement that all PBD's revenues and expenses were to be considered in setting defendant's rates, with review and audit of all operations by Commission staff. New PBD operations required prior staff approval.

Under a Publishing Agreement dated December 12, 1986, PBD contracts with defendant to fulfill defendant's franchise responsibility to publish and distribute white pages telephone directories to all of its business and residential customers. PBD is responsible for the scheduling, photocomposition, printing, binding, hauling, warehousing, and distribution of white page directories, either in combination with yellow pages directories or separately. PBD owns all directories published by it as well as the associated copyrights for the white and yellow pages. PBD still functions like a division of defendant, but is now under a separate corporate structure and under contract with its parent corporation, defendant. This is important to the context of PBD's present treatment under the Credit Tariff and when analyzing its internal communications linkages to defendant's computer systems resulting in its treatment outside defendant's tariffs.

2. Regulatory Framework

As opposed to PBD, customers must take defendant's listing information under tariff. California is the only state that requires listing information to be provided under tariff, rather than by contracts with independent publishers. For this reason, complainants' assertions that other Bell companies outside California allegedly provide the information they seek from defendant, are not germane.

The List Rental Tariff allows the sale of published subscriber information, excluding residential listings, in sorted form on magnetic tape or other computer printout to companies who wish to conduct market research, data base reconciliation, and direct mail or telemarketing campaigns. Customer specific information on nonpublished customers and published customers requesting exclusion is not included. Only one-time use is permitted and defendant has the right to review and approve the purpose and use of the list information. This tariff was established in 1986 to operate from data bases created by defendant. The List Service Tariff, under Section 5.7.6 of Schedule Cal PUC No. A5, does include residential listings. It will append telephone numbers of customers listed in the alphabetical section of defendant's white pages directories to a list of names and addresses furnished by the customer. It may be used solely for telephone calling purposes of the purchasing customer and cannot be resold.

The Reproduction Rights Tariff has existed since 1976 and permits reproduction of names, addresses and telephone numbers of customers contained in the defendant's telephone directories, by publishers engaged in the business of publishing a general directory, printed on paper, for public use and distribution only. The subscriber information comes from defendant's Directory Assistance System. At the time of complainants' information requests, subscriber information was furnished 10 days following

the publication date of each monthly directory assistance directory. However, in some areas, such updates were made only semi-monthly. In March 1988, sorted options on magnetic tape became available. The tariff presently excludes use for electronic publishing and talking yellow pages. Originally it provided no update service. In March 1988, monthly update service became available. The Reproduction Rights Tariff does not permit licensing of names, addresses, telephone numbers, art work, headings and other materials contained in defendant's classified yellow page directories and directory sections or other customers listed in defendant's directories. Listings licensed under this tariff cannot be compiled into lists for the purposes of selling, renting, or otherwise providing copies of listings to any other person or corporation.

The Credit Tariff prevents a telephone utility from releasing customer credit information or other customer billing and calling data, with minor exceptions. One such exception permits release of information to a "Bell Company." Defendant asserts PBD is such a Bell Company.

The January 22, 1986 letter agreement between defendant and PBD, as modified January 15, 1987, declares in paragraph 2 that: "Where Pacific Bell is providing the Services, the methodology and procedures for determining that appropriate expenses are billed to [Pacific Bell] Directory shall be pursuant to Pacific Bell's Inter-Entity Transfer Pricing Manual." Defendant's Inter-Entity Transfer Pricing Guidelines declare in § 1.0202 that: "Transfer Pricing applies to only those transactions dealing with non-tariffed goods and services."

We find that PBD has paid tariffed rates for the services it receives from defendant, when those services are, in fact, tariffed. For this reason, PBD has paid the tariffed rate under the Reproduction Rights Tariff when it received listings to produce the white pages. Similarly, when it pays for its regular telephone

services and other tariff services, it pays defendant the tariffed rates. PBD does not rent business listings from defendant under the List Rental Tariff for any directory publication, distribution, or canvassing. However, on one occasion, PBD did order List Service upgrade under the List Service Tariff for the purpose of appending telephone numbers to its lists in order to conduct market research.

PBD pays defendant through several transfer pricing agreements on the non-tariffed services in order to ensure that defendant does not provide goods and services to PBD at a below-cost price. Transfer pricing generally requires payment of cost or tariffed rates. Items covered by defendant and PBD's transfer pricing agreements include the non-tariffed business subscriber information available to PBD but not complainants, as well as services such as training, motor pool, human resources, billing, and collection. The transfer prices used are the costs of the work, but defendant does not track the cost to it of providing PBD with only subscriber information due to the way their computer linkage works. This is why understanding these internal operations is so important to assessing complainants' allegations.

3. Internal Computer Operations

Due to the shared internal computer system, defendant does teleprocess business listing information, including some billing and credit information, to PBD on a daily basis. This is done for the purpose of updating PBD's yellow pages data base with publishing data and billing and collection information. This business subscriber information is charged under the transfer pricing agreement, along with other bundled services, since no tariff exists to cover it. Defendant's witness, Abercrombie, testified that once Proposal No. 88120 (Proposal), containing revisions to the Reproduction Rights and Credit Tariffs, went into effect, PBD would purchase all its newly offered business subscriber information at these tariffed rates rather than continue

to obtain it under transfer pricing agreements. Daily update information would be available to all licensees under the Proposal. The Proposal would also permit electronic directories to utilize tariffed information. It would provide more timely access to business listing information, on both a daily or weekly basis, provide business billing name, address, and telephone information and include defendant's CLHs, and SIC codes as options available to licensees.

Although this Proposal was pending at the time of the evidentiary hearing, it was never adopted or withdrawn by defendant. Instead, in July, 1989, defendant filed a new application for the same revisions to the Credit Tariff but to create a new Business Directory File tariff. This application is still pending as A.89-07-030 and has been consolidated with the List OII. If approved, the application would provide complainants with almost all of the information they seek in this complaint proceeding, except PBD's proprietary CLHs.

An analysis of the internal operations discloses that some of the information requested by complainants is not given PBD, some is furnished for legitimate internal business purposes pursuant to an exception in the Credit Tariff, some is not permitted to be released to complainants under the terms of the Credit Tariff, and some is proprietary information of PBD which defendant cannot realease.

Although complainants assert that PBD has access to defendant's Universal Service Order (USO) form, we find that no such "form" exists. Instead, the mechanized Service Order Retrieval and Distribution (SORD) computer system processes order information obtained by defendant's customer service representative at the time of initial customer contact. This information goes through computer terminal devices in defendant's business offices and large computer facilities throughout California. The SORD system handles the mechanized USO and then distributes it through

various data systems in support of defendant's ordering process. The information is stored on magnetic disc devices and then transferred to defendant's computerized Customer Records Information System (CRIS) each night to be further processed in billing and white page directories once the physical work associated with the order is complete. Portions of the USO, if printed at all, are used for some physical work on the part of defendant's installation or central office forces. No "form" is passed from process to process within the CRIS white pages and billing systems and then passed on to PBD for its use. Instead, the entire mechanized order is passed through CRIS simply for retention purposes and much of the data is not used in CRIS processing.

Once the data is in CRIS, the order is broken down into records that are relevant to defendant's various master file processes. The data is contrasted with a master address table to further validate address information and assign directory and tax codes. At this point, the listing information is split out for defendant's Directory Assistance System from which the Reproduction Rights Tariff operates. Listing information is different than subscriber information. Information on the customer itself is subscriber information and is different from how a customer chooses to be listed or not listed in a telephone directory. Less than 10% of business numbers are unlisted and approximately 40% of residential numbers are unlisted. There are approximately 1,000,000 California business listings.

The listing information goes through a different computer channel to defendant's white pages system, the white pages master file or WP-10. In this WP-10 master file, all listings are assigned by billing account telephone numbers, and thereafter, contain whatever other information there is. All data is keyed to the billing account telephone number. This is the essential informational linkage in defendant's and PBD's shared computer

system. We find that this is the reason why defendant could not then provide much of the information requested by complainants in the form they requested. The billing account telephone number is utilized by defendant and PBD for communications between their integrated computer systems. Everything in the system is linked to the billing telephone number since it is an integrated system. We find credible Abercrombie's testimony that major cost and operational difficulties would be incurred if this linkage was required to be eliminated.

Downstream from this WP-10 master file is the WP-60 master file, which is the computer module that processes the business listing activity on a daily basis to PBD. The WP-60 master file does contain some account level information, billing name and address and any of the revenues pertaining to advertising. This is the primary feed going across to PBD. The business listing information is also sent through several internal paths to accomplish the update functions of add, change, and delete. No process, inside or outside the system, needs or sees the entire mechanized order, nor does PBD see it.

The USO which is processed through the SORD system and CRIS is not the only method by which relevant information is added, changed, or deleted from the system supporting the directory listings and exchange services. A variety of other sources of information are utilized. One is the caption data base, which is a CRIS function. If a business has one primary listing with other departments and numbers under its main listing, this data base permits caption listings to be changed and rearranged in an on-line system. It is not dependent on any USO form. Other internal CRIS processes update listing information within CRIS, such as community consolidation and zip code changes.

Only two modern computer data bases are used--a master address table and the caption data base. Otherwise, defendant's records are kept on a sequential computer system using batch

processing. What is available was developed over 20 years ago to fit exactly how PBD, then a division of defendant, prepares its white pages. Because this computer system has not been modernized into a data base system, it limits defendant's extraction capabilities and necessitates the bundling of information within the system. This is the reason why PBD has available to it much of the information complainants want to use. It is also why defendant cannot unbundle the information to provide complainants the nonconfidential portion not prohibited by its tariffs.

Within CRIS, there is not a single comprehensive statewide file of listing information. This is because the listing information was developed out of CRIS which is based on regional accounting office billing needs. For historic reasons, the listing information is split between northern and southern California. A new data base developed by defendant as a result of complainants' demands merged all information into one consolidated data base. At the time of hearing, defendant was preliminarily assessing moving the WP-10 master file of white pages listings to a data base environment. However, to obtain a preliminary design would take at least two years. Abercrombie testified this would be a major change and could be very expensive, resulting in loss of revenues.

As discussed below, the evidence disclosed that much of the information which complainants contend was furnished to PBD by defendant, was not actually available to it. Other available information was not used for competitive purposes.

We find that PBD did not have broad access to defendant's standing computerized information for residential information. Residential listing information is only provided to PBD in connection with scheduled extractions for PBD's directory publications, generally, on an annual basis. Extractions for defendant's street address telephone directories may be more frequent. No access is granted PBD to a data base for the purpose of obtaining residential information. Instead, defendant actually

extracts all the listings for the publication and provides them to PBD on magnetic tape. Because of the integrated computer system, this has been done since the 1960's. The specifications for this tape do not match the specifications of the tapes requested by complainants.

We find that in the normal course of business, delivery information is not provided to PBD. Instead, defendant provides the delivery information on residential subscribers on a daily basis to Product Development Corporation (PDC), which is the delivery and distribution vendor of PBD. Delivery information is also made available to PDC on magnetic tape for periodic routine directory distribution. It is used by PDC for distribution of printed directories to new and moved customers and to provide additional copies of directories to customers requesting them.

We also find that, contrary to complainants' allegations, defendant does not provide Standard Industrial Classification (SIC) codes to PBD, but instead develops them from the CLHs defendant obtains from business subscribers. PBD pays defendant under a transfer pricing agreement for obtaining the initial CLH. Only the yellow pages CLH that is provided at the initial customer contact with defendant's service representative is sold to PBD. PBD personnel then personally contact each business to determine whether a different CLH is desired for the yellow pages. One reason this verification is sought is that many times the assigned CLH is incorrect. Thus, PBD does not always directly utilize the CLHs as provided by defendant. We find that PBD's CLHs, as opposed to the ones purchased from defendant, are its proprietary information which cannot be sold by defendant. Defendant uses its CLHs to develop its SIC codes, which defendant uses internally for marketing purposes. This is why defendant is willing to use its service representatives to assign initial CLHs.

Service and equipment information, such as custom calling features, calling plans, trunking, Centrex versus PBX, what office

location is to install what numbers, who the installer should contact, and how defendant physically programs automatic number assignment are not furnished PBD.

Also contrary to complainants' claims, defendant also does not provide to PBD the identity and location of businesses under common ownership or control. Instead, only the billing account telephone number, which is provided to PBD for billing purposes, is given. No other information is provided to link accounts under common ownership. The billing account number does identify accounts that have a common bill. But we find that, as to billing name and address information, PBD does not use new connect information for directory preparation. Instead, PBD uses listed name, address, telephone number, and the defendant's assigned CLH and calls on the customer to verify all the information.

We find that the provision of the billing account telephone number to PBD is proper due to the billing arrangements between defendant and PBD and the computer linkages. The yellow pages customer receives one bill from both defendant and PBD. Credit information is also properly made available to PBD by defendant as a result of defendant performing billing and collection services for PBD. We find that the credit information is not used by PBD to produce white or yellow pages directories. It is only available to a limited customer service group of PBD and is not available to PBD's yellow pages sales force. The credit information is used by PBD to handle billing and collection account inquiries from its customers. Also, PBD works the collection aspect of its delinquent accounts turned over by defendant. The information is not used for sales regeneration or testing the customer's creditworthiness to obtain classified advertising. Instead, PBD normally runs its credit checks through TRW rather than using defendant's credit information to check out new directory advertisers. However, since PBD does receive billing inquiries from yellow pages customers, it needs access to the

credit data. The billing name and address are simply available to a small group of employees in PBD's customer service department so they can deal with customer inquiries. Customers do routinely call PBD to obtain information. Although defendant will take inquiries from PBD's customers about their bills, if the customers have other questions, they are handed off to PBD.

We have previously concluded that PBD does pay tariffed rates and receive some subscriber information under the Reproduction Rights and List Service Upgrade Tariffs. Our analysis of the defendant's internal computer systems discloses that the nontariffed subscriber information requested by complainants and allegedly given to PBD by defendant falls into three categories: 1) information not provided; 2) information available, but not used for yellow pages; and 3) information which is proprietary to PBD. In the first category of information not provided are the USO form, broad access to defendant's computerized residential information, delivery information, SIC codes, the identity and location of businesses under common ownership or control, and service and equipment information. The second category comprises the credit information and billing amount number furnished PBD due to internal computer linkages and in order to service customer inquiries. The third category is PBD's CLHs obtained as a result of its customer contacts.

