

Decision 12-09-009 September 13, 2012

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 DENYING NOVATEL LTD., INC., PETITION FOR
MODIFICATION OF DECISION 10-09-017**

Summary

This decision denies the petition of NovaTel Ltd., Inc. (NovaTel), for modification of Decision 10-09-017 to permit the posting of an irrevocable letter of credit in lieu of a performance bond. The petition is denied because the Commission does not have the discretion to accept an irrevocable letter of credit to satisfy the requirements of Public Utilities Code Section 1013(e), and because non-dominant interexchange telecommunications carrier registrants are currently able to obtain the required performance bond.

1. Background

The authorization for the Commission's registration process for non-dominant interexchange telecommunications carriers (NDIECs) was established by Public Utilities Code § 1013.¹ Section 1013 was adopted in

¹ All statutory references are to the Public Utilities Code.

Senate Bill 665, (Ch. 74, Stats. 1995) as a means to provide a simplified process by which certain telecommunications services could be exempted from the certification requirements of § 1001. Decision (D.) 97-06-107, established the requirements and procedures for the streamlined registration of NDIECs, pursuant to the authority granted in § 885 and § 1013.²

Rulemaking (R.) 09-07-009 was initiated in response to the issues raised in the State Controller's 2007 Audit Report (2007 Audit Report).³ The 2007 Audit Report, among other things, found that the Commission was slow in rendering decisions imposing fines and restitution, and that it was inherently difficult for the Commission to collect fines and to make restitution to customers if the offending parties are no longer operating or have filed for bankruptcy.

R.09-07-009 was initiated to address this issue, with the goal of improving the Commission's ability to successfully collect fines and bring about restitution.

On September 2, 2010, the Commission issued D.10-09-017, adopting revisions to the requirements for the registration of NDIECs established in D.97-06-107. Among other issues, D.10-09-017 addressed the need for a performance bond and what aspects of financial responsibility would be covered by any adopted performance bond requirement.⁴

² Section 885 provides, with certain exceptions, that any entity offering the services of telephone prepaid debit cards is subject to the registration requirements of § 1013.

³ John Chiang, California State Controller, "California Public Utilities Commission – Report of Review, Fines and Restitution Accounting and Collection," August 2007.

⁴ Section 1013(e) provides that "[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

Footnote continued on next page

D.10-09-017 determined that requiring NDIEC registrants to post a bond to facilitate the collection of fines, penalties and restitution was appropriate due to the inherent difficulty of collecting fines from NDIEC registrants and providing for restitution to customers of NDIEC registrants that are no longer operating or have filed for bankruptcy. D.10-09-017 adopted the requirement for NDIEC registrants to obtain a performance bond, pursuant to § 1013(f), and specified the nature of the bond and its legal requirements, including the telecommunications corporations to which the requirement was applicable, minimum coverage values, the requirements for the bond issuer, and bond timing and notice requirements.

On September 28, 2011, the Commission adopted D.11-09-026, modifying D.10-09-017 in response to the Division of Ratepayer Advocates (DRA) petition for modification. D.11-09-026 acknowledged that the performance bond requirement of § 1013(e) is mandatory, and modified D.10-09-017 to allow the performance bond required by D.10-09-017 to also cover taxes or fees or both, pursuant to § 1013(e), in addition to fines, penalties or restitution related to enforcement actions, pursuant to § 1013(f).

On August 5, 2011, NovaTel Ltd., Inc., (NovaTel) filed a petition requesting that D.10-09-017 be modified to permit NDIEC registrants to submit an irrevocable letter of credit as an alternative to posting a performance bond

advances or deposits be held in escrow or trust.” Section 1013(f) was subsequently added in response to potential enforcement situations, and states, “[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 (Ch. 552, Stats. 2008).)

(Petition). The Petition states that accepting irrevocable letters of credit in lieu of performance bonds would serve the intended goals of D.10-09-017. The Petition further states that NovaTel is having difficulty obtaining a performance bond, and other NDIEC registrants may be having difficulties obtaining performance bonds.

On September 2, 2011, DRA filed a response conditionally opposing the Petition.

The November 28, 2011 Administrative Law Judge (ALJ) ruling (November 28 Ruling) directed NovaTel to submit additional information explaining the nature of the difficulties that it and other NDIEC registrants may be having obtaining the required performance bond. The November 28 Ruling also permitted parties to R.09-07-009 to comment on the nature of the difficulties, if any, that carriers may be having in obtaining the required performance bond.

In addition, the November 28 Ruling invited NovaTel and parties to R.09-07-009 to identify the specific features an irrevocable letter of credit must have to provide an equal or better assurance of collection than a performance bond if a carrier goes bankrupt, and to propose specific language that should be included in an irrevocable letter of credit or provide a recommended version of an irrevocable letter of credit. The November 28 Ruling also directed NovaTel and invited parties to R.09-07-009 to explain why the Commission would have the discretion to accept other financial security instruments in lieu of the performance bond required pursuant to § 1013(e).

On January 9, 2012, DRA submitted comments in response to the November 28 Ruling. NovaTel did not respond to the November 28 Ruling, and no party submitted reply comments.

On January 26, 2012, NovaTel requested an extension of time until March 1, 2012, to respond to the November 28 Ruling. NovaTel states that, due to a typographical error in the email address on the service list, NovaTel did not receive the November 28 Ruling.⁵

On February 2, 2012, NovaTel was granted an extension of time until March 1, 2012 to respond to the November 28 Ruling, and parties were allowed until March 16, 2012 to file and serve reply comments. On February 29, 2012, NovaTel submitted its response to the November 28 Ruling (Response), and on March 16, 2012, DRA submitted reply comments.

2. Parties' Positions

NovaTel states that other jurisdictions allow irrevocable letters of credit to be used in lieu of performance bonds, and that doing so in California would serve the intended goals of D.10-09-017.⁶ NovaTel asserts that it is having difficulty obtaining the required performance bond and that other NDIEC registrants may have similar difficulties.

DRA states that the goals of R.09-07-009 are to improve the Commission's ability to successfully collect fines, bring about restitution, and to facilitate the

⁵ On January 12, 2012, the Commission issued D.12-01-003 in R.09-07-009, denying the petition of Worldwide Marketing Solutions to modify D.10-09-017. On January 20, 2012, the Commission received an electronic message that the service of D.12-01-003 in this proceeding was not deliverable to Judith A. Riley, Consultant for NovaTel, at the e-mail address on the service list for R.09-07-009. On January 23, 2012, the ALJ contacted Ms. Riley via telephone and determined that the e-mail address on the service list for Ms. Riley contained a typographical error. However, Commission records show that NovaTel was served via United States Mail the notice of availability of documents.

⁶ NovaTel provides a copy of the Tennessee statute that permits carriers to provide either an irrevocable letter of credit or a surety bond as acceptable financial security instruments, and a proposed irrevocable letter of credit.

collection of taxes and fees. DRA recommends that any financial security instruments accepted as alternatives to the performance bond should be functionally equivalent to a performance bond. In particular, DRA contends that an irrevocable letter of credit must provide an equal or better assurance of collection than the currently required performance bond if a carrier goes bankrupt.⁷

3. Discussion

The Petition to modify D.10-09-017 to permit an irrevocable letter of credit to serve as an alternative to posting a performance bond is denied. As discussed below, the Commission does not have the discretion to accept an irrevocable letter of credit to satisfy the requirements of § 1013(e) in lieu of a performance bond, and NDIEC registrants are currently able to obtain the required performance bond.

3.1. An Irrevocable Letter of Credit Does Not Satisfy the Requirements of § 1013(e)

The Commission has discretion to accept an irrevocable letter of credit to satisfy the requirements of § 1013(f).⁸ However, as discussed below, the

⁷ DRA notes that R.11-11-006 is considering, among other things, whether to require performance bonds for Certificate of Public Convenience and Necessity (CPCN) and Wireless Identification Registration (WIR) holders, and whether there are alternatives to a performance bond that would provide the same level of protection. DRA recommends that the Commission carefully consider whether an irrevocable letter of credit is functionally equivalent to a performance bond, and any finding the Commission makes in this proceeding be consistent with the determination the Commission makes in R.11-11-006.

⁸ NovaTel states that the Commission has the discretion to accept an irrevocable letter of credit in lieu of a performance bond pursuant to § 1013(f), because § 1013(f) permits but does not require the Commission to require a performance bond.

Commission does not have discretion to accept an irrevocable letter of credit to satisfy the requirements of § 1013(e).

Section 1013(f) provides that “[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.” (Emphasis added.) Thus, the Commission has the discretion to not require the procurement of a performance bond, and could accept other financial security instruments such as an irrevocable letter of credit as an alternative to the performance bond.

However, § 1013(e) provides that “[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.” (Emphasis added.) As noted above, D.11-09-026 acknowledged that the performance bond requirement of § 1013(e) is mandatory.

DRA states that the Commission may have discretion to accept an irrevocable letter of credit in lieu of a performance bond to facilitate the collection of fines, penalties and restitution pursuant to § 1013(f). However, because the performance bond requirement of § 1013(e) is mandatory, DRA questions whether the Commission has the authority to accept an irrevocable letter of credit pursuant to § 1013(e).⁹

⁹ DRA states that the Commission might accept an irrevocable letter of credit in lieu of a performance bond pursuant to the Commission’s authority under § 701, but only if NDIEC registrants are unable to obtain performance bonds suited for the purposes of

Footnote continued on next page

NovaTel states that, pursuant to § 701,¹⁰ the Commission also has the authority to accept an irrevocable letter of credit in lieu of a performance bond to satisfy the requirements of § 1013(e). We disagree.

The California Supreme Court has determined that § 701 does not permit the Commission to disregard the Legislature's express directives embodied in statute.¹¹ Because § 1013(e) expressly requires a performance bond as a precondition to registration, the Commission may not rely on § 701 for authority to instead permit the use of an irrevocable letter of credit to satisfy the requirements of § 1013(e). As a result, it would not benefit NDIEC registrants for the Commission to accept irrevocable letters of credit to satisfy the requirements

§ 1013(e) and § 1013(f) and if irrevocable letter of credit provide equal or better protection than a performance bond.

¹⁰ Section 701 states, "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

¹¹ For example, in *Southern California Gas Company v. Public Utilities Commission* (1979) 24 Cal.3d 653, the California Supreme Court (Cal Supreme Court) determined that the Commission exceeded its authority by establishing a mandatory Home Insulation Financing Assistance Program (HIFAP), and thereby disregarded the Legislature's desire that participation in the HIFAP be permissive or optional. The Cal Supreme Court determined that § 701 does not permit the Commission to disregard the Legislature's express directives embodied in §§ 2781 through 2788.

In *Pacific Telephone and Telegraph Company v. Public Utilities Commission* (1965) 62 Cal.2d 634, the California Supreme Court found that the Commission exceeded its authority by retroactively setting rates when § 728 expressly requires rates to be put into effect on a prospective basis.

In *Assembly of the State of California v. Public Utilities Commission* (1995) 12 Cal.4th 87, the Cal Supreme Court concluded that the Commission exceeded its authority when it established the California Teleconnect Fund with ratepayer monies expressly required by § 453.5 to be returned to customers.

of § 1013(f) because NDIEC registrants must still obtain and maintain a performance bond to satisfy the requirements of § 1013(e).

If NDIEC registrants were unable to reasonably obtain the required bond to satisfy the requirements of § 1013(e), or if irrevocable letters of credit were equal to or better than bonds in meeting the goal of protecting consumers, the Commission could work with the Legislature in an effort to modify § 1013(e) to allow the Commission the discretion to accept irrevocable letters of credit. However, as discussed below, NDIEC registrants are currently able to obtain the required performance bond, and the requirement to obtain a bond better achieves the goal of protecting consumers.

3.2. NDIEC Registrants are Able to Obtain the Required Bond

NovaTel asserts that it has had difficulty obtaining the required performance bond.¹² However, NovaTel states that Hartford Bonds has now informed NovaTel's insurance broker that it would consider NovaTel's application for a bond, and NovaTel's bond application is pending. Nevertheless, NovaTel continues to recommend that an alternative to the bond requirement be allowed.

No other NDIEC registrant or party to R.09-07-009 commented that NDIEC registrants are having difficulty obtaining the required bond. Thus,

¹² NovaTel states that its insurance broker, SWBC Insurance Services, submitted requests to CNA Western Surety, SureTec and Hartford, which declined to write the bond. According to NovaTel, these companies did not consider NovaTel's financial information but instead declined the request because the companies did not offer this type of bond as part of their portfolio.

difficulty in obtaining the required bond does not appear to be a significant problem.

Commission records show that more than 100 NDIEC registrants have provided the Commission evidence of the performance bond required pursuant to D.10-09-017, as modified by D.11-09-026. Because NovaTel has a pending bond application and because NovaTel has not shown that it or other NDIEC registrants are unable to obtain the required performance bond, NovaTel has not demonstrated sufficient good cause to grant the Petition.

4. Comments on Proposed Decision

The proposed decision of the ALJ 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 by DRA on September 4, 2012. No reply comments were filed. DRA supports the proposed decision and does not request any changes.

5. 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. On August 5, 2011, NovaTel filed a petition requesting that D.10-09-017 be modified to permit NDIEC registrants to submit an irrevocable letter of credit as an alternative to posting a performance bond.

2. Hartford Bonds has informed NovaTel's insurance broker that it would consider NovaTel's application for a bond, and NovaTel's bond application is pending.

3. NDIEC registrants are currently able to obtain the required performance bond. Commission records show that more than 100 NDIEC registrants have

provided the Commission evidence of the performance bond required pursuant to D.10-09-017.

Conclusions of Law

1. NovaTel has not shown that it or other NDIEC registrants are unable to obtain the performance bond required by D.10-09-017, as modified by D.11-09-026.
2. The performance bond requirement of § 1013(e) is mandatory.
3. Because § 1013(e) expressly requires a performance bond as a precondition to registration, the Commission may not rely on § 701 for authority to instead permit the use of an irrevocable letter of credit to satisfy the requirements of § 1013(e).
4. It would not benefit NDIEC registrants for the Commission to accept irrevocable letters of credit to satisfy the requirements of § 1013(f) because NDIEC registrants must still obtain and maintain a performance bond to satisfy the requirements of § 1013(e).
5. The Petition to modify D.10-09-017 to permit an irrevocable letter of credit to serve as an alternative to posting a performance bond should be denied because NovaTel has not demonstrated sufficient good cause to grant the Petition.

O R D E R

IT IS ORDERED that:

1. The petition of NovaTel Ltd., Inc., requesting the Commission to modify Decision 10-09-017 to permit an irrevocable letter of credit to serve as an alternative to posting a performance bond is denied.

2. Rulemaking 09-07-009 is closed.

This order is effective today.

Dated September 13, 2012, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners