BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Revise the Certification Process for Telephone Corporations and the Registration Process for Wireless Carriers.	Rulemaking 11-11-006 (Filed November 10, 2011)

ORDER DENYING REHEARING OF DECISION (D.) 13-05-035

I. INTRODUCTION

This order addresses the disposition of the application for rehearing of Decision (D.) 13-05-035 (or "Decision") filed by Cricket Communications, Inc. ("Cricket"), Sprint Nextel and T-Mobile West LLC dba T-Mobile (collectively, "Joint Wireless Carriers").[1] D.13-05-035 is the order adopting revisions to the certification processes for telephone corporations seeking or holding certificates of public convenience and necessity ("CPCN"), and for wireless carriers seeking or holding registration.

Joint Wireless Carriers timely filed an application for rehearing of D.13-05-035. Joint Wireless Carriers allege that the bonding requirement imposed on wireless carriers as a condition of entry into, and continued participation in, the California market violates section 332(c)(3)(A) of the Federal Communications Act, 47 U.S.C. § 332(c)(3)(A), and provisions of the Public Utilities Code. Joint Wireless Carriers also

[1] On March 21, 2014, Cricket filed in this docket "Notice of Withdrawal by Cricket Communications, Inc. from Joint Application for Rehearing of Decision No. 13-05-035 filed July 3, 2013." Cricket stated in its withdrawal filing that it is now a subsidiary of AT&T and, therefore, exempt from the bond requirement that Joint Wireless Carriers are challenging in their request for rehearing.

assert that the Decision imposes this bonding requirement in a discriminatory, arbitrary and capricious manner.

We have reviewed each and every allegation raised in the application for rehearing, and are of the opinion that good cause has not been demonstrated to warrant a rehearing. Therefore, the application for rehearing of D.13-05-010 is denied.

II. DISCUSSION

A. Federal law does not preempt the Commission from imposing a bond requirement on wireless carriers.

Joint Wireless Carriers assert that the Commission is preempted from imposing a performance bond requirement on wireless carriers by 47 U.S.C. § 332(c)(3)(A) of the Federal Communications Act, because such a requirement constitutes an impermissible market-entry regulation. This federal statute provides: "[N]o state or local government shall have authority to regulate the entry of or the rates charged by any Commercial Mobile Service or any Private Mobile Service, except this paragraph shall not prohibit a state from regulating the other terms and conditions of Commercial Mobile Service." According to Joint Wireless Carriers, the phrase "terms and conditions" applies only to matters concerning consumer welfare, such as notification requirements and disclosures, and does not apply to the bond requirement adopted by D.13-05-035. (Rehrg. App., pp. 4-5.)

As the party alleging preemption, Joint Wireless Carriers have the burden of demonstrating that Congress had a "clear and manifest" intention to preempt state law in a field traditionally occupied by the states, such as the exercise of a state's police powers, which extends to consumer protection matters. (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1372, citing *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485; *California v. ARC America Corp.* (1988) 490 U.S. 93, 101.) Joint Wireless Carriers have failed to meet their burden. Section 332 does not define "entry" regulation or "terms and conditions" of wireless service, and nothing in its plain language limits "terms and conditions" to only issues relating to consumer protection, as Joint Wireless Carriers argue.

The bond requirement is not an impermissible entry regulation. The Federal Communications Commission ("FCC") and the courts have narrowly interpreted the preemptive clause of 47 U.S.C. § 332(c)(3)(A), focusing on whether the principal purpose and direct effect of the regulation is to prevent market entry and control rates. (See *In the Matter of Wireless Consumers Alliance, Inc.* (200) 15 FCC Rcd 17021; *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366; *Communications Telesystems Intern. v. CPUC* (9th Cir. 1999) 196 F.3d 1011, 1017; *Fedor v. Cingular Wireless* (7th Cir. 2004) 355 F.3d 1069, 1074.) "Congress's intent in enacting [Section 332(c)(3)(A)] was to prevent the states from obstructing the creation of nationwide cellular service coverage, and not the preemption of health and safety and police powers." (*Farina v. Nokia et al.* (E.D. Penn. 2008) 578 F. Supp 2d 740, 761; *Murray v. Motorola* (D.C. Cir. 2009) 982 F.2d 764, 775.) Thus, states are generally precluded from engaging in direct efforts to prevent telecommunications companies from operation, but may adopt regulations that merely impose financial requirements on such companies.

The Ninth Circuit Court of Appeals recently addressed a test for preemption under the "market entry" prong of 47 U.S.C. § 332(c)(3)(A). In *Telesaurus VPC, LLC v. Power* (9th Cir. 2010) 623 F.3d 998, the court stated: "Just as § 332(c)(3)(A) preempts claims that require a court to substitute its judgment for the [FCC's] with respect to the reasonableness of a particular rate, § 332(c)(3)(A) also preempts claims that require a court to substitute its judgment for the agency's with regard to a market-entry decision." (*Id.* at p. 1008.) Licensing has long been recognized as the FCC's core tool in the regulation of market entry and such licensing directly involves agency determinations of public interest, safety, efficiency and adequate competition. (*Id.*) Accordingly, 47 U.S.C. § 332(c)(3)(A) preempts state actions that require a court "to substitute its judgment for the agency's" with regard to a licensing decision. (*Id*. at pp. 1008-1009.)

Applying the same principle here, 47 U.S.C. § 332(c)(3)(A) preempts Commission action that would require us to engage in an assessment or reexamination of the FCC's regulatory determination regarding a mobile service's entry into the market.