Cutting across all three categories of nontariffed subscriber information sought by complainants are the facts that complainants did not need the information to produce yellow pages nor did complainants make full use of the subscriber information available to them. We find that defendant is correct in its assertion that the information which is essential to publication of yellow pages is information which any publisher can get through routine sales contact. Much of the information utilized in defendant's official yellow pages, published by PBD, is obtained by just such face-to-face sales force contact. When PBD does its

annual yellow pages sales canvassing, it contacts every customer, whether it has advertised in the yellow pages or not. On these sales calls, PBD verifies the CLH, reviews the next issue of the yellow pages and the advertising orders, the close dates and asks who to contact to make the sale.

In order to compete fairly, complainants claimed that Donnelley must be able to scope its directory exactly as PBD does and to stand user comparison with an incumbent utility directory in terms of accuracy, currency, and completeness in both content and distribution. They assert no other source of commercially acceptable telephone listing information, other than that in the possession of defendant, exists. Hillman testified that, unless the information is obtained from its primary source, a directory based upon it will not be as accurate, complete, or up to date as those of its competitors, so that consumers will not use it and therefore advertisers will not advertise in it. For these reasons, Hillman declared that complainants must have the same access to information as does PBD in order to remain competitive and accepted in the marketplace. No evidence to support such statements was offered.

We find that much of the subscriber information available to PBD is completely irrelevant to a competing directory publisher. Defendant's evidence showed that the top three publishers in California, including Transwestern, have used defendant's white pages listings to identify directory sales prospects and to produce directories. We find that complainants have not demonstrated why they cannot feasibly do so. Abercrombie, who had worked with PBD's data, sales, and business personnel for over three years, testified he had an understanding of what information from this historic computer feed PBD uses and does not use. We find that the order information was not used by PBD and that its mere availability, due to the computer linkages, is not sufficient to find defendant acted improperly.

We find that complainants did not carry their burden of proof that the differences which existed between Donnelley and PBD's access to information had a real and substantial adverse impact on Donnelley's ability to compete fairly. Instead, Hillman merely made conclusory statements to this effect. Hillman testified that Donnelley publishes 18 directories in five southern California counties. Donnelley Directory, an affiliated company, acts as both an independent publisher and agent for regional phone companies outside California. When Donnelley Directory acts as an agent of a regional phone company to publish a yellow pages directory, those other companies give it access to service order information of business name, address, other location, telephone number, heading or classification, can-be-reached number, other associated phone numbers, credit status, and other special information dependent on the account's status. However, no other competitors receive such data. Complainants do not act as defendant's agent and need the information for internal business purposes. Such internal business uses are the basis upon which the Bell Company and other Credit Tariff exemptions rest.

Although Hillman claimed that PBD relied upon its advantages of more current and extensive information in PBD's sales presentations to advertisers, complainants introduced no direct evidence to support this conclusory statement. Therefore, we reject this contention. Hillman also asserted conclusorily that Donnelley was prejudiced and disadvantaged in every aspect of the classified directory business due to defendant's practice of providing less information on a less timely basis to it than to PBD because Donnelley incurred increased costs and produced a less useful and valuable product with less advertising sales than it would otherwise be willing and able to produce. No statistical or other evidentiary support was provided to substantiate these allegations. We also reject these contentions.

We also find that complainants have not made full use of the information available to them. Hillman testified that the information obtained under defendant's tariffs is stale, being from 60 to 120 days old upon receipt. But, as of March 1988, he admitted the information was only 60 days stale under the revised Reproduction Rights Tariff. Hillman testified that a 25% to 35% turnover rate existed in businesses and that the Reproduction Rights Tariff information was too stale to be of value to Donnelley. No statistical proof documented the alleged turnover percentage. However, Donnelley only has received residential listings from defendant's alphabetical residence directories and did not use these in publishing its yellow pages directories. Hillman also admitted that Donnelley had yet to place an order for the magnetic tape product that defendant had offered under the revised Reproduction Rights Tariff. However, he stated that no product was ordered because it did not do exactly what Donnelley requested and for that reason Donnelley considered it deficient.

Hillman admitted that Donnelley Directory did not get any information from defendant for years in order to produce its yellow pages. Instead, the information was gathered by its sales force as best it could. He testified that Donnelley used mostly published products that are "in the street" as public information. Donnelley closes its directory sales about 12 weeks before publication. We find that Donnelley could update information during that gap period. Donnelley's sales campaigns vary in length and lead time and may end before the sales close date for a book. During that time Donnelley could still make changes to the information. Donnelley does tell its customers to notify it if the customers make changes in their PBD yellow pages listings. Hillman asserted that, although Donnelley could call on all businesses disclosed in white pages listings, an army of qualifiers would be necessary since there are 600,000 businesses in the five California counties

in which Donnelley operates. Yet, as we have observed, other independant publishers successfully do this.

Hillman admitted that just being the telephone company and having its name and reputation, plus the fact that it has been in the directory business almost one hundred years, makes it more difficult to compete against defendant's directories. Hillman also testified that the likelihood of errors and omissions, and the customer dissatisfaction and attendant legal liability, was significantly higher in competing directories than for PBD's. No statistics or further proof were offered to support this contention. Hillman stated that, compared to PBD directories, Donnelley directories were poor quality. Donnelley has a very high percentage of errors on the in-column free business listings but a relatively low percentage of errors in its display advertising. The types of errors were categorized as mostly publishing of dead listings of out-of-business customers, inaccurate listings because of changes of which Donnelley is unaware, or omissions of new businesses because Donnelley does not know about them, allegedly due to the lack of defendant's service order information. But we have found Donnelley does not make full use of available information to try to correct this problem.

Because of lack of service order information, Hillman claimed Donnelley cannot find the new businesses to call on them in order to ask for the information it needs. But Hillman agreed that the add record usually showed new connects, the delete reference usually showed disconnects and the change record normally recorded zip code changes. Hillman admitted that, when Reproduction Rights Tariff updates disclosed a change had been made in a listing, although no reason is indicated for the change, most data processors for independent publishers are able, by creating logic, to take the information and develop computer programs to analyze it and identify the nature of the change. We find complainants failed

to show why such an approach is not feasible for their directories and uses.

Hillman asserted Donnelley needed the defendant's credit information to see if a business was worth contacting in order to make a decision to send a salesperson. He contended Donnelley should not have to rely on outside credit bureaus, as PBD does, because PBD has the opportunity to access credit information to make decisions, whether PBD accesses it or not. We find PBD does not use credit information for this purpose and thus does not receive an advantage from its availability. Therefore, we reject this argument of complainants.

Hillman asserted that whether PBD used the information available on defendant's computer system or not, Donnelley should have equal access to the information in order to have the opportunity to compete fairly and equally with PBD. It is the opportunity to use the information that Donnelley claims it should have, regardless of whether PBD does in fact use it. Yet, we find the proof disclosed that complainants do not make full use of the information that defendant does furnish. Since PBD did not use the available information, we find that there was no proof of a competitive advantage to PBD based on mere availability of the information due to the internal computer linkages. Conversely, because complainants did not use tariffed information and outside services otherwise available to them, they did not prove a competitive disadvantage to them due to the lack of commensurate availability of the subscription information.

Finally, we find that no dollar figures were produced to support the alleged negative impact on Donnelley of this alleged lack of opportunities. Instead, Hillman relied simply on the fact that PBD's revenues were greater than Donnelley's. We find this insufficient to support complainants' claims of alleged competitive disadvantage.

However, even in light of our findings as to the nature of the subscriber information furnished and not furnished to PBD, we further conclude that defendant did respond to defendant's demands for release of more information in a more useable format. We find that, based on the internal operating constraints of defendant's computer system, defendant's course of conduct in dealing with complainants' subscriber information demands was proper and prudent. As disclosed by the evidence, the antiquated computer system which supports PBD is not flexible enough to also support the varying needs of all independent publishers. The white pages system within defendant's CRIS, utilized by PBD, was developed initially in approximately 1964 and utilizes second generation computer hardware and software. Defendant has upgraded the hardware, but the data files and much of the software that are utilized within the system still reflect 20-year old technology. The data content provided to PBD in this structural format has been relatively the same for the last 20 years. The outmoded technology is extremely difficult to program and does not reflect the more advanced technological efficiencies of today's modern computer technology. It is an integrated computer system not a modern shared data base.

As acknowledged by defendant, the technology could be changed with significant modifications and lead time. But, such changes are difficult and time-consuming. Only 1% of defendant's current programmers know autocode programming and only a handful are even conversant with autocoding in the simulation mode in order to work the necessary extraction logic to modify the system. Abercrombie testified that defendant did not believe the current tariff, under its present wording, requires defendant to custom-design a computer interface between its computers and the computers of each independent directory publisher, in order to provide them product under each's individual terms and specifications. We find

this interpretation justified, although we are re-examining the issue in the pending List OII.

Instead of modifying the older computer system to accommodate the needs of all independent directory publishers, Abercrombie testified that defendant believed another route provided greater flexibility and ability to meet competitors' needs. Therefore, defendant emphasized development of an internal computer system which utilizes relational data base technology and current programming capability in order to further process listing information.

This was felt necessary since CRIS is utilized to support defendant's obligation to produce and distribute directories for all areas in which defendant provides telephone services. As acknowledged by complainants, independent publishers often scope their directories differently than those of telephone companies, for selected communities and markets based on their own independent market analysis. The defendant's newer computer system accommodates this difference and contains flexible selection capabilities for selected geographic communities not conforming to the way defendant extracts its telephone books.

Additionally, independent publishers do not print directories on the same schedule utilized by defendant. Therefore, flexibility had to be developed to accommodate requests of different publishers throughout the year to obtain timely and accurate listing information rather than tying the publishers to the timing and limitations of the existing CRIS white pages.

We also find that the delay in seeking modifications to defendant's tariffs to accommodate complainants was justified. Abercrombie testified that no immediate revisions were made to defendant's tariffs because defendant had to determine whether the demand would exceed just one request from one customer. Complainants' request was the first request defendant had for other than printed directories. The second demand occurred almost one

year after complainants'. Abercrombie stated that, since defendant had no product available to match complainants' specifications, it conducted market research and developed a business case. Then, funding and approval to go forward was obtained, so a product could be developed. A proposal and advice letter were then prepared. Defendant developed the M and P and the billing and technical capability to provide it. The revisions to the Reproduction Rights Tariff were filed and approved by this Commission, resulting in the March 28, 1988 changes.

Based on Rule 35 restrictions, a business decision was made, in conjunction with marketing data, not to modify the Reproduction Rights Tariff to give publishers all PBD received. Instead, defendant decided to develop the product demanded, which was a smaller subset of information, available on either a weekly or biweekly basis. Offering business and residence listings separately required a new system because the Reproduction Rights Tariff is a reprint of defendant's Directory Assistance System (DAS). DAS does not indicate whether a listing is business or residential. Only the internal, integrated system to which PBD and defendant were linked marked listings R (residential), B (business), or G (governmental). This system, however, also contained the confidential Rule 35 information. Under the terms of Rule 35 tariffs, Bell Companies may have access to credit information and calling records not available to outside parties. As we later conclude, because of this, under CRIS, information need not be screened out of the computer system before being provided to PBD. However, for independent publishers, defendant must further process CRIS information to eliminate what it is prevented from releasing by the Credit Tariff. Instead of so modifying CRIS, the new data bases were developed.

On December 30, 1988, defendant filed the Proposal to further modify the Reproduction Rights Tariff and to liberalize the Credit Tariff to permit it to give complainants the credit.

information they sought. This was to be based on the new data base system. In March, 1989, defendant agreed orally to give complainants foreign exchange and remote call forwarding indicators. This also will be given to all other directory publisher customers. Beginning May 1, 1989, new connects and disconnects in the upgrade under the Reproduction Rights Tariff were to be delineated. At the time of hearing, defendant was working on additional listings and caption listings, including sequencing of captions.

In summary, we conclude that defendant did not make available to PBD much of the nontariffed subscriber information sought by complainants. We find PBD did not use information available to it to compete with complainants and that PBD used credit information properly to handle billing inquiries. We also conclude that complainants failed to carry their burden of proof that lack of subscriber information is the cause of an alleged competitive disadvantage. We declare that defendant followed proper procedure in developing revisions to present tariffs and new tariffs to satisfy complainants' demands, rather than modifying its CRIS computer system.

B. Rule 35, Customer Credit Information and Calling Records

An analysis of complainants' legal arguments must necessarily commence with an examination of this Commission's Rule 35 decisions, which mandated the language of defendant's Credit Tariff and the constitutional privacy protections behind it. The confidential treatment of much of the subscriber information sought by complainants was a major reason for defendant's refusal to supply it. Therefore, if defendant has properly interpreted its Credit Tariff and the constitutional rights behind it, defendant should not be liable for its refusals to provide this information.

The genesis of Rule 35 was D.88597 (83 Cal. PUC 559 (1978)), which arose out of three consolidated complaints regarding

practices of telephone companies as to nonpublished subscriber information. As a result of those complaints, much as this Commission has done with this instant complaint and the List OII, the Commission issued an Order of Investigation (OII) inquiring into the practices of all California telephone corporations in regard to: (1) disclosure of nonpublished numbers, (2) rates and charges therefor, (3) furnishing of subscriber credit information, the release of toll call records, and the release of any other subscriber information or records to persons, businesses, or governmental agencies. The OII was consolidated with the three individual complaints for policy reasons so that the resulting rules would be uniform, where possible, for all telephone companies.

In its survey of subscriber credit information practices of all telephone companies, the Commission found that Pacific Bell made subscriber credit information and telephone service records available to company employees when warranted to perform their jobs, to other Bell system or independent telephone companies upon request, and for Bell collection purposes. GTEC was found to release subscriber credit information to telephone companies when officially requested on a need-to-know basis or to collection agencies performing collection services for GTEC. Continental Telephone was found not to furnish credit information to anyone but company personnel authorized to receive such information.

In D.88597, this Commission found that "Legal process shall not be required where credit information is furnished to other company employees for business purposes or upon the request of other Bell companies in other states or independent telephone companies within California for the same purposes." (83 Cal. PUC at 569.) The Commission then analyzed and defined the scope of privacy to which subscribers were entitled. The Commission found that the constitutional right to privacy existed where there was a reasonable expectation that certain personal information would

remain confidential and used only for business purposes of the entity retaining the records. Toll records and credit information were declared to fall within the purview of such personal information entitled to constitutional privacy protection. Nonpublished information, however, was found not to relate to the personal affairs of a subscriber, but instead to pertain to the identification of the subscriber.

The Commission drew a line between identifying information of name, address, and telephone number of the subscriber and current biography information such as toll records and credit information which a subscriber would reasonably expect not to be disclosed. Thus, the Commission declared that an agency or outside entity requesting toll records and credit information must secure legal process, but legal process would not be required in order to obtain the identifying information of non-published name, address, and telephone number. Tariffs concerning such information were then prescribed by Commission order and non-published subscribers were required to be advised by bill insert of the tariffs. By contrast, the Commission concluded that: "A subscriber has a reasonable expectation that personal information, such as credit and toll records maintained by a company, are confidential and will be used only for business purposes, absent legal process. This expectation comes within the constitutional protection of privacy. Credit and toll information are matters of personal and confidential nature and since a constitutional right to privacy exists with respect to this type of information, legal process should be required in order to obtain it,..." (Id.) Corresponding tariffs were so ordered by the Commission, but their language was not mandated.

The Commission noted in D.88597 that the OII had also sought information on releases of subscriber information other than nonpublished, credit, and toll records, to persons, business entities or governmental agencies. The hearings were to examine

any actual and potential abuses of present practices in their regard along with recommendations to eliminate them. However, evidence disclosed that neither Pacific Bell, GTEC, nor Continental released subscriber information other than nonpublished, credit or toll records to outside agencies or entities, except in response to legal process and that no abuses, actual or potential, were in evidence. For this reason, the Commission took no further action in this area. One of our concerns in the List OII is to re-examine this issue in light of changing circumstances.

The Commission, in D.91086 (April 24, 1979), reopened the three consolidated complaints and the OII for further hearing. We permitted the appearance of parties new to the proceedings and declared that the hearings which led to D.88597 and the further hearings after reopening would result in a decision de novo which would supersede D.88597.

In the new decision (D.92860, 5 Cal. PUC 2d 745 (1981)), the Commission found that to establish the requisite uniformity of procedures desired under the terms of the OII, tariff publication of the rules established by the decision must be instituted. The Commission concluded that: "Name, address, and telephone number are matters of identity, do not give rise to an expectation of privacy, and are not entitled to the constitutional protection of privacy." (5 Cal. PUC 2d at 759-60.)[1] Toll records and credit information were again found to be protected. Publication of a tariff rule was found necessary to dispel the public misconception

1 This conclusion was later overturned by the California Supreme Court in People v. Chapman, 36 Cal.3d 98,112 (1984), in which it was found that a criminal defendant had a reasonable expectation of privacy in his/her name and address, as a subscriber to an unlisted telephone number. The court declared that "one's name and address as the subscriber to an unlisted telephone is information which one may legitimately seek to keep private." (36 Cal.3d at 111.)

about the scope of nonpublished service and to minimize public dissatisfaction with such service. As in the previous decision, subscriber credit information and calling records were found to be part of the personal history of the subscriber and entitled to privacy protection under the constitution. All telephone companies were ordered to adopt the tariff rules that Commission itself set forth in Appendices A and B to the decision. These rules were declared just and reasonable by the Commission and any future rules or practices of telephone companies differing from the Commission mandated rules were declared to be unjust and unreasonable. (5 Cal. PUC at 767.)

The Appendix B Credit Tariff as originally adopted contained two important sections germane to the instant complaint:

> "A. Definitions
>
> "(1) Credit Information
>
> "A subscriber's credit information is the information contained in the subscriber's utility account record, including but not limited to: account established date, 'can-be-reached' number, name of employer, employer's address, subscriber's social security and/or driver's license number, billing name, location of previous service. Not included in subscriber credit information for purposes of these rules are: nonpublished subscriber information, or subscriber's name, address, and telephone number as listed in the telephone directory."[2]
>
> * * *

2 The defendant's Credit Tariff in Section a(1) tracks this language except that it uses the term "customer" rather than subscriber.

"E. Exception to Procedure for Release of Credit and Calling Records

"(1) The procedure set forth above does not apply where the requester is a collection agency working for the utility on the subscriber's account or is an independent telephone company or Bell Company." (5 Cal PUC 2d at 771-72.)

D.93361 (July 22, 1981) (6 Cal PUC 2d 417) further modified D.92860 in regard to subpoenas but did not reword Sections A(1) and E(1) of the Credit Tariff.

Further petitions to modify these tariff rules resulted in the Commission's D.83-06-066 (June 15, 1983). D.83-06-066 did not modify the Credit Tariff's Section A(1) definition of Credit Information, but did modify its subsection E(1) exceptions. In its decision, the Commission noted that it had required the establishment of uniform rules on unlisted telephone numbers, corresponding names and addresses and release of subscriber credit information and calling records, "because the lack of uniformity and detail in telephone company tariff rules led to public misconception and dissatisfaction concerning the degree of privacy accorded this subscriber information." (D.83-06-066 at 2-3.)

GTEC and Pacific Bell requested that the Credit Tariff's Section E(1) exceptions be expanded to also include "other common carrier/interexchange carrier, Bell Operating Company" in addition to Bell Company. The only discussion of the change by the Commission was:

"In support of this rule change Pacific points out that companies other than independent telephone companies now provide telephone service to subscribers in the State. Just as it was necessary in the past for telephone companies to have access for credit information and calling records, so now it is necessary for these other newer companies, sometimes referred to as common carriers or interexchange carriers, to have access to this information.

> These companies similarly require the names and addresses of called parties in order to resolve billing problems relating to the provisions of these services.
>
> We see no objection to amending Rule E(1) in the manner requested." (D.83-06-066 at 12.)

There was no discussion of any need to remove the term "Bell Company" due to the insertion of the new term "Bell Operating Company." The Commission clearly had the entire language of the amended Section E(1) before it and could have removed the reference to Bell Company had it been deemed superfluous. However, the term Bell Company was retained. The Commission then later concluded that the amendment to Section E(1) was reasonable (D.83-06-066 at 15) and ordered Section E(1) amended to read:

> "(1) The procedure set forth above does not apply where the requester is a collection agency working for the utility on the customer's account or is an independent telephone company, other common carrier/interexchange carrier, Bell Operating Company, or Bell Company."
> (D.83-06-066 at 16.)

The Commission then ordered the all corresponding tariffs be amended by all telephone companies as reflected in its decision. The exceptions in defendant's current Rule 35 Credit Tariff contain the language quoted above and established by this Commission in D.83-06-066.

Later decisions, D.83-06-073 and D.83-09-061, dealt with modifications which did not affect Sections A(1) or E(1), except to renumber former Section E as Section D. Defendant's Credit Tariff, in its Section a(1), substitutes the term "customer" each place "subscriber" appears in the Commission mandated language. Defendant's Credit Tariff's Section d is worded identically to the Commission's Section D.

We first analyze defendant's interpretation of the scope of protection afforded business subscribers under the Credit

Tariff's definition of credit information. If that interpretation is proper, so was defendant's course of conduct in refusing to release the information.

As noted in Sunland Refining Corp. vs. Southern Tank Lines, Inc. (80 Cal. PUC 806 (1976)), "Tariffs should be given a fair and reasonable construction and not a strained or unnatural one." (80 Cal. PUC at 814.) Additionally, "all of the pertinent provisions of a tariff should be considered together." (Id. at 815.) If the language of a tariff is unambiguous, there is no room for construction and the provision must be applied in accordance with the literal meaning of the words used. Ad Visor, Inc. v. General Telephone Co. of California, 82 Cal PUC 685, 697 (1977).

We find, construing the plain meaning of the Credit Tariff's Section a(1), that it refers to all customers. The term "customer" is not modified by the adjective "residential." Nor is the term "subscriber" so modified. A customer or subscriber may be of any class entertained by the telephone utility--residential, business or governmental. Therefore, Section a(1) is applicable to all customers or subscribers. We reject complainants' contention that the references to a customer or subscriber's social security and drivers' license numbers evince an intent to narrow the tariff's application to only natural persons who are residential subscribers. The Section a(1) definition of credit information clearly defines a customer or subscriber's credit information as "the information contained in the customer's utility account record." The following references to the types of information which may be found in the utility account record are preceded by the words "including but not limited to." This wording contemplates that other types of information exist in a customer or subscriber's utility account record. Such information can include business subscriber information, including service address and distribution information.

We find unpersuasive complainants' argument that PU Code § 2891, which applies solely to residential subscribers, supercedes this Commission's Rule 35 and renders it applicable only to residential subscribers. Section 2891 merely proscribes this Commission's conduct in regard to any present or future interpretation of Rule 35 as it relates to residential customers or subscribers. It does not render nugatory this Commission's power under our Rule 35 mandate to retain or reformulate the tariffs as to business or governmental subscribers or our ability to change Rule 35 in their regard should we find it warranted, as in the pending List OII proceedings.

Defendant's interpretation of its Credit Tariff to cover business subscribers is also consistent with this Commission's recent decisions on defendant's enhanced services products which are marketed mainly to business subscribers. In D.89-05-020, we declared: "Pacific should not provide BNA [billing name and address] to any other enhanced service provider pursuant to its tariffs until it receives further direction on this subject from the Commission." In our recent D.90-07-052 enhanced services decision, we reiterated the applicability of this condition to defendant.

We find that defendant's Credit Tariff reflects the wording mandated by this Commission and has been properly applied by defendant to cover business directory subscriber information falling within its parameters.

Because defendant has properly interpreted the present scope of Section a(1) of its Credit Tariff, it must comply with its terms when faced with requests to release credit information. Tariffs have the force and effect of law. (Ad Visor, Inc., 82 Cal PUC at 698.) "Tariffs duly published and filed with the Commission, including rules published therein, have the force and effect of a statute and any deviation therefrom is unlawful and void, unless authorized by the Commission." (Sunland Refining

Corp., 80 Cal PUC at 809 (citations omitted.)) We find that defendant interpreted its current Credit Tariff properly and acted lawfully in refusing to deviate from it. By filing for revisions to the Credit Tariff in its attempts to satisfy complainants' requests, defendant has followed the correct course.

One of the purposes of the pending List OII is to determine whether subscriber information protected by Rule 35 tariffs should properly exclude certain classes of business subscriber information. We welcome complainants' comments in that proceeding and note that Donnelley has filed both initial and reply comments therein. However, under the existing Commission mandated Credit Tariff, prior to any future decision in the List OII, defendant's application of its Credit Tariff as a basis for its refusal of complainants' requests for credit information correctly interpreted Rule 35 as presently written. As in the original proceedings which culminated in the Credit Tariff's language, for policy reasons, decisions on such modifications should be made in a fully participatory proceeding so that resulting rule changes will be uniform for all.

We also observe that, in defendant's various requests for interim authority to provide enhanced services, Donnelley has stridently opposed grants of interim authority for defendant to compete with Donnelley. Instead, in these proceedings Donnelley has urged full completion of the regulatory process, including determinations on the propriety of releasing billing name and address, before defendant is allowed to compete. The underlying notion of our Phase II decision, D.89-10-031, in Order Instituting Investigation (I.) 87-11-033, is the right of equal competition so that competitors know that a local exchange company's monopoly position will not be used against them. But, the level playing field so envisioned is a two-way street. Utilities have the right to know that their position as regulated entities, with the attendant constraints upon their actions, will not be used against

them, as complainants have attempted to do in this complaint proceeding. Complainants cannot use the regulatory framework against defendant on a selective basis.

We emphasize the fact that the original OII, forming a part of the consolidated proceedings which resulted in the Commission's formulation of Rule 35 tariffs, sought to explore the release of other types of subscriber information in order to promulgate uniform rules to prevent actual and potential abuses associated with their release. However, when Rule 35 was promulgated, prior to the break up of the Bell system, no competitive usage of subscriber information was made by independent directory publishers nor did electronic or taking yellow pages applications exist. It is because of complainants' increasing demands on defendant and because of defendant's constraints due to its tariffs as approved by this Commission, that we opened the List OII. Its purpose is to determine whether changes in the competitive marketplace, with altered demands on use of information, necessitate revisions in this Commission's present policies.

We also declare that defendant has properly treated PBD as a "Bell Company" subject to the exception to the nondisclosure requirements of the Credit Tariff due to the language of Section d." Our reasoning in support of this conclusion is also germane to the remainder of complainants' claims in this proceeding. This is because the relationship to defendant of PBD, as its direct subsidiary, and the consideration of its revenues in setting defendant's basic rates, places it in a special category of regulatory affiliate.

As noted in General Telephone Company of California vs. Public Utilities Commission, 195 Cal. Rptr. 695, 701 (1983) (en banc), the utility enterprise must be viewed as a whole, without regard to the separate corporate entities. See also In re Westgate-California Corp., 72 Cal PUC 26,38 (1971) (corporate

combination consisting of parent and subsidiary may be considered one operation for purpose of regulation). The fact that a party may have more than half his business not subject to Commission regulation does not render the portion of his business which is subject to regulation immune from the Commission's proper regulating supervision. (Landis v. Railroad Commission, 220 Cal. 470, 475 (1934) (en banc)). For these reasons, rate setting may take into account more than just the sales of defendant. This is the principle behind PU Code § 728.2(a) which requires this Commission to "investigate and consider revenues and expenses with regard to the acceptance and publication of such [classified] advertising for purposes of establishing rates for other services offered by telephone corporations." While Section 728.2 does presently deprive this Commission of jurisdiction to actually regulate commercial advertising in yellow pages or the classified telephone directories themselves, it does not prevent this Commission from recognizing the important interrelationship between PBD and defendant that justifies the special treatment currently afforded it. Section 728.2 also does not prevent this Commission from reviewing that relationship in the List OII and making decisions as to whether change is proper under today's current competitive climate.

PBD began operations as simply the directory division of the defendant. In this Commission's D.85-12-065 (December 4, 1985), we granted defendant the right to establish PBD as a wholly owned subsidiary in order to serve the public interest in telephone service and revenues.

When we issued D.85-12-065, we observed that defendant was requesting the transfer of the directory properties to a separate subsidiary because of its need to preserve directory revenues by competing on an equal basis with directory and print media competitors. At that time, the Commission declared that "We are concerned that the emergence of competing directory services

and providers will erode existing contribution from directory operations. The development of expanded services by Pacific Bell may protect this contribution and hopefully increase it." (D.85-12-065 at 2.) To that end, approval of the transfer of the directory operations to PBD was conditioned on the requirement that revenues and expenses of all PBD operations be considered in setting defendant's rates. However, we stated that if PBD should enter lines of business which eroded or stifled the directory contributions to telephone revenues, an appropriate amount of revenues would be imputed when setting defendant's rates. And, to ensure the ratepayers' interest would be protected, we declared that PBD's operations would be subject to thorough review and audit by this Commission's staff in conjunction with defendant's rate proceedings. PBD's book and records must be made available for our staff's review and inspection upon request.

Under our new incentive ratemaking arrangement with defendant, PBD's revenues remain a part of defendant's rates, but are subject to the general revenue sharing mechanism established in D.89-10-031.

In D.85-12-065, we also specifically forbade PBD's entry into the electronic publishing business absent further authority of this Commission. We then required that defendant not undertake new PBD subsidiary operations until Commission staff had approved, among other things, a description of its proposed new lines of business and allocations of revenues and expenses for operations.

We also note that PBD is distinct from PacTel Publishing, which is a separate publishing subsidiary of Pacific Telesis that pursues publishing activities outside the scope of the traditional directory arena.

We find that, as comtemplated in our original Credit Tariff Decision, D.88597, the use of the credit information by PBD has been for internal business purposes, as is the intent of the Section d exception for its use by a Bell Company. The fact that

PBD is not a Bell Operating Company, as that term is currently used and understood, does not exclude it from qualifying as a Bell Company subject to the tariff's exceptions.

We find that, under Commission decisions to date, PBD, as a wholly owned subsidiary of defendant, is a different department in one business enterprise. PBD's revenues for its classified advertising sales support basic telephone service to ratepayers. Although not heard as evidence in this proceeding, for appropriate reasons, examination of the impact on ratepayers of changes in the special relationship of PBD to defendant along with corresponding changes in the Credit Tariff are properly to be considered in the List OII. We welcome complainants' comments and evidence on these issues in that investigation. But, under present operating conditions, PBD is a Bell Company subject to the tariff's exceptions.

Much as in the proceedings leading to the imposition of the Credit Tariff, it is necessary to make an orderly investigation into the public perception regarding the nature of such information and its possible uses and to ensure its uniform treatment with the knowledge of the subscribing public. The need for such safeguards is why defendant's A.89-07-030, to modify its Credit Tariff and establish a new Business Directory File Tariff to satisfy complainants' demands, was consolidated with the List OII.

We conclude that the Credit Tariff does apply to the business subscriber information sought by complainants and that PBD was properly treated as a "Bell Company" able to use confidential information for internal business purposes. Therefore, defendant acted properly when denying complainants' requests for the same information given PBD.

As a result of our findings as to PBD, we move now to the basic flaw in complainants' assertions that defendant's differing conduct and supply of information to PBD versus complainants amounts to discrimination against complainants, undue preference to

PBD, and undue disadvantage to complainants under PU Code §§ 451, 453, and 532. The keystone of complainants' arguments is that PBD and complainants are customers of the same class. Based on this faulty assumption, complainants argue their claims of discrimination and prejudice under Sections 451, 453, and 532. We have found that PBD is justifiably treated presently as a different department in defendant's business enterprise. For this reason, defendant's arguments that PBD occupies a special position, as its vendor or subcontractor, are immaterial to our analysis. What is material is that PBD and complainants are not presently customers of the same class.

C. PU Code Section 453

PU Code Section 453(a) declares that:

> "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."

In Sunland Refining Corp., the Commission observed that a prejudice, disadvantage or unreasonable difference under § 453 "can only be established when comparison is made between situations which are comparable." 80 Cal PUC at 816. Thus, not all inequity of treatment is entitled to redress under that statute. As we have noted previously:

> "Discrimination by a public utility does not mean, merely and literally, unlike treatment accorded by the utility to those who may wish to do business with it, but refers to partiality in the treatment of those in like circumstances seeking a class of service offered to the public in general. With respect to a utility's offer to serve the general public or a limited portion thereof, as evidenced by its schedules of rates and rules, the offer is made, to the extent of the utility's ability to provide the service, to serve impartially any member of the public who may qualify under the rules and is willing to pay the rates; here the duty to serve impartially is correlative with the right to demand and receive the service applied for."

International Cable T.V. Corporation vs. All Metal Fabricators, Inc., 66 Cal PUC 366, 382-83 (1966) (emphasis added). In International Cable, we found that the complainant was not in like or similar circumstances with a customer who contracted with the utility outside its tariffs and, therefore, no § 453 discrimination had occurred.

Similarly, differences in operating conditions may justify substantial differences in rates, so that no violation of

the statute occurs. See Southern Pipe and Casing Company vs. Pacific Electric Railway Company, 49 Cal PUC 567, 569 (1950). Complainants admit the application of this principle but assert it cannot apply to affiliate transactions. They base this contention on cases involving stockholders, subscribers, and a parent company.

Even if discrimination exists, for preference or prejudice to be unlawful under § 453, "the preference or prejudice must be unjust or undue. To be undue, the preference or prejudice must be shown to be a source of advantage to the parties or traffic allegedly favored and a detriment to the other parties or traffic." California Portland Cement Company vs. Union Pacific Railroad Company, 54 Cal PUC 539, 542 (1955). See also, In re Western Airlines, Inc., 62 Cal PUC 553, 562 (1964). The discrimination must also be the proximate cause of the injury which is the source of complaint. Ad Visor, Inc., 82 Cal PUC at 698. Discrimination forbidden by the statute "must be undue, taking into consideration all of the surrounding facts and circumstances." In re Atchison, Topeka and Santa Fe Railway Company, 43 CRC 25, 34 (1940).

We find that the disparity of treatment between PBD and complainant is not undue preference, disadvantage or discrimination violative of § 453 because PBD and complainants are not in a comparative situation. As we discussed in our analysis of the Credit Tariff, the special treatment of PBD is warranted and PBD is not in like circumstances with complainants under the present state of the law and this Commission's policies.

Differences in operating conditions between PBD and complainants also justify their disparate treatment. In our previous analysis of defendant's operations, we found that defendant's system was designed specifically for its own internal operations and is antiquated by today's technological standards. We find that defendant has acted properly to attempt to establish new data bases in order to accommodate the demands of complainants rather than attempting to modify the older system. Because the

entire system is driven from the billing account telephone number which forms the essential link in the computer systems, this difference in operating conditions presently justifies the special subset of computer feed information going to PBD.

We have also previously found that defendant correctly interpreted its Credit Tariff to prevent the release of much of the information requested by complainants, which we have found can properly be given PBD. This also justifies the disparate treatment. Both defendant and PBD need access to the credit information since defendant actually sends out the bill for PBD's directories but PBD does receive and handle customer inquiries and pursue collection of delinquent accounts. Complainants, on the other hand, would be responsible for billing their own customers rather than working with the integrated system that defendant now utilizes. In addition, the proof showed that PBD does not make use of the credit information to qualify the advertisers, but instead uses TRW, an outside credit agency. Thus, it is not a source of advantage to PBD.

We reject complainants' assertions that justifications due to differences in costs of provision of service or operating conditions do not apply to utility affiliates, based on cases involving shareholders, subscribers, or parent companies. Review of In re Narbonne Ranch Water Company, 31 CRC 548 (1928) discloses a bald rate difference, based only on water users' status as stockholders versus nonstockholders, absent any other justification, was found discriminatory. Similarly, in In re Raymond Telephone Company, 30 CRC 64 (1927), customers in the same service area who were charged different prices to use the same toll line, dependent on whether they were subscribers of the line's owner, were found to be charged discriminatory rates, as no other justification existed. And, in In re Aptos Water Company, 32 CRC 628 (1929), the parent company water user was not billed the same tariffed rates as customers, but instead was supplied free water.

The proof in this complaint proceeding showed that, when tariffed rates exist, PBD has paid them. When information is not tariffed, transfer pricing regulations were followed. And, operating condition justifications also are present. Therefore, the rationale of cases cited by complainants is not applicable.

Additionally, the proof adduced at hearing leads us to conclude that complainants have not carried their burden of proof that the alleged discrimination is the proximate cause of their alleged competitive injury. Instead, the proof only showed that much of the information furnished PBD was not used by it in competition with complainants and it is therefore not a source of advantage to PBD. Proof also showed complainants could have used data processing and sales calls to obtain much of the information they need to produce their directories. The fact that if may be easier to obtain the information direct from defendant does not rise to the level of an illegal competitive advantage to PBD.

Much as observed in International Cable, defendant's offer to serve customers is made to the extent of its ability to provide the service, as evidenced by its tariffs, to those who qualify under their rules. Defendant has found correctly that, as presently written, the tariffs do not cover complainants' requests for additional information and the Credit Tariff forbids release to complainants of much of the information demanded. When imposing the language of the tariffs, we specifically declared any future rules or practices deviating therefrom would be unjust and unreasonable. We declare that no violation of PU Code §453 occurred in the course of defendant's conduct in following the Credit Tariff.

We also find that the defendant has done all it could properly do under this Commission's present constraints in order to accommodate complainants' requests. Defendant has met with complainants and conducted marketing studies and prepared business plans. It then sought modifications to its existing Credit Tariff

and Reproduction Rights Tariff to accommodate complainants and other independent directory publishers' demands for new and different sources of subscriber information for previously uncontemplated purposes.

Whether new competitive conditions and possible uses of information justify imposing operational changes on defendant, if privacy rights permit, with the attendant impact on ratepayers, is exactly what we will consider in the pending application of defendant to modify its Credit Tariff and establish the new Business Directory File tariff and in the List OII with which it is consolidated.

D. PU Code Section 451

PU Code Section 451 requires that:

> "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

Complainants contend that the disparate treatment of PBD also amounts to forbidden discrimination under § 451 because defendant has failed to provide them with the information they want, in the format they want, and with the timeliness they demand and, therefore, has not rendered the requisite service. However, under § 451, discrimination per se is not forbidden; only undue or unreasonable discrimination is not allowed. NAACP vs. All Regulated Public Utilities, 71 Cal PUC 460, 464 (1970).

In refusing to provide complainants the information as requested, defendant has followed the dictates of its tariffs and attempted, as best it could, to work within the constraints of its internal computer systems from which the subscriber information is derived. The Reproduction Rights Tariff does not presently permit use of listing information for electronic or talking yellow pages

as requested by Donnelley. The List Rental Tariff does not permit the use contemplated by D&B-IR. The Credit Tariff bars the release of most of the subscriber information requested by both complainants.

As we noted in our discussion of defendant's interpretation of its Credit Tariff, tariffs have the force and effect of law and must be followed unless deviation is authorized by this Commission. If tariffs are clear and unambiguous, different requirements may not be inserted in the tariffs, even though a change might seem more reasonable and equitable. Petaluma and Santa Rosa Railroad Co. vs. Commodity Credit Corporation, 83 F. Supp. 639, 641 (N.D. CA 1949), aff'd, 190 F. 2d 438 (1951). As noted in Petaluma and Santa Rosa Railroad, if a situation arises after a tariff rule is framed that was not dealt with in the tariff, a tariff cannot be conformed to fit the present circumstances. Instead, the tariff rule must be applied as it existed at the time the action subject to the tariff occurred. The utility must obey its tariffs, and if for any reason tariffs are objectionable, then the utility's remedy is to change the tariff, not to disregard it. Lavensaler vs. Kuppinger, 29 CRC 77, 81 (1926). See also In re Pacific Motor Tariff Bureau, 39 CRC 551, 558 (1936), (if tariff rules are unenforceable, it is no justification for their violation, rather steps should be taken to remove them from the tariff) and Transmix Corporation, 9 Cal. Rptr. 714, 719 (1960).

We find that, during the time period covered by this complaint, defendant has provided just and reasonable service as contemplated by § 451. In adhering to its published Credit, List Rental, and Reproduction Rights Tariffs, while attempting to utilize the mandated Commission procedure to change them to satisfy complainants, defendant has acted properly. This Commission observes that complainants are not regulated entities and, as private corporations, may act faster under less constraints and

with concern only for their shareholders. By contrast, defendant must act to the benefit of ratepayers and the general public while operating under the dictates and constraints of the regulatory scheme. Defendant's conduct in seeking new and revised tariffs and this Commission's subsequent commencement of the List OII, in response to complainants' demands, affirms that the regulatory process in fact works, although perhaps not as quickly as complainants might wish. Defendant has already modified its Reproduction Rights Tariff once and has pending before this Commission its application to modify the Credit Tariff and provide the business subscriber information complainants desire as the newly tariffed Business Directory File. Due to the concerns raised by complainants herein, the Commission opened the List OII to address the broad public policy issues surrounding complainants' demands and defendant's attempts to accommodate them. Those proceedings will provide this Commission the full range of information necessary to decide whether its policies, and the corresponding tariffs implementing them, should change. We recognize that both defendant and the Commission have an obligation to respond to competitive changes in the telecommunications and information services industries. But, defendant's conduct in light of the present regulatory realities was proper. These regulatory realities, and defendant's course of conduct, may or may not be changed by the outcome of the List OII.

E. PU Code Section 532

PU Code Section 532 requires that a public utility adhere to the rates and charges in its applicable tariff schedules on file and in effect at the time and forbids a utility from extending any form of contract, facility, or privilege except such as are regularly and uniformly extended to all corporations and persons. However, § 532 permits the Commission by rule or order to establish such exceptions from the operation of the statute's prohibitions as it may consider just and reasonable for each utility.

Complainants contend that the transfer pricing agreements between PBD and defendant, existing outside defendant's tariffs, violate § 532 because, pursuant to them, defendant provides PBD information not available to complainants under tariff. Defendant argues such transfer pricing is mandated by the regulations under the federal Communications Act of 1934. The pertinent regulation, 47 C.F.R. Section 32.27(c), requires that assets be sold or transferred to affiliates from regulated carriers at prices reflected in tariffs on file with a regulatory commission or at a prevailing price held out to the general public or, if there is no tariff or prevailing price applicable, at the higher of cost or fair market value. This is also consistent with this Commission's policy on transfer pricing. See, D.86-01-026 and D.87-12-067. However, because PBD is a direct subsidiary of defendant, the regulated utility, our transfer pricing policies, which apply to Pacific Telesis affiliates, technically do not apply. It is because defendant and PBD agreed in the January 22, 1986 letter agreement, to apply transfer pricing policies, that they are being applied.

We find that when tariffs do exist for information furnished by defendant to PBD, PBD does pay the tariffed price. It is only the information resources which do not fall within the parameters of defendant's tariffs that are subject to the transfer pricing agreements. Though not priced separately from other nontariffed services, the information used is paid for by PBD. We have previously concluded that much of the information complainants contend is furnished PBD, is not given to it and that some information which is available is not used by PBD to produce its yellow pages. Defendant's pending application A.89-07-030 for the new Business Directory File tariff and Credit Tariff modifications would place all information furnished to PBD under tariff. At that time, PBD would pay tariffed rates for all such information.

However, that application has yet to be approved by this Commission.

We find that under the present state of defendant's tariffs, it acted properly under § 532 by utilizing transfer pricing agreements as required by FCC regulations consistent with this Commission's policies. We find that the circumstances warrant application of the transfer pricing agreements outside those tariffs. This may change as a result of the ongoing List OII and A.89-07-030 proceedings, but during the time period covered by the instant complaint, no violation of § 532 has occurred.

F. The Offers of Proof

We have found that no violations of PU Code §§ 453, 451, or 532 have occurred and that the Credit Tariff, in its present form, has been properly applied by defendant. We now consider complainants' contentions that we should consider, in this proceeding, the parties' offers of proof and conduct further hearings thereon. In their offer of proof, complainants have alleged unreasonable terms in the Reproduction Rights and List Rental Tariffs and, in essence, have requested that the tariffs be rewritten. Defendant's offer of proof addresses the privacy, ratepayer subsidy, and other ramifications of the requests for tariff changes.

This Commission is not limited in the exercise of its expertise and statutory authority by the solutions proposed by litigants. In re City of Visalia, 69 Cal PUC 310, 319 (1969). As noted in In re Private Crossing in Fresno County D.78339 (February 22, 1971), "Any request for a ruling not actually required to resolve a controversy is addressed to the Commission's discretion." D.78339, mimeo. at p. 2. When no necessity for such a ruling is presented, the Commission may postpone a determination until the matter has been argued by parties with fully adverse interests. Id. In order for the Commission to consider alternate methods of achieving objectives sought in a complaint proceeding,

the Commission may designate proceedings in which to consider the relief sought. Com-U-Trol Corp. v. General Telephone of California, 74 Cal PUC 593, 597 (1973). In Com-U-Trol, we observed that a utility tariff which is significantly anticompetitive can be justified by an overriding public interest. We noted that proceedings more generic in nature, rather than a complaint with one utility represented and one class of product, were the most appropriate. This is true of complainants' allegations made in their offer of proof and defendant's rebuttal offer thereto.

The public interests to be considered can be economic, social, and political and the Commission must place the important public policy in favor of free competition on the scale along with other rights and interests of the general public in weighing evidence and arguments. Northern California Power Agency v. Public Utilities Commission, 5 Cal. 3d 370, 377-379 (1971) (en banc). While the rights of litigants are important, so are the rights of the general public and this Commission, when acting, must take into consideration the impact of such action on the general public too. In re Golconda Utilities Co., 68 Cal PUC 296, 300 (1968). The lawful duty of the Commission is to attempt a solution of the problem presented which is calculated to comport with the public interest. In re AT & SF Railway Co., 63 Cal PUC 625, 627 (1964).

> "It is not always necessary for the Commission to pass upon or resolve...matters in the proceedings in which they came to light. Due process may require that parties affected by a prospective determination be given appropriate notice of its consideration....The Commission may desire to develop a complete record on the facts disclosed." (Golconda, 68 Cal PUC at 302.)

In order to establish such a complete record comporting with due process, we have opened the List OII and consolidated with it defendant's application for the new Business Directory File Tariff and changes in the Credit Tariff, developed in response to

complainants' requests for subscriber information. Applications of individual utilities are sufficient reason to order the Commission's own inquiry on its own initiative in order to consider the interests of the public and utilities alike. In re Northern Electric Railway Company, 1 CRC 81, 82 (1912). This power arises from the fundamental nature of this Commission, orginally created by the California constitution in 1911 as the California Railroad Commission.

> "Although [the Commission] has been termed a 'quasi-judicial' tribunal in some of its functions, its powers and duties go beyond those exercised by the judicial arm of government. A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.
>
> "The powers and functions of the Railroad Commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. Hence, unless the act requires the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order."
>
> * * *
>
> "It will be noted that in the exercise of all of these powers public convenience and necessity is the criterion of administrative judgment."

(Sale v. Railroad Commission, 15 Cal 2d 612, 617-18 (1940). (en banc)).

The issues raised in the offers of proof are important ones; however, these issues are now being raised in the List OII and consolidated proceedings. That is the proper forum for their consideration.

We, therefore, conclude that no violations have been shown under PU Code §§ 453, 451 or 532 nor has the present Credit Tariff been misinterpreted by defendant. Accordingly, the complaint should be denied and the offers of proof should not be considered in this proceeding. Thus, we find defendant's treatment of PBD versus complainants was justified under present law, Commission rules and decisions and defendant's internal operating conditions during the time period covered by complainants' complaint. Whether the defendant's tariffs and operational ties to PBD should now change, in light of any altered regulatory and competitive realities, is the decision we will make in the pending List OII.

Comments on Proposed ALJ Decision

The main thrust of the comments of both the complainants and ANADP are that the decision resolves issues not set for hearing thus denying them their due process rights. Both complainants and ANADP now contend that the January 24, 1989 ALJ ruling, narrowing the scope of the proceeding, limited discovery and testimony. Yet, in their opening post-hearing brief, when discussing the scope of the proceedings, hearing counsel for complainants (who did not represent complainants in filing the comments) stated:

> "Administrative Law Judge Bennett, in her January 24, 1989 Administrative Law Judge's Ruling, adopted a more narrow view of the proper issues before the Commission than that set forth in Section 1702. In the January 24 Ruling, the question of the lawfulness (including, but not limited to, reasonableness) of Defendant's current Reproduction Rights and List Rental Service Tariffs was excluded from

> consideration in this proceeding. Subsequent to that Ruling, oral assurances were given by the Administrative Law Judge that this proceeding did encompass the issues of Defendant's discriminatory treatment of PBD and Defendant's nontariffed provision of services to PBD."

(Opening Brief at pages 10-11.) Indeed, hearing counsel for complainants, at an April 17, 1989 hearing before ALJ Weissman, on motions to strike portions of written testimony, responded to defendant's counsel's statements that the scope of the case was narrowed by the January ruling: "That ruling was a discovery ruling. That ruling was not a ruling as to the scope of the testimony, but an appropriate discovery ruling given the fact that the information was best obtained from parties other than us in the first place." (RT at 38.)

Complainants also based claims, that the scope of the decision exceeded the issues set for hearing, on a series of conference calls between complainants, defendant, DRA and GTEC. Yet on April 20, 1989, the first day of hearing, hearing counsel for complainants summarized these conversations:

> "The resolution, as I understand it, was that the parties were to make offers of proof as to the evidence they would present if this broader set of issues were considered, and <u>that the Administrative Law Judge, and I suppose ultimately the Commission, would determine whether that proof would be heard, and if so, in what context and in what procedural framework.</u>" (RT at 53, emphasis added.)

In response to this, counsel for defendant queried: "Are we saying that the reasonableness issues are out of the case for purposes of this morning's hearings?" (RT at 54.) ALJ Weissman responded:

> "Well, no. In the discussion yesterday, Mr. Whitehouse, on behalf of his clients, expressed concerns as to whether or not the rulings that were issued last Monday on the 17th in any way expanded the scope of the

> hearings as it was perceived based on the January 24th ruling from ALJ Bennett.
>
> And my advice to Mr. Whitehead and to Pac Bell was that if there was concern that there was a need to introduce more evidence based on the Monday rulings, that an offer of proof would be the proper next step in order to determine whether there is a need to open up the hearings for new evidence.
>
> The characterization of reasonableness issues is not coming from the Bench or Commission; it is coming from parties. And I am not seeing a division of the case into reasonableness and nonreasonableness issues at this point.
>
> I am going to strain not to restate or rephrase the rulings I gave on Monday. I tried to make them as clear as I could.
>
> If there are specific questions based on those rulings, maybe we could deal with that. But issues as to whether there is a need to expand this hearing in any way, or to open the hearing up for more evidence, it will have to be based on showings from the parties and demonstrating the need to present more evidence." (RT at 54-55. Emphasis added.)

It is clear to us that at no time was a decision made by the ALJ to bifurcate the hearing and try the so-called "reasonableness" issues in a second proceeding. All ALJ Weissman stated was that a decision would be made whether there was a need to open further hearings in the proceeding. That decision was made by ALJ Watson in her proposed decision. We support her findings that no further hearing is necessary and find she did not violate due process rights when making such a finding.

We also reject the contention due process rights were violated because the case was not decided on the issues the parties thought it would be. We note that, immediately after the quoted statements by ALJ Weissman at RT 54-55, hearing counsel for complainants admitted that:

> "And we've made some assumptions up until now about where that line was [drawn in ALJ Bennett's ruling], and I think we're now discovering those assumptions may not be subject to absolute concurrence at present by the Administrative Law Judge...." (RT at 55.)

Not only was the scope of issues to be tried not narrowed as contended by complainants and ANADP, it is also clear any such perception of narrowing was based on mere assumptions of counsel. Quotes from the transcript, found throughout complainants' and ANADP's comments, of statements made by counsel prior to hearing are assumptions or speculation of parties, not a ruling of the ALJ or Commission. For this reason, Todd Freight Lines, 63 Cal. PUC 723 (1964), cited by complainants and ANADP, is inapplicable. The parties' understandings of the scope of a hearing do not bind the Commission. See, Market Street Railway Company v. Railroad Commission, 324 U.S. 548, 558 (1945) (though a decision and its grounds are unexpected, surprise is not necessarily violation of due process); Ashbury Truck Co. v. Railroad Commission, 52 F.2d 263, 268 (to meet due process requirements, Commission need not follow any particular form of procedure); City of Visalia, 69 CPUC 310, 319 (1969) (Commission not limited by solutions proposed by litigants). See also, Pacific Telephone and Telegraph Company, 48 CPUC 461, 473 (1949); Carnation Company v. Southern Pacific Company, 50 CPUC 443, 444 (1951).

We also note that ANADP did not appear at the hearing of this proceeding nor did it file briefs. Although in its comments ANADP contends that it was granted intervenor status only on the condition it not broaden the issues in the case, this ruling was based on ANADP's own request. In its March 6, 1989 petition for leave to intervene, it stated: "If intervention is allowed, the Association will not seek to broaden the issues beyond those raised by the pleadings of the complainants and defendant." (Petition at

paragraph 5.) In ANADP's April 6, 1989 reply to defendant's opposition to its intervention, it stated:

> "The Association disclaims any intent by its intervention to broaden the issues beyond those set out by ALJ Bennett's ruling of January 24, 1989 or by any subsequent ruling of the assigned administrative law judge. Independently of this disclaimer, Rule 53... makes it clear that the presiding officer may, by the order allowing intervention and by rulings at the hearing, prescribe and control the degree of the Association's participation in the proceeding. In view of the Association's disclaimer and the administrative law judge's power to control the proceeding, Pacific's allegation that the Association seeks to broaden the issues herein does not provide a basis for denial of the Association's petition." (Reply at p. 2, emphasis added.)

We find that ANADP was not required unwillingly not to broaden the issues. Instead ANADP chose to intervene on that basis rather than employing the Rule 53 procedure to request to broaden them. It chose not to be present at the hearings, even though it was aware of the disputes between the parties over the scope of the proceedings. ANADP chose not to file briefs after the hearing was complete and it knew of ALJ Weissman's rulings. Therefore, we reject any comments that its due process rights were violated by the rulings made at the hearing or the proposed ALJ decision's scope.

Our review of the record also convinces us that any assumptions made by complainants and ANADP as to "reasonableness" issues only affected issues of the reasonableness of the Credit, Reproduction Rights, and List Rental Tariffs. However, in their comments, complainants try to expand the self-defined "reasonableness issues" beyond this. We also reject these contentions. We observe that the proposed decision follows the issues as delineated by complainants in their brief, from which we quote:

"Defendant is in violation of § 453 of the PU Code:

"A. Defendant Affords Pacific Bell Directory Unreasonably Preferential Treatment

"B. Defendant Affords Complainant Donnelley Inferior and Discriminatory Treatment Resulting in Unreasonable Prejudice and Disadvantage to Complainant Donnelley

"C. Nondiscriminatory Competitor Access to Utility Services Is Consistent with Commission Policy

"Defendant has failed to discharge its obligations under § 451 of the PU Code to provide adequate, just, and reasonable subscriber information services to all customers.

"Defendant is in violation of § 532 of the PU Code.

"The restrictions of Rule 35 are applicable to Pacific Bell Directory.

"A. Defendant is in Violation of its Tariff Rule 35

"B. Defendant Has Improperly Construed Rule 35 to Apply to Business Subscriber Information" (Opening Brief of Complainants at page i.)

All of the testimony and evidence relied upon by the ALJ and the findings and conclusions made by her rise properly from these issues as set forth by complainants. Any findings and conclusions she made dealing with the reasonableness or unreasonableness of any conduct are consistent with her consideration of these issues. She did not, as contended by complainants, rule that the tariffs were in and of themselves reasonable. Instead, based on legal precedent cited in this decision, she deferred consideration of these and other issues raised by defendant, to the List OII, a proceeding which is also pending before ALJ Watson. We reject

complainants' contention that she has denied due process rights by doing so.

We also find that the ALJ did not decide, in her proposed decision, issues fundamental to the List OII and consolidated proceedings, also as claimed by complainants. She based her decisions on facts as they existed at the time complainants made data requests of defendant, but noted that the Commission is now considering whether policy and other reasons necessitate a change in that reasoning. No prejudgement affecting the parties to this proceeding, all of which are parties in the List OII, or any other parties to the List OII has occurred. That proceeding remains tabula rasa.

Equally specious is complainants' argument that its characterization of the issues, in its posthearing Motion to Require the Designated Administrative Law Judge to Issue and File a Proposed Decision, and, Thereafter for the Commission to Issue Its Decision Consistent With Section 311 of the Public Utilities Code, are binding on the Commission. Its characterization therein differed from the issues it delineated in its post hearing brief. Complainants argue that the issues set forth in the motion control merely because no party opposed the motion and the ALJ granted the request to issue the decision. We note that in her November 6, 1990 ruling, she made no reference to complainants' characterization of the issues.

We consider complainants' comments under Legal Principles, as to the section 453 issues and the status of PBD, to be reargument, which is to be accorded no weight as set forth by Rule 77.3. We do wish to note that complainants' reliance on Gay Law Students Ass'n v. Pacific Telephone and Telegraph Company, 24 Cal. 3d 468 (1979) is improper. The statements made by the supreme court in regard to the status of public utilities are limited solely to employment discrimination situations and do not contravene the ALJ's findings as to the special status of PBD.

Those comments also do not deal with the relation between a public utility and its wholly owned subsidiary as in this proceeding.

We also consider as reargument complainants' comments, under Evidentiary Failures, and ANADP's comments, under Burden of Proof, that the ALJ should have found they carried the Section 453 burden of proof of the defendant's real and substantial adverse impact on Donnelley's ability to compete fairly. The law clearly requires a detriment to complainants and an advantage to PBD to be proven. Western Airlines, Inc., 62 CPUC 553, 562 (1964). "[I]t cannot to presumed that a mere difference in rates creates unlawful prejudice or preference...." California Portland Cement Company v. Southern Pacific Company, 42 CRC 92, 116 (1939). Discrimination, prejudice, and preference are questions of fact to be determined by the Commission in light of all relevant circumstances and conditions and to be unlawful must be unjust and undue. Id. at 117. We find the ALJ's characterization of the paucity of such evidence of unjust and undue prejudice in Hillman's testimony to be correct. We note that the direct evidence of one witness can be sufficient proof of any fact. Pacific Telephone & Telegraph Company, 70 CPUC 121 (1969). It is our duty to decide whose testimony to accept. Silver Beehive Telephone Co., Inc., 71 CPUC 304, 309 (1970). We accept that of Abercrombie as relied on by the ALJ. We also reject ANADP's assertion that an antitrust "essential facilities" burden of proof standard was employed and note that this issue is also reargument.

Complainants also cite a statement in Exhibit 7 that PBD receives and has access to defendant's subscriber information and uses it for the publication and delivery of directories. They contend it contravenes the ALJ's recitations that PBD does not make use of certain information available to it. However, we find this statement does not refer specifically to yellow pages directories and we refuse to speculate that it does. We find that this language from Exhibit 7 does not contravene the ALJ's proposed

decision as it states that subscriber information has been purchased by PBD under the Reproduction Rights Tariff to produce white pages directories.

Complainants also contend that a statement from Exhibit 9 is contrary to the ALJ's decision. In Exhibit 9, the defendant described the extent to which subscriber information acquired or received by defendant is utilized in PBD's SMART Pages directories: "The subscriber information is used...to assign Yellow Pages sales accounts for advertiser contact...." As noted in the ALJ's proposed decision, the term subscriber information covers a variety of customer information. In the decision, she noted that PBD uses listed name, address and telephone number, and the defendant's assigned CLHs, which it purchases from defendant, and then calls on the customers. Credit information was found by the ALJ not to be used to make sales calls. Therefore, the use of one component of subscriber information, as reflected in Exhibit 9, is not inconsistent with the findings that other components are not so used.

In addition to making the due process and burden of proof arguments previously addressed, ANADP alleges that the witness for the defendant was incompetent to testify on many of the issues since he was an employee of defendant, and not PBD, and allegedly lacked necessary knowledge of the directory publishing business. ANADP asserts, therefore, that we must reject any findings of fact, discussion, or conclusions of law based on evidence contrary to complainants' witness on the issues of conduct and requirements of independent directory publishers and factors such as the timely

delivery of complete and accurate listing information. No new proposed findings and conclusions from complainants' testimony are offered, as required by Rule 77.4. Complainants' counsel's cross examination of Abercrombie belies ANADP's contentions. As ascertained by counsel, since 1985, all defendant's listing information, including the List Rental and Reproductions Rights Tariffs, were under Abercrombie's management when he took over defendant's information resources product district. (RT at 198-199.) Since the December 12, 1986 agreement between PBD and defendant, Abercrombie had the responsibility of liaison for PBD and worked closely with them for 4 to 5 years and was responsible for the provision of listings to other directory publishers. (RT at 200.) In addition, his sole special assignment from January 1, 1989 to hearing was dealing with this complainant proceeding. (RT at 198.) We find him a qualified, credible, and competent witness and reject ANADP's request his testimony be afforded no weight on the issues delineated.

ANADP argues that a double standard was employed in the proposed decision, when it stated that defendant could not unilaterally alter its Credit Tariff to provide information to complainants and then cited with approval a course of defendant's conduct in which the March, 1988 modifications to the Reproduction Rights Tariff were developmental, though not so stated in the tariff.

As noted by Abercrombie in his testimony, the Commission staff was aware of the developmental status of the tariff and the fact customers would be given an explanation when they called to place orders under the tariff. (RT at 204-207.) A review of the tariff's language discloses that it provides for just such a developmental phase. Both the simple sort listings and complex listings are characterized as "provided, at the publisher's option, on paper or on magnetic tape, <u>where the Utility has the capability of doing so</u>." Schedule Cal PUC No. 5 at 5.7.4 A. (Emphasis

added.) Also, the tariff states: "Base files will contain the most recent listings available in the Utility Directory Assistance data base." Id. at 5.7.4 B.13. Thus, the tariff's language reflects the understanding of staff as to the developmental status of some of its listings options. We see a valid distinction between altering a tariff to add or delete provisions, without Commission staff's knowledge and concurrence, and defendant's conduct in tariffing a service that was still developmental with the knowledge of staff and references to that status in the tariff. We do not find that a double standard has been employed in the analysis of the Credit versus the Reproduction Rights Tariffs.

DRA, in its comments, merely stated that it was in basic agreement with the proposed decision, particularly as to the unique relationship between PBD and defendant and the finding that PBD is, in effect, a different department in one business enterprise of defendant.

Defendant's comments agreed with the proposed decision and the analysis underlying it. Defendant stated the proposed decision reflects a thorough understanding of the technical testimony, correctly perceives complainants' lack of probative evidence and reflects substantial independent research and analysis by the ALJ which aptly responds to complainants' claims. Defendant then suggested nonsubstantive changes to the proposed decision. Those which we have found to be truly nonsubstantive have been made.

Complainants' reply comments generally reargue their comments and those of ANADP and make new allegations as to the evidentiary record, rather than merely identifying misrepresentations of law, fact or condition of the record in the comments of the other parties as required by Rule 77.5. For this reason we will not discuss them further.

Defendant's reply comments assert complainants had misrepresented the record which showed that the ALJ had properly scoped the decision and had not decided issues outside its scope; had properly assessed the complainants's testimony on alleged competitive injury to complainants; and had not denied ANADP's or complainants' due process rights. The reply comments contend complainants misrepresent Gay Law Students Ass'n., as we have so found. Defendant also analyzes several findings complainants and ANADP contend are outside the record or scope of the hearing and cite to the transcript of the proceedings to disclose that these assertions are incorrect and misrepresent the record. We concur with defendant's assessment of complainants' comments to strike findings of the ALJ.

No parties other than complainants and defendant filed reply comments.

Findings of Fact

1. Complainant The Reuben H. Donnelley Corporation (R. H. Donnelley) is a Delaware corporation, all of the stock of which is owned by The Dun & Bradstreet Corporation. R. H. Donnelley, through its Donnelley Directory division (Donnelley Directory), acts as sales agent for the yellow pages directories of various telephone companies outside California. It also publishes yellow pages directories of its own in competition with local telephone company directories. Donnelley, a subsidiary of R. H. Donnelley, publishes and manages approximately 18 independent yellow pages telephone directories serving approximately 200 communities in southern California. R. H. Donnelley, through another division, provides a telephonic classified directory service, called The Talking Yellow Pages.

2. Complainant D&B-IR is an unincorporated division of Dun & Bradstreet, Inc., a Delaware corporation which is, in turn, a subsidiary of The Dun & Bradstreet Corporation. D&B-IR maintains a commercial database of over 10 million records to support the

mailing and telemarketing list business of its affiliate, Dun's Marketing Services, Inc., and the commercial credit information business of its parent, Dun & Bradstreet, Inc.

3. Defendant, Pacific Bell, is a California local exchange company. PBD is the successor to defendant's directory publishing division and is a wholly owned subsidiary of defendant.

4. On January 2, 1986, Donnelley made its first letter request for business subscriber information from defendant. Donnelley requested the terms and conditions upon which the following information would be made available: current subscriber names, addresses, telephone numbers, business classification, primary business listing, billing authority, customer contact identification, credit information, directory distribution information and service and equipment (including related, associated and foreign telephone numbers) as well as update service reflecting service order activity affecting directory. Donnelley requested that such service order activity updates include, new connects, disconnects, changes in name, address, telephone numbers, primary business classification and billing authority at a minimum. This request dealt only with printed directories.

5. On March 4, 1986, more information was requested by Donnelley for purposes of a telephonic business classified directory service. Weekly updates were requested. The information was requested in a computer-readable media, magnetic tape, if available.

6. Defendant responded by furnishing copies of its tariffs, which provided only paper lists for purposes of publishing printed directories and forbade release of much of the information requested.

7. The List Rental Tariff was submitted by defendant on February 13, 1986 and approved on May 7, 1986. The List Rental Tariff allows the sale of published subscriber information, excluding residential listings, in sorted form on magnetic tape or

other computer printout to companies who wish to conduct market research, data base reconciliation, and direct mail or telemarketing campaigns. Customer specific information on nonpublished customers and published customers requesting exclusion is not included. Only one-time use is permitted and defendant has the right to review and approve the purpose and use of the list information. This tariff was established to operate from data bases created by defendant.

8. The List Service Tariff, under Section 5.7.6 of Schedule Cal PUC No. A5, does include residential listings. It will append telephone numbers of customers listed in the alphabetical section of defendant's white pages directories to a list of names and addresses furnished by the customer. It may be used solely for telephone calling purposes of the purchasing customer and cannot be resold.

9. The Reproduction Rights Tariff has existed since 1976 and permits reproduction of names, addresses and telephone numbers of customers contained in the defendant's telephone directories, by publishers engaged in the business of publishing a general directory, printed on paper, for public use and distribution only. The subscriber information comes from defendant's Directory Assistance System. At the time of complainants' information requests, subscriber information was furnished 10 days following the publication date of each monthly directory assistance directory. However, in some areas, such updates were made only semi-monthly. It presently excludes use for electronic publishing and talking yellow pages. Originally it provided no update service. The Reproduction Rights Tariff does not permit licensing of names, addresses, telephone numbers, art work, headings and other materials contained in defendant's classified yellow page directories and directory sections or other customers listed in defendant's directories. Listings licensed under this tariff cannot be compiled into lists for the purposes of selling, renting,

or otherwise providing copies of listings to any other person or corporation.

10. The Credit Tariff prevents a telephone utility from releasing customer credit information or other customer billing and calling data, with minor exceptions. One such exception permits release of information to a "Bell Company."

11. On October 5, 1987, D&B-IR made its first request for defendant's subscriber information. D&B-IR stated that Dun's Marketing Services, Inc. uses the information gathered by D&B-IR to compile and purvey, in hard copy and on-line, mailing and telemarketing lists and information to its customers. Dun & Bradstreet, Inc. would use the information primarily to compile and purvey information relevant to the granting of commercial credit and insurance, and to provide such information in hard copy, on-line and over the telephone. D&B-IR requested the terms and conditions upon which information would be made available. It was particularly interested in the following for current subscribers and billing: names, addresses, telephone numbers, business classification, primary business listing, billing authority, customer contact identification, and associated telephone numbers. It also required continuous updates thereto.

12. In its response of November 23, 1987, defendant referred D&B-IR to its List Rental and Reproduction Rights Tariffs, and opined the List Rental Tariff was most appropriate. Defendant then stated that "The information provided under this tariff may not lawfully be resold or compiled into publication for distribution to third parties."

13. D&B-IR responded by letter of December 16, 1987 and stated that it believed its request fell under defendant's List Rental Tariff for the purposes of data base reconciliation and defendant's List Upgrade Service. D&B-IR stated that subscriber information would be used specifically to:

"1) Verify / correct business name construction and spelling.

"2) Verify / correct / add physical business address (as compared to mailing address) including street number, directional, street name, city and zip code.

"3) Verify / correct / add business telephone number.

"4) Periodically ensure that the above mentioned data elements remain accurate.

"5) Code those records in our file were [sic] the businesses listed appear to no longer be in business.

"6) Identify businesses, as a starting point for additional Dun & Bradstreet investigation, as new businesses are established."

14. Defendant responded on January 18, 1988, by furnishing tape output specifications and data descriptions for its List Rental Tariff. The letter then stated that information on businesses that are not contained in D&B-IR's current databases, or that are newly established, may only be used for purposes agreed to in advance and in writing by Pacific Bell.

15. On February 16, 1988, defendant filed Advice Letter 15348 to revise its Reproduction Rights Tariff to provide business subscriber listings on magnetic tape, in sorted form, and to include, ultimately, new connect, disconnect, and change order activity. Users were given the choice to receive listings for businesses or residences separately and by specific community or telephone prefix. Monthly updates were offered. On March 28, 1988, defendant's revisions to its Reproduction Rights Tariff were effective.

16. The magnetic tape update service remained developmental for approximately one year in order to add additional listings and captions. Within three months of the tariff revision's filing, defendant made a test tape available to complainants.

17. Donnelley never ordered subscriber information for directory related purposes from defendant under the revised Reproduction Rights or List Rental Tariffs.

18. On June 21, 1988, complainants filed their original complaint in this proceeding.

19. On December 30, 1988, the defendant's new proposed revisions to the Reproduction Rights and Credit Tariffs were submitted to the Commission's staff for preliminary review as Proposal No. 88120. Proposal No. 88120 provided for both daily and weekly update service for business listing information and release of customer name, address, telephone number and zip code, billing name and address of business subscribers, SIC codes and defendant's classified list headings. The revisions permitted electronic and talking yellow pages applications. Market pricing was proposed.

20. Complainants were furnished a copy of Proposal No. 88120. Proposal No. 88120 was pending at the time of hearing of this complaint.

21. In March 1989, defendant agreed orally to give complainants foreign exchange and remote call forwarding indicators. At the time of hearing, defendant was working on additional listings and caption listings, including sequencing of captions.

22. Two days of hearings were held on the complaint in April 1989.

23. On May 1, 1989, defendant added to its update service under the Reproduction Rights Tariff the specific identification of new connects and disconnects. Formerly, the update indicated only add or delete, which could also include other types of changes.

24. On July 17, 1989, defendant filed A.89-07-030, its application for authority to adopt a tariff for a Business Directory File to offer to third parties business subscribers' information allegedly not presently available. The Business Directory File was to complement the List Rental and Reproduction

Rights Tariffs for use by companies which offer products competitive with defendant's.

The application provided for daily change order activity on business subscribers with certain detailed listing and customer account-level information obtained by defendant as a result of service order activity on business listings. The information included billing telephone number, billing name and address, service order number, service address, and transmittal codes which identify new connects, disconnects, service location changes and supersedures. The information is generated by a COBOL program and was to be provided initially on magnetic tape. Market value pricing was proposed, with Commission monitoring and reevaluation of the new offering in future rate cases. The proposed Schedule Cal. PUC A12.2 was annexed to the application.

In A.89-07-030, defendant also requested a modification of the Credit Tariff to permit the release of the customer account information contained in the proposed Business Directory File tariff. Defendant asked to add to the Credit Tariff's Section d, excepting from the non-release restrictions a Bell Company and Bell Operating Company, an exemption when "the requester is licensing the information pursuant to Schedule Cal. PUC No. A12.2." This application is still pending as A.89-07-030 and has been consolidated with the List OII. If approved, the application would provide complainants with almost all of the information they seek in this complaint proceeding, except PBD's proprietary CLHs.

25. On July 25, 1989, Donnelley moved to dismiss defendant's application on various grounds.

26. In D.89-10-031, on Phase II of I.87-11-033, we found that Yellow Pages directory services revenues should be subject to a revenue sharing mechanism. Thus, the revenues and costs from yellow pages continue to be part of the rate setting process for telephone utilities, as permitted by PU Code § 728.2.

27. As a result of this complaint proceeding, the defendant's tariff proposal and application, the limited rehearing of D.89-03-051, and the decisions made in Phase II of I.87-11-033, the Commission decided to commence a generic proceeding on policy and legal issues surrounding yellow pages competition and access to customer list information. On January 24, 1990, the Commission issued its Order of Investigation into the matter of competitive access to customer list information, I.90-01-033 (List OII).

28. The List OII consolidated two pending proceedings: A.89-07-030, defendant's tariff application for the Business Directory File tariff and a revision to the Credit Tariff, and the limited rehearing of D.89-03-051 to resolve issues of compensation to GTEC and Pacific Bell for each's use of the other's proprietary listing information for purposes of providing directory assistance. The List OII remains pending. The List OII declared that the complaint case would "remain open, with a final decision reserved until comments are received in this Investigation" or "until we have made sufficient progress in this Investigation to address the broader issues raised in C.88-06-031."

29. On March 16, 1990, complainants filed, in this complaint proceeding, a Motion to Require the Designated ALJ to Issue and File a Proposed Decision and, Thereafter, for the Commission to Issue its Decision Consistent with Section 311 of Public Utilities Code. Also on that date, Donnelley filed a petition to modify the List OII and asserted that the decision in this complaint case should not be deferred pending the outcome of the List OII.

30. The complaint case was transferred to ALJ Watson. On November 6, 1990, a ruling of ALJ Watson granted the motion filed by complainants in C.88-06-031 and the portion of Donnelley's petition for modification of the List OII requesting the issuance of a decision in C.88-06-031.

31. PBD began operations as defendant's directory division. In D.87-12-065 (December 4, 1985), we approved the spinoff of PBD

as a wholly owned subsidiary of defendant, a regulated entity. Thus, PBD is not a Pacific Telesis subsidiary, like PacTel Publishing, which pursues publishing activities outside the traditional publishing arena. Our approval of the transfer of the directory operations was conditional on the requirement that all PBD's revenues and expenses were to be considered in setting defendant's rates, with review and audit of all operations by Commission staff. New PBD operations required prior staff approval.

32. Under a Publishing Agreement dated December 12, 1986, PBD contracts with defendant to fulfill defendant's franchise responsibility to publish and distribute white pages telephone directories to all of its business and residential customers. PBD is responsible for the scheduling, photocomposition, printing, binding, hauling, warehousing, and distribution of white page directories, either in combination with yellow pages directories or separately. PBD still functions as a division of defendant.

33. As opposed to PBD, customers must take defendant's listing information under tariff. California is the only state that requires listing information to be provided under tariff, rather than by contracts, and which has constitutional privacy protections.

34. The January 22, 1986 letter agreement between defendant and PBD, as modified January 15, 1987, declares in paragraph 2 that: "Where Pacific Bell is providing the Services, the methodology and procedures for determining that appropriate expenses are billed to [Pacific Bell] Directory shall be pursuant to Pacific Bell's Inter-Entity Transfer Pricing Manual." Defendant's Inter-Entity Transfer Pricing Guidelines declare in § 1.0202 that: "Transfer Pricing applies to only those transactions dealing with non-tariffed goods and services."

35. PBD paid tariffed rates for the services it receives from defendant, when those services are, in fact, tariffed. PBD paid

the tariffed rate under the Reproduction Rights Tariff when it received listings to produce the white pages. PBD does not rent business listings from defendant under the List Rental Tariff for any directory publication, distribution, or canvassing. However, on one occasion, PBD did order List Service upgrade under the List Service Tariff for the purpose of appending telephone numbers to its lists in order to conduct market research.

36. Items covered by defendant and PBD's transfer pricing agreements include the non-tariffed business subscriber information available to PBD but not complainants, as well as services such as training, motor pool, human resources, billing, and collection. The transfer prices used are the costs of the work, but defendant does not track the cost to it of providing PBD with only subscriber information due to the way their computer linkage works.

37. Due to the shared internal computer system, defendant does teleprocess business listing information, including some billing and credit information, to PBD on a daily basis. This business subscriber information is charged under the transfer pricing agreement, along with other bundled services, since no tariff exists to cover it.

38. If Proposal No. 88120 (Proposal), containing revisions to the Reproduction Rights and Credit Tariffs, went into effect, PBD would purchase all its newly offered business subscriber information at these tariffed rates rather than continue to obtain it under transfer pricing agreements. Daily update information would be available to all licensees under the Proposal which would also permit electronic directories to utilize tariffed information. It would provide more timely access to business listing information, on both a daily or weekly basis, provide business billing name, address, and telephone information and include defendant's CLHs, and SIC codes as options available to licensees.

39. Although this Proposal was pending at the time of the evidentiary hearing, it was never adopted or withdrawn by defendant.

40. Contrary to complainants' allegations, PBD does not have access to defendant's Universal Service Order (USO) form, because no such "form" exists. The mechanized Service Order Retrieval and Distribution (SORD) computer system processes order information obtained by defendant's customer service representative at the time of initial customer contact. This information goes through computer terminal devices in defendant's business offices and large computer facilities throughout California. The SORD system handles the mechanized USO and then distributes it through various data systems in support of defendant's ordering process. The information is stored on magnetic disc devices and then transferred to defendant's computerized Customer Records Information System (CRIS) each night to be further processed in billing and white page directories once the physical work associated with the order is complete.

41. Portions of the USO, if printed at all, are used for some physical work on the part of defendant's installation or central office forces. No "form" is passed from process to process within the CRIS white pages and billing systems and then passed on to PBD for its use. The entire mechanized order is passed through CRIS simply for retention purposes and much of the data is not used in CRIS processing.

42. Once the data is in CRIS, the order is broken down into records that are relevant to defendant's various master file processes. The data is contrasted with a master address table to further validate address information and assign directory and tax codes.

43. At this point, the listing information is split out for defendant's Directory Assistance System from which the Reproduction Rights Tariff operates.

44. Listing information is different than subscriber information. Information on the customer itself is subscriber information and is different from how a customer chooses to be listed or not listed in a telephone directory. The Credit Tariff protects covered subscriber information.

45. The listing information goes through a different computer channel to defendant's white pages system, the white pages master file or WP-10. In this WP-10 master file, all listings are assigned by billing account numbers, and thereafter, contain whatever other information there is.

46. All data within defendant's internal computer system is keyed to the billing account telephone number. The billing account telephone number is utilized by defendant and PBD for communications between their integrated computer systems. Everything in the system is linked to the billing account telephone number since it is an integrated system.

47. Downstream from the WP-10 master file is the WP-60 master file, which is the computer module that processes the business listing activity on a daily basis to PBD. The WP-60 master file does contain some account level information, billing name and address and any of the revenues pertaining to advertising. This is the primary feed going across to PBD.

48. The business listing information is also sent through several internal paths to accomplish the update functions of add, change, and delete.

49. The USO which is processed through the SORD system and CRIS is not the only method by which relevant information is added, changed, or deleted from the system supporting the directory listings and exchange services. A variety of other sources of information are utilized. One is the caption data base, which is a CRIS function. If a business has one primary listing with other departments and numbers under its main listing, this data base permits caption listings to be changed and rearranged in an on-line

system. It is not dependent on any USO form. Other internal CRIS processes update listing information within CRIS, such as community consolidation and zip code changes.

50. Only two modern computer data bases are used--a master address table and the caption data base. Otherwise, defendant's records are kept on a sequential computer system using batch processing. What is available was developed over 20 years ago to fit exactly how PBD, then a division of defendant, prepares its white pages. Because this computer system has not been modernized into a data base system, it limits defendant's extraction capabilities and necessitates the bundling of information within the system.

51. Within CRIS, there is not a single comprehensive statewide file of listing information.

52. PBD did not have broad access to defendant's standing computerized information for residential information. Residential listing information is only provided to PBD in connection with scheduled extractions for PBD's directory publications, generally, on an annual basis. No access is granted PBD to a data base for the purpose of obtaining residential information. Defendant actually extracts all the listings for the publication and provides them to PBD on magnetic tape. The specifications for this tape do not match the specifications of the tapes requested by complainants.

53. In the normal course of business, delivery information is not provided to PBD. Defendant provides the delivery information on residential subscribers on a daily basis to Product Development Corporation (PDC), which is the delivery and distribution vendor of PBD.

54. Defendant does not provide Standard Industrial Classification (SIC) codes to PBD, but instead develops them from the CLHs defendant obtains from business subscribers. PBD pays defendant under a transfer pricing agreement for obtaining the

initial CLH. Only the yellow pages CLH that is provided at the initial customer contact with defendant's service representative is sold to PBD. PBD personnel then personally contact each business to determine whether a different CLH is desired for the yellow pages. PBD's CLHs are its proprietary information which cannot be sold by defendant. Defendant uses its CLHs to develop its SIC codes, which defendant uses internally for marketing purposes.

55. Defendant also does not provide to PBD the identity and location of businesses under common ownership or control. Only the billing account telephone number, which is provided to PBD for billing purposes, is given. No other information is provided to link accounts under common ownership. The billing account number does identify accounts that have a common bill, but PBD does not use new connect information for directory preparation. Instead, PBD uses listed name, address, telephone number, and the defendant's assigned CLH and calls on the customer to verify all the information.

56. Service and equipment information, such as custom calling features, calling plans, trunking, Centrex versus PBX, what office location is to install what numbers, who the installer should contact, and how defendant physically programs automatic number assignment are not furnished PBD.

57. The yellow pages customer receives one bill from both defendant and PBD. Credit information, including billing account telephone number, is properly made available to PBD by defendant as a result of defendant performing billing and collection services for PBD. This is permitted by the terms of the Credit Tariff exceptions.

58. Credit information is not used by PBD to produce white or yellow pages directories. It is only available to a limited customer service group of PBD and is not available to PBD's yellow pages sales force. Billing name and address are available to a small group of employees in PBD's customer service department so

they can deal with customer inquiries. Customers do routinely call PBD to obtain information. Although defendant will take inquiries from PBD's customers about their bills, if the customers have other questions, they are handed off to PBD.

59. The credit information is used by PBD to handle billing and collection account inquiries from its customers. PBD works the collection aspect of its delinquent accounts turned over by defendant. The information is not used for sales regeneration or testing the customer's creditworthiness to obtain classified advertising. Instead, PBD normally runs its credit checks through TRW rather than using defendant's credit information to check out new directory advertisers. Thus, PBD receives no advantage from the availability of the information.

60. The information which is essential to publication of yellow pages is information which any publisher can get through routine sales contact. When PBD does its annual yellow pages sales canvassing, it contacts every customer, whether it has advertised in the yellow pages or not.

61. Much of the subscriber information available to PBD is completely irrelevant to a competing directory publisher. The top three publishers in California, including Transwestern, have used defendant's white pages listings to identify directory sales prospects and to produce directories. Complainants did not demonstrate they cannot also feasibly do so.

62. Complainants have not made full use of the information available to them. Donnelley only has received residential listings from defendant's alphabetical residence directories and did not use these in publishing its yellow pages directories. At the time of the hearing, Donnelley had yet to place an order for the magnetic tape product that defendant had offered under the revised Reproduction Rights Tariff.

63. Donnelley Directory did not get any information from defendant for years in order to produce its yellow pages. Instead,

the information was gathered by its sales force as best it could. Donnelley used mostly published products that are "in the street" as public information.

64. Donnelley closes its directory sales about 12 weeks before publication, but could update information during that gap period. Donnelley does tell its customers to notify it if the customers make changes in their PBD yellow pages listing. Donnelley could call on all businesses disclosed in white pages listings, although this would increase its operating expenses.

65. The Reproduction Rights Tariff updates disclosed a change had been made in a listing. The add record usually showed new connects, the delete reference usually showed disconnects and the change record normally recorded zip code changes. Although no reason is indicated for the change, most data processors for independent publishers are able, by creating logic, to take the information and develop computer programs to analyze it and identify the nature of the change. Complainants failed to show why such an approach is not feasible for their directories and uses.

66. No dollar figures were produced to support the alleged negative impact on Donnelley of the alleged lack of competitive opportunities. Complainants have not proven competitive disadvantage to them due to the lack of subscriber information.

67. PBD does not use information available to it to compete with complainants. Complainants did not prove a competitive advantage to PBD based on more availability of the information due to internal computer linkages.

68. The antiquated computer system which supports PBD is not flexible enough to also support the varying needs of all independent publishers. The data content provided to PBD in this structural format has been relatively the same for the last 20 years.

69. The outmoded technology is extremely difficult to program. Only 1% of defendant's current programmers know autocode

programming and only a handful are even conversant with autocoding in the simulation mode in order to work the necessary extraction logic to modify the system.

70. To accommodate the needs of all independent directory publishers, defendant emphasized development of an internal computer system which utilizes relational data base technology and current programming capability in order to further process listing information, instead of modifying the older computer system.

71. Independent publishers often scope their directories differently than those of telephone companies, for selected communities and markets based on their own independent market analysis. Defendant's newer computer system accommodates this difference and contains flexible selection capabilities for selected geographic communities not conforming to the way defendant extracts its telephone books.

72. Independent publishers do not print directories on the same schedule utilized by defendant. Therefore, flexibility had to be developed to accommodate requests of different publishers throughout the year to obtain timely and accurate listing information rather than tying the publishers to the timing and limitations of the existing CRIS white pages.

73. Based on Rule 35 restrictions, a business decision was made, in conjunction with marketing data, not to modify the Reproduction Rights Tariff to give publishers all PBD received. Defendant decided to develop the product demanded, which was a smaller subset of information, available on either a weekly or biweekly basis.

74. Offering business and residence listings separately required a new system because the Reproduction Rights Tariff is a reprint of defendant's Directory Assistance System (DAS). DAS does not indicate whether a listing is business or residential. Only the internal, integrated system to which PBD and defendant were linked marked listings R (residential), B (business), or G

(governmental). This system, however, also contained the confidential Rule 35 information. Under CRIS, information need not be screened out of the computer system before being provided to PBD. However, for independent publishers, defendant must further process CRIS information to eliminate what it is prevented from publishing by the Credit Tariff.

