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Decision 91-08-014 August 7, 1991

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
US Telecom, Inc., doing business as  
Sprint Services, for a Certificate  
of Public Convenience and Necessity  
to Provide InterLATA Telecommu-  
nications Services within the State  
of California.

ORIGINAL

Application 89-09-012  
(Filed September 11, 1989)

Application of AT&T Communications  
of California, Inc. (U 5002 C) for  
Authority to Provide Intrastate  
AT&T Multiquest<sup>SM</sup> Services.

Application 89-10-019  
(Filed October 6, 1989)

Application of MCI Telecommu-  
nications Corporation (U 5011 C)  
Under Rule 15 of the Commission's  
Rules of Practice and Procedure for  
Authority to Provide Intrastate 900  
Service.

Application 89-11-019  
(Filed November 20, 1989)

In the Matter of the Investigation  
and Suspension on the Commission's  
own motion of tariffs filed by  
Advice Letters Nos. 8 and 9 of  
Telesphere Network, Inc.

(I&S)  
Case 89-11-020  
(Filed November 20, 1989)

Order Instituting Investigation into  
the rates, charges, and practices  
of local exchange carriers in  
California.

I.90-12-040  
(Filed December 19, 1990)

(See D.91-03-021 for appearances.)

OPINION

1. Summary

Consumer Action requests compensation of \$19,653.30 for its contribution to Decision (D.) 91-03-021. We find that Consumer Action made a substantial contribution to D.91-03-021, and we award compensation of \$12,084.12. The adjustment from Consumer Action's request reflects a reduction for duplication of effort with other parties, a reduction in the per hour compensatory rate, and an elimination of the hours spent preparing the compensation request, but includes an enhancement based on Consumer Action's particular contribution.

2. Eligibility, Timing, and Services

On March 13, 1991, in D.91-03-021, we found Consumer Action eligible to file a request for compensation for its participation in these proceedings.

2.1 Timing of Request

Rule 76.56 of the Commission's Rules of Practice and Procedure governs requests for compensation:

"Following issuance of a final order or decision by the Commission in the hearing or proceeding, a customer who has been found by the Commission...to be eligible for an award of compensation may file within 30 days a request for an award. The request shall include, at a minimum, a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding...."

Rule 76.52(h) defines "final order or decision" to mean "an order or decision that resolves the issue(s) for which compensation is sought." D.91-03-021 is the final decision in Application (A.) 89-09-012, A.89-10-019 and A.89-11-019 and closes those proceedings. D.91-03-021 resolves the issues in Case 89-11-020 for which compensation is sought.

D.91-03-021 was decided on March 13, 1991. Consumer Action's filing of April 15, 1991 was therefore not made within 30 days of the date of the decision. As we found in D.89-03-034, however, since Rule 85 (governing applications for rehearing) defines the date of issuance as "the date when the Commission mails the order of decision to the parties in the action or proceeding," a similar approach makes sense for the filing of requests for compensation. Since D.91-03-021 was mailed on March 15, 1991, Consumer Action's filing of April 15, 1991 (a Monday) was made within 30 days of the date of issuance of the decision. Thus, the filing met the deadline of Rule 76.56.

## 2.2 Consumer Action's Services and Request for Compensation

Consumer Action submits that its efforts led the Commission to adopt Consumer Action's basic positions on necessary consumer safeguards to be required with 900 telephone service. Consumer Action describes its efforts in making this contribution in seven ways.

First, Consumer Action participated in the adoption of the Pacific Bell (Pacific) 976 service. Consumer Action worked with Pacific in an attempt to resolve problems (e.g., unauthorized calls; children's access to "pornographic" providers) and was a strong supporter of specific safeguards (e.g., consumer blocking of access at no charge to 976 numbers; refunds for unauthorized calls; the right for callers to know the name, address and telephone number of 976 information providers (IPs); protection of consumers from disconnection of basic service for failure to pay 976 charges; an educational campaign). Beginning in 1988 Consumer Action started to receive consumer complaints about 900 service. Late in 1988 Consumer Action protested the adoption by the Commission of the "900 Settlement" advocated by Pacific, the Division of Ratepayer Advocates (DRA), and the Information Providers Association. The Commission rejected the settlement and approved a program after receiving comments on Commission advanced proposals.

When US Telecom, Inc., doing business as Sprint Services (Sprint), AT&T Communications of California, Inc. (AT&T), MCI Telecommunications Corporation (MCI), and Telesphere Network, Inc. (Telesphere) subsequently applied to provide 900 service, Consumer Action researched the applications to determine if applicants were voluntarily providing safeguards consistent with those approved by the Commission for Pacific's 900 program. Further, Consumer Action undertook a nationwide survey to determine the types of programs being offered, the prices, and whether program content matched the advertising claims.

Second, Consumer Action participated in a workshop ordered by the administrative law judge (ALJ) in these interexchange carrier (IEC) proceedings, and submitted a position paper.

Third, Consumer Action filed an opposition to a motion by applicants for interim authority, noting that the four additional safeguards proposed by applicants in exchange for interim authority were substantially weaker than those already adopted by the Commission.

Fourth, Consumer Action filed its request for a finding of eligibility for compensation, along with a response to an opposition filed by Sprint. In its response, Consumer Action argued that voluntary safeguards proposed by applicant to protect residential consumers did not lessen the need for Consumer Action to represent residential consumers. Consumer Action points out the Commission agreed that Consumer Action represents an interest not otherwise adequately represented.

Fifth, Consumer Action argues it played a major and significant role in hearings held on the IEC applications. Consumer Action points out it provided actual 900 numbers of potentially problem IPs. Consumer Action asserts it was active in cross-examination of IEC witnesses and through the submission of a brief.

Sixth, Consumer Action responded to a motion by AT&T to strike Consumer Action's brief.

Lastly, Consumer Action asserts that the Commission decision closely addresses the concerns Consumer Action raised throughout the proceedings with the solutions Consumer Action suggested. Consumer Action points out that it or its position was specifically cited in the decision in many cases (e.g., the discussion on blocking; price caps; age limit for children; advance notification and blocking at certain bill limits; adjustment policies; complaint procedures; provision of IP name, address and business telephone number to consumers; provisions for fundraising IPs; business practices of applicants that are actually safeguards to be included in tariffs; and the need for an education campaign.)

No party responded to Consumer Action's request for compensation.

While Consumer Action's description of its services includes its effort on the Pacific 976 and 900 programs, Consumer Action points out that its request for compensation is limited to its participation in these IEC proceedings. The compensation request covers Consumer Action's efforts in the workshop, prehearing conference, submission of eligibility request and response to Sprint's opposition, review and filing of opposition to applicants' request for interim authority, participation in hearings, filing of brief and response to AT&T's motion to strike, review of proposed decision and comments of others on proposed decision, submission of comments on proposed decision, submission of reply comments, and preparation of compensation request. Consumer Action is not seeking compensation for surveying national 900 programs, preparing its press release, or researching the voluntary standards proposed by applicants.

3. Issues to be Decided

Rule 76.58 requires the Commission to not only determine whether Consumer Action made a substantial contribution to D.91-03-021, but also to describe that substantial contribution and to set the amount of the compensation to be awarded. According to Rule 76.52(g), an intervenor has made a "substantial contribution" when:

"...in the judgment of the Commission, the customer's presentation has substantially assisted the Commission in the making of its order or decision because the order or decision had adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer."

We agree with Consumer Action that it made a substantial contribution to D.91-03-021. Specifically, we were particularly aided by Consumer Action's proposals and comments on the 24 items identified below. Consumer Action's proposals were nearly all policy recommendations. While we may not have adopted the specific recommendation made by Consumer Action, in many cases we adopted the general policy proposal. Consumer Action made a significant contribution to D.91-03-021.

Consumer Action claims no duplication resulted by its participation since no party argued the need for a common legal representative and none was found by the Commission. Moreover, Consumer Action asserts the decision makes clear that Consumer Action played a role in representing the interests of residential ratepayers that was not duplicated by other parties. As such, Consumer Action argues it should be fully compensated.

While we find Consumer Action made substantial contributions, we also find that Consumer Action's efforts duplicated those of other parties on some issues. In those cases:

"If in the Commission's opinion there is such duplication, any compensation to which the customer would otherwise be entitled may be

reduced in proportion to the amount of duplication in effort." (Rule 76.53 (c).) Consumer Action asserts that the final decision closely addresses the concerns that Consumer Action raised with the solutions it suggested. Consumer Action specifically identified ten issues cited by the decision on which it believes it made a material, unduplicated, significant contribution. We will first address those ten issues, then address Consumer Action's other contributions.

### 3.1 Blocking

Consumer Action argued that blocking is a vital part of any set of consumer safeguards and that two additional refunds (as advocated by some applicants, and as we apply to Pacific's 900 service) are not sufficient if central office blocking is not available. All parties agreed to some form of blocking. DRA argued that we should apply the same standards for applicants' service as we apply for Pacific's service, including free residential blocking. We will reduce Consumer Action's request by 50% to reflect duplication.

### 3.2 Price Cap for Children's Programs

Not all applicants agreed that a price cap for children's programs is needed. AT&T, Sprint, and Telesphere either did not oppose or now have price limits for children's programs. Consumer Action argued we should adopt the same level that we use for Pacific, which Consumer Action argued is \$3.00 per call. In fact, Pacific has no separate limit for children's programs. We will reduce Consumer Action's request by 75%.

### 3.3 Age Limit For Children's Programs

Only Consumer Action argued for an age limit of 18, which is the age adopted.

### 3.4 Price Caps for Nonchildren Programs

Consumer Action proposed the same levels as in Pacific's 900 service. Further, Consumer Action did not oppose higher

levels, only that the higher levels should be charged independently rather than on the utility bill. This proposal duplicates that of DRA. We will reduce Consumer Action's request by 50%.

### 3.5 Advance Notification

Consumer Action proposed advance notification in opposition to the proposal of applicants, but in duplication with DRA. We will reduce Consumer Action's request by 50%.

### 3.6 Complaint Procedure and Refund Policy

Consumer Action pointed out that applicants' adjustment policies differ, are vague, and provide considerable discretion to the individual service representative. We were persuaded by these arguments. Consumer Action argued for a uniform complaint procedure and adjustment policy and we concurred. While DRA also advanced the same arguments, Consumer Action was particularly persuasive. Therefore, we will reduce Consumer Action's request by only 20%.

### 3.7 IP Name, Address and Telephone Number to Consumers

Consumer Action more persuasively than any other party stressed that consumers have the right to know with whom they are doing business, that a written request for that information (as proposed by applicants) discourages consumers, and the consumers should be able to get the information toll free. We agreed with Consumer Action.

### 3.8 Amount Going to Which Charity

Consumer Action argued that consumers have the right to know what percent of each call will go to charity for fundraising IPs, and the name of the charity. We agreed. Consumer Action argued that the IP must be able to prove that it has a contract with the charity. DRA argued that the same standards applied to Pacific should apply to applicants. We require Pacific to have a contract and make it available to any consumer upon request. Here again, however, Consumer Action was more persuasive than any other party. We will not reduce Consumer Action's request.



### 3.9 Other Safeguards Or Business Practices

Consumer Action argued that many business practices applicants follow but do not wish to place in tariffs as safeguards are nonetheless safeguards that should be tariffed. We agreed. Pacific and DRA also advanced this proposal. We will reduce Consumer Action's request by 67%.

### 3.10 Consumer Education

Consumer Action proposed a comprehensive consumer education campaign, which we adopted in large part. Consumer Action did not materially duplicate the showing of any other party on this issue.

### 3.11 Other Issues

Consumer Action also raised concerns and presented solutions on fourteen other issues:

1. introductory messages;
2. delayed billing after introductory message;
3. disconnection of basic service for failure to pay 900 charges;
4. use of the utility bill to bill for charity, information or communication only, not other items;
5. separate prefixes;
6. videotext time and charges at logoff;
7. directory listing to show that additional charges apply;
8. the information provider must declare program content and show proposed advertising to the interexchange carrier;
9. cross-promotions must include price;
10. cross-promotions to harmful matter information providers should not be allowed;

11. warning tone on group access bridging programs;
12. description of program on the bill;
13. advertising guidelines; and
14. monitoring of 900 safeguard effectiveness.

We did not always adopt Consumer Action's proposed solution, and there was some duplication. But here again Consumer Action made particularly persuasive arguments and substantial contributions that justify less than a simple proportionate reduction of its request. Therefore, we will reduce Consumer Action's request on these contributions by only 25%.

#### 4.12 Summary of Contribution

Weighting the reductions equally by the 24 issues produces a weighted composite reduction of 27.6% (i.e., compensation of 72.4%).

#### 4. Compensation

##### 4.1 Advocate's Fee

Rule 76.60 sets the bounds for the calculation of compensation:

"[The calculation] shall take into consideration the compensation paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the market value of services paid by the Commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services."

Consumer Action requests compensation for 141.5 hours of Executive Director Ken McEldowney's time at a rate of \$135 per hour, for a total advocacy fee request of \$19,102.50. Consumer Action argues \$135 is reasonable since McEldowney has been the executive director of Consumer Action for more than ten years, he performed the expected functions of an advocate in preparation of

briefs and cross-examination of witnesses (since Consumer Action does not have any attorneys on staff or retainer), and McEldowney's rate includes overhead and staff support.

We will allow \$100 per hour for McEldowney's time. While McEldowney has over ten years' experience as executive director of Consumer Action, Consumer Action does not explain how McEldowney's ten years of experience compare to the training and experience of other advocates before the Commission offering similar services. McEldowney has little experience practicing before the Commission. Expert witness advocates with substantially more experience before the Commission have been compensated at a rate of \$120 per hour. (See D.91-06-010, D.91-04-054.) In fact, we have not authorized compensation for expert witnesses at a rate greater than \$120 per hour. In 1990 and 1991 we have authorized compensation for witnesses from \$40 to \$120 per hour, and most recently authorized a lay advocate \$100 per hour (D.91-06-015). McEldowney's limited background before the Commission makes him a lay advocate and justifies a rate of \$100 per hour. We have authorized compensation for attorneys at rates from \$90 to \$175 per hour. We note that McEldowney is not an attorney, but a rate of \$100 per hour falls within the range we authorize for attorneys, and adequately compensates Consumer Action for the services performed (e.g., McEldowney's cross-examination of witnesses and preparation of its brief).

Moreover, Consumer Action has worked on information provider safeguards since soon after the Pacific 976 product began (with 976 tariffs going into effect in September 1983). Similar to complainant Sawaya's tireless effort regarding Touch-Tone refunds (see D.91-06-015), Consumer Action has pursued consumer safeguards for 900 service. McEldowney's efforts in these proceedings compared to those of Sawaya and justify a rate of \$100 an hour.

Consumer Action requests compensation for 141.5 hours of McEldowney's time. Consumer Action asserts that the hours claimed are not allocated by issue since the heart of the case was the package of interrelated safeguards that would be necessary, not which individual safeguards could stand alone. The safeguards impacted each other, according to Consumer Action. We agree.

The hours requested are allocated in detail to time spent on: reviewing the ALJ's ruling establishing a workshop, participating in the workshop, participating in the prehearing conference, preparing the eligibility petition, preparing a response to Sprint's opposition, participating in the hearings, preparing the brief, responding to AT&T's motion to strike Consumer Action's brief, preparing comments on the proposed decision of the ALJ, and preparing its compensation request. We will authorize compensation for 132.75 hours. As we said in D.91-07-001, we will no longer allow recovery for time spent preparing the compensation request. We reduce the 141.5 total hours by the 8.75 hours worked preparing that request.

Therefore, we will allow advocate's fee compensation of 72.4% of \$100 per hour for 132.75 hours, or \$9,611.10.

#### 4.2 Other Expenses

Consumer Action requests other expenses of \$384.80 for copying and \$166.00 for mailing, totaling \$550.80. These are reasonable expenses, and are less than 25% of the total reasonable advocate's fees awarded (as specified by Rule 76.52).

#### 4.3 Enhancement

We will add an enhancement of 20% (\$1,922.22) to the advocate's fee we award. As we indicated in D.83-04-017 (wherein we adopted rules for awarding attorney and witness fees and other expenses for participation in Commission proceedings), other factors may affect the appropriate amount of an award (Rule 76.26).<sup>1</sup> These factors include but are not necessarily limited to:

1 In D.83-04-017 we noted that certain courts determine fees in terms of actual hours worked and the normal billing rates which are then modified by the court in light of various contingency factors (e.g., risk of litigation and of nonpayment; preclusion of other work; undesirability; quality of representation; complexity and novelty of the issues; and the results obtained). The California Supreme Court approved this method (Serrano v Priest (1977) 20 Cal 3d 25 (Seranno III)) using the time spent and reasonable hourly compensation, then taking into account:

1. the novelty and difficulty of the questions and the skill in presenting them;
2. the preclusion of other employment by the attorneys;
3. the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the establishment of eligibility for an award;
4. the fact that an award against the State would ultimately fall on the taxpayers;
5. the fact that the attorney involved received public and charitable funding for bringing lawsuits of this character;
6. the fact that moneys awarded would not inure to the individual benefit of the attorneys involved but to the organizations that employed them; and

(Footnote continues on next page)

1. time and labor expended in the participation;
2. the novelty and difficulty of the issues presented;
3. the skill required to participate effectively;
4. the preclusion of other employment due to participation in this matter;
5. the customary fee;
6. whether the fee is fixed or contingent;
7. time constraints imposed by the proceeding;
8. the amount involved and the results obtained;
9. the experience, reputation, and ability of the participants; and
10. awards in similar cases.

Moreover, in D.88-02-056 we further considered in awarding an enhancement (mimeo. pp. 5, 9):

1. the intervenor's degree of success;
2. the efficiency of the presentation; and

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(Footnote continued from previous page)

7. the fact that in the court's view, the two law firms involved had an equal share in the success of the litigation.

We noted similar factors used by other courts (Johnson v Highway Express, Inc., 488 F 2d 714 (5th Cir. 1974) and Waters v Wisconsin Steel Works of International Harvester Co., 502 F 2d 1309 (7th Cir. 1974)). We noted that some factors are more applicable to our proceedings than others. We did not establish a rigid formula, but within a flexible framework discussed the factors that parties may address and we may consider in our proceedings.

3. the importance of the issue.

Finally, in D.91-06-015 we considered the necessity of private action in awarding an enhancement (mimeo. pp.10-11; i.e., that experienced, professional intervenor organizations ignored, avoided, or had failed to join an issue).

We consider these factors and award a 20% enhancement to the advocate's fee based on: the novelty and difficulty of the issues due to IEC circumstances (e.g., the degree to which necessary IEC safeguards can be implemented by the IEC, must be implemented by the IEC's billing agent or the LEC, can be accomplished at all or must be adjusted to be implementable); the large total dollar amount at stake in the 900 industry (and therefore the large potential cost to consumers if necessary safeguards are not adopted); awards in similar cases (discussed below); Consumer Action's relative degree of success; the efficiency of the presentation (i.e., a large degree of success achieved primarily only through cross-examination and the filing of a brief); and the importance of the issue. Moreover, we consider Consumer Action's dedication to pursuing to the final and successful resolution issues that benefit a large group that would not otherwise be adequately represented.

We awarded 25% enhancement (in the amount of \$3,142.50), in a recent case and noted that the enhancement was a "modest amount" (D.91-06-015). We only needed to consider two factors in D.91-06-015 in deciding to award the modest amount requested by the complainant in that proceeding. Consumer Action makes no such request or argument for enhancement here, and the factors we consider in arriving at a percent enhancement are less compelling than in D.91-06-015. Therefore, a 20% enhancement is reasonable in this proceeding.

#### 4.4 Summary

Consumer Action is therefore entitled to compensation of:

Advocate's Fee	\$ 9,611.10
Other Expenses	550.80
Enhancement	<u>1,922.22</u>
Total	12,084.12

#### 5. Allocation

No party addressed the question of how to allocate Consumer Action's compensation among the utilities involved in these proceedings. The proceedings focused on safeguards to include in the 900 service tariffs of Sprint, AT&T, MCI, and Telesphere. It is reasonable to allocate the responsibility for paying Consumer Action's compensation equally among these four utilities.

#### 6. Conclusion

Consumer Action is entitled to compensation of \$12,084.12 to be paid by Sprint, AT&T, MCI, and Telesphere each in the amount of \$3,021.03.

As discussed in previous Commission decisions, this order will provide for interest commencing on July 1, 1991 (the 75th day after Consumer Action filed its request), with interest calculated at the three-month commercial paper rate beginning July 1, 1991 and continuing for each utility until that utility makes its full payment of the award.

Consumer Action is placed on notice it may be subject to audit or review by the Commission Advisory and Compliance Division. Therefore, adequate accounting records and other necessary documentation must be maintained and retained by the organization in support of all claims for intervenor compensation. Such record-keeping systems should identify specific issues for which compensation is being requested, the actual time spent by each employee, the hourly rate paid, fees paid to consultants and any other costs for which compensation may be claimed.



Findings of Fact

1. Consumer Action requests compensation totaling \$19,653.30 for its participation in these proceedings.
2. Consumer Action filed its request for compensation timely.
3. Consumer Action made a significant contribution to D.91-03-021 on the safeguard package necessary to protect consumers while permitting potentially beneficial service.
4. Consumer Action's contribution duplicated the contribution made by other parties.
5. A composite 27.6% reduction in the advocate's fees quantifies the amount of duplication in contribution to D.91-03-021 between Consumer Action and other parties.
6. An hourly rate of \$100 for McEldowney is equal to the compensation we have allowed to advocates with similar training and experience offering similar services and is within the range we have allowed for attorneys.
7. McEldowney spent 132.75 hours working on the issues in this proceeding which led to the significant contribution made by Consumer Action, excluding 8.75 hours preparing the compensation request.
8. Consumer Action spent \$384.80 on copying and \$166.00 for mailing expenses, for a total of \$550.80, which is less than 25% of the total reasonable advocate's fee awarded.
9. An enhancement of 20% is based on Consumer Action's dedication to pursuing to the final and successful resolution issues that benefit a large group that would not otherwise be adequately represented; the degree of success obtained by Consumer Action in achieving its original objectives; the large total dollar amount at stake in the 900 industry; the novelty of the issues due to IEC circumstances; and the difficulties encountered because of the limited resources available to Consumer Action.
10. The proceeding focused equally on each utility's safeguard package, thus justifying an equal allocation of the compensation award among the four IECs.

11. Since the request is unopposed, this order should be made effective today.

### Conclusions of Law

1. Reimbursable hours for Consumer Action's efforts should be 132.75 hours, reduced by 27.6% for duplication of effort with other parties.

2. The hourly rate should be \$100 per hour.

3. An enhancement of 20% of the advocate's fee is reasonable and should be awarded.

4. Reasonable compensation for Consumer Action's contribution to D.91-03-021 is \$12,084.12.

5. Sprint, AT&T, MCI, and Telephere should each be ordered to pay \$3,021.03, plus interest at the three-month commercial interest rate beginning July 1, 1991 and continuing for each utility until that utility makes its full payment of the award.

ORDER

IT IS ORDERED that US Telecom, Inc., doing business as Sprint Services, shall pay \$3,021.03; AT&T Communications of California, Inc. shall pay \$3,021.03; MCI Telecommunications Corporation shall pay \$3,021.03; and Telesphere Network, Inc. shall pay \$3,021.03 to Consumer Action. These payments shall include interest calculated at the three-month commercial paper rate beginning July 1, 1991 and continuing for each utility until that utility makes its full payment of the award.

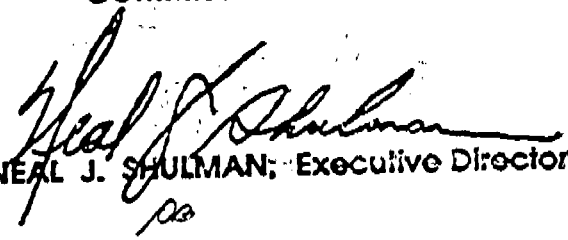
This order is effective today.

Dated August 7, 1991, at San Francisco, California.

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

Commissioner Daniel Wm. Fessler,  
being necessarily absent, did  
not participate.

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

  
NEAL J. SHULMAN; Executive Director