 Mailed 6/29/99

Decision 99-06-088 June 24, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the petition by Pacific Bell (U 1001 C) for arbitration of an interconnection agreement with Pac-West Telecomm, Inc. (U 5266 C) pursuant to Section 256(b) of the Telecommunications Act of 1996.	Application 98-11-024 (Filed November 16, 1998)

O P I N I O N

1. Summary

We affirm the results adopted in the Final Arbitrator's Report, and approve the resulting arbitrated Interconnection Agreement between Pacific Bell and Pac-West Telecomm, Inc. Parties shall each sign the adopted Interconnection Agreement, and shall file the signed Interconnection Agreement within 5 days of today. The proceeding is closed.

2. Background

Pacific Bell (Pacific or applicant) and Pac-West Telecomm, Inc., (Pac-West or respondent) entered into a Local Interconnection Agreement on March 15, 1996. By letter dated April 30, 1998, Pacific notified Pac-West that it was terminating the 1996 agreement, and was prepared to begin negotiations for a new Interconnection Agreement (Agreement).

Having failed to reach a new agreement by negotiation, on November 16, 1998, Pacific filed an application for arbitration pursuant to Section 252 of the

Telecommunications Act of 1996 (Act).[1] By letter dated December 2, 1998, applicant and Pac-West jointly stated their agreement that Pac-West's response could be delayed pending Commission consideration of a subsequent motion to dismiss.[2] They also agreed that the time period for a Commission decision under the Act would be extended from nine to ten months.[3]

On December 3, 1998, respondent filed a motion for immediate dismissal. On December 11, 1998, applicant filed a response in opposition to the motion. Also on December 11, 1998, respondent filed a reply to applicant's response.

An Initial Arbitration Meeting was held on December 21, 1998. By letter dated December 23, 1998, applicant and respondent jointly agreed to an additional delay in the filing of Pac-West's response, and a further extension of time from 10 to 11 months for a Commission decision under the Act.

On February 4, 1999, we denied respondent's motion for dismissal. (Decision (D.) 99-02-014.) Consistent with the agreed upon schedule, Pac-West filed its response on February 8, 1999. On February 17, 1999, parties jointly filed a revised statement of unresolved issues (also referred to herein as the issues matrix), and applicant served testimony in response to the issues raised by respondent. A total of 41 items were presented for arbitration within 22 specifically identified issues.

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[1] The caption submitted by applicant contains a typographical error. Arbitration is sought by applicant pursuant to Section 252(b), not Section 256(b), of the Act.

[2] All references to the Commission are to the California Public Utilities Commission. References to the Federal Communications Commission (FCC) are noted separately.

[3] The Act requires that arbitrations be completed by state commissions within nine months after the date on which the local exchange carrier receives a request for negotiation under the Act. (47 U.S.C. Section 252(b)(4)(C).)

Arbitration conferences and hearings were held on February 22, 23, 24, and 25, and March 4, 1999. On March 8, 1998, parties served a further revised statement of unresolved issues reflecting resolution of several issues. Briefs were filed on March 15, 1999, and the matter was submitted for preparation of the Draft Arbitrator's Report (DAR). As a result of resolution of many issues by parties over the course of the conferences and hearings, 15 items were finally presented for arbitration within 11 issues.

At the request of the Arbitrator, on March 16, 1999 applicant served a revised proposed Interconnection Agreement (Agreement) reflecting what it understood to be joint acceptance of all items except for the specific items wherein dueling clauses were presented in the statement of unresolved issues. On March 17, 1999, parties individually served a further revised statement of unresolved issues summarizing their support for each position.

By letter dated March 19, 1999, Pac-West stated that the Agreement provided by Pacific on March 16, 1999 contained many differences from what Pac-West understood to be the Agreement. By letter dated March 23, 1999, Pacific addressed the issues raised in Pac-West's March 19, 1999 letter, and provided a revised Agreement.

By letter dated March 24, 1999, Pac-West stated its disagreement with elements of Pacific's March 23, 1999 revised Agreement, particularly with regard to the price exhibits. At the Arbitrator's request, parties continued to seek resolution of their differences.