But the bond requirement does not entail the Commission substituting its judgment for the FCC's with regard to a licensing decision. The purpose of the bond requirement is not to prevent wireless companies from operating in the state; it does not involve a discretionary state action to approve market entry and is not otherwise intended to limit the number of market entrants. D.13-05-035 is clear that the purpose of the bond requirement is to protect consumers of this state and ensure there is a means to pursue fines, restitution, taxes and fees. (D.13-05-035, pp. 51-52 [Ordering Paragraphs 3, 9, 15].) Therefore, the bond requirement constitutes permissible regulation of the "terms and conditions" of wireless service pursuant to 47 U.S.C. § 332(c)(3)(A).

Moreover, Joint Wireless Carriers are incorrect in their assertion that "terms and conditions" refer only to issues that relate to consumer welfare. The legislative history of 47 U.S.C. § 332 shows that the phrase "other terms and conditions" includes matters beyond consumer protection. (D.13-05-035, p. 21.) Congress intended for states to regulate the terms and conditions of wireless services. (D.13-05-035, p. 21, fn. 30, citing H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.) Terms and conditions include matters such as customer billing information, packaging and billing disputes and other consumer protection matters; facilities siting issues such as zoning; transfers of control; the bundling of services and equipment; the requirement that carriers make capacity available on a wholesale basis; and "such other matters as fall within a state's lawful authority." (*Id.*) The examples given are not meant to be an exhaustive list, but "intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions.'" (*Id.*)[2]

[2] "Other terms and conditions" have included state regulatory activities such as informational filing requirements (*In the Matter of Petition of the Connecticut Dep't of Pub. Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers*, PR Docket No. 94-106, FCC 95-199, (1995) 10 FCC Rcd 7025 ¶ 82) and contribution requirements to state universal service programs (*In the Matter of Petition of Pittencrieff Communications, Inc.* (1997) 13 FCC Rcd 1735, 1737, upheld by *Cellular Telecomms. Indus. Ass'n v. FCC* (D.C. Cir. 1999) 168 F.3d 1332). As the FCC has stated, "nothing in [the Omnibus Budget Reconciliation Act of 1993] indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders … we believe [a state] retains whatever authority it

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Joint Wireless Carriers also mischaracterize the bond requirement as "a requirement to demonstrate financial fitness" and criticize the decision's reliance on the FCC's *Preemption of State Entry Regulation in the Public Land Mobile Service* (1986) FCC 86-112, Report and Order, 1986 FCC LEXIS 3749, as not supporting a "broad based bond requirement on all wireless carriers." (Rehrg. App., pp. 7-8.) However, the FCC in that case did not impose a blanket prohibition on financial requirements. A state may not impose a financial qualification that discriminates against or is implemented in such a way as to impair the ability of a carrier to provide service. But the FCC "[does] not intend to preempt state regulation which does not prohibit or impede entry while serving legitimate state interests such as consumer protection, or regulation of carrier practices and services." (*Preemption of State Entry Regulation*, *supra*, at ¶ 3.) The FCC noted that the imposition of a bond or escrow account for the purpose of effectuating a state's interest in protecting consumers would be a legitimate form of entry regulation. Citing the sale of pre-paid services as an example, the FCC stated that a "state would have a legitimate consumer protection interest in this practice and would not be preempted from imposing consumer protection requirements, such as a bond or escrow requirement, to effectuate this state interest and protect consumers." (*Id.* at ¶ 28.) In an attempt to undermine this conclusion, Joint Wireless Carriers claim that the FCC's statements about the legitimate imposition of a performance bond only applies to pre-paid wireless services, and note that the case in which the FCC made these statements has been vacated. However, the case was vacated because the FCC exceeded its statutory authority in preempting state regulation of intrastate common carrier mobile services. (*NARUC v. FCC, et al.*, 1987 U.S. App. LEXIS 17810, *2.) It remains instructive as to the FCC's belief that the imposition of a bond to serve legitimate state interests such as consumer protection constitutes permissible state regulation of wireless carriers and

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possesses under state law to monitor the structure, conduct, and performance of [Commercial Mobile Radio Service] providers in that state." (*Connecticut DPUC*, at ¶ 82.)

would not be preempted. Moreover, the FCC's statements were not limited to pre-paid wireless services. The FCC was clear that such services were merely one example, and that "[t]here may well be other such interests which could be the subject of state regulation without imposing barriers to entry." (*Preemption of State Entry Regulation*, *supra*, at ¶ 28.) Joint Wireless Carriers have failed to demonstrate that the bond requirement is preempted by federal law. The fact that the bond requirement may impose a financial requirement does not make it an impermissible entry regulation.

Joint Wireless Carriers also claim that imposing the bond requirement on wireless carriers does not serve any legitimate state interest, because there is no evidence of any documented problem with any wireless carrier with respect to the collection of fines, penalties, taxes, surcharges, fees and restitution. (Rehrg. App., p. 6.) However, we have revoked Wireless Identification Registrations ("WIRs") and CPCNs for carriers that have not paid taxes, fees, fines, penalties or restitution. In December 2010, we revoked 43 operating authorities held by telephone corporations for failing to comply with the California Public Utilities Reimbursement Account Fee filing and reporting requirements of Public Utilities Code sections 401 through 435. (D.13-05-035, p. 20, citing Resolution (Res.) T-17300.) In April 2012, we revoked operating authorities held by 106 telephone carriers. (*Id.*, citing Res. T-17359.) In August 2010, we revoked eight WIRs for failure to comply with Public Utilities Code section 401, which requires the filing of reimbursement account reports and the remitting of applicable fees. (Office of Ratepayer Advocates ("ORA") Reply Comments on R.11-11-006,[3] pp. 3-4, citing Res. T-17278.) In November 2009, we revoked authorizations for 97 telephone corporations for failure to pay fees. (*Id.* at p. 4, citