

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
ASSOCIATED CONSTRUCTION PUBLICATIONS ET AL.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 7285. Complaint, Oct. 21, 1958—Decision, Apr. 26, 1962

Order dismissing without prejudice—the allegations not having been sustained—
complaint charging a Detroit association and its 14 member publishers with
combining illegally to eliminate competition and to monopolize the ad-
vertising business of advertisers using regional construction trade papers,
including limitation of membership to one publication in a given area, allo-
cation of territories so as to exclude overlapping in circulation, securing of
patronage of advertisers by unlawful means and diverting it from com-
peting publications, and agreements upon prices, discounts, and terms of
sale for advertising space.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act
and by virtue of the authority vested in it by said Act, the Federal
Trade Commission, having reason to believe that the parties named in

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the caption hereof and hereinafter more particularly described and designated as respondents, have violated and are violating the provisions of Section 5 of said Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Associated Construction Publications is a non-profit membership corporation, organized and existing under and by virtue of the laws of the State of Michigan, with its home office and principal place of business located at 2746 Penobscot Building, Detroit, Mich. Said respondent will be hereinafter referred to as respondent ACP. Its officers are as follows: Richard C. Mertz, President, Robert O. Schaefer, First Vice President, Roscoe Laing, Vice President, and Gordon L. Anderson, Secretary-Treasurer. The foregoing individuals, together with Earl P. Keyes, comprise the Board of Directors and Executive Committee of respondent ACP. The business address of all the foregoing individual respondents is 2746 Penobscot Building, Detroit, Mich.

PAR. 2. (a) Respondents Eunice Chapin, Thomas Chapin and Harold C. Chapin are individuals and co-partners trading and doing business under the partnership name of Chapin Publishing Co. The business address of said respondents is 1022 Lumber Exchange Building, Minneapolis, Minn. Said respondents are engaged in the business of publishing a regional construction publication known as CONSTRUCTION BULLETIN.

(b) Respondent Construction Publishing, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its home office and principal place of business located at Peoples Federal Building, Roanoke, Va. Respondent is engaged in the business of publishing a regional construction publication known as CONSTRUCTION. Respondent Kenneth O. Dinsmore is an individual and President of respondent corporation; William Beury is an individual and Vice President of respondent corporation; George C. Stewart is an individual and is Secretary of respondent corporation. The address of said respondents is Peoples Federal Building, Roanoke, Va.

(c) Respondent Construction News, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Arkansas, and its business address is Post Office Box 2421, Little Rock, Ark. Respondent is engaged in publishing a regional construction publication known as CONSTRUCTION NEWS. Respondents Ray Metzger, E. L. Gaunt, Marie Metzger are individuals and President, Vice

President, and Secretary-Treasurer, respectively, of respondent corporation. Respondents' address is Post Office Box 2421, Little Rock, Ark.

(d) Respondent Reports Corporation, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and respondent's business address is 6 South Orange Avenue, South Orange, N.J. Respondent is engaged in publishing a regional construction publication known as CONSTRUCTIONEER. Respondents George C. Stewart, Kenneth O. Dinsmore, and Hermon S. Swartz are individuals and are President, Vice President, and Secretary-Treasurer, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent Reports Corporation, Inc.

(e) Respondents Fred Johnston, Sr., Anna C. Johnston, Fred Johnston, Jr., Jerry Johnston, and Mary Anne Howard are individuals and co-partners trading and doing business as Construction Digest. Respondents' address is 101 East 14th Street, Indianapolis, Ind. Respondents are engaged in publishing a regional construction publication known as CONSTRUCTION DIGEST.

(f) J. O. Bowen, as Trustee for Margaret E. Bowen, owns and publishes a regional construction publication known as DIXIE CONTRACTOR, with offices at 110 Trinity Place, Decatur, Ga.

(g) Respondent Contractor Publishing Company is a corporation organized and existing under and by virtue of the laws of the State of Michigan, with its home office and principal place of business located at 642 Beaubien Street, Detroit, Mich. This respondent publishes a publication known as MICHIGAN CONTRACTOR AND BUILDER. Respondents Richard C. Mertz, Jane Huey Mertz, and Rena A. Beardsley are individuals and President-Treasurer, Vice President, and Secretary, respectively, of respondent corporation. Respondents' address is 642 Beaubien Street, Detroit, Mich.

(h) Respondent Mid West Records, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its home office and principal place of business located at 2537 Madison, Kansas City, Mo. Respondent is engaged in publishing a regional construction publication known as MID WEST CONTRACTOR. Respondents Elbert E. Smith, Norman D. Smith, and Clifford B. Smith are individuals, and are President, Vice President, and Secretary-Treasurer, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent Mid West Records, Inc.

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(i) Respondent R. O. Schaefer, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Tennessee and its home office and principal place of business is located at 425 DeBali-viere Avenue, St. Louis, Mo. Respondent is engaged in publishing a regional construction publication known as **MISSISSIPPI VALLEY CONTRACTOR**. Respondents R. O. Schaefer, R. O. Schaefer, Jr., and Margaret E. Schaefer are individuals and President and Treasurer, Secretary, and Director, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent R. O. Schaefer, Inc.

(j) Respondent Construction Publishing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts with its home office and principal place of business located at 27 Muzzey Street, Lexington, Mass. Respondent is engaged in publishing a regional construction publication known as **NEW ENGLAND CONSTRUCTION**. Respondents Hermon S. Swartz, Dorothy Swartz, Richard Nichols, and Charles Goodhue are individuals and President and Treasurer, Secretary, Director, and Clerk, respectively, of respondent corporation. Said individual respondents' address is the same as that of the corporate respondent Construction Publishing Co., Inc.

(k) Respondent Pacific Builder & Engineer, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington, and its home office is located at 2418 Third Avenue, Seattle, Wash. Respondent is engaged in publishing a regional construction publication known as **PACIFIC BUILDER & ENGINEER**. Respondents Nancy B. Chapin, William Anderson, and Llewellyn Wing are individuals and are President, Vice President, and Secretary-Treasurer, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent Pacific Builder & Engineer, Inc.

(l) Respondent Mountain Publishing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Indiana, with its home office and principal place of business located at 855 Lincoln Street, Denver, Colo. Respondent is engaged in publishing a regional construction publication known as **ROCKY MOUNTAIN CONSTRUCTION**. Respondents Lewis S. Parsons, Gettie A. Parsons, and James L. Parsons are individuals and President, Secretary, and Treasurer, respectively, of respondent corporation. Respondents' business address is 855 Lincoln Street, Denver, Colo.

(m) Respondent Iles-Ayars Publishing Co. is a corporation organized and existing under and by virtue of the laws of the State of

California, with its home office and principal place of business located at 1660 Beverly Boulevard, Los Angeles, Calif. Respondent is engaged in publishing a regional construction publication known as SOUTHWEST BUILDER & CONTRACTOR. Respondents John D. Bowler, Dean I. Bowler, E. J. Evans, and John D. Bowler, Sr., are individuals and President, Vice President, Vice President and Secretary, and Vice President and Treasurer, respectively, of respondent corporation. Respondents' address is 1660 Beverly Boulevard, Los Angeles, Calif.

(n) Respondent Peters Publishing Co., is a corporation organized and existing under and by virtue of the laws of the State of Texas, with its business address as Post Office Box 1706, Dallas, Tex. It publishes TEXAS CONTRACTOR. Respondents W. A. McDonald, Wm. B. Morrison, and B. R. Pruitt are individuals and President, Vice President, and Secretary-Treasurer, respectively, of respondent corporation. Respondents' address is Post Office Box 1706, Dallas, Tex.

(o) Respondent Western Builder Publishing Co., is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and its business address is 407 East Michigan Street, Milwaukee, Wis. Respondent is engaged in publishing a regional construction publication known as WESTERN BUILDER. Respondents Earl P. Keyes, Dorothy C. Keyes, Emil Hoenig, and Arthur G. Larsen are individuals and President, Secretary, Vice President, and Treasurer, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent Western Builder Publishing Co.

The individual respondents hereinabove named in their individual capacities and as copartners and/or as officers of respondent corporations promulgate, direct, and control the policies, acts, and practices of the partnerships and corporations with which they are connected.

PAR. 3. Respondent ACP is a non-stock membership corporation, composed of the fifteen respondent publishers hereinbefore named and described. It was organized as an unincorporated association by twelve of its present members in 1938 and incorporated as a Michigan corporation in 1957. It performs functions commonly performed by trade associations and in addition sells advertising space on behalf of its members, employing one or more paid employees for the purpose. Members pay dues, but most of the revenue expended by respondent is obtained from members by special assessment or collected in the form of enrollment fees. The present fee for enrollment as a member is \$5,000.

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PAR. 4. Each respondent publisher named in paragraph 2 hereof is engaged in publishing a paper or magazine commonly classified and referred to as a regional construction magazine or regional construction paper. These are trade papers for the construction industry conveying news, informative data, and advertising to those engaged in the construction industry.

There are in the United States approximately thirty-five regional construction publications. Most of the revenue of said publications is derived from the sale of space for advertising. The remainder is derived from the sale of paid subscriptions.

Magazines published by the respondents are generally recognized by advertisers as being well established and well recognized publications in their regions. Together, respondents enjoy approximately 90% of the nation's regional construction magazine advertising business.

PAR. 5. The respondents are in commerce within the meaning of the Federal Trade Commission Act in that they sell and ship their publications across state lines to subscribers, many of whom are located in states of the United States other than the state of origin of said shipments. They also exchange with each other and in connection therewith transmit and/or ship across state lines news items, advertising plates, and mats.

PAR. 6. For more than two years last past respondents have been engaging in and carrying out, and are continuing to engage in and carry out a combination, agreement, understanding, and planned common course of action to eliminate and restrain competition among and between themselves and with others and to monopolize in themselves the advertising business of those using regional trade papers designed for the construction industry, as an advertising medium. Pursuant to and in furtherance of their unlawful combination, agreement, and planned common course of action, respondents have, among other things, engaged in and used the following acts, practices, and methods:

(a) Created and organized the respondent ACP as an instrumentality through which to carry out their agreed upon purposes;

(b) So organized and operated ACP as to limit membership to one publication in any given area;

(c) Allocated territories to members so as to exclude overlapping in the circulation of their publications;

(d) Used ACP as a means of securing the patronage of advertisers for themselves and diverting it from competitive publications; and

(e) Have agreed upon prices, discounts, and terms of sale to be charged or applied for advertising space in their publications.

PAR. 7. The tendency and effect of the acts, practices, and methods of respondents, as herein alleged, are now and have been to unduly restrict and restrain competition; cause injury to competitors; stabilize prices for advertising in members' trade papers; impose a barrier to the establishment and development of new trade papers; and to tend to create in respondents a monopoly in the publication of regional trade papers for the construction industry.

Said acts and practices of respondents are all to the injury of competition and the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lynn C. Paulson, supporting the compliant.

Mr. Marshall M. Massey of *Dykema, Jones, Wheat, Spencer & Goodnow*, of Detroit, Mich.; and *Mr. John J. Hudson* of *Gibson, Dunn & Crutcher*, of Los Angeles, Calif.; *Mr. Robert W. Kroening*, of St. Louis Mo.; and *Baker & Daniels*, of Indianapolis, Ind., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in the above-entitled and numbered proceeding alleges that Associated Construction Publications, a corporation, its officers and members, engaged in a planned common course of action to monopolize the sale of advertising space in regional trade magazines published by the individual member respondent publications now serving the construction industry in violation of Section 5 of the Federal Trade Commission Act. They deny in substantial part the allegations of the complaint.

At the conclusion of the Commission's case-in-chief, counsel for respondents moved to dismiss the complaint for lack of proof to sustain the charges. The motion was argued orally before the hearing examiner and denied. Thereafter, at further hearings, counsel for respondents offered oral testimony and documentary evidence in opposition to the allegations of the complaint. Proposed findings of fact, conclusions of law and order have been submitted by respective counsel and oral argument had thereon. All proposed findings of fact and conclusions of law not specifically found or concluded herein have been rejected. Upon the basis of the entire record, the undersigned hearing examiner makes the following findings of fact, conclusions of law drawn therefrom and issues the following order:

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FINDINGS OF FACT

1. The respondent Associated Construction Publications is a non-profit corporation, which will hereinafter be referred to as ACP, organized and doing business under the laws of the State of Michigan, with its office and principal place of business located at 2746 Penobscot Building, Detroit, Mich. Roscoe Laing, named in the complaint as Vice President of respondent Associated Construction Publications, was not at the time of the issuance of the complaint nor is he now an officer of said corporation, and will, therefore, be dismissed from this proceeding. At the time of the issuance of the complaint herein the officers of ACP were as follows:

Ray Metzger, President

W. A. McDonald, First Vice President

Fred G. Johnston, Jr., Second Vice President, and

Gordon L. Anderson, Secretary-Treasurer

The foregoing individuals, together with Richard C. Mertz, comprise the board of directors of the respondent ACP. The respondent ACP is not a publisher and does not publish a trade magazine and, beginning in 1955 or 1956, it assisted its member regional publications as a group in obtaining so-called "national" advertising as contrasted to regional or local advertising. This is advertising from manufacturers of general industrial equipment, such as trucks and wire rope, which are not solely for the construction industry but can be used in the construction as well as in other industrial fields. This is a market which regional magazines have not in the past been able to penetrate. Individual regional construction magazines are not able to compete with national publications for this business.

2. The respondent members of ACP are as follows:

(a) Respondents Eunice, Thomas, and Harold C. Chapin are co-partners doing business under the trade name of Chapin Publishing Co. The business address of said respondents is 1022 Lumber Exchange Building, Minneapolis, Minn. Said respondents are engaged in the business of publishing a regional construction magazine known as "Construction Bulletin."

(b) The respondent Construction Publishing, Inc., is a corporation organized and doing business under the laws of the State of Virginia with its office and principal place of business located at Peoples Federal Building, Roanoke, Va. Respondent is engaged in the business of publishing a regional construction magazine known as "Construction". The individual respondent Kenneth O. Dinsmore is President of said corporation, William Beury is Vice President, and George C. Stewart

is Secretary of said corporation. The address of the individual respondents is the same as that of the corporate respondent.

(c) The respondent Construction News, Inc., is a corporation organized and doing business under the laws of the State of Arkansas, with its office and principal place of business located in Little Rock, Ark. Its mailing address is Post Office Box 2421 in said city and state. The respondent Construction News, Inc. is engaged in the business of publishing a regional construction magazine known as "Construction News". The individual respondents Ray Metzger and Marie Metzger are President and Secretary-Treasurer, respectively, of said respondent corporation. E. L. Gaunt named in the complaint as an officer of said corporation was not then nor is he now an officer of said corporation and, for this reason, will be dismissed from this proceeding.

(d) The respondent Reports Corporation, Inc., is a corporation organized and doing business under the laws of the State of New Jersey with its office and principal place of business located at 6 South Orange Avenue, South Orange, N.J. Respondent Reports Corporation, Inc. is engaged in the business of publishing a regional construction magazine known as "Constructioneer". The individual respondents George C. Stewart, Kenneth O. Dinsmore and Hermon S. Swartz are President, Vice President, and Secretary-Treasurer, respectively, of said corporation. The address of said individual officers are the same as that of the corporation.

(e) The individual respondents Fred Johnston, Sr., Anna C. Johnston, Fred Johnston, Jr., Jerry Johnston, and Mary Anne Howard are co-partners doing business under the trade name "Construction Digest", located at 101 East 14th Street, Indianapolis, Ind. Said respondents are engaged in the business of publishing a regional construction magazine known as "Construction Digest".

(f) The individual respondent J. O. Bowen, as Trustee for John Mann Bowen, William McGowan Bowen and Margaret Elizabeth Bowen, owns and publishes a regional construction magazine known as "Dixie Contractor", with its office at 110 Trinity Place, Decatur, Ga.

(g) The respondent Contractor Publishing Company is a corporation organized and doing business under the laws of the State of Michigan, with its office and principal place of business located at 642 Beaubien Street, Detroit, Mich. This corporation publishes a magazine known as "Michigan Contractor and Builder". The individual respondents Richard C. Mertz, Jane Huey Mertz and Rena A. Beardsley are President-Treasurer, Vice President, and Secretary, respec-

tively, of said corporation. The address of said officers is the same as that of the corporation.

(h) The respondent Mid-West Records, Inc. is a corporation organized and doing business under the laws of the State of Missouri, with its office and principal place of business located at 2537 Madison, Kansas City, Mo. Said corporation is engaged in the business of publishing a regional magazine known as "Mid-West Contractor". The individual respondent Elbert E. Smith is Chairman of the Board of Directors of said corporation and his address is the same as that of the corporation. Norman D. Smith and Clifford B. Smith, named in the complaint as officers of the corporate respondent Mid-West Records, Inc., are not now and were not officers of said corporation at the time of the issuance of the complaint herein and, therefore, will be dismissed from this proceeding.

(i) R. O. Schaefer, Inc., a corporation, alleged in the complaint to be publisher of the regional construction magazine "Mississippi Valley Contractor," is now and was, at the time of the hearings in this proceeding, out of business, and said corporation is no longer publishing said magazine. Therefore, the complaint against said corporation and its former officers R. O. Schaefer, Jr., and Margaret E. Schaefer will be dismissed.

(j) The respondent Construction Publishing Co., Inc., is a corporation organized and doing business under the laws of the State of Massachusetts with its office and principal place of business located at 27 Muzzey Street, Lexington, Mass. Said corporate respondent is engaged in the business of publishing a regional construction magazine known as "New England Construction". Respondents Hermon S. Swartz, Dorothy Swartz, Richard Nichols, and Charles Goodhue are President and Treasurer, Secretary, Director, and Clerk, respectively, of said corporation. The address of the individual respondent officers is the same as that of the corporate respondent.

(k) The respondent Pacific Builder and Engineer, Inc., is a corporation organized and doing business under the laws of the State of Washington, with its office and principal place of business located at 2418 Third Avenue, Seattle, Wash. Said corporate respondent is engaged in the business of publishing a regional construction magazine known as "Pacific Builder & Engineer". The individual respondents Nancy B. Chapin, William Anderson, and Llewellyn Wing are President, Vice President, and Secretary-Treasurer, respectively, of said corporation. The address of the individual respondents is the same as that of the corporation.

(l) The respondent Mountain Publishing Co., Inc., is a corporation organized and doing business under the laws of the State of Indiana, with its office and principal place of business located at 855 Lincoln Street, Denver, Colo. Said corporation is engaged in the business of publishing a regional construction magazine known as "Rocky Mountain Construction". The individual respondents Lewis S. Parsons, Gettie A. Parsons, and James L. Parsons are President, Secretary, and Treasurer, respectively, of said corporation. Their address is the same as that of the respondent corporation.

(m) The respondent Iles-Ayars Publishing Co. is a corporation organized and doing business under the laws of the State of California, with its office and principal place of business located at 1660 Beverly Boulevard, Los Angeles, Calif. Said corporate respondent is engaged in publishing a regional construction magazine known as "Southwest Builder & Contractor". The individual respondents John D. Bowler, Dean I. Bowler, E. J. Evans, and John D. Bowler, Sr., are President, Vice President, Vice President and Secretary, and Vice President and Treasurer, respectively, of said corporation. The address of the individual officer respondents is the same as that of the corporate respondent.

(n) The respondent Peters Publishing Co. is a corporation organized and doing business under the laws of the State of Texas with its office and principal place of business located in Dallas, Tex. Its mailing address is Post Office Box 1706 in said city. Said respondent is engaged in publishing a regional construction magazine known as "Texas Contractor". The individual respondents W. A. McDonald, Wm. B. Morrison, and B. R. Pruitt are President, Vice President and Secretary-Treasurer, respectively, of said corporation. The address of the individual respondent officers is the same as that of the corporation.

(o) The respondent Western Builder Publishing Co. is a corporation organized and doing business under the laws of the State of Wisconsin, with its office and principal place of business located at 407 East Michigan Street, Milwaukee, Wis. Said corporation is engaged in the business of publishing a regional construction magazine known as "Western Builder". The individual respondents Earl P. Keyes, Dorothy C. Keyes, Emil Hoenig, and Arthur G. Larsen are President, Secretary, Vice President, and Treasurer, respectively, of said corporation. The address of the individual officers is the same as that of the corporation.

3. Trade publications for the construction industry generally are either "national" magazines or "regional" magazines. National mag-

azines have nationwide circulation. The circulation of regional magazines is limited to a particular region or area of the United States, such as a state or states. Each of the respondent magazines named in paragraph 2 above is engaged in publishing a magazine generally referred to as a regional construction magazine. Generally, they contain news, advertisements for bids, informative data and advertising of interest to the construction industry. They are circulated to contractors, engineers, architects, companies engaged in construction, mining, such as oil and gas, coal, sand, gravel, and also to federal, state and local public works officials. Their principal income is derived from the sale of advertising space to manufacturers, distributors and dealers of construction equipment. The fourteen respondent publishers are engaged in "commerce" within the meaning of the Federal Trade Commission Act in that they sell and ship their magazines across state lines to subscribers, many of whom are located in states of the United States other than the state of origin of said shipments. They also exchange and ship to each other across state lines, news items, advertising plates and mats. Their course of trade in said magazines, in "commerce", is substantial.

4. Although the complaint alleges there are 35, in his Proposed Findings of Fact, counsel supporting the complaint contends that there are only 26 regional construction magazines in the United States, of which fourteen belong to ACP and the remaining twelve are non-ACP magazines. Counsel further contends that there are ten or twelve national magazines circulated to the construction industry and only four of these are the principal competitors of ACP magazines for advertising from general industrial advertisers. Counsel for respondents do not agree with these contentions. Counsel for respondents offered and there were received in evidence RX-10 and 11. These exhibits purport to list the names of all national and regional construction magazines, showing, among other things, their advertising rates and other information. Most of the information contained in RX-10 was obtained from *Standard Rate and Data*, a reliable advertising publication. There was testimony to substantiate the information contained in RX-10 and 11. These exhibits show that there are approximately seventeen national construction magazines and approximately 119 regional, sectional and local publications in the United States circulated to the construction industry. Upon consideration of all of the testimony and evidence, it is found that there are at least seventy-two regional and local construction publications and seventeen national construction publications circulated to the construction

industry in the United States. All of these magazines compete for construction advertising.

5. The complaint alleges that the respondent publishers of the fourteen regional construction magazines and the individuals alleged to control them, have conspired to restrain competition and create a monopoly in themselves, the advertising business of those using regional construction magazines for advertising purposes. Pursuant to these purposes, the complaint alleges that the respondents have engaged in the following acts and practices:

- (a) Created and organized the respondent ACP as an instrumentality to carry out their agreed upon purposes;
- (b) Organized and operated ACP so as to limit membership to one publication in any given area;
- (c) Allocated territories to members so as to exclude overlapping in the circulation of their publications;
- (d) Used ACP as a means of securing the patronage of advertisers for themselves and diverting it from competitive publications; and
- (e) Have agreed upon prices, discounts, and terms of sale to be charged or applied for advertising space in their publications.

The complaint in the following paragraph (Seven), further alleges that the tendency and effect of these acts and practices has been to unduly restrain competition; cause injury to competitors; stabilize prices for advertising in member publications; impose a barrier to the establishment of new trade papers; and create in respondents a monopoly in the publication of regional trade papers for the construction industry. It was further alleged that these acts and practices amount to unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act. The evidence in the record with respect to paragraph 6 of the complaint and each sub-paragraph thereof, will now be discussed and evaluated.

Was ACP Created and Organized by Respondents As An Instrumentality Through Which To Carry Out Their Agreed Upon Purposes?

6. As found in paragraph 3 above, each of the fourteen¹ respondent magazines involved in this proceeding is a "regional" construction magazine. The respondent Associated Construction Publications was

¹ The complaint herein was directed against a fifteenth regional magazine, "Mississippi Valley Contractor", and its publishers. However, at the time of hearings herein, said magazine had gone out of business and had ceased publication. It was agreed, therefore, that the complaint against the publishers of this magazine would be dismissed.

organized by the owners and publishers of eleven of the respondent regional magazines, and originally was an unincorporated, non-profit association. The respondent Associated Construction Publications was organized in 1938 at the instance of several advertising men handling construction advertising accounts who were interested in improving the quality of regional construction magazines. These advertising men believed that, if the then existing standards of regional construction magazines were raised, the effectiveness of advertising in regional construction magazines would be improved. At that time, the advertised circulation figures of many of the regional construction magazines were not reliable, the page sizes of the magazines were not uniform, requiring different size advertising plates for different magazines, and the editorial content and general make-up of many of the magazines were inferior to the national construction magazines. Therefore, these advertising men believed that, if the regional construction magazines would improve the quality of their publications, such as furnishing audited circulation figures, establishing uniform page sizes so that the same size advertising plates could be used interchangeably by all regional magazines, and raise the editorial and general content of the magazines, the regional magazines would be more acceptable to advertisers, not only national advertisers, but regional and local advertisers. Accordingly, several advertising men, including Mr. Harvey Scribner, now president of Russell T. Gray Advertising Agency, Chicago, Illinois; Mr. Arnold Andrews, then Advertising Manager of the Bucyrus-Erie Company; Ervin Goes, Advertising Manager of the Koehring Company; George McNutt, Advertising Manager of Le-Tourneau, all manufacturers of heavy construction equipment, and Mr. Jim Costello, of the Giddings Advertising Agency, Milwaukee, Wisconsin, called together representatives of fourteen of the then existing regional construction magazines to outline and discuss their objectives. Several of these advertising men and representatives of regional magazines testified at hearings in this proceeding. The fourteen magazines selected by the advertising men to attend this first meeting were considered by these advertising men to be representative of the best and most satisfactory of the then existing regional construction magazines. In short, the idea for the creation of the respondent ACP came from the advertisers, not the publishers of the regional magazines, and the purpose was to raise the quality of the regional magazines. It was the belief of these advertisers that, by raising the quality and standards of the magazines, their usefulness to the advertiser, reader and publisher would be improved. Duplication of coverage or so-called "overlap" among the magazines was not con-

sidered in the formulation and organization of ACP, nor was it intended to create the ordinary type of trade association among the publishers. Thereafter, the publishers met and discussed the suggestions made by the advertising men. As a result, in 1938, eleven of the fourteen publishers who had attended the first meeting with the advertising men formed ACP as an unincorporated association. Approximately 19 years later, in 1957, ACP was incorporated under the laws of the State of Michigan. During this time the membership in ACP was increased from the original 11 to 15 but, as stated on page 865 hereof, one member magazine, "Mississippi Valley Contractor," ceased publication after issuance of the complaint herein. The by-laws, minutes of annual and semi-annual meetings of ACP and documentary evidence offered and received in evidence at the hearings demonstrate that the principal purpose for the information of ACP was to raise the publishing standards of the regional construction magazines. Originally, the initiation or enrollment fee for each member was \$50, but has since been increased from time to time. The present membership enrollment fee is \$5,000 for each new member. The procedure for admitting new members is provided for in the by-laws. Membership is by invitation only. Proposals for membership are communicated by the secretary to the members. A committee composed of the then current officers of ACP determines the eligibility of the applicant and makes a recommendation with respect to said applicant at the next membership meeting. A three-fourths affirmative vote of the members is required to admit the prospective new member to membership in ACP.

Have Respondents Organized and Operated ACP So As to Limit
Membership to One Publication in Any Given Area?

7. At the initial meeting called by the advertisers to discuss the raising of standards of regional construction magazines and the formulation of ACP, representatives of fourteen regional construction magazines appeared and eleven of these magazines joined in the organization of ACP. At the initial meeting and at the organization of ACP, the question of overlapping or duplication of circulation between the regional magazines was not discussed. The advertisers who called the meeting had as their prime purpose the raising of standards of the regional magazines and the magazines who were invited to attend the original meeting were selected because, in the opinion of the advertising men, they were the most satisfactory of the then existing regional magazines. There were varying degrees of overlapping and duplication of circulation among and between some of the regional

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construction magazines who were original members when ACP was first organized. As an example, the geographical circulation area of *Mississippi Valley Contractor* was overlapped or duplicated by three of the other original members of ACP, *Construction Digest*, *Construction News*, and *Mid-West Contractor*. ACP has not restricted its membership to the original charter members. Since 1938, five regional construction magazines have been accepted to membership in ACP, these being *Construction Bulletin* in 1943, *Constructioneer* in 1945, *Construction* and *Rocky Mountain Construction* in 1953, and *Pacific Builder and Engineer* in 1956. However, one of the important considerations in the selection of the last three magazines to membership in ACP, *Construction*, *Rocky Mountain Construction*, and *Pacific Builder and Engineer* was the growing importance of nation-wide coverage in competing with national construction magazines for general industrial advertising. With the addition of these last three construction magazines, nation-wide circulation coverage was achieved for the first time and made it possible for ACP to begin to compete with national construction magazines for general industrial advertising. Even in the selection of *Construction Bulletin*, *Construction Engineer*, *Construction*, *Rocky Mountain Construction* and *Pacific Builder and Engineer* to membership in ACP, there was some overlap. *Construction Bulletin* overlapped *Mid-West Contractor* with respect to the State of Iowa. *Rocky Mountain Construction* overlapped *Southwest Builder and Contractor* with respect to Arizona and part of Nevada. *Pacific Builder and Engineer* overlapped *Rocky Mountain Construction* in the states of Montana, Wyoming, Utah and Idaho.

8. Since the formation of ACP in 1938 only two applications for membership have been denied and neither of these applications was denied by reason of overlapping or duplication of circulation coverage. The first application to be rejected was the application of Mr. Maurice Baker of Lansing, Michigan, for his magazine, *Michigan Roads and Construction*, in 1947. Mr. Baker was one of the principal Commission witnesses. Mr. Baker testified that, in his opinion, his application was denied by reason of the fact that his magazine duplicated the circulation coverage of *Michigan Contractor and Builder*, an ACP magazine. A preponderance of the evidence shows that one of the reasons for the rejection to membership was due to the inferior quality of his magazine, *Michigan Roads and Construction*, in comparison to *Michigan Contractor and Builder*, a competing ACP magazine. Another reason was that some of the ACP members acquired a personal dislike for Mr. Baker by reason of his alleged threats to institute antitrust proceedings if his magazine was not admitted to membership in ACP. Some of the members charac-

terized such threats as blackmail. Several members of ACP testified at the hearing concerning Mr. Baker's application. They testified that the principal reason for the rejection of Mr. Baker's application for membership in ACP was due to the overall inferiority of Mr. Baker's magazine, *Michigan Roads and Construction*. Their testimony was corroborated by the testimony of several advertisers of construction equipment who testified at the hearing. Each of these witnesses who testified concerning the quality of Mr. Baker's magazine, *Michigan Roads and Construction*, testified that it is inferior in quality to its competitor *Michigan Contractor and Builder*, the ACP publication. The evidence does not sustain the contention by counsel supporting the complaint that Mr. Baker's magazine would have been admitted to membership in ACP had it not duplicated the territory of *Michigan Contractor and Builder*. The other application for membership in ACP which was rejected was the application of *Pacific Builder and Engineering Review* for its California Supplement in 1951. This was Mr. Roy Fellom's publication. Mr. Fellom testified in support of the complaint and his testimony will be discussed more in detail later on in this decision. The circulation of *California Supplement* covered northern California. At that time there was no ACP magazine which covered the northern California area. Consequently, it cannot be found that duplication of territory with a competing ACP publication determined the rejection of either of these magazines to membership in ACP.

Has ACP Allocated Territories to Members So As to Exclude Overlapping In the Circulation of Their Publications?

9. As previously found, the regional magazines selected by the construction equipment advertisers to attend the first meeting which led to the organization of ACP were selected by reason of their being some of the better regional magazines and not by reason of the fact that there was no overlapping or duplication of circulation coverage between any of them. The reason for their selection according to the testimony of the advertisers who were responsible for the organization of ACP was the fact that these magazines were, in the opinion of these advertisers, the best regional magazines being published at that time from the standpoint of quality, and the raising of the quality and standards of these regional construction magazines was the primary purpose for the organization of ACP. So, the fact that the territorial coverage of some of the ACP magazines overlapped and duplicated coverage of some of the other ACP magazines is an indication that

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ACP was not formed on the basis of one member magazine in a given area. The members today remain predominantly the original publications. The trade territories covered by each of the ACP regional construction magazines are controlled by and coincide with the trade territories of the construction equipment dealers in the particular area. This is also true of regional construction magazines generally, irrespective of membership in ACP. With some exceptions, one of the characteristics of most regional magazines is their intensive coverage of their circulation area. Their territorial coverage remains constant because the dealers' territories remain stable. The original individual magazines which became members of ACP had been in existence for many years prior to the organization of ACP in 1938 and, as has been found, there was overlapping and duplication of coverage between some of the ACP magazines at the time ACP was formed and continues today. The ACP brochure (CX-55), which was published and distributed to advertisers in 1958, shows circulation overlap in all of the following states:

<i>State</i>	<i>ACP members with advertised circulation in that area</i>	<i>Circulation in the area</i>
Arizona	Rocky Mountain Construction	705
	Southwest Builder and Contractor	258
Arkansas	Construction News	1,309
	Mississippi Valley Contractor	367
Illinois	Construction Digest	3,685
	Mississippi Valley Contractor	2,149
	Western Builder	214
Iowa	Mid-West Contractor	1,182
	Construction Bulletin	712
Michigan	Michigan Contractor and Builder	3,021
	Western Builder	224
Nevada	Rocky Mountain Construction	95
	Pacific Builder and Engineer	94
	Southwest Builder and Contractor	63
Mississippi	Construction News	861
	Mississippi Valley Contractor	462
Missouri	Mississippi Valley Contractor	1,790
	Mid-West Contractor	1,563
	Construction News	1,451
Tennessee	Construction News	894
	Mississippi Valley Contractor	419

10. The evidence shows that advertisers do not object to the present degree of overlapping existing between some of the ACP member magazines because a certain amount of overlapping is unavoidable. Of course, advertisers object to a large degree of overlapping, especially where the dealer is participating in the cost of advertising because it

means paying twice to reach the same potential customer in the overlapped area. The evidence discloses that ACP members have discussed the question of overlap between member publications at various meetings but it was "a lot of talk and no action." Mr. Roy Fellom, publisher of *Pacific Road Builder and Engineering Review*, testified that he discussed with several publishers, including Mr. Kenneth O. Dinsmore, whose magazine, *Construction*, is a member of ACP, on two occasions, the possibility of membership in ACP for his magazine; that he understood from these conversations he would have to "draw in" his twelve-state circulation from the Rocky Mountain and Southern California areas and limit his circulation to the Northern California area in order to be accepted as a member. Mr. Fellom did not apply for membership nor was he invited to become a member of ACP. However, on cross examination, Mr. Fellom further testified that in his conversation with Mr. Dinsmore in 1956, Mr. Dinsmore did not suggest that Mr. Fellom's magazine "draw in" or withdraw from the Rocky Mountain and Southern California areas so as not to compete with the ACP magazine in those areas nor did Mr. Dinsmore suggest or state that the ACP magazines in the Rocky Mountain or Southern California area would stay out of the Northern California area if Mr. Fellom's magazine became a member of ACP; that Dinsmore may have stated that Fellom's magazine, which covers eleven western states, Alaska and the Pacific basin was too sprawling to be effective as an advertising medium. A preponderance of the evidence demonstrates that the purpose of Mr. Dinsmore's conversation with Mr. Fellom was to find a suitable magazine to cover the then existing gap in ACP coverage in the Pacific Northwest and there was no demand or agreement, in the conversations between Mr. Fellom and Mr. Dinsmore or other members of ACP, expressed or implied, that Mr. Fellom's magazine could become a members of ACP on the condition that his magazine not duplicate or overlap the circulation of an ACP magazine.

Have the Respondents Used ACP As A Means of Securing Patronage of Advertisers and Diverting It From Competitive Publications?

11. The evidence shows that there are two categories or types of display advertising contained in ACP regional magazines. The first type is (1), construction equipment advertising and the second (2), advertising of general industrial products which are marketed to other industries than construction. The first type, construction equipment advertising, includes tractors, engines, earth moving equipment,

shovels, cranes, draglines and cement. Some of the manufacturers who advertise these products include Allis Chalmers, Caterpillar, International Harvester, The Oliver Corporation, J. I. Case, Northwest Engineering, Bucyrus-Erie, Manitowoc, Bay City, Harnischfeger, and Huron Portland Cement. These manufacturers direct their advertising toward the construction equipment industry exclusively. Many of these manufacturers employ advertising agencies to handle their construction equipment advertising. Revenue from construction equipment advertising accounts for 85% to 90% of all display advertising in regional construction magazines, including the ACP magazines. In other words, revenue from construction equipment advertising is their principal source of income, their "bread and butter," as characterized in the testimony. The second category, advertising of general industrial products, is a new field for ACP and for all regional construction magazines. Historically, advertisers in this second category, of general industrial products, have used national construction magazines exclusively for their advertising. They have not advertised in regional construction magazines. It was not until *Pacific Builder and Engineer* became a member of ACP in 1956 and ACP obtained nationwide circulation coverage for the first time that ACP began soliciting advertising for and on behalf of each of the member ACP magazines as a group from this second category of advertisers, that is, advertisers of general industrial products. Up to the present time, however, ACP has not been able to obtain very much of this class of advertising. This second category of display advertising that, of general industrial products, will be discussed more in detail later on in this decision. For the moment, the first category of advertising, advertisers of construction equipment, will be discussed.

12. Manufacturers of construction equipment sell their products through regional distributors or local dealers who sell locally to the users of construction equipment. Usually each distributor or dealer handles, distributes, and sells several lines of construction equipment. Within the State of Michigan, for instance, in its trade territory, each manufacturer of construction equipment ordinarily has one or two dealers in the lower peninsula and one in the upper peninsula. The number of construction dealers in that trade territory is approximately 34. Approximately five Michigan construction dealers testified at the hearing. Distributors and dealers of construction equipment are not interested in advertising in national construction magazines for the reason that their individual sales territory is limited to a local geographical area. Therefore, the dis-

tributors or dealers of construction equipment prefer to advertise in a regional construction magazine whose area of circulation is more heavily concentrated in the local area where the distributor or dealer sells his product. One of the advantages of a regional construction magazine as contrasted to a national magazine is dealer identification. This is of value to both the manufacturer and dealer in selling the product. Construction equipment dealers usually participate in the cost of the advertising of the manufacturers' product which they sell. Some of the manufacturers pay the entire cost of advertising in the regional construction magazines. Approximately 50% of the manufacturers share the advertising costs of their products on a 50-50 basis with their local dealer or distributor. Consequently, the dealer is usually influential with his manufacturer in determining where regional advertising will be placed as between two competing regional construction magazines. Contrary to the testimony of some of the publishers of non-ACP members regional construction magazines that, in some instances, the manufacturer or his advertising agency refused to follow the recommendation of the dealer in placing display advertising in a competing non-ACP member's regional construction magazine, a preponderance of the testimony and evidence demonstrates that the manufacturer generally follows the recommendation of his local dealer in placing advertising in a regional construction magazine. Of the five Michigan construction equipment dealers who testified at the hearing, only one witness testified that he had ever been overruled by a manufacturer or its advertising agency in his recommendation of a regional construction magazine and that was in favor of the non-ACP member regional construction magazine in Michigan over the dealer's recommendation of the ACP magazine.

13. Many of the manufacturers of construction equipment employ advertising agencies to handle their advertising and for the most part, these agencies are located in the Chicago-Milwaukee area. The plants of many of the construction equipment manufacturers are also located in this general area. However, some of the construction equipment manufacturers have an advertising staff in their own offices who assist the advertising agency in laying out and planning the manufacturer's advertising campaign. The manufacturers of construction equipment and their advertising departments and agencies are personally familiar with most of the regional ACP magazines. In fact, some of these advertising agencies were directly responsible for the organization of ACP. These advertising agencies pick and choose between the different regional construction magazines in each

area, ACP and non-ACP alike, on the basis of their specific advertising and sales needs and the quality of the regional construction magazine. Advertisers of construction equipment do not purchase so-called "package" advertising in all of the ACP regional construction magazines. One of the witnesses for respondents, Mr. Joseph L. Serkowich, vice president of Aubrey, Finlay, Marley & Hodgson, an advertising agency which handles the advertising account of International Harvester Co., Construction Equipment Division, testified that he selects the regional construction magazine in which he places advertising on the basis of the quality of the magazine, regardless of whether it is, or is not, a member of ACP. Mr. Serkowich sponsored RX-18 which is an advertising folder prepared by his agency each month for distribution to International Harvester Company's dealers of construction equipment to show its dealers the advertising International Harvester is doing each month for its products. The folder contains, among other things, a list of 74 trade publications in which advertising of International Harvester products appeared during the month of August, 1959. This list includes both regional and national construction magazines and corroborates the testimony of the advertisers that they select regional construction magazines on the basis of particular needs or object of the advertising program. In some instances, for specific purposes, Mr. Serkowich may select an ACP magazine over a competing non-member ACP magazine and, in another case, select a non-member magazine over an ACP magazine. As an example, Mr. Serkowich testified that, as shown in RX-18, on behalf of International Harvester, one advertisement was placed in four regional construction magazines, three ACP magazines, and one non-member magazine, *Kansas Construction* (Mr. Weilepp's magazine). Mr. Serkowich further testified that the non-ACP regional construction magazine *Kansas Construction* was used in this advertisement instead of the ACP magazine *Mid-West Contractor* because the advertisement was a "rifle shot to a state", Kansas, and Mr. Serkowich was not interested in *Mid-West Contractor's* additional coverage of two or three more states for the purposes of the particular advertisement.

14. The evidence further shows that each individual ACP magazine confines its solicitation of advertising to the dealers of construction equipment in its own area. Of course, to be successful, it is generally necessary for a representative of the individual ACP magazine to also call on the advertising agency and the advertising department of the manufacturer, if the manufacturer has an advertising department. But the individual ACP magazine does not solicit construction

equipment advertising for any other ACP magazine. However, considerable construction equipment advertising accounts are obtained by regional construction magazines, ACP and non-ACP, through the recommendation of the local dealer alone. In other words, when a representative of an ACP magazine solicits construction equipment advertising he only solicits for his own magazine and does not go outside its own area of circulation and solicit construction equipment advertising either for his own magazine or for any other ACP magazine.

15. Proceeding to the field of general industrial advertising, which ACP began to solicit in 1955 or 1956, it is clear that these advertisers are not interested in spot coverage such as a regional magazine generally affords, but are interested only in nation-wide advertising coverage. Typical products in the general industrial category include trucks, wire rope, petroleum, logging, mining, metal working, elevators, etc. The evidence shows that the potential revenues from general industrial advertising are large. As an example, Mr. David Hyde, the advertising salesman for ACP, testified that he clipped out 106 full-page advertisements of general industrial products from *Engineering News Record* and *Construction Methods*, two of the leading national construction magazines published by McGraw-Hill Co., for the four month period October, 1958 to January, 1959, which represented a total revenue of approximately \$1,500,000 annually. (RX-15.) Mr. Hyde also counted the pages of similar advertising which appeared in the other fifteen national construction magazines and estimated that the total revenue of the seventeen national construction magazines from advertisements from general industrial products approximates \$3,000,000 a year. This would equal approximately two-thirds of the entire present billings of all fourteen ACP magazines. The advertisers of general industrial products do not use regional construction magazines because their advertising is not directed solely at construction equipment, but is aimed at a broader field and, consequently, they concentrate on a national advertising. They must cover the entire country with their advertising budget. They are not familiar with the regional construction magazines. Therefore, they ordinarily advertise in national magazines with circulation throughout the United States. Distributors who carry general industrial products do not sell just to the construction industry as construction equipment dealers do. Distributors of general industrial products handle all types of machinery, equipment and supplies used by the broad field of industry. The time and effort necessary for advertisers to analyze individual regional magazines is justified in construction equipment

advertising where the advertiser can cover the construction industry and particular territories in depth, but it is not justified in advertising general industrial products where only a fraction of the advertising budget is aimed at construction and the whole country must be covered with this fraction. Also, since advertising agents are generally compensated on the basis of 15% of the cost of advertising used, it is a natural tendency to advertise in one or two of the national magazines in preference to analyzing and choosing between a large number of regional publications in an effort to cover the entire United States. Since regional construction magazines work closely with the local construction equipment distributor or dealer, they not only obtain advertising from them but the distributor and dealer also assist the regional construction magazine in obtaining advertising from the manufacturer, whereas this is not possible with distributors and dealers of general industrial products. Since ACP began soliciting general industrial advertising accounts through Mr. Hyde, the ACP magazines as a group have obtained the national advertising accounts of American Chain and Cable, The John Roebling Co., B. F. Goodrich, and Mack Truck, who had theretofore used national construction magazines.

16. ACP had an advertising budget of \$30,000 in 1958 and Mr. Robert Thomson of Thomson Advertising, Inc., Chicago, Illinois, handles the advertising for ACP. Mr. Thomson's company is also the advertising agency for Caterpillar Tractor Company. Approximately two-thirds of ACP's advertising budget is expended on advertisements in *Industrial Marketing*, *Construction Equipment News*, and *Standard Rate and Data*, which are magazines read by buyers of advertising generally. The aim of this advertising is to stress the advantages of regional magazines, local news coverage, bid news, and dealer identification so as to induce the advertiser to place advertising in the ACP regional magazines instead of national construction magazines. The evidence shows that ACP's budget of \$30,000 is a modest one. Some of the competitor non-member ACP witnesses who testified in support of the complaint complained of the entertaining of advertisers by ACP magazines at cocktail parties. The evidence shows that the entertaining consists of a yearly cocktail party at a road convention in Chicago and possibly one other party annually attended by representatives of ACP magazines and invited advertising agencies and their accounts. Such entertaining is normal and does not appear unreasonable.

17. There is no evidence in the record that the ACP members exercise or have exercised any form of coercion on advertisers to place

advertising in the ACP magazines or that they have attempted to induce advertisers not to purchase advertising in non-member competing regional construction magazines. As previously found, Mr. Hyde does not solicit distributors or local dealers for construction equipment advertising. Mr. Hyde restricts his solicitation to advertisers of general industrial products exclusively for and on behalf of the ACP magazines as a package. The ACP magazines solicit construction equipment advertisers on an individual basis and do not use ACP as a selling agency for construction equipment advertising and ACP has not been used to divert business from competitors. In other words, the evidence shows that the individual ACP magazines solicit and obtain construction equipment advertising from advertisers who pick and choose between the regional construction magazines, without regard to ACP. Therefore, membership in ACP is not the determining factor in obtaining construction equipment advertising. Since construction equipment advertising is the only kind of display advertising in which ACP and non-ACP regional construction magazines have ever really competed for, it follows that ACP has not been used to divert business from non-ACP competitor magazines with respect to either construction equipment advertising or industrial products advertising. Even in the general industrial advertising field where Mr. Hyde solicits advertising for ACP, it cannot be said that the members use ACP to divert business from non-member regional construction magazines, for these non-member magazines have never had the general industrial advertising which Mr. Hyde began soliciting for the ACP members in 1956. These non-member magazines have not been nor are they now in position to compete for this business because the evidence shows that general industrial advertisers demand nationwide circulation coverage such as that afforded by the national construction magazines and, in recent years, by the ACP magazines. The evidence and testimony is overwhelming and is even corroborated by the testimony of some of the non-member regional publishers who testified in support of the complaint that ACP does not now nor would it in the future deprive non-member magazines of any opportunity to obtain national advertising from general industrial advertisers even if they were to become members of ACP for the reason that they do not have any of this advertising now and if all regional magazines who might apply were required to be admitted to membership in ACP, ACP's appeal to these general industrial advertisers would be rendered ineffective and injure the present members without aiding the new members. This is so because there would be duplication and overlapping of circulation coverage, rendering the group selling appeal

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of ACP to national advertisers of general industrial products ineffective and less attractive. Furthermore, there is no evidence in the record that ACP has prevented or intended to prevent non-member regional construction magazines from forming a similar selling organization to ACP so as to compete for general industrial advertising. Under the doctrine announced in *Prairie Farmer Publishing Co. v. Indiana Farmer's Guide Publishing Co.*, 88 F.2d 979 (7th Cir. 1937), *cert. denied*, 301 U.S. 696, 81 L. ed. 1351 (1937), group selling by a specific group of regional magazines to compete as a national medium with national publications is lawful, even if incidental injury to non-member regional publications may result from it.

Have the Respondents Agreed Upon Prices, Discounts, and Terms of Sale to be Charged or Applied for Advertising Space in Their Publications?

18. There is complete absence of any evidence or testimony of price-fixing on the part of any respondent. In fact, Commission counsel did not attempt to prove price-fixing. No witness who testified on behalf of the Commission complained about any price-fixing by respondents. The advertising rates and the circulation figures for each of the ACP magazines are available to the public and are published in *Standard Rate and Data Service*, a reliable publication and considered in advertising circles as the advertising man's "Bible". The advertising rates of the individual ACP magazines vary from magazine to magazine. Each individual ACP magazine solicits construction equipment advertising for its own account and not for any other ACP magazine. The only advertising which ACP solicits for the ACP magazines as a group is general industrial advertising. Mr. Hyde, the advertising salesman for ACP, solicits advertising of general industrial products for all of the ACP magazines as a "package". For convenience, Mr. Hyde carries a rate card showing the advertising rates for each individual ACP magazine. If the advertiser buys the "package," the advertiser pays the total of the individual rate for each of the ACP magazines making up the "package". The advertiser can purchase advertising in one or more of the individual ACP magazines as he may select. No discount is granted other than the usual 2% discount which is standard among all publications.

19. Paragraph 7 of the complaint alleges that the tendency and effect of the acts and practices of respondents have tended to unduly restrict and restrain competition and create a monopoly in the publication of regional construction magazines. These restraints are alleged to cause injury to competitors, stabilize advertising charges, and

impose a barrier to the establishment and development of new trade papers. The allegation in paragraph 4 of the complaint that "there are in the United States approximately 35 regional construction publications" and that "together, respondents enjoy approximately 90% of the nation's regional construction magazine advertising business" has not been established. It has been found in paragraph 4 above that there are at the very least 72 regional and local construction publications and 17 national construction publications circulated to the construction industry in the United States. All of the evidence, including the testimony of the non-ACP publishers who testified in support of the complaint, establishes the fact that each of these magazines compete with each other for construction advertising. The evidence in the record demonstrates beyond any question that the ACP magazines comprise a small fraction of the total number of publications in the construction advertising field and their total share of the construction equipment advertising market is similarly small compared to the total. As an example, Mr. Akers, publisher of *Arizona Builder and Contractor* testified that there are at least 15 national construction magazines with whom he must compete in each of the states covered by his magazine and there are approximately 30 construction publications with which he competes in the state of Utah alone.

20. The charge in the complaint that the respondents impose a barrier to the establishing and development of new trade papers has not been established. The evidence shows that, of the 64 non-ACP construction publications for which dates of first publication are available, 35 were established prior to the formation of ACP in 1938, while 29 were established during the 20-odd year period since 1938. Two of the construction magazines which have been established since 1938, when ACP was organized, are *Kansas Construction*, whose assistant publisher, Mr. Weillepp, testified in support of the complaint, and *Arizona Builder and Contractor*, published by Mr. Akers, who also testified in support of the complaint. Mr. G. D. Crain of Chicago, Illinois, publisher of *Industrial Marketing, Advertising Age*, and *Advertising Requirements*, testified concerning the increase in the number of construction publications established during the 20-odd year period since ACP was organized in 1938. Mr. Crain testified that the 1938 directory of business publications which his own firm publishes listed 33 publications "of primary interest to advertisers" in the "engineering construction" field, whereas the 1959 directory listed 47 such publications. This is an increase of approximately 42%. Mr. Scribner testified that there were more regional construction publications now than in 1938 when ACP was formed and that he knew of two regional

publications entering the field within "a few weeks" prior to the date of his testimony.

21. Counsel supporting the complaint seems to lay the greatest emphasis on his argument that ACP is a private and exclusive "club" which is injurious to nonmember regional construction magazines competing for national construction equipment advertising. As previously found, the ACP magazines contain two types of display advertising, (1) construction equipment advertising, and (2) general industrial advertising. Each individual ACP magazine solicits construction equipment advertising for itself and for its own individual account. The individual ACP magazines do not solicit this second category of advertising, general industrial advertising. General industrial advertising is solicited by Mr. Hyde, advertising salesman for the ACP magazines as a group. In spite of the general statements by three non-member publishers, Messrs. Baker, Weilepp and Akers that they were not able to obtain specific advertising accounts for their magazines because of ACP, the evidence shows that membership in ACP is not determinative in the eyes of the construction equipment advertising agencies as to which regional construction magazine they select in which to place advertising. These advertisers are familiar with most of the regional construction magazines and they pick and choose between them in selecting the magazine in which to place construction equipment advertising for their clients. Mr. Harvey Scribner, President of Russell T. Gray Agency, an industrial advertising agency handling some of the leading construction equipment accounts, testified that membership in ACP does not carry with it any competitive advantage over non-member magazines and that he buys advertising space from the best publication available in a given area, regardless of membership or non-membership in ACP. Mr. Howard Kenyon, President of Andrews Agency, Inc., another industrial advertising agency handling some of the leading construction equipment manufacturing accounts testified, like Mr. Scribner, that he picks and chooses between regional construction magazines, as do all construction equipment advertisers to his knowledge, and that membership or non-membership in ACP does not carry with it a competitive advantage or disadvantage. Mr. H. I. Orwig, Senior Vice-President of the Buchen Company, an advertising agency, handling construction equipment accounts, testified that he picks and chooses between competing regional magazines in placing advertising on the basis of their relative quality without reference to membership or non-membership in ACP. He further testified that a non-member regional magazine could not expect to obtain any more advertising

business from his agency simply by joining ACP and would have to justify itself strictly on an individual quality basis. Mr. Joseph Serkowich, an advertising agency executive handling the Construction Equipment Division account of International Harvester Company testified that, among other things, membership in ACP is "not at all" a factor in his consideration of which regional magazine should be selected to carry International Harvester advertising; his determination is based on such factors as the circulation of the magazine, its editorial quality and whether it is audited. Mr. Arthur E. Thode, Advertising Manager of the Construction Machinery Division of the Allis-Chalmers Company also testified that membership in ACP is in no way a factor in his selection of a regional magazine in which to place advertising. In addition to the advertising agencies, the construction equipment dealers who testified at the hearing, Messrs. Earle, Frost, McNutt, Clark, and Stewart, all testified that membership or non-membership in ACP was an immaterial factor to them in selecting a regional magazine in which to place advertising.

22. Counsel supporting the complaint offered the testimony of several publishers of non-member regional construction magazines, evidently for the purpose of showing injury to competitors,—that their magazines did not obtain advertising because their magazines were not members of ACP. These witnesses included Mr. Morris J. Baker, publisher of *Michigan Roads and Construction*, Lansing, Michigan, Edward Weilepp, Editor and Assistant Publisher of *Kansas Construction*, Topeka, Kansas, Mr. John Kelsey Akers, Phoenix, Arizona, publisher of *Arizona Builder and Contractor*, Mr. Roy Fellom, Jr., publisher of *Pacific Builder and Engineering Review*, San Francisco, California, and Mr. Arthur Franklin King, publisher of *Western Construction*, San Francisco, California, along with *Western Industry*. Messrs. Baker, Weilepp, Akers, and Fellom testified, in general, that they were not able to obtain construction equipment advertising by reason of the existence of ACP. Some of the specific construction equipment accounts which they testified they were not able to obtain by reason of ACP will now be discussed.

23. Mr. Baker testified that there are several large construction equipment manufacturers who will not accede to the local dealers' requests to place advertising in Mr. Baker's magazine. He named these construction equipment advertisers as being: Schield-Bantam, Pioneer Engineering, Gradall Division of Warner and Swazey Singley Co., Austin-Western, Clark Equipment, Allis-Chalmers, and Iowa Manufacturing Company. Mr. Baker testified that these are advertisers who were advertising regionally in the Michigan area in

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Mr. Mertz' magazine, *Michigan Contractor and Builder*, and that, although their local dealers requested that they place advertising in Mr. Baker's magazine, *Michigan Roads and Construction*, they refused. During the presentation of testimony on behalf of respondents, representatives of five of the companies named by Mr. Baker testified and contradicted his testimony. These witnesses testified as follows:

(a) *Allis-Chalmers*. Mr. Sawyer Earle, President of Earle Equipment Company, dealer for Allis-Chalmers' products in the state of Michigan testified, among other things, that: He had not made any specific request that Allis-Chalmers place advertising in Mr. Baker's magazine, as Mr. Baker had testified; that any request he had ever made to Allis-Chalmers for the placing of advertising had never been denied; and that he personally prefers Mr. Mertz' magazine, *Michigan Contractor and Builder*. Mr. Arthur E. Thode, advertising manager of Allis-Chalmers, Milwaukee, Wisconsin, also testified concerning his choice of regional construction magazines in the State of Michigan as between *Michigan Contractor and Builder* and *Michigan Roads and Construction*, the latter being Mr. Baker's magazine. Mr. Thode testified, among other things, that: the reason he does not use Mr. Baker's magazine in his advertising program is because *Michigan Contractor and Builder* "does a better job" and denied that ACP had any influence in his selection of competing magazines.²

(b) *Schild-Bantam*. Mr. Earle, whose company is also the Michigan distributor for Schild-Bantam products, as well as for Allis-Chalmers, denied that his request to Schild-Bantam that its advertising be placed in any particular magazine had ever been refused by Schild-Bantam or its advertising agency. Mr. H. S. Orwig, an officer of the Buchen Company, an advertising agency which handles advertising for Schild-Bantam, Waverly, Iowa, denied that either he or his agency ever refused to comply with a dealer's request that advertising be placed in Mr. Baker's magazine.

(c) *Pioneer Engineering*. Mr. Alfred J. Swart, Vice-President and General Manager of Contractors Machinery Company, Michigan distributor for Pioneer Engineering, testified that Pioneer has never refused a request that advertising be placed in Mr. Baker's magazine. Mr. Swart testified that he prefers *Michigan Contractor and Builder* as an advertising medium in preference to *Michigan Roads and Construction*.

² It is significant in this connection that the remaining four of the five non-ACP member publishers who testified on behalf of the Commission, testified that they each carry the Allis-Chalmers' advertising account in their magazines, *Kansas Construction*, *Arizona Builder and Contractor*, *Pacific Road Builder* and *Engineering Review*, and *Western Construction*.

(d) *Clark Equipment Company*. Mr. Donald Clark, Vice-President and General Manager of Miller Equipment Company, Detroit, Michigan, dealer for the state of Michigan for Clark Equipment Company products contradicted the testimony of Mr. Baker. Mr. Clark testified that Clark Equipment had never denied his request that advertising be placed in a particular magazine. He also testified that he had never requested Clark Equipment Company to place its advertising with *Michigan Roads and Construction*, Mr. Baker's magazine. He further testified that he generally recommends that the advertising on his accounts be split between the two Michigan magazines, *Michigan Contractor and Builder* and Mr. Baker's magazine, *Michigan Roads and Construction*. Mr. Clark explained that he actually prefers *Michigan Contractor and Builder* but splits the advertising as a friendly gesture to Mr. Baker.

(e) *Iowa Manufacturing Company*. Mr. Harry A. Scribner (one of those who suggested the organization of ACP in 1938) President of Russell T. Gray Co., an industrial advertising agency which handles the advertising account of Iowa Manufacturing Company, testified that he did not use Mr. Baker's magazine, *Michigan Roads and Construction*, because *Michigan Contractor and Builder* is a superior magazine.³

24. Mr. Baker, to support his testimony that his magazine *Michigan Roads and Construction* had lost advertising business because of ACP, prepared and sponsored a graph (CX 60) which purports to compare the pages of display advertising in his magazine *Michigan Roads and Construction* with the pages in the competing ACP regional magazine *Michigan Contractor and Builder*, published by Mr. Richard Mertz. This graph (CX 60) indicates that *Michigan Contractor and Builder* has grown faster over the 1938-1956 period than Mr. Baker's magazine although Mr. Baker's magazine more than doubled its own annual volume of display advertising pages during this period. Mr. Baker attributed the slower rate of growth of his magazine primarily to the existence of ACP or the fact that he was not admitted to membership when he applied in 1947. He also testified that the difference in rate of growth which he attributed to ACP was represented in the named accounts heretofore discussed. It will be noted that Mr. Baker's graph (CX 60) begins with the year when ACP was formed, 1938. Mr. Mertz prepared an extension of Mr. Baker's graph back to the year 1931, the year Mr. Baker joined *Michigan Roads and Construction*.

³ Mr. Arthur Franklin King, publisher of two non-ACP member publications, *Western Construction* and *Western Industry*, who testified in support of the complaint, also testified that his publication *Western Construction* carries the advertising account for Iowa Manufacturing Company and never had any difficulty in obtaining it.

Initial Decision

60 F.T.C.

Mr. Mertz' data and chart, RX 13 and 14, respectively, show that Mr. Mertz' ACP magazine *Michigan Contractor and Builder* grew faster than Mr. Baker's magazine prior to the organization of ACP as well as afterward. The chart shows that the ACP magazine carried fewer pages of display advertising than did Mr. Baker's magazine for some years, the faster rate of growth of the ACP magazine carried it ahead of Mr. Baker's magazine in 1937 and it has remained that way permanently. The projection of Mr. Baker's graph back to the year 1931 suggests that the faster rate of growth of the ACP magazine as contrasted to that of Mr. Baker's magazine began before ACP was organized. The evidence and testimony of the construction equipment advertisers and dealers, also heretofore discussed, shows that the rate of growth between the ACP magazine and Mr. Baker's magazine is attributable to factors other than ACP.

25. Mr. Edward Weilepp was another non-ACP publisher who testified Mr. Weilepp's magazine, *Kansas Construction*, Topeka, Kansas, circulates in the State of Kansas and three counties in western Missouri. *Kansas Construction* is published monthly and its first issue came out on April 1, 1948. This magazine does not contain any listing of bid lettings and concentrates on matters of interest to the construction industry in Kansas and the three counties in western Missouri. Mr. Weilepp testified that: advertising carried by *Kansas Construction* falls into two large classifications, national advertising, which is the advertising of manufacturers of construction equipment, materials, supplies and services by companies who operate on a national basis such as Caterpillar Tractor Company, Allis-Chalmers, and International Harvester; the second classification is local advertising, which includes the advertisements of the local equipment distributors or dealers who sell products manufactured by companies such as Caterpillar, Allis-Chalmers and International Harvester; these distributors or dealers operate in certain geographical areas of the country such as a state or section of a state, usually, advertising paid for or placed by manufacturers is national advertising and local advertising is likely to be placed by the distributors or dealers; on the national advertising the manufacturer pays 100% of the cost and on some of the local advertising by distributors or dealers, the manufacturer pays one-half and the local distributor or dealer pays one-half; this is sometimes called co-operative advertising; these types of advertising exist throughout the industry; *Mid-West Contractor*, an ACP publication, and one of the respondents in this proceeding, is the nearest competitor of *Kansas Construction Magazine*; *Mid-West Contractor* circulates also in territories not covered by *Kansas Construction* magazine.

Mid-West circulates in four States, Kansas, Nebraska, parts of Iowa and Missouri; these two magazines compete for both national and local advertising.

26. Mr. Weilepp, like Mr. Baker, also testified, among other things, that: ACP was formed at the request of some of the national advertisers and agencies in an effort to raise the quality and standards of the regional construction magazines and, since its formation in 1938, the member magazines have raised the standards of regional construction magazines and ACP magazines have come to be regarded by national advertisers as good magazines. In the meanwhile, by necessity, other regional magazines raised their standards; some new regional magazines have been established; ACP member magazines have acquired a "hallmark of quality" and, since *Kansas Construction* is not a member of ACP, it is a suspect magazine and has difficulty in obtaining advertising with some of the national advertisers; there are some instances where Weilepp has been able to sell advertising space in *Kansas Construction* after an advertiser has selected an ACP magazine, but he, like Mr. Baker, testified that he has encountered situations where a dealer has requested the manufacturer to place advertising in *Kansas Construction* but the manufacturer refused to do so for a variety of reasons, the primary reason being that the budget or the money available for advertising in the area covered by *Kansas Construction* and *Mid-West Contractor* had been allotted to *Mid-West Contractor* as an ACP member magazine and no more money in the advertising budget for that year was available. In short, Mr. Weilepp, like Mr. Baker, claims that not being a member of ACP, his magazine does not obtain as much national advertising as it would if he were a member. Mr. Weilepp does not complain that the advertising revenue of his magazine is going down because of ACP. *Kansas Construction's* gross revenues are approximately \$100,000 per year. The evidence shows that *Kansas Construction* has grown steadily since it began publication in 1948, ten years after the organization of ACP. Mr. Weilepp's complaint is not that his magazine's advertising and revenues are going down because of ACP but that he believes they would go higher if it were not for ACP; he does not claim that ACP has taken any business away from *Kansas Construction* or that *Mid-West* or any other ACP magazine has granted discounts or other inducements to advertisers to take advertising business away from *Kansas Construction*.

27. On cross-examination, Mr. Weilepp testified that, in estimating the damage which ACP has done *Kansas Construction* in depriving it of a greater share of national advertising, he was speculating on an

educated guess basis as to what he believes he would have otherwise obtained. On the other hand, Mr. Weilepp admitted that during the past ten years *Kansas Construction* has obtained a number of national accounts which *Mid-West Contractor* either never had or used to have and the accounts switched to *Kansas Construction*—among these were Clinton Welded Wire Division of Colorado Fuel and Iron, Quick-Way Truck Shovel Company, D. W. Onan & Sons, and Transport Trailers. Mr. Weilepp admitted that the following are factors in *Mid-West Contractor* having more pages of national advertising than *Kansas Construction*: (a) *Mid-West* has greater territorial coverage—covers four states and makes it more attractive to national advertisers, (b) *Mid-West* has been in business longer than *Kansas Construction*, (c) *Mid-West* has a larger aggregate readership than *Kansas Construction* and (d) the twelve-time advertising rate of *Mid-West* is lower than *Kansas Construction*. The twelve-time black and white rate for *Mid-West* is \$130 as contrasted to \$156 for *Kansas Construction*. *Kansas Construction* is a monthly magazine and *Mid-West Contractor* is a weekly magazine.

28. One of Mr. Weilepp's principal complaints seems to be that he has failed to obtain some national advertising accounts because national advertisers told Mr. Weilepp when he solicited their advertising that they had already allotted their budgeted advertising funds to the ACP publications and they had no more funds remaining for advertising in *Kansas Construction*. Northwest Engineering was the only advertising account Mr. Weilepp could specifically name that he was not able to obtain by reason of ACP. Mr. Weilepp had previously testified that he personally makes four or five hundred calls on advertising agencies and manufacturers during the course of a year. However, he was not very familiar with this one account he had named because his conclusion was based on only one conversation with a Mr. Gray or Mr. Scribner at an advertising agency in Chicago. Mr. Harry C. Scribner, President of Russell T. Gray, Inc., an industrial advertising agency, Chicago, Illinois, later called as a witness upon behalf of respondents, testified that he preferred *Mid-West Contractor* over Mr. Weilepp's publication, *Kansas Construction* for the reason that *Mid-West Contractor* is a superior publication and covers a larger area more effectively. Mr. Scribner testified, among other things, in regard to Mr. Weilepp's characterization of ACP magazines having acquired a "hallmark of quality," that ACP magazines have a "hallmark of quality" because they have created standards that made better publishing practices, but the fact that a magazine does or does not carry the ACP on its masthead would not make any

difference to him or to any one of his clients. Mr. Scribner denied that mere membership in ACP is a factor in his selection of a magazine for advertising purposes and that, even if Mr. Weilepp's magazine was a member of ACP, Mr. Weilepp's magazine would not get his business unless Mr. Weilepp's magazine demonstrated that it was a better magazine than *Mid-West Contractor*. Mr. Scribner stated that Mr. Weilepp had only called in person at his office soliciting advertising on one occasion and that Mr. Weilepp's magazine had only called on him twice since it began publication in 1948.

29. The fact that *Kansas Construction* has been able to grow during the past ten years in spite of its smaller circulation coverage, a higher page-rate than *Mid-West Contractor*, its rate per page per thousand being higher, a younger publication, does not publish construction reports of bids wanted and bids placed and type, indicates that *Kansas Construction* has been successful in competing with *Mid-West Contractor*, an ACP publication. A preponderance of the evidence shows that Mr. Weilepp's claims that his magazine is not able to obtain national construction equipment accounts are unfounded and not established by the evidence. Mr. Weilepp testified that he has never applied for membership in ACP for the reason that membership is by invitation and he has not been invited. Also, the initiation fee of \$5,000 is rather high, in his opinion, and he cannot say whether his magazine would accept an invitation to join ACP, if asked, although it might have been different three, four or five years ago. Mr. Weilepp further testified that, if membership in ACP should be opened to all magazines, one of its advantages from an advertising standpoint would be defeated, because there would likely be too much duplication of circulation coverage and duplication would render the ACP magazine or magazines less attractive to advertisers.

30. Mr. Akers named eight or nine advertising accounts which he believed he was not able to obtain by reason of the existence of ACP. These accounts were J. I. Case Company, Koehring, Yale and Towne, Bucyrus-Erie and Eimco. With respect to J. I. Case and Koehring, Mr. Howard Kenyon, President of Andrews Agency, Inc., an industrial advertising agency, Milwaukee, Wisconsin, testified that he and his company handles the advertising accounts for J. I. Case and Koehring and contradicted the testimony given by Mr. Akers. Among other things Mr. Kenyon testified that: Mr Akers' magazine, *Arizona Builder and Contractor*, had never carried Case advertising and the reason Mr. Kenyon did not use Mr. Akers' magazine was certainly not attributable to ACP; it was just that the cost of using Mr. Akers' magazine could not be justified because of the limited area it covers.

With respect to Koehring, Mr. Kenyon testified that he chose the ACP magazine on the basis of quality and not circumstance that it was an ACP magazine. With respect to the other accounts named by Mr. Akers, Yale and Towne, Bucyrus-Erie and Eimco, the evidence shows that *Western Construction* the regional magazine published by Mr. Arthur Franklin King, San Francisco, California, carries each of these accounts and Mr. King's magazine covers the entire territory covered by Mr. Akers' magazine. Mr. King's magazine is not an ACP magazine and his magazine carries each of these accounts. He also testified that Eimco is a new account. It would appear that, if Mr. King's non-member magazine, *Western Construction* did not have any difficulty in obtaining these accounts by reason of non-membership in ACP, it strains credulity to believe that non-membership in ACP was the reason Mr. Akers was unable to obtain advertising from these companies.

31. Mr. Roy Fellom refused to name any specific advertising accounts which he claimed he was not able to obtain by reason of ACP and stated that he did not hold this "injury" against ACP and did not believe that they had done anything unethical. With respect to Mr. King, he really did not attribute any loss of business to ACP. So, it is seen that the only advertising business Messrs. Baker, Weilepp, and Akers claimed to have lost by reason of the existence of ACP was construction equipment advertising. The advertisers and dealers who testified with respect to the accounts which Baker, Weilepp and Akers claimed to have lost by reason of ACP completely disputed their unsubstantiated charges. The reasons these advertisers gave for not advertising in Baker's Weilepp's and Akers' magazines were unrelated to ACP.

32. Counsel supporting the complaint, in his proposed findings of fact, proposes a finding that there are 10 or 12 national construction magazines of which 4 are the principal competitors of ACP for national advertising. To the contrary, the evidence shows that there are approximately 17 national construction magazines and these nationals compete with the ACP regional magazines for national advertising. Counsel also proposes a finding that the ACP magazines lead all national construction magazines in total circulation and advertising sales volume. As an example, counsel suggests that the national construction magazine *Engineering News-Record*, a McGraw-Hill publication, sold approximately 2,900 pages of advertising in 6 months of 1957, as against 29,257 pages of advertising for all of the ACP magazines, indicating that the *Engineering News-Record* sales are only 20% of the total ACP annual sales. The fallacy in this argument

is that counsel only compares the total pages of advertising and does not compare the total advertising revenue in dollars. The 12-time advertising rate of *Engineering News-Record* is approximately 5 to 10 times the rate of any of the individual ACP construction magazines.

33. The 12-time page rate of *Engineering News-Record* is \$985, whereas, the comparable rates of the ACP magazines are many times lower, generally somewhere between \$100 and \$200. The total pages of advertising attributable by counsel to the ACP magazines are the aggregate of the pages sold by each individual ACP magazine at its individual page rate. It must also be kept in mind that the page rates of the individual ACP magazines vary from magazine to magazine and, when a general industrial advertiser places advertising in each of the ACP magazines simultaneously, that advertiser pays the total of the page rates of each individual magazine in which he advertises. It is not possible to compare sales volume or sales growth for any period of time between the ACP magazines as a group with any other construction magazines without first converting pages for the several magazines concerned into dollars. RX-10 contains page and rate data for the months of September and October, 1958 of the 17 national construction magazines and more than 100 regional and local construction magazines. In RX-11 a comparison is made between the ACP magazines as a group and the national magazines as a group. The average individual sales volume of the 16 national magazines for which complete data is available in RX-10 for the 2-month period was \$129,465.94 as against \$42,056.33 for the ACP publications for the same period. Thus, it is seen that these 16 national magazines have approximately three times the average individual sales volume of the ACP magazines. *Engineering News-Record* alone, with 777 pages at \$985 per page had a larger advertising revenue for this period than all of the ACP magazines put together, \$767,215 as against \$630,845. This national magazine is one of the two national construction magazines published by McGraw-Hill Publications, the other being *Construction Methods*. In short, the national magazines are larger by any method of comparison, individually or collectively, than the ACP publications.

34. Counsel supporting the complaint also urges that ACP intends to limit membership in violation of the law and that the most important qualification has been that an applicant must not compete in an existing ACP member's territory. The minutes of practically all ACP membership meetings since its formation were offered and received in evidence. Counsel supporting the complaint relies on a letter dated September 10, 1947 from Mr. Anderson to Mr. Mertz,

ACP members at the time of Mr. Baker's application for membership, to show that ACP limits membership in violation of the law. In this letter, Mr. Anderson stated that he intended to offer several amendments to the by-laws at the next meeting of ACP, including an amendment limiting new members to magazines which do not duplicate the coverage of existing members. However, the minutes of the next meeting of ACP held in Chicago on September 26, 1947, which are in evidence, do not show that such an amendment was even offered. The minutes of the various meetings of ACP disclose that there was discussion at some of the meetings concerning the question of circulation duplication or overlapping, but the evidence is convincing that no affirmative steps were ever taken to reduce or remove the coverage duplication or overlap. Counsel supporting the complaint also urges that Mr. Dinsmore, in his report to ACP concerning his survey of the Pacific Northwest in an effort to complete ACP coverage of the United States showed his "thinking and the thinking of the group regarding duplication of territory". This alleged "thinking" on the part of Mr. Dinsmore and some of the ACP members, to the effect that ACP would not admit to membership any regional magazine unless it agreed to discontinue duplication coverage with an existing ACP magazine, was not ever put into action. Mere "thinking", not put into effect by affirmative or positive action, is not unlawful. Certainly, no unreasonable restraint on competition has been shown. On this particular subject, Mr. Fellom, publisher of *Pacific Builder & Engineering Review*, San Francisco, California, testified that, in 1957, during Mr. Dinsmore's trip to the West Coast he came to San Francisco and talked to Mr. Fellom concerning the possibility of Mr. Fellom's magazine becoming a member of ACP, so as to fill the gap which was principally in Northern California and possibly would include Oregon or parts of Oregon, but not Southern California or the Rocky Mountain Area. Mr. Fellom further testified that he told Mr. Dinsmore to have ACP make him a definite statement as to what they had in mind, but Mr. Fellom heard nothing further from Mr. Dinsmore or ACP. Mr. Fellom has never applied for membership in ACP nor has he or his magazine *Pacific Builder & Engineering Review* * been invited by ACP to file an application for membership. However, it cannot be argued that his application for his *California Supplement* was rejected on the grounds of duplication of coverage or overlap with an existing ACP member because his *California Supplement* did not duplicate the territory of any ACP member magazine.

* Mr. Fellom had previously filed an application for membership in ACP for his *California Supplement*, which was rejected.

35. Counsel supporting the complaint also claims that *Construction*, an ACP magazine, in September 1953, gave up circulation in 13 of its 16 states in order to comply with ACP requirements for membership. The evidence does not support this charge. The fact that the management of *Construction* decided to eliminate 13 states from a widely scattered circulation and concentrate its efforts in a more limited area of three States, Virginia, West Virginia, and North Carolina, does not establish the allegation that *Construction* reduced its circulation coverage by reason of demands made by ACP in this regard.

36. Counsel supporting the complaint argues that membership in ACP is a substantial competitive advantage to its members, pointing to the \$52,000 annual budget for national advertising, entertainment at cocktail parties and solicitation of advertising by each ACP member on behalf of all the other ACP magazines. As has previously been found, the \$52,000 budget is not unreasonably large for 14 separate magazines and most of this advertising is directed toward a particular category of advertisers which regional magazines have not previously been able to reach; that is, general industrial advertisers. General industrial advertisers include a wide range of products and they prefer nationwide coverage. After obtaining nationwide circulation coverage in 1956, ACP, on behalf of the individual member magazines as a group, began to compete with the national construction magazines for this type of advertising. The individual ACP magazines do not solicit advertising for the other members of ACP. Each individual ACP magazine only solicits construction equipment advertising for its own individual magazine. With respect to counsel's assertion that ACP members receive a substantial volume of business simply because they are members of ACP is not borne out by the evidence and testimony. Messrs. Baker, Weillepp, Akers and Fellom did testify that ACP members receive construction equipment advertising business simply because they are members of ACP, but these were their own self-serving declarations and unsubstantiated conclusions. The advertisers and dealers of construction equipment who testified at the hearing contradicted their testimony and testified that they did not buy any ACP "package" and that membership in ACP is not the determining factor when choosing between regional construction magazines in placing advertising. The only competitive advantage which ACP members may have over non-members is in being able to compete with the national construction magazines for advertising from general industrial advertisers because a national advertiser can place advertising in each of the 14 ACP magazines and cover the entire United States.

37. Counsel supporting the complaint also says that the ACP magazines bring a united front in quoting prices by means of a composite rate card. This is not unlawful. This rate card is used by Mr. Hyde in soliciting advertising from general industrial advertisers in competition with the national construction magazines. This rate card merely lists the advertising rates charged by each individual ACP magazine, and the individual rates of each magazine are totaled at the bottom of the card, which is a quick and convenient way of quoting the total charge for placing national advertising in each of the ACP magazines. These are the regular rates for each individual magazine and no discount is granted to any advertiser by reason of his placing national advertising in each of the ACP magazines. The only discount is the usual 2% discount granted by all publishers.

38. Counsel supporting the complaint also states that the ACP magazines do not have any intrinsic qualities which make them superior to other regional magazines and that the ACP magazines have an advantage in their unity and the convenience of buying the ACP "package." This conclusion is not supported by the evidence and testimony. Numerous construction equipment dealers and advertisers testified at the hearing and contradicted the testimony of Messrs. Baker, Weilepp, Akers and Fellom. These advertisers, and there were eight or nine of them (local construction equipment dealers and advertisers), testified that they do not buy advertising in the ACP magazines as a "package" but do pick and choose between the individual regional construction magazines, ACP magazines and non-ACP magazines. These advertisers are personally familiar with each of the competing regional construction magazines, ACP magazines and non-member magazines. Construction equipment advertising comprises approximately 85% to 90% of the business of the ACP magazines. These construction equipment advertisers and dealers testified unanimously that the various ACP magazines are superior in quality to the non-ACP regional construction magazines.

39. The construction equipment dealers and advertisers also contradicted the testimony of Messrs. Baker, Weilepp and Akers with regard to their claims of injury by reason of the ACP magazines taking advertising business away from them and excluding them from business. With respect to the testimony of Messrs. Fellom and King on this phase of the allegations, Mr. Fellom refused on cross-examination to name any specific accounts that he had lost to an ACP magazine or was prevented from obtaining by reason of ACP, and flatly testified that he did not hold the "injury" in question against ACP and felt that they had done nothing unethical or wrong. Mr. King testified

that the business of his magazine, *Western Construction* was not as good in 1958 as it was for 1957 or 1956 and there were three reasons for the decline in business: (1) the general economic condition of the country, (2) our own capacity to obtain business, and (3) more vigorous competition than we had had hitherto. He further testified that "one or two of the nationals are stepping up the tempo of their selling activity. I think, in general, the ACP group of magazines, having a package to offer, may in a degree be a factor in this competition I, in fairness, cannot charge ACP with too much of the blame for this. I think at least an equal amount of blame, if not more, is chargeable perhaps to our own laxity in selling activity."

40. As has been found, construction equipment advertising constitutes 85% to 90% of the advertising of regional construction magazines, including the ACP magazines. These construction equipment advertisers are familiar with the quality of each of the regional construction magazines and these advertisers pick and choose between them in placing advertising. These advertisers of construction equipment are not influenced in any manner by the activities of ACP in its advertising efforts to obtain general industrial advertising for the ACP magazines as a group. All of the accounts named by Messrs. Baker, Weilepp and Akers to support their claims that they were losing advertising revenues by reason of ACP were *construction equipment advertisers*. Since the evidence is conclusive that ACP, as an organization, only solicits advertising from general industrial advertisers, this does not injure the non-member regional magazines because they have never had and do not have the advertising accounts of general industrial advertisers. Regional magazines have not been able to obtain this class of advertiser on the basis of individual solicitation. The evidence and testimony further shows that non-member regional construction magazines would not be able to obtain this class of advertising from general industrial advertisers simply by joining ACP because the addition of these non-member magazines to membership in ACP would destroy the attractiveness of the present nationwide coverage of ACP magazines with their present minimum amount of overlap which makes the so-called ACP "package" salable to this class of advertisers. In other words, if ACP should be required to open its membership to all regional construction magazines as requested by counsel supporting the complaint, this would destroy the present attractiveness of the ACP "package" to general industrial advertisers. Any increase in membership of ACP will add to the duplication of circulation coverage which already exists among the ACP magazines and impair the salability of the present ACP "pack-

age" to general industrial advertisers. It would further kill any opportunity for the new ACP magazines to obtain general industrial advertising accounts. This would be so because general industrial advertisers want nationwide circulation coverage with a minimum amount of circulation duplication. So what is the solution? There is testimony in the record that a second organization of regional construction magazines could be formed, similar to ACP. This new organization could then compete with the national and ACP magazines for general industrial advertising. As now constituted, the ACP magazines compete with the national construction magazines for general industrial advertising. This competition had not existed prior to 1956 when ACP obtained nationwide circulation coverage. Such competition is in the public interest. The effectiveness of ACP as a competitive factor in this field would be destroyed if its membership were unrestricted.

41. As stated in *Board of Trade v. U.S.*, 246 U.S. 231, 238, 62 R. ed. 683, 687 (1917): "But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable." Trade practices will not be held to be unfair under Section 5 of the Federal Trade Commission Act where "the record does not show that the probable effect of the practice will be unduly to lessen competition", *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463 [1 S. & D. 306]. In the present case, the evidence is clear that the respondents have not injured any of the competing non-ACP regional magazines in the construction equipment advertising market. With respect to the second category of advertising, general industrial advertising, which ACP began soliciting as a so-called "package" in 1956 on behalf of all of the ACP magazines as a group, this put the ACP magazines in competition for the first time with the national construction magazines for this category of advertising. General industrial products have wider uses than construction equipment and are sold to other industries in addition to the construction industry. The advertisers must spread their available advertising budgets over media going to each of these industries and cover the nation in each

industry. Consequently, this category of advertisers has used only national construction magazines and regional construction magazines have not been able to obtain this category of advertising by individual solicitation. This was one of the considerations in ACP accepting *Construction*, *Rocky Mountain Construction* and *Pacific Builder and Engineer* to membership in ACP. The addition of these three regional magazines closed several gaps in ACP regional magazine coverage and gave ACP magazines nationwide circulation coverage for the first time.⁵ With nationwide coverage, the ACP magazines began to compete with the national construction magazines for general industrial advertising. This created competition between the ACP and national construction magazines for advertising of general industrial products where none had existed before. This group selling by ACP on behalf of the member regional magazines has not injured the non-member regional construction magazines because they have never had the accounts of general industrial advertisers. No business has been taken from them nor are they precluded from access to this market category by reason of ACP. Admission to ACP membership will not make the market accessible to them; rather, it will make it inaccessible to the present membership which is presently offering competition to the national construction magazines. There is nothing to prevent some of the non-member regional construction magazines from forming a competing organization of their own, including magazines in various regions of the country, so they can effectively solicit general industrial advertising.

42. Counsel supporting the complaint urges that *Associated Press v. United States*, 326 U.S. 1, is controlling here. In that case, the Supreme Court held, among other things, that the effect of the AP by-laws was (1) to block all newspaper non-members from any opportunity to buy news from AP or any of its publisher members, (2) admission to membership in AP was a prerequisite to obtain or buy AP news from any one of its more than 1200 publishers and, (3) admission of a new member who would compete with an old member was very difficult and burdensome. The court held, among other things, that, the by-laws on their face, were in restraint of trade and, by the restrictive by-laws, each of the publishers among the 1200 in the combination has, in effect, "surrendered himself completely to the control of the association," *Anderson v. Shipowners Ass'n.*, 272 U.S. 359,

⁵ Contrary to the assertions by counsel supporting the complaint that a new magazine would not be admitted to membership in ACP if it overlapped the circulation coverage of a member, *Rocky Mountain Construction* overlapped member *Southwest Builder and Contractor* as to Arizona and part of Nevada, and *Pacific Builder and Engineer* overlapped member *Rocky Mountain Construction* in Montana, Wyoming, Utah and Idaho.

362, in respect to the disposition of news in interstate commerce. The *Associated Press* case is not analogous to the facts in the present case. The primary distinction between the facts in the two cases is that exclusion from membership in ACP is not tantamount to exclusion from the advertising business market of regional construction magazines. The evidence is undisputed that ACP has not retarded or prevented the establishment of new regional construction magazines. Since ACP was organized in 1938, 29 new regional construction magazines have begun publication. A preponderance of the evidence shows that most of the non-member regional construction magazines which began publication since 1938 are growing and prospering. A case more nearly in point is *Prairie Farmer Publishing Co. v. Indiana Farmer's Guide Publishing Co.*, 88 F. 2d 979 (7th Cir. 1937), *Cert. Denied*, 301 U.S. 696, 81 L. ed. 1351 (1937). In that case the U.S. Circuit Court of Appeals set aside a jury verdict for the plaintiff, a competitor non-member regional farm paper, and directed dismissal of the complaint against the defendant association of regional farm journals on the ground that even the demonstrated injury to such competitor from discriminatory package pricing by the association was not unreasonable and not in violation of the antitrust laws where the injury was only an incidental effect of the association's effort to compete with the national farm magazines on a package basis. The ACP magazines are now competing with the national construction magazines for general industrial advertising on a "package" basis. If the efforts of the ACP magazines as a group to compete with the national construction magazines for general industrial advertising has resulted in injury to Mr. Baker's magazine or any other non-member regional magazine, it was *damnum absque injuria*.

43. Counsel supporting the complaint also urges that, when measuring the effect on competition, the only real difference between this case and *Associated Press* is that the "blackball" provision written into AP's by-laws is not written into ACP's by-laws, but instead exists by *understanding among members*. (Italics supplied.) There is not even an iota of testimony in the record of such an understanding. This is counsel's conclusion. Much of the testimony of the non-member regional construction magazine publishers concerning pecuniary injury due to the alleged failure of their magazines to obtain certain advertising accounts by reason of the existence of ACP were their own mere conclusions. Later in the hearing respondents offered the testimony of advertisers and dealers of construction equipment who represented manufacturers and accounts which the non-member publishers had previously testified they were unable to obtain by rea-

son of ACP. These advertisers and dealers contradicted their testimony and testified that they advertised in ACP and non-ACP regional magazines alike; that, when they selected an ACP magazine for a particular account, it was the best quality magazine for the purpose, not because it belonged to ACP. In other words, membership in ACP was irrelevant.

44. The hearing examiner has carefully examined the record and discussed in this decision most of the questions raised by the pleadings and by counsel. The circumstance that one or more questions raised by counsel have not been specifically discussed does not mean that it has not been considered. Upon the basis of the entire record, the hearing examiner is of the opinion that the allegations of the complaint has not been established. The words of Justice Murphy in his dissenting opinion in *Associated Press v. United States*, supra, are appropriate here: "Competitive practices emerge as unreasonable restraints of trade only if they are infused with an additional element of unfairness, such as monopoly, domination, coercion, price fixing or an unreasonable stifling of competition. If there is such a factor in this instance, however, it lies deep in the unfathomed sea of conflicting or unproved facts." Accordingly,

It is ordered, That the complaint be, and the same hereby is, dismissed.

ORDER DENYING APPEAL AND DISMISSING COMPLAINT

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision filed December 29, 1961, dismissing the complaint.

The complaint herein charged respondents, Associated Construction Publications, a non-stock membership corporation, named publisher members thereof and certain individuals, with violating Section 5 of the Federal Trade Commission Act by engaging in and carrying out an agreement, understanding and planned common course of action to eliminate and restrain competition among and between themselves and with others, and to monopolize in themselves the advertising business of those using regional trade papers designed for the construction industry as an advertising medium. Among the acts, practices and methods which it was charged that respondents engaged in pursuant to the alleged combination, agreement and planned common course of action were: limitation of membership to one publication in a given area, allocation of territories so as to exclude overlapping in circulation, securing of patronage of advertisers by unlawful means and

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diverting it from competing publications and agreement upon prices, discounts and terms of sale for advertising space.

The Commission, upon review of the whole record, has determined that the allegations of the complaint have not been sustained. Respondents, however, have engaged in practices which under different circumstances could result in giving them an undue advantage over competitors. Since future practices of the respondents might be such as to constitute a violation of the Federal Trade Commission Act, the Commission, under such circumstances, should safeguard the public interest by continuing a close scrutiny of respondents' operations. Furthermore, as is inherent in all dismissals such as ordered here, the Commission is in no wise prejudiced in the future from reopening or from taking such other action in the future as may be warranted.

It is ordered. That the appeal of counsel supporting the complaint from the hearing examiner's initial decision be, and it hereby is, denied.

It is further ordered. That the complaint in this matter be, and it hereby is, dismissed.