By conference call on March 30, 1999, parties stated their desire that the arbitration remain on the existing timeline, with the DAR issued on March 30, 1999. By letter dated March 30, 1999, parties confirmed their statements in the conference call "that both parties were unaware of any additional issues which

will arise in this proceeding other than those contained in the Issues Matrix and the briefs." The DAR was filed and served on March 30, 1999.

By letter dated April 5, 1999 on behalf of both parties, Pac-West served a complete Agreement with dueling clauses. The April 5, 1999 Agreement resolved all issues raised in Pac-West's letters dated March 19, 1999, and March 24, 1999. Further, parties confirmed that the only issues to be arbitrated were those presented in the latest issues matrix.

Comments on the DAR were filed on April 9, 1999 by applicant, respondent and GTE California Incorporated. The Final Arbitrator's Report (FAR) was filed and served on April 23, 1999.

Pursuant to Rule 4.2.1,[4] on April 30, 1999, parties filed a complete Interconnection Agreement incorporating the arbitrated results. Concurrently, parties each filed a statement which identified the criteria in the Act and the Commission's Rules by which the negotiated and arbitrated portions of the Agreement are to be tested, stated whether the negotiated and arbitrated portions pass or fail those tests, and stated whether or not the Agreement should be approved or rejected by the Commission. By letters dated May 26, 1999, and letters dated or executed June 10, 1999, each party stated their agreement that a Commission decision under the Act could be extend a limited period beyond the May 27, 1999 Commission meeting.

3. Discussion

3.1 Negotiated Portions of Agreement

Section 252(e) of the Act provides that we may only reject an agreement (or portions thereof) adopted by negotiation if we find that the agreement (or

[4] Resolution ALJ-174, Revised Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996.

portions thereof) discriminates against a telecommunications carrier not a party to the agreement, or implementation of such agreement (or portion thereof) is not consistent with the public interest, convenience and necessity. No party or member of the public alleges that any negotiated portion of the Agreement should be rejected. We find nothing in any negotiated portion of the Agreement which results in discrimination against a telecommunications carrier not a party to the Agreement, nor which is inconsistent with the public interest, convenience and necessity.

3.2 Arbitrated Portions of Agreement

Section 252(e) of the Act, and our Rule 4.2.3, provide that we may only reject an agreement (or any portion thereof) adopted by arbitration if we find that the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC pursuant to Section 251, or the standards set forth in Section 252(d) of the Act.[5]

Fifteen items were presented for arbitration. In statements filed with the conformed Agreement, parties each state that the arbitrated outcomes do not violate the Act or Commission Rules with regard to 11 of the 15 items. That is, parties do not state that they agree with the arbitrated outcomes for the 11 items when their positions were not adopted. Parties continue to believe their position on each item should be adopted. Nonetheless, each party states that the 11 arbitrated outcomes do not meet a threshold test for rejection by the Commission under the Act and our Rules.[6]

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[5] Section 251 states interconnection standards. Section 252(d) identifies pricing standards.

[6] Pac-West qualifies its statement by saying that it does not waive its rights to contest the compliance of any of these provisions with the requirements of the Act in the event

Footnote continued on next page

Of the four remaining arbitrated outcomes, Pacific contends that three arbitrated outcomes that are contrary to Pacific's recommendations must be rejected: (1) the definition of local calls, (2) the definition of toll free service, and (3) whether local traffic which Pac-West delivers to its internet service provider (ISP) customers is subject to this agreement. These are arbitrated issues 1A, 1B, and 2. They are related and will be addressed together in the discussion below.

Pac-West argues that one arbitrated outcome contrary to its recommended position must be rejected. That item is arbitrated issue 3: the proper compensation to be paid to Pac-West for its termination of local traffic subject to the Agreement.

3.2.1 Definition of Local Traffic, Definition of Toll Free Service and Internet Service Provider Traffic (Issues 1A, 1B and 2)

Pacific argues that finding Pac-West ISP-bound traffic as local violates the Act, and that the arbitrated outcome must, therefore, be rejected. Pacific points out that Section 251(b)(5) of the Act specifies its duty to establish reciprocal compensation for the transport and termination of telecommunications, and that the FCC has concluded that this obligation applies only to traffic that originates and terminates within the local area. Pacific further states that the FCC's recent Declaratory Ruling (dated February 25, 1999) finds that ISP-bound traffic is not

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the FAR is not accepted in its entirety by the Commission. Pac-West asserts that its evaluation of compliance with the Act's requirements is totally premised on the interrelationship of these provisions with other provisions of the arbitrated Agreement. Modification of some provisions of the Agreement as mandated by the FAR can and would materially affect the business, financial, and operational implications of other provisions, according to Pac-West. Under such circumstances, Pac-West says one or more of the affected provisions could potentially be contrary to the requirements of the Act. (Pac-West's Statement dated April 30, 1999, page 9, footnote 6.)

local, is not separated into two distinct components, and must be viewed as one single communication.

We affirm the results of the arbitration. The first arbitrated issue is the definition of local calls (Issue 1A) and the definition of toll free service (Issue 1B). For the reasons stated by the Arbitrator, we find Pac-West's specifically proposed Agreement clauses more reasonable than those proposed by Pacific.

For example, Pacific proposes a definition of local calls that is inconsistent with Commission and industry practice. Further, Pacific's proposed definition is in conflict with a reasonable reading of Pacific's tariffs, as explained in both D.99-02-096 and the FAR. Similarly, Pacific proposes to apply a definition of toll-free service to ISP-bound calls that is inconsistent with the dialing pattern used for these calls, as well as the definition of a local call.

We reach the same conclusion with regard to the second arbitrated issue: whether local traffic delivered by Pac-West to its ISP customers is subject to this Agreement. While Pacific is right that the February 25, 1999 FCC Declaratory Ruling generally finds a call to an ISP is not composed of two parts but is one call, and that such calls are largely interstate, the FCC also states that it has a longtime policy of treating this traffic as local. (FAR, page 21, citing FCC Declaratory Ruling, paragraph 24.) Further, the FCC emphasizes that it has treated, and continues to treat, ISP-bound traffic as local for the purpose of exempting ISPs from access charges. (FAR, page 21, citing FCC Declaratory Ruling, paragraphs 16, 20, and 23.)

Moreover, the FCC states that state commissions may determine in arbitrations whether reciprocal compensation should apply, and that the fact that the FCC finds ISP-bound traffic to be largely interstate does not necessarily remove it from the negotiation and arbitration process of the Act. (FAR, page 21, citing FCC Declaratory Ruling, paragraph 25.) While the FCC states that

arbitrated outcomes must be consistent with governing federal law, nothing about the result of this arbitration is inconsistent with governing federal law since the FCC itself says it "currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic." (FAR, page 21, citing from FCC Declaratory Ruling, paragraph 26.)

Finally, the FCC specifically says "nothing in this Declaratory Ruling precludes state commissions from determining…that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the [FCC's] rulemaking." (FAR, page 26, citing from FCC Declaratory Ruling, paragraph 27.)[7] We concur with the Arbitrator that continuation of reciprocal compensation is appropriate as an interim measure pending completion of further consideration by the FCC and this Commission.

We point out, however, that arbitrated issue 20 addresses modifications to the Agreement. Consistent with the arbitrated outcome of issue 20, the adopted Agreement must be amended without unreasonable delay as soon as the FCC and/or this Commission issue further decisions on treatment of ISP-bound traffic, inter-carrier compensation, and rating and routing.[8] Amendments to the adopted agreement must be submitted by advice letter. Approval of an advice letter will ensure that the resulting modification is consistent with FCC and Commission decisions. If found otherwise, the advice letter will be rejected, with

[7] The FCC's rulemaking on inter-carrier compensation was initiated on February 25, 1999, concurrently with adoption by the FCC of its Declaratory Ruling.

[8] The FCC will consider the matter further in its Notice of Proposed Rulemaking in CC 99-68, adopted February 25, 1999. The Commission will give further consideration to treatment of ISP-bound traffic in our decision addressing an application for rehearing of D.98-10-057, or another proceeding. The Commission will also consider proper treatment of routing, rating and inter-carrier compensation for ISP-bound traffic in Rulemaking 95-04-043 and Investigation 95-04-044 (local competition proceeding).

directions to parties regarding an appropriate amendment, to the extent reasonable.

Pacific contends that adoption of Pac-West's position on these threshold issues will transform Pac-West's unconventional service into the ordinary, including Pac-West's rating and routing practices which eliminate toll charges for long distance calls. According to Pacific, this would occur by all competitive local exchange carriers adopting these clauses from the Pacific/Pac-West Agreement under their "pick and choose" rights.[9] Pacific concludes that the adoption of Pac-West's position, even for the interim pending further FCC and Commission decisions, will create mischief, and be reckless, inequitable and unsound.

To the contrary, all interconnection agreements approved by this Commission require that they be brought into conformance with subsequent decisions of the Commission. Thus, even interim adoption of the clauses here by another carrier under their "pick and choose" rights will be subject to modification as, and when, appropriate. Moreover, all amendments to agreements (even those under "pick and choose") require approval before they become effective. We will not approve an amendment that adopts the Pac-West clauses without a clear statement that the amendment is subject to modification based on subsequent Commission action, as also required in the Pacific/Pac-West Agreement.

Pacific repeats other arguments addressed in the FAR. We do not repeat each argument, and the Arbitrator's resolution, here, but affirm the Arbitrator's conclusions as stated in the FAR.

[9] 47 U.S.C. Section 252(i), and 47 C.F.R. Section 51.809.

3.2.2 Compensation

Pac-West states that the arbitrated outcome regarding compensation fails to meet the standards of the Act, and violates one or more Commission rules or regulation, and must, therefore, be rejected. We disagree, however, for all the reasons stated in the FAR.

For example, rates must be symmetrical unless proven otherwise by an appropriate cost study. Pac-West fails to prove rates should be asymmetrical. (FAR, pages 28-29, citing 47 C.F.R. Sections 51.711(a) and (b).)

Further, the reasonableness of asymmetrical rates must be proven by a cost study. Pac-West's study is based on the FCC's Hybrid Cost Proxy Model (HCPM). The model is a cost proxy model, not a cost model.

As part of the HCPM platform, Pac-West's study relies on the Hatfield & Associates, Inc. (HAI) switching and interoffice facilities modules, version 5. We reviewed, and soundly rejected, earlier versions of the HAI model. The evidence here is not convincing that the infirmities which led to our rejection of the HAI model have been adequately resolved.

The purpose of the HCPM is to estimate the costs of providing universal services support, and to develop universal services support payments, not the costs of call termination. As the FCC says, the HCPM produces "estimates…of providing the supported services" and "will serve as the foundation for determining the final universal service support payments," not call termination costs. (FAR, page 29, citing from the FCC Fifth Report and Order "In the Matter of Federal-State Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs" adopted October 22, 1998, paragraph 12.)

Further, the FCC does not say that the HCPM is appropriate for developing switch termination costs, or rates for the purpose of reciprocal

compensation. In fact, the FCC says that where switching costs are important, a cost model to determine such costs would need more scrutiny. (FAR, page 30, citing FCC Fifth Report and Order, paragraph 75.)

FCC regulations require that the cost study used to justify asymmetrical rates be based on the network costs of the carrier other than the incumbent local exchange carrier (i.e., in this case, Pac-West). In contrast, the HCPM determines "costs on a wide scale basis," according to the FCC, not a carrier-specific basis. (FAR, page 30, citing from the FCC Fifth Report and Order, paragraph 12.)

Pac-West largely used default proxies when running the HCPM, including a default value for switch investment. Switch investment is one of the most critical items for determining termination costs. Pac-West has been in business for several years, and has experience buying switches. Pac-West's President testified that Pac-West is a rapidly growing company, and there is every reason to believe it plans to continue that growth. Pac-West is, therefore, in a reasonable position to determine its forward-looking switch investment cost. Pac-West's use of the proxy value is unreasonable here. Moreover, as explained in the FAR, where Pac-West sought to employ Pac-West specific input factors, not all were reasonable. (FAR, pages 30-31.)

For all these reasons, as well as others stated in the FAR, we believe Pac-West failed to justify asymmetrical rates. We find nothing about the arbitrated result on compensation that would justify its rejection. Therefore, we adopt the arbitrated outcome.

Pac-West recommends in its April 30, 1999 statement that the Commission require immediate implementation of Pacific's prices from the Open Access and Network Architecture Development (OANAD) proceeding (Rulemaking 93-04-003/Investigation 93-04-002). Pac-West makes this recommendation based on its understanding that the OANAD prices will be available before this

decision. We decline to adopt Pac-West's recommendation given that the OANAD prices are not yet adopted and final. Nonetheless, as required by Resolution ALJ-174, the interim rates adopted herein must be revised on a going forward basis to mirror the rates adopted in the OANAD pricing decision when they are adopted.

3.3 Preservation of Authority

Section 252(e) of the Act, and our Rule 4.2.3, provide that nothing shall prohibit a state Commission from establishing or enforcing other requirements of state law in its review of an agreement, including compliance with intrastate telecommunications service quality standards, or other requirements of the Commission. Other than the matters addressed and disposed of above, no party or member of the public identifies any clause of the Agreement that potentially conflicts with any state law, including intrastate telecommunications service quality standards, or other requirements of the Commission, and we are aware of none.

4. Unforeseen Emergency

The Public Utilities Code, and our Rules of Practice and Procedure, generally require that proposed decisions be circulated to the public for comment, and the Commission not issue its decision any sooner than 30 days following the filing and service of the proposed decision.[10] On the other hand, the Act requires that the Commission reach its decision to approve or reject an

[10] See Pub. Util. Code §§ 311(d) and (g), and Rules 77 to 83 of the Commission's Rules of Practice and Procedure.

arbitrated agreement within 30 days after submission by parties.[11] This establishes a conflict.[12]

Pursuant to Rule 81, consideration of this decision qualifies as an "unforeseen emergency situation." An unforeseen emergency situation is one "that requires action or a decision by the Commission more quickly than would be permitted if advance publication were made on the regular meeting agenda." (Rule 81.) It qualifies as such because of a deadline "for Commission action imposed by legislative bodies…" (Rule 81(g).) Therefore, we consider and adopt this decision today on the basis of an unforeseen emergency.

5. Effective Date

The Agreement provides that it is effective upon approval by the Commission. We approve the Agreement today, but it is not yet signed by the parties. To avoid confusion about the effective date, the Agreement should be determined to be approved by the Commission on the date that the signed copy is filed with the Commission. Parties should sign the approved Agreement, and file it with the Commission, within 5 days from today.

Findings of Fact

1. On April 30, 1999, parties filed an arbitrated Agreement for Commission approval, along with statements whether or not the Agreement should be approved by the Commission.

2. The parties negotiated the entire Agreement, with the exception of 15 items presented for arbitration.

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[11] 47 U.S.C. Section 252(e)(4).

[12] See D.99-01-009 for a more thorough discussion and explanation.

3. No party or member of the public alleges that any negotiated portion of the Agreement must be rejected.

4. No negotiated portion of the Agreement results in discrimination against a telecommunications carrier not a party to the Agreement, or is inconsistent with the public interest, convenience and necessity.

5. In their April 30, 1999 statements, parties say that the arbitrated outcomes with regard to 11 of the 15 issues, even if different than the position of the party, do not meet a test in the Act or Commission Rules for rejection of the Agreement.

6. Pacific proposes a definition of local calls that is inconsistent with Commission and industry practice, and conflicts with a reasonable reading of Pacific's tariffs, as explained in both D.99-02-096 and the FAR.

7. Pacific proposes to apply a definition of toll-free service to ISP-bound calls that is inconsistent with the dialing pattern used for these calls, as well as the definition of local calls.

8. The FCC has a longtime policy of treating ISP-bound traffic as though it were local.

9. The FCC has treated, and continues to treat, ISP-bound traffic as though it were local for the purpose of exempting ISPs from access charges.

10. The FCC currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic.

11. Nothing about the result of this arbitration is inconsistent with governing federal law.

12. Nothing in the FCC's February 25, 1999 Declaratory Ruling precludes state commissions from determining that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the FCC's rulemaking.

13. Consistent with the arbitrated outcome of issue 20, the adopted Agreement must be amended without unreasonable delay as soon as the FCC and/or this Commission issue further decisions on treatment of ISP-bound traffic, inter-carrier compensation, and rating and routing.

14. All amendments to agreements (even those under "pick and choose") must be submitted by advice letter, and must be approved before they become effective.

15. Interconnection rates must be symmetrical unless proven otherwise by an appropriate cost study. (47 C.F.R. Section 51.711.)

16. FCC regulations require that the cost study used to justify asymmetrical rates be based on the network costs of the carrier other than the incumbent local exchange carrier (i.e., in this case, Pac-West).

17. Pac-West fails to prove rates should be asymmetrical.

18. The purpose of the HCPM (the model used by Pac-West for the call termination costs it seeks to be paid by Pacific) is to estimate the costs of providing universal services support, and to develop universal services support payments, not the costs of call termination.

19. The HCPM determines costs on a wide scale basis, not a carrier-specific basis.

20. Pac-West largely used default proxies when running the HCPM, including a default value for switch investment.

21. Switch investment is one of the most critical items for determining termination costs.

22. Pac-West has been in business for several years, and has experience buying switches.

23. Pac-West's President testified that Pac-West is a rapidly growing company, and it is reasonable to believe that Pac-West plans to continue to grow.

24. Pac-West is in a reasonable position to determine its forward-looking switch investment cost.

25. As required by Resolution ALJ-174, the interim rates adopted herein must be revised on a going forward basis to mirror the rates adopted in the OANAD pricing decision when they are adopted.

26. No arbitrated portion of the Agreement fails to meet the requirements of Act Section 251, including FCC regulations pursuant to Section 251, or the standards of Act Section 252(d).

27. No provision of the Agreement conflicts with State law, including compliance with interstate telecommunications service quality standards, or other requirements of the Commission.

28. The Act requires that the Commission approve or reject an arbitrated interconnection agreement within 30 days after the agreement is filed. (47 U.S.C. Section 252(e)(4).)

29. The Commission generally may not act on a proposed decision any sooner than 30 days after it is filed and served for public comment. (Pub. Util. Code §§ 311(d) and (g).)

30. The Commission's 30-day period before acting on a proposed decision may be reduced or waived in an unforeseen emergency situation. (Pub. Util. Code § 311(g)(2).)

31. An unforeseen emergency situation includes deadlines established for Commission action imposed by legislative bodies. (Rule 81(g).)

32. Parties in writing have agreed that the time requirement for a Commission decision under the Act may be extended a limited period beyond May 27, 1999.

Conclusions of Law

1. State commissions may determine in arbitrations whether reciprocal compensation should apply, and that the fact that the FCC finds ISP-bound

traffic to be largely interstate does not necessarily remove it from the negotiation and arbitration process of the Act.

2. The Agreement between Pacific and Pac-West should be approved.

3. Commission approval of the Agreement should be determined to be the date the signed Agreement is filed with the Commission.

4. The parties should sign the Agreement and file it with the Commission within 5 days from today.

5. This matter comes before the Commission as an unforeseen emergency situation pursuant to Rule 81 due to the conflict between Pub. Util. Code § 311 and § 252(e)(4) of the Act.

6. This order should be effective today because it is in the public interest to implement national telecommunications policy as accomplished through the Agreement, and to replace the existing Agreement with this new Agreement, as soon as possible.

O R D E R

IT IS ORDERED that:

1. Pursuant to the Telecommunications Act of 1996, and Resolution ALJ-174, the Interconnection Agreement between Pacific Bell and Pac-West Telecomm, Inc. filed April 30, 1999 is approved. The parties shall sign, file and serve the approved Interconnection Agreement within five days of the date of this order, and the date of Commission approval shall be the date the signed Interconnection Agreement is filed.

2. The parties shall, within 10 days of today, serve on the Director of the Telecommunications Division a copy of the approved Interconnection Agreement.

3. This proceeding is closed.

4. This order is effective today.

Dated June 24, 1999, at San Francisco, California.

RICHARD A. BILAS
President
JOEL Z. HYATT
CARL W. WOOD
Commissioners

I dissent.

/s/ HENRY M. DUQUE
Commissioner

I will file a dissent.

/s/ JOSIAH L. NEEPER
Commissioner

I will file a concurrence.

/s/ RICHARD A. BILAS
Commissioner