

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
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August 9, 2011

Agenda ID #10615
Quasi-Legislative

TO PARTIES OF RECORD IN RULEMAKING 09-07-009

This is the proposed decision of Commissioner Catherine J. K. Sandoval. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Richard Smith at rs1@cpuc.ca.gov and Commissioner Sandoval's advisor Mellissa C. Slawson at mcs@cpuc.ca.gov. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:lll

Attachment

Decision **PROPOSED DECISION OF COMMISSIONER SANDOVAL**
(Mailed 8/9/2011)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion to Revise the
Simplified Registration Process for
Non-dominant Interexchange Carriers
Established by Decision 97-06-107.

Rulemaking 09-07-009
(Filed July 9, 2009)

DECISION GRANTING PETITION FOR MODIFICATION

Summary

This decision grants the unopposed petition for modification of Decision 10-09-017 filed by the Commission's Division of Ratepayer Advocates and requires that a performance bond be available to address the non-payment of taxes or fees or both in addition to the categories of fines, penalties and restitution related to enforcement actions, as previously approved.

Background

On September 2, 2010, we issued Decision (D.) 10-09-017 in the above captioned Order Instituting Rulemaking (OIR). This decision adopted revisions to the requirements initially established in D.97-06-107 for the registration of non-dominant interexchange telecommunications carriers. The authorization for the registration process was established by Public Utilities Code § 1013.¹

¹ All statutory references are to the Public Utilities Code.

Discussion

Among the topics addressed in D.97-06-107 and D.10-09-017 was the need for a “performance bond” and what aspects of financial responsibility would be covered by any performance bond requirement adopted. D.10-09-017 adopted requirements for a performance bond and specified the nature of the bond and its legal requirements, including such requirements as the telecommunications corporations to which the requirement was applicable, minimum coverage values, the requirements for the bond issuer, and bond timing and notice requirements.

We additionally considered the types of financial obligations the performance bond would be available to satisfy. This was done in the context of the history of § 1013 and our earlier registration decision.

Section 1013 was adopted in 1995 (SB, 665, 1995, ch. 74) as a means to provide a simplified process by which certain telecommunications services could be exempted from the certification requirements of § 1001. Among the requirements specified for any exemption process so adopted was

[t]he commission shall require as a precondition to registration the procurement of a performance bond sufficient to cover taxes or fees, or both, collected from customers and held for remittance and advances or deposits the telecommunications company may collect from its customers, or order that those advances or deposits be held in escrow or trust. (§ 1013(e).)

Subsequently an additional provision was added related to potential enforcement situations. It stated:

[t]he commission may require, as a precondition to registration, the procurement of a performance bond sufficient to facilitate the collection of fines, penalties, and restitution related to enforcement actions that can be taken against a

telecommunications company. (§ 1013(f), added by AB 2578 (Stats. 2008, ch. 552).

In D.97-06-107, which initially established the “simplified registration process” authorized by § 1013, we determined that the performance bond specified in then- (and still) § 1013(e) was not required since the Commission had not experienced problems in collecting fees, did not collect taxes and had elected to use the alternative offered for covering advances or deposits, i.e., requiring them to be held in escrow or trust.

In R.09-07-009, questions regarding the need for performance bonds were again raised and considered. In reaching our decision we determined there was nothing indicating any reason to change our determination that a performance bond was not required for any of the financial elements listed in § 1013(e), i.e., taxes, fees, advances or deposits. We noted that the State Controller’s 2007 Audit Report (Audit Report), which was the impetus for both this OIR and AB 2578, raised concerns about the Commission’s collection success in pursuing fines when companies had filed for bankruptcy but did not raise concerns about the Commission’s ability to collect fees or any concerns about the handling of customer advances or deposits. (D.10-09-017 at 21-22.)

Based on that we determined that a performance bond of a specified size would be required to cover, at least in some part, “any fines, penalties, or restitution that may be imposed.” (D.10-09-017, COL 14, OPs 4-9.) It would not be required for the topics of § 1013(e), i.e., taxes, fees, advances or deposits. (D.10-09-017, COL 12.)

On February 1, 2011, the Commission’s Division of Ratepayer Advocates (DRA) filed a petition for modification of D.10-09-017 limited to one issue: that a

performance bond requirement is mandatory pursuant to § 1013(e) with respect to covering “taxes or fees or both”.

Based on a reconsideration of the clear mandatory language of the statute, we have determined that DRA is correct. While we still believe that our assessment of the recovery risk for taxes and fees was reasonable, § 1013(e) is clear and directive and we will require compliance with it. However, corresponding to our assessment that the risk for recovery of taxes and fees remains small, we do not see a need to increase the overall size of the performance bonds from that previously required. Thus the performance bond will be required to be available to satisfy tax or fees or both in addition to fines, penalties or restitution related to enforcement actions.

Comments of Proposed Decision

The proposed decision of the Commissioner Catherine J. K. Sandoval in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

Assignment of Proceeding

Catherine J. K. Sandoval is the assigned Commissioner and Richard Smith is the assigned ALJ in this proceeding.

Findings of fact

1. The Commission does not collect taxes.
2. The absence of a performance bond has not affected the ability of the Commission to collect fees.
3. The Audit Report did not identify any concerns with the ability of the Commission to collect fees.

4. The Audit Report did not identify any concerns with the manner in which the Commission was directing the handling of customer advances or deposits.

Conclusions of Law

1. Section 1013(e) is mandatory in requiring carriers registering under this section to secure a performance bond to cover taxes or fees or both.
2. Section 1013(e) does not specify the size of the performance bond required.

O R D E R

IT IS ORDERED that:

1. Conclusion of Law 12 in Decision 10-09-017 is deleted.
2. Conclusion of Law 16 in Decision 10-09-017 is modified to read:

Requiring registrants to post a bond to facilitate the collection of taxes or fees or both is required by § 1013(e). Requiring that same bond to facilitate the collection of fines, penalties and restitution is authorized by § 1013(f) and is appropriate due to the inherent difficulty in collecting fines or restitution from companies that engage in fraudulent or inappropriate practices and cease operations or file for bankruptcy before the Commission is able to collect fines or bring about restitution.

This order is effective today.

Dated _____, at San Francisco, California.