

SW/NB

ORIGINAL

Decision No. 90549 JUL 17 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THE SELTEN AGENCY, INC., a
California corporation,

Complainant,

vs.

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,

Defendant.

Case No. 10588
(Filed June 8, 1978)

Rick M. Stein and Michael Q. Eagan,
Attorneys at Law, for complainant.
Charles M. Stern, Robert Steinberg,
and Karen Sue Newman, Attorneys
at Law, for defendant.

OPINION

The Selten Agency, Inc. (complainant or Selten), a California corporation, filed its complaint with this Commission on June 8, 1978. Among other relief requested, the complainant sought certain injunctive relief, both ex parte and after a hearing, against defendant, The Pacific Telephone and Telegraph Company (Pacific or defendant).

The Complaint Proceeding

The proceedings before this Commission were:

1. On June 8, 1978 the complaint was filed.
2. On June 12, 1978 defendant filed a document entitled Opposition to Ex Parte Application for Temporary Restraining Order and Order to Show Cause. A Declaration of Alan R. McKeown in Opposition to Complainant's Application was filed at the same time.

3. On June 23, 1978 defendant filed its petition (Petition for Order and Supporting Declarations of A. R. McKeown and P. J. Quigley) requesting an ex parte order granting certain requested relief to Pacific.

4. On June 26, 1978 complainant filed its Reply Memorandum of Points and Authorities in response to Pacific's opposition to the original complaint. A supplemental declaration of Eric Selten was included.

5. On June 27, 1978 the Commission issued D.89002 (Order Denying Injunctive Relief). The decision ordered Pacific to accept ads from Selten if Selten prepays 70 percent of the annual directory charges for ads in Pacific directories.

6. On July 12, 1978 defendant filed its answer to the complaint.

7. On August 4, 1978 defendant fired yet another salvo and filed a Motion to Dismiss Complaint with a Memorandum of Points and Authorities in Support Thereof.

8. On August 15, 1978 complainant filed its Memorandum of Points and Authorities in Opposition to Motion to Dismiss.

9. Five days of public hearings were held from August 24, 1978 to September 8, 1978 at Los Angeles, California, before Administrative Law Judge Charles E. Mattson. On September 8, 1978 the matter was submitted subject to the filing of concurrent briefs due October 27, 1978.

10. By application dated October 5, 1978, complainant requested that time to file briefs be extended to 20 days after the United States District Court ruled on a pending motion for a preliminary injunction in the case titled The Selten Agency, Inc., v The Pacific Telephone and Telegraph Co., et al., Civil No. 77-3450-FW, a matter before the United States District Court, Central District of California.

11. By letter dated October 11, 1978, the request for an extension of time dated October 6, 1978 was denied by the Administrative Law Judge. On October 12, 1978 counsel for defendant filed a declaration opposing complainant's application for an extension of time in which to file its brief. No further requests for extension of time were received.

12. On October 27, 1978 complainant and defendant filed concurrent briefs.

The Antitrust Action (Selten Agency vs. Pacific Telephone)

The complaint in this proceeding filed June 8, 1978 alleges that Selten has filed an antitrust case in the United States District Court for the Central District of California, Civil No. 77-3450-FW. Exhibit 16 in our record is a copy of the Amended Complaint for Damages and Injunctive Relief filed in the federal court June 30, 1978. Exhibit 17 is the Answer and Amended Counterclaim of The Pacific Telephone and Telegraph Company, a defendant in the federal case.

The allegations of the plaintiff, The Selten Agency, Inc., a California corporation, includes the following:

"JURISDICTION AND VENUE

- "1. This action is brought under and pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C., SS 15 & 26) to prevent and restrain violations by Defendant of Sections 1 and 2 of the Sherman Act (15 U.S.C., SS 1 & 2), and to obtain damages for injuries to Plaintiff's business and property by reason of such violations.
- "2. The unlawful acts hereinafter alleged were, and are threatened to be, planned, carried out and made effective in part within the Central District of California, and certain of the unlawful acts have been performed by Defendants and their representatives within this District. The interstate trade and commerce involved is carried on, in part, within this district.

- "3. Many of the Defendants transact business or are found within the Central District of California.

"DEFINITIONS

- "4. As used herein:

"(a) "NYPSA" means Defendant, National Yellow Pages Service Association, an unincorporated trade association composed exclusively of publishers of Telephone Directories.

"(b) "Telephone Directory" means a publication issued periodically to the public by the publisher thereof, which contains (standing alone or together with "White Pages" listings) a classified yellow pages compilation of a substantial number of business telephone service subscribers located within a specified geographical area, together with their respective telephone numbers and classified advertising regarding their products or services.

"(c) "National Yellow Pages Advertising" means an advertising program involving two or more Telephone Directory publishers in which advertisements are placed in twenty or more Telephone Directories, in at least three states and in which 30% or more of the advertising revenue is derived from states outside of the state in which the home office of the National Yellow Pages Advertiser is located.

"(d) "National Advertiser" means any buyer of National Yellow Pages Advertising.

"(e) "Yellow Pages Advertising Agency" means a person, partnership or corporation who engages in the business of soliciting National Advertisers to purchase National Yellow Pages Advertising in Telephone Directories throughout the United States, and who acts as agent for such National Advertisers and receives a commission for such service.

"(f) "Selling Company" means an individual, partnership or corporation which is authorized by NYPSA members to place orders for National Yellow Pages Advertising with publishers thereof."

* * *

"The Defendants

- "6. Defendant, National Yellow Pages Service Association ("NYPSA"), is an unincorporated trade association founded in March of 1975. Each and every member of NYPSA is a publisher of a Telephone Directory. NYPSA has its principal offices in Detroit, Michigan.
- "7. Defendant, Pacific Telephone & Telegraph Company ("Pacific Telephone") is a corporation organized under and pursuant to the laws of the State of California, which conducts its business, in part, in Los Angeles, California. Pacific Telephone is a selling company and a member of NYPSA."

* * *

"NATURE OF TRADE AND COMMERCE

- "11. The trade and commerce involved is the business acting as National Yellow Pages Advertising Agencies. Such business involves the placing of orders for National Yellow Pages Advertising for publication in Telephone Directories throughout the United States. Each of the Defendants, except NYPSA, is a publisher of one or more Telephone Directories and the defendant, NYPSA, is a trade association for all such publishers."

* * *

"FIRST CLAIM FOR RELIEF

- "15. Beginning at a time unknown to Plaintiff, and commencing at least four years prior to the commencement of this action and continuing to this date, defendants and the co-conspirators have engaged, and continue to be engaged in a contract, combination and conspiracy to unreasonably restrain trade and commerce among the several states. The purpose of this contract, combination and conspiracy is to eliminate competition, including Plaintiff, in the Yellow Pages Advertising Agency market within the United States."

A review of Exhibit 17, the Answer and Amended Counterclaim in the action in the United States District Court, establishes that Pacific generally denies the alleged violation of the antitrust laws. Pacific admits that the National Yellow Pages Service Association (NYPSA) is an unincorporated trade association whose membership is composed exclusively of telephone directory publishers. Pacific denies that it is a "selling company", alleging that on September 1, 1977 it terminated its functions as a publisher/seller as that term is defined in the NYPSA Publishers Guidelines.

The amended counterclaim includes a cause of action for breach of contract. This counterclaim alleges that Selten has placed NYPSA orders with Pacific, advertising has been published in accordance with such orders, Selten has breached a promise and agreement to pay for such advertising, and that there is due and owing from Selten to Pacific the sum of \$254,421.45. Pacific further alleges that it is informed and believes that Pacific will be billed by publishers for several more months for advertising ordered by Pacific on behalf of Selten before September 1, 1977, and states that Pacific will seek permission of the court to amend the counterclaim for the amounts of such bills.

The defendants listed on the complaint in the antitrust matter in the United States District Court include Pacific, 16 Bell System telephone companies operating in the United States, the National Yellow Pages Service Association (NYPSA), and others.

The Evidence Presented at Hearing

The material facts regarding the background of the dispute between the Selten Agency and Pacific are virtually undisputed. Selten conducts a business as an agency which places yellow page advertising on behalf of its clients. It does business in the State of California and throughout the United

States. In 1975 yellow pages directory publishers throughout the United States formed an association called the National Yellow Pages Service Association (NYPSA). NYPSA provided that publishers could become "publisher/sellers", and a publisher/seller could place national yellow pages advertising any place in the United States. Pacific became a seller of national yellow pages advertising.

After 1975 Selten had a continuing business relationship with Pacific for the placement of yellow pages advertising on behalf of Selten's clients. Pacific, acting as a NYPSA seller, would accept Selten's orders and transmit such orders both to Pacific as a publisher and to other publishers of yellow pages telephone directories, both in and outside California.

Pacific would forward tear sheets (copies of advertising as published) and invoices from publishers to Selten. Pacific would pay other publishers the invoice charges less a substantial commission (discount) given to NYPSA sellers. Selten, in turn, was entitled to a 15 percent agency commission (discount) on the amount billed for published advertising.

The business relationship of the parties deteriorated sharply in 1977 when Pacific advised Selten, among others, that it was terminating its national yellow pages service sales department. Selten was advised that national advertising orders should be placed with a NYPSA selling company, and was recommended L. M. Barry and Company. Selten did not reach an agreement with a NYPSA selling company. After June 1, 1977 Selten ceased making its regular payments to Pacific on advertising billed to Selten.

Selten's Exhibit 31 and Pacific's Exhibit 5 set forth the business transactions between the parties in terms of billings by Pacific and payments by Selten. For the period December 1975 to June 1977 payments to Pacific exceeded \$839,000.

Selten's June 1 payment was for Pacific's April 1, 1977 billings. Selten's outstanding advertising orders continued to be published and Pacific continued to bill Selten after April 1, 1977.

Pacific alleges that the unpaid bills for NYPSA orders by Selten to Pacific as a selling company total over \$666,000 as of August 1978. This total does not reflect a payment to Pacific in August 1977 of approximately \$67,500.

Selten's payments in the regular course of business would be at 85 percent of total invoice amounts. Pacific's total unpaid billings presented at hearing are at 100 percent of invoice amounts. (Pacific states that Selten is not entitled to a commission because the commission agreement requires payment within 30 days.) The yellow pages directories involved are published at different times throughout a year. Pacific receives invoices and tear sheets after publication. Selten is billed after Pacific processes the invoices and tear sheets, and forwards them to Selten. A large amount of unpaid billings has obviously accumulated.

On January 30, 1978 Selten filed a complaint in the United States District Court alleging that Pacific, NYPSA, and others had violated the antitrust laws. Selten alleged damages of \$3 million trebled to \$9 million. Pacific counterclaimed for damages for the amounts due from Selten for the published advertising ordered by Selten. The alleged debt for published advertising in the federal case is for the NYPSA advertising set forth above.

On June 8, 1978 Selten filed its complaint with this Commission. The complaint alleged that an emergency existed because Pacific had three directories soon to be published in San Diego County; another directory was to be published shortly ✓

thereafter; and Selten was informed by Pacific that advertising for Selten's clients will not be allowed to appear in Pacific's directory. Selten alleged that if orders for clients are not placed, clients would most likely terminate service from Selten and Selten will be forced out of business. Likewise, Selten's clients would suffer irreparable damage to their Yellow pages advertising programs, even though they are innocent third parties. ✓

Complainant requested, among other relief, permanent and preliminary injunctions enjoining defendant and all persons in active concert and participation with defendant from canceling, rejecting, refusing to accept or causing a cancellation, rejection, or refusal to accept any Selten Agency orders, or orders from clients represented by the Selten Agency for yellow pages advertising, "...for telephone directories published and distributed by Pacific, unless such cancellation rejecting, or refusal is based upon tariffs filed with this Commission."

Pacific's subsequent pleadings admitted that it had three directories soon to be published in San Diego County and other directories to be published shortly thereafter, and that Pacific had informed Selten that Pacific would not accept national yellow pages advertising from Selten directly. Pacific alleged that its refusal to accept advertising from Selten was supported by Pacific's tariffs on file with this Commission and said refusal was, therefore, reasonable and lawful. Specifically, Pacific alleged that Selten was delinquent in payment of amounts due for yellow pages advertising ordered from Pacific.

The pleadings disclosed that Selten's clients were third parties threatened with substantial harm. Our Decision No. 89002 dated June 27, 1978 ordered Pacific to accept ads from Selten on prepayment of 70 percent of annual directory charges.

The evidence at the hearing was that Pacific had accepted orders from Selten pursuant to our decision. The 30 percent balance on the orders placed would be billed after publication and would be due within 30 days. A Pacific witness estimated that the 30 percent balance due would be approximately \$36,000 on the orders placed.

At the hearing it was admitted and recognized by all parties that this Commission had no jurisdiction to resolve the dispute between Selten and persons, entities, and organizations outside the State of California. In short, the disputed matters within the jurisdiction of this Commission involved Selten's right to utility service from Pacific within the State of California: Selten's right to order yellow pages advertising from Pacific on behalf of its clients and Pacific's refusal to accept such advertising.

Selten accurately states that the amount of the debt is in dispute. The significance of the NYPSA advertising ordered by Selten from Pacific is that Pacific's refusal to accept Selten advertising orders is based on Selten's failure to pay for past advertising. Pacific relies upon its tariffs, Schedule Cal. P.U.C. No. 39-T, Special Conditions 9 and 9.a.

Selten relies on evidence that Pacific grants commissions (discounts) in excess of 15 percent to NYPSA "selling companies" on yellow pages advertising published in Pacific's directories. Selten's witness testified that these "selling companies" are competitors of Selten.

Pacific's witness testified that no commission (discount) is offered or given any person on yellow pages advertising ordered directly from Pacific on ads in Pacific's directories. Commissions (discounts) are offered to approved NYPSA "selling companies" by Pacific. Selling companies, according to Pacific, deal in national yellow pages advertising as distinguished from local advertising (orders placed directly with Pacific for publication in Pacific's directories).

The Failure to Pay for NYPSA Advertising

The refusal of Pacific to accept orders for yellow pages advertising from Selten is based on Pacific's tariff, Schedule Cal. P.U.C. No. 39-T, Special Conditions 9 and 9.a. Special Condition 9.a. provides, in relevant part:

". . . any applicant or advertiser who has refused or failed to pay charges for advertising service in the current or a preceding directory or directories in accordance with terms and conditions of the signed advertising order, may be refused further advertising in any directory; or may be required, prior to the closing date of the subsequent directory, to pay the amounts which had been previously billed, and also to pay in full for all advertising desired in any such subsequent directory or directories."

Pacific urges that it can and should refuse to accept Selten's advertising orders until the amounts due from Selten are paid in full. The amount due, in Pacific's view, is over \$600,000 in NYPSA advertising ordered by Selten.

Selten contends that the Special Conditions are inapplicable for two reasons. First, Special Condition 9 provides that a utility may refuse to accept advertising only "when such action will not result in unlawful discrimination." Selten

contends that unlawful discrimination exists because NYPSA selling companies, competitors of Selten, can place yellow pages advertising with Pacific. Moreover, such selling companies are afforded a commission (discount). Secondly, Selten argues that Special Condition 9.a. is not applicable to NYPSA advertising placed with Pacific. Selten contends that an advertising agency placing orders for clients is not an "applicant" or "advertiser". Further, selling company service involves placing advertising with other directory publishers throughout the United States and the reference to charges for advertising service in the current or a preceding directory or directories in Special Condition 9.a. must be a reference to Pacific's directories.

We conclude that Pacific (or any utility under our jurisdiction) offering selling company services may apply Special Conditions 9 and 9.a. to advertising ordered and published in directories of such utility. National Yellow Page Service (NYPS) was offered pursuant to a form contract (Schedule Cal. P.U.C. No. 38-T, Sheet 70). When such advertising is published in Pacific's directories, an advertising agency's failure to pay will fall within the language of Special Condition 9.a. We do not find any "unlawful discrimination" in the selling company operations of Pacific prior to September 1, 1977 nor, we might add, did Selten so long as it was afforded advertising agency status by Pacific pursuant to NYPS agreements.

Due to the particular facts and circumstances of this case we will substantially modify the application of Special Conditions 9 and 9.a. Pacific states that Selten's failure to pay for NYPS advertising falls within 9.a. The fact is that if Pacific and Selten were in a dispute regarding nonpayment on

NYPS orders for yellow pages advertising published outside the State of California no party would suggest that this Commission should attempt to resolve such dispute. Selten concedes, and Pacific alleged in its Answer (Sixth...Affirmative Defense), that this Commission lacks jurisdiction over non-California NYPSA members. The directories involved in the application of Special Condition 9.a. must be Pacific's directories.

The application of Special Condition 9.a. as requested by Pacific in this case would, ultimately, require a determination of the amounts due Pacific from Selten for NYPS orders published in Pacific's directories. The total amount due (for Pacific and non-Pacific publications) is in issue in the pending case before the United States District Court. The debt dispute should be resolved as part of that case, not bifurcated before this Commission.

An additional problem arises if we adopt Pacific's position. Selten claims it is entitled to damages in the anti-trust action which is before the federal court. This claim should also be tried in the federal case, not before this Commission. If Selten prevails, the NYPS debt could be more than offset by Selten's recovery. Pacific argues that the antitrust claims of Selten are spurious. Those claims have not been adjudicated. While we can assume that justice will prevail in the United States District Court, Central District of California, it does not follow that NYPSA (and Pacific) will necessarily prevail.

Pacific contends that a continued extension of credit for current advertising to Selten, in the face of a failure to pay amounts due within the tariff provisions, is an affront to common sense. This problem involves the appropriate terms and

conditions applicable to advertising orders placed by Selten and accepted by Pacific pursuant to our Decision No. 89002, after Pacific ceased its operations as a seller of NYPS advertising. We shall refer to such advertising as "the CPUC jurisdictional advertising."

The CPUC Jurisdictional Advertising ("Local")

The evidence regarding unpaid advertising billings presented at hearing related to NYPS advertising ordered by Selten from Pacific prior to September 1, 1977. The complaint filed June 8, 1978 presented an emergency situation to this Commission in that Pacific's directories were about to be published and advertising ordered by Selten for its clients was refused by Pacific. Our order provided for a 70 percent prepayment of the annual directory charges to Pacific by Selten on advertising orders for Pacific directories. Obviously, the parties computed the 70 percent prepayment by using Pacific's filed tariff rates (Schedule Cal. P.U.C. No. 39-T, Sheets 12-20).

At hearing, Selten requested that this Commission order Pacific to grant a commission (discount) on the advertising published pursuant to our decision. Pacific offers commissions (discounts) only to NYPSA sellers placing national yellow pages advertising. Selten argues that there is no distinction between "local" and "national" advertising. Pacific does not offer a commission (discount) on advertising ordered directly from Pacific for publication in Pacific directories, except for orders from NYPSA sellers placing national advertising.

Selten argues that the local and national distinction is a sham, and that Selten is discriminated against because NYPSA sellers receive substantial commissions (discounts) from Pacific on yellow pages advertising. Selten requests that we determine what commission (discount) should be granted on its advertising ordered from Pacific.

We do not find the local and national distinction a sham. The pleadings of Selten in the federal case define national yellow pages advertising as an advertising program "...in which advertisements are placed in twenty or more Telephone Directories, in at least three states..." All members of the public are entitled to place advertising in Pacific directories by ordering such advertising directly from Pacific, subject to the filed tariff rates and rules governing such service. Pacific charges its full tariff rates for such advertising. The placement of national yellow pages advertising pursuant to NYPSA arrangements involves the placing of orders for advertising for publication throughout the United States. (See Selten's Complaint in the United States District Court, Exhibit 16, p. 5, para. 11.) The NYPSA arrangements involve negotiated commissions (discounts) for advertising orders. Commissions are offered only to approved NYPSA "selling companies."

Selten, in effect, requests the Commission to incorporate NYPSA contractual arrangements into advertising ordered directly from Pacific. The present NYPSA arrangements of Pacific include the acceptance of advertising orders from NYPSA sellers of national yellow pages advertising, with payment due Pacific directly from such sellers. The negotiated arrangements made for publication and payment of national yellow pages advertising pursuant to NYPSA are distinguishable from local advertising orders received by Pacific.

Our conclusion should not imply that NYPSA and Pacific are without liability to Selten in the federal anti-trust case. Primary jurisdiction over federal antitrust issues lies with the United States District Court, not with this Commission. Pending a determination of its rights in the federal case, Selten is entitled to place advertising directly with Pacific subject to its applicable tariffs.

Selten's advertising ordered pursuant to our Decision No. 89002 is subject to the tariff rates on file without discount. If the 30 percent balance is not paid in full within 30 days from invoice date, Selten can deposit the balance due with this Commission and set forth any claim for adjustment of the balance billed by Pacific. Failure to pay the balance when due or deposit the balance with this Commission will be grounds for refusal of further advertising in any Pacific directory pursuant to Special Condition 9.a. (Schedule Cal. P.U.C. No. 39-T).

The above payment schedule is provided in lieu of authorizing refusal of advertising to Selten until the NYPS advertising ordered prior to September 1, 1977 and published in Pacific directories is paid in full. If Pacific obtains a judgment in the federal case for such NYPS advertising, Pacific will be authorized to apply Special Condition 9.a. and refuse advertising to Selten until such judgment is paid in full.

Petition for Modification - D.89002

On November 15, 1978, Pacific filed a Petition for Modification of D.89002 and on December 8, 1978, Selten filed a Memorandum of Points and Authorities in Opposition to Petition for Modification. Both parties attached supporting declarations to their late-filed pleadings.

We have reviewed the Petition of Pacific and complainant's Memorandum in Opposition. Our decision disposes of the matters raised in Pacific's Petition. One contention raised by complainant's response requires additional comment. ✓

A payment was made to Pacific in August 1977 on behalf of Selten in the amount of \$67,588. Selten suggests that this payment constitutes an advance for amounts due to Pacific for advertising ordered from Pacific pursuant to our D.89002 dated June 27, 1978. The check issued to Pacific was dated August 25, 1977 and forwarded to Pacific by attorneys representing Selten. Exhibit 13 is a copy of the letter dated September 6, 1977, which accompanied the check. Exhibit 12 is a copy of the letter of Pacific to the attorney representing Selten who authored Exhibit 13.

Pacific's letter (Exhibit 12) dated September 2, 1977, and the response (Exhibit 13) establish that the payment of \$67,588 to Pacific was a deposit on an account for directory advertising charges due Pacific from Selten. The letters disclose that the parties were attempting to negotiate a settlement of directory advertising charges. It is obvious that the amount in dispute in September 1977 arose from NYPS advertising ordered by Selten from Pacific, the debt in dispute in the federal case.

Selten argues that the \$67,588 paid to Pacific was a deposit against any amounts claimed owing, and that this amount is a deposit against any amount due for advertising ordered pursuant to our D.89002. The difficulty with this request is that the amount deposited in August 1977 was not a deposit for advertising ordered by Selten pursuant to and after a decision issued approximately ten months later. It was a deposit paid pursuant to negotiations over the NYPS debt. The negotiations failed (see Exhibit 15).

The NYPS debt dispute should be resolved in the federal case, including the amount due for NYPS' advertising after past payments by Selten for such advertising. The deposit of \$67,588 is merely another payment by Selten to Pacific for the past NYPS advertising. The deposit cannot be converted to a deposit on

local advertising ordered months later pursuant to D.89002.

Findings of Fact

1. The Pacific Telephone and Telegraph Company (Pacific or defendant) is a California utility subject to the jurisdiction of this Commission.
2. Defendant's intrastate yellow pages directory operations are included within the utility service to the public regulated by this Commission.
3. Defendant is obligated to offer yellow pages advertising in its directories to all members of the public, subject to the tariffs on file which regulate the terms and conditions of such service.
4. The rates and charges for yellow pages advertising in Pacific's directories are set forth in Pacific's tariffs on file with this Commission.
5. Defendant is authorized to enter into written agreements which provide commissions (discounts) to advertising agencies which place national yellow pages advertising for clients of such agencies.
6. The Selten Agency, Inc. (Selten or complainant) filed an antitrust action in the United States District Court for the Central District of California, Civil No. 77-3450-FW, prior to June 8, 1978. The amended complaint in that proceeding, filed June 30, 1978, is in evidence as Exhibit 16 in this proceeding. The allegations of that complaint included definitions as set forth in our decision herein. Our findings regarding the business transactions between complainant and defendant will incorporate such definitions for all transactions prior to September 1977 and subsequent to March 1975.
7. Complainant placed national yellow pages advertising orders with defendant prior to September 1977 as an advertising agency. Defendant acted as a seller of national yellow pages advertising and placed complainant's orders with publishers of

yellow pages advertising both in California and outside California. Upon publication of such advertising, Pacific's charges to Selten included an advertising agency commission (discount) of the invoice amount.

8. National Yellow pages directory operations of the National Yellow Pages Service Association (NYPSA) in interstate commerce are not subject to regulatory control by this Commission.

9. In September 1977 Pacific ceased its operations as a seller of national yellow pages advertising.

10. Prior to September 1977 defendant advised complainant that any orders for national yellow pages advertising would have to be placed with a "selling company" authorized by NYPSA members to place advertising orders with NYPSA publishers.

11. From December 1975 through April 1, 1977, Pacific regularly billed Selten for advertising ordered by Selten after publication of such advertising. Through June 1, 1977 payments were made by Selten to Pacific in the ordinary course of business after receipt of invoices and tear sheets (copies of the advertising as published).

12. For the period from November 1, 1975 through June 1, 1977, Selten's payments averaged in excess of \$45,000 per month. Selten ceased making payments in the ordinary course of business on June 1, 1977, when a payment was made for Pacific's billings as of April 1, 1977.

13. Advertising ordered by Selten continued to be published and billed by Pacific after April 1, 1977. In the absence of regular payments by Selten, the amount due from Selten to Pacific continued to increase. A single payment was made on behalf of Selten to Pacific in August 1977, in the approximate amount of \$67,500, as a deposit against the amounts due Pacific from Selten for NYPS advertising ordered prior to September 1977. Pacific alleges that over \$500,000 remains due and payable from Selten for advertising published pursuant to Selten's orders placed prior to September 1977.

14. Pacific will pay a commission (discount) only on yellow pages advertising placed by NYPSA "selling companies" on orders for national yellow pages advertising. Pacific does not pay a commission (discount) on yellow pages advertising orders placed with Pacific for publication in Pacific's directories and not received from NYPSA selling companies.

15. Complainant has requested relief from the United States District Court under the federal antitrust laws as set forth in Exhibit 16 in evidence in this proceeding. Pacific is a defendant in that proceeding and the allegations of the Answer and Amended Counterclaim of Pacific are set forth in detail in Exhibit 17 in evidence in this proceeding.

16. Pacific's allegations, as set forth in its Amended Counterclaim (Exhibit 17), include a Second Cause of Action for Breach of Contract against Selten. Pacific seeks damages for the amounts alleged to be due and payable from Selten to Pacific for national yellow pages advertising allegedly ordered by Selten through Pacific. This claim is for the same NYPSA advertising alleged by Pacific to be due and payable from Selten in this proceeding in an amount in excess of \$500,000.

17. Selten was entitled to a commission (discount) of 15 percent on national yellow pages advertising orders placed with Pacific in the ordinary course of business prior to September 1977.

18. By Decision No. 89002 dated June 27, 1978 this Commission ordered Pacific to accept advertising orders from Selten in Pacific's California directories if Selten prepaid 70 percent of annual directory charges.

19. Selten has placed advertising orders pursuant to Decision No. 89002, and Pacific has accepted and published such advertising orders pursuant to our decision. Selten has prepaid 70 percent of the annual charges, based on the rates and charges provided by Pacific's tariffs on file with this Commission.

20. Complainant contends that the distinction between national and local advertising by Pacific is unlawful discrimination, and that Pacific should be ordered to give complainant a commission (discount) on yellow pages advertising placed with Pacific for publication in Pacific's directories.

21. Pacific alleges that its tariffs, Schedule Cal. P.U.C. No. 39-T, Special Conditions 9 and 9.a., provide that it is authorized to refuse advertising service in its directories to complainant because of complainant's failure to pay for advertising service in a current or preceding directory. This claim is based upon the alleged amounts due and owing from complainant to defendant for advertising orders placed prior to September 1977.

Conclusions of Law

1. The issues involved in the dispute between complainant and defendant regarding unlawful conduct of NYPSA in violation of the antitrust laws are within the primary jurisdiction of the United States District Court for the Central District of California in Civil No. 77-3450-FW. Complainant is a plaintiff in that case and defendant is one of the named defendants.

2. The issues involved in the dispute regarding amounts alleged to be due and payable from complainant to defendant are at issue in the federal case. This Commission could not issue a final order which would be binding upon both complainant and defendant regarding the alleged indebtedness for NYPSA advertising.

3. Advertising placed by Selten with Pacific pursuant to our Decision No. 89002 dated June 27, 1978 is accepted by Pacific upon prepayment of 70 percent of the annual directory charges. Annual directory charges set forth in our order and decision are those rates and charges set forth in Pacific's tariffs, Schedule Cal. P.U.C. No. 39-T, Sheets 12-20. If Selten fails to pay the 30 percent balance due on such rates and charges 30 days after publication and billing, Pacific is no longer obligated to accept and publish advertising from Selten, pursuant to Schedule Cal. P.U.C. No. 39-T, Special Conditions 9 and 9.a., provided, however, Selten may deposit the amounts claimed to be due and owing by Pacific with this Commission and set forth facts supporting a claim that such balance due for yellow pages advertising is in dispute.

4. Pacific's tariff, Schedule Cal. P.U.C. No. 39-T, Special Conditions 9 and 9.a., is applicable to NYPS advertising orders accepted and published by Pacific as a selling company. However, the rights and obligations of complainant and defendant regarding national yellow pages advertising ordered prior to September 1, 1977 are matters within the primary jurisdiction of the United States District Court, Central District of California, Civil No. 77-3450-FW. If Pacific prevails in the federal court and obtains a judgment against complainant for amounts due for advertising, Pacific will be authorized to refuse advertising orders from complainant until such judgment is paid.

5. Pacific is not obligated to grant a commission (discount) on yellow pages advertising ordered directly from Pacific for placement in Pacific's directories. Pacific is obligated to place such advertising under the rates, charges, terms, and conditions set forth in its tariffs on file with this Commission. Commissions

(discounts) for national yellow pages advertising granted under NYPSA arrangements involve business conducted in interstate commerce. Any unlawful business practices by NYPSA would be within the primary jurisdiction of the federal courts. The dispute between complainant and defendant regarding the acceptance of national yellow pages advertising is, in fact, the subject matter of Civil No. 77-3450-FW in the United States District Court, Central District of California.

6. Complainant should be authorized to continue to place advertising orders directly with Pacific upon prepayment of 70 percent of annual directory charges. Pacific is authorized to refuse to accept such advertising orders if payment of the 30 percent balance is not paid 30 days after publication and billing of such advertising or, alternatively, unless such amounts are deposited with this Commission pursuant to a bill dispute.

O R D E R

IT IS ORDERED that:

1. The Pacific Telephone and Telegraph Company (Pacific) shall accept advertising from The Selten Agency, Inc. (Selten) for California directories if Selten prepays 70 percent of the annual directory charges, subject to Ordering Paragraphs 2 and 3, below.

2. Pacific is authorized to refuse advertising from Selten if the 30 percent balance due is not paid within 30 days after publication of such advertising and billing for such balance. However, such balance may be deposited with this Commission if the amount of such bill is disputed.

3. Pacific is authorized to refuse advertising to Selten in the event Pacific secures a final judgment against Selten for amounts

C.10588 SW/NB

due for past advertising ordered by Selten from Pacific and such judgment is not paid.

4. All other relief requested by Selten is denied.

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

Dated at San Francisco, California, this 17th day of JULY, 1979.

John E. Bryan
President
James L. Higgins
Robert W. Galloway
Charles L. Sedwick
James J. ...
Commissioners