75. Complainants' request was the first request defendant had had for other than printed directories. The second demand occurred almost one year after complainants'.

76. Since defendant had no product available to match complainants' specifications, it conducted market research and developed a business case. Then, funding and approval to go forward was obtained, so a product could be developed. A proposal and advice letter were then prepared. Defendant developed the M and P and the billing and technical capability to provide it. The revisions to the Reproduction Rights Tariff were filed and approved by this Commission, resulting in the March 28, 1988 changes.

77. We find the development of the new tariffs and computer data bases a reasonable and prudent response to complainants' demands for information.

78. Donnelley publishes 18 directories in five southern California counties. Donnelley Directory, an affiliated company, acts as both an independent publisher and agent for regional phone companies outside California. When Donnelley Directory acts as an agent of a regional phone company outside California to publish a yellow pages directory, those other companies give it access to service order information of business name, address, other location, telephone number, heading or classification, can-be-reached number, other associated phone numbers, credit status, and other special information dependent on the account's status. However, no other competitors receive such data. Complainants do not act as defendant's agent and need the information for internal business purposes. Such internal business uses are the basis upon

which the Bell Company and other Credit Tariff exemptions rest. Defendant properly refused the information on this basis.

79. When imposing the Credit Tariff, the Commission required the establishment of uniform rules on unlisted telephone numbers, corresponding names and addresses and release of subscriber credit information and calling records, "because the lack of uniformity and detail in telephone company tariff rules led to public misconception and dissatisfaction concerning the degree of privacy accorded this subscriber information."

80. Under the terms of the Credit Tariff, a Bell Company and Bell Operating Company can have access to credit information and calling records for internal business purposes.

81. When the exception to the Credit Tariff's non-release provisions to add a Bell Operating Company was adopted, there was no discussion of any need to remove the term "Bell Company" due to the insertion of the new term "Bell Operating Company." The Commission clearly had the entire language of the amended Section E(1) before it and could have removed the reference to Bell Company had it been deemed superfluous. However, the term Bell Company was retained. PBD, as it operates presently, is a Bell Company subject to the exception.

82. Defendant has done all it could properly do under this Commission's present regulatory constraints in order to accommodate complainants' subscriber information requests.

83. When tariffs do exist for information furnished to PBD, PBD does pay the tariffed price. Nontariffed subscriber information used by PBD is paid for under transfer pricing agreements consistent with this Commission's policies.

84. When the Credit Tariff was promulgated, prior to the break up of the Bell system, no competitive usage of subscriber information was made by independent directory publishers nor did electronic or taking yellow pages applications exist. Because of complainants' increasing demands on defendant and defendant's constraints due to its tariffs as approved by this Commission, the Commission opened the List OII. Its purpose is to determine whether changes in the competitive marketplace, with altered demands on use of information, necessitate revisions in this Commission's present policies.

Conclusions of Law

1. Complainants did not carry their burden of proof that the differences which existed between Donnelley and PBD's access to information had a real and substantial adverse impact on their ability to compete fairly.

2. Mere availability of defendant's subscriber information to PBD, due to the computer linkages, without its use is not sufficient to find defendant acted improperly.

3. Complainants have not demonstrated why they cannot feasibly use data programming logic to extract the information demanded from what is presently available to them.

4. Under the terms of Rule 35 tariffs, a Bell Company may have access to credit information and calling records not available to outside parties.

5. Legal process shall not be required where credit information is furnished to other company employees for business purposes or upon the request of other Bell Companies in other states or independent telephone companies within California for the same purpose.

6. The constitutional right to privacy exists where there is a reasonable expectation that certain personal information would remain confidential and used only for business purposes of the entity retaining the records. Toll records and credit information

fall within the purview of such personal information entitled to constitutional privacy protection.

7. One's name and address, as the subscriber to an unlisted telephone, is also information which one may legitimately seek to keep private.

8. All telephone companies were ordered to adopt the tariff rules on credit information that Commission itself set forth in Appendices A and B to D.92860.

9. These rules were declared just and reasonable by the Commission. Any future rules or practices of telephone companies differing from the Commission mandated rules were declared to be unjust and unreasonable.

10. Defendant's Credit Tariff does not deviate from the Commission mandated rules and is therefore presently just and reasonable.

11. Defendant's adherence to the Credit Tariff's provisions was both justified and required by law.

12. The Credit Tariff declares that "A customer's credit information is the information contained in the customer's utility account record, including but not limited to: account established date, "can-be-reached" number, name of employer, employer's address, customer's social security and/or driver"s license number, billing name, location of previous service." Such information cannot be released to the general public.

13. The exceptions to non-release are: "(1) The procedure set forth above does not apply where the requester is a collection agency working for the utility on the customer's account or is an independent telephone company, other common carrier/interexchange carrier, Bell Operating Company, or Bell Company." The intent behind the exception is for internal business uses.

14. Tariffs should be given a fair and reasonable construction and not a strained or unnatural one. All of the pertinent provisions of a tariff should be considered together. If

the language of a tariff is unambiguous, there is no room for construction and the provision must be applied in accordance with the literal meaning of the words used.

15. The Credit Tariff's Section a(1) definition of credit information refers to a "customer", a term not modified by the adjective "residential". Nor is the Commission's term "subscriber" so modified. A customer or subscriber may be of any class entertained by the telephone utility--residential, business, or governmental. The plain meaning of this language is that Section a(1) is applicable to all customers or subscribers, including business.

16. References to customers' social security and drivers' license numbers do not narrow the Credit Tariff's application to only natural persons who are residential subscribers.

17. The definition of credit information defines a customer's credit information as "the information contained in the customer's utility account record." The following reference to the types of information which may be found in the utility account record are preceded by the words "including but not limited to." This wording contemplates that other types of information exist in a customer or subscriber's utility account record. Such information can include business subscriber information, including service address and distribution information. The Credit Tariff does apply to the business subscriber information sought by complainants.

18. PU Code Section 2891 merely proscribes this Commission's conduct in regard to any present or future interpretation of the Credit Tariff as it relates to residential customers or subscribers. It does not render nugatory this Commission's power to retain or reformulate the tariffs as to business or governmental subscribers or our ability to change the Credit Tariff in their regard should we find it warranted and in accord with constitutional privacy protections, as in the pending List OII proceedings.

19. Defendant's Credit Tariff reflects the wording mandated by this Commission and has been properly applied by defendant to cover business subscriber information falling within its parameters.

20. Tariffs duly published and filed with the Commission, including rules published therein, have the force and effect of a statute and any deviation therefrom is unlawful and void, unless authorized by the Commission. Defendant interpreted its current Credit Tariff properly and acted lawfully in refusing to deviate from the terms of its Credit Tariff.

21. By filing for revisions to the Credit Tariff in its attempts to satisfy complainants' requests, defendant has followed the correct course. For policy reasons, decisions on such modifications should be made in a fully participatory proceeding so that resulting rule changes will be uniform for all.

22. The utility enterprise must be viewed as a whole, without regard to the separate corporate entities. The relationship to defendant of PBD, as its direct subsidiary, and the consideration of its revenues in setting defendant's basic rates, places it in a special category of regulatory affiliate. The fact that a party may have more than half his business not subject to Commission regulation does not render the portion of his business which is subject to regulation immune from the Commission's proper regulatory supervision.

23. PU Code Section 728.2 does presently deprive this Commission of jurisdiction to actually regulate commercial advertising in yellow pages or the classified telephone directories themselves, but it does not prevent this Commission from recognizing the important interrelationship between PBD and defendant that justifies the special treatment currently afforded it. Section 728.2 also does not prevent this Commission from reviewing that relationship in the List OII and making decisions as

to whether change is proper under today's current competitive climate.

24. The fact that PBD is not a Bell Operating Company, as that term is currently used and understood, does not exclude it from qualifying as a Bell Company subject to the tariff's exceptions.

25. Under Commission decisions to date, PBD, as a wholly owned subsidiary of defendant, is a different department in one business enterprise.

26. Defendant has properly treated PBD as a "Bell Company" subject to the exceptions to the nondisclosure requirements of the Credit Tariff.

27. It is necessary to make an orderly investigation into the public perception regarding the nature of defendant's subscriber information and its possible uses and to ensure its uniform treatment with the knowledge of the subscribing public. The need for such safeguards is why defendant's A.89-07-030, to modify its Credit Tariff and establish a new Business Directory File tariff to satisfy complainants' demand, was consolidated with the List OII.

28. The Reproduction Rights and List Rental Tariffs prohibit the usages of the subscriber information envisioned by complainants. Defendant acted properly when denying complainants' requests on these bases.

29. PU Code Section 453(a) declares that: "No public utility shall, as to rates, charges, services, 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."

30. A prejudice, disadvantage, or unreasonable difference under Section 453 can only be established when comparison is made between situations which are comparable. Not all inequity of treatment is entitled to redress under that statute.

31. Discrimination by a public utility does not mean, merely and literally, unlike treatment accorded by the utility to those who may wish to do business with it, but refers to partiality in the treatment of those in like circumstances seeking a class of service offered to the public in general. With respect to a utility's offer to serve the general public or a limited portion thereof, as evidenced by its schedules of rates and rules, the offer is made, to the extent of the utility's ability to provide the service, to serve impartially any member of the public who may qualify under the rules and is willing to pay the rates. The duty to serve impartially is correlative with the right to demand and receive the service applied for.

32. PBD and complainants are not customers of the same class nor are they in like circumstances.

33. Differences in operating conditions may justify substantial differences in rates, so that no violation of Section 453 occurs.

34. For preference or prejudice to be unlawful under Section 453, the preference or prejudice must be unjust or undue. To be undue, the preference or prejudice must be shown to be a source of advantage to the parties or traffic allegedly favored and a detriment to the other parties or traffic.

35. The discrimination must also be the proximate cause of the injury which is the source of complaint.

36. The disparity of treatment between PBD and complainant is not undue preference, disadvantage, or discrimination violative of Section 453 because PBD and complainants are not in a comparative situation. PBD is not in like circumstances with complainants under the present state of the law and this Commission's policies.

37. Because the entire system is driven from the billing account telephone number which forms the essential link in the computer systems, this difference in operating conditions presently

justifies the special subset of computer feed information going to PBD.

38. Defendant correctly interpreted its Credit Tariff to prevent the release of much of the information requested by complainants which we have found can properly be given PBD. It also properly refused to release information for uses not presently permitted by its tariffs. This also justifies the disparate treatment.

39. Since PBD does not make use of the credit information to produce its yellow pages or to qualify the advertisers, but instead uses TRW, an outside credit agency, it is not a source of advantage to PBD.

40. Complainants have not carried their burden of proof that the alleged discrimination is the proximate cause of their alleged competitive injury. Complainants could have used data processing and sales calls to obtain much of the information they need to produce their directories. The fact that it may be easier to obtain the information direct from defendant does not rise to the level of an illegal competitive advantage to PBD.

41. No violation of PU Code § 453 has occurred.

42. PU Code § 451 requires that: "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities...as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

43. Under § 451, discrimination per se is not forbidden; only undue or unreasonable discrimination is not allowed.

44. In refusing to provide complainants the information as requested, defendant has followed the dictates of its present tariffs. The Reproduction Rights Tariff does not permit use of subscriber information for electronic and talking yellow pages purposes as requested by Donnelley. Nor does the List Rental Tariff permit the uses envisioned by D&B-IR. The Credit Tariff

bars the release of most of the information requested, even for printed directories.

45. If tariffs are clear and unambiguous, different requirements may not be inserted in the tariffs, even though a change might seem more reasonable and equitable. If a situation arises after a tariff rule is framed that was not dealt with in the tariff, a tariff cannot be conformed to fit the present circumstances. Instead, the tariff rule must be applied as it existed at the time the action subject to the tariff occurred. If for any reason tariffs are objectionable, then the utility's remedy is to change the tariff, not to disregard it. If tariff rules are unenforceable, it is no justification for their violation, rather steps should be taken to remove them from the tariff.

46. In adhering to their published Credit, List Rental, and Reproduction Rights Tariffs, while attempting to utilize the mandated Commission procedure to change them to satisfy complainants, defendant has acted properly. No violation of § 451 has occurred.

47. PU Code § 532 requires that a public utility adhere to the rates and charges in its applicable schedules on file and in effect at the time and forbids a utility from extending any form of contract, facility, or privilege except such as are regularly and uniformly extended to all corporations and persons. However, § 532 permits the Commission by rule or order to establish such exceptions from the operation of the statute's prohibitions as it my consider just and reasonable for each utility.

48. 47 C.F.R. Section 32.27(c), requires that assets be sold or transferred to affiliates from regulated carriers at prices reflected in tariffs on file with a regulatory commission or at a prevailing price held out to the general public or, if there is no tariff or prevailing price applicable, at the higher of cost or fair market value.

49. This is also consistent with this Commission's policy on transfer pricing.

50. We find that under the present state of defendant's tariffs, it acted properly under § 532 by utilizing transfer pricing agreements for nontariffed subscriber information used by PBD as required by FCC regulations consistent with this Commission's policies. These are a permitted Commission exception to tariffed rates and charges.

51. No violation of § 532 has occurred.

52. This Commission is not limited in the exercise of its expertise and statutory authority by the solutions proposed by litigants. Any request for a ruling not actually required to resolve a controversy is addressed to the Commission's discretion. When no necessity for such a ruling is presented, the Commission may postpone a determination until the matter has been argued by parties with fully adverse interests.

53. In order for the Commission to consider alternate methods of achieving objectives sought in a complaint proceeding, the Commission may designate proceedings in which to consider the relief sought.

54. The public interests to be considered can be economic, social, and political and the Commission must place the important public policy in favor of free competition on the scale along with other rights and interests of the general public in weighing evidence and arguments.

55. It is not always necessary for the Commission to pass upon or resolve matters in the proceedings in which they came to light. Due process may require that parties affected by a prospective determination be given appropriate notice of its consideration. The Commission may desire to develop a complete record on the facts disclosed.

56. In order to establish such a complete record comporting with due process, we have opened the List OII and consolidated with

it defendant's application for the new Business Directory File Tariff and changes in the Credit Tariff, developed in response to complainants' requests for subscriber information. Applications of individual utilities are sufficient reason to order the Commission's own inquiry on its own initiative in order to consider the interests of the public and utilities alike.

57. The Commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. Hence, unless the Public Utilities Code requires the Commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order.

58. The issues raised in the offers of proof are important ones; however, these issues are being raised in the List OII and consolidated proceedings. That is the proper forum for their consideration. The offers of proof shall not be considered in this complaint case.

ORDER

IT IS ORDERED that the complaint is denied.

This order is effective today.

Dated January 15, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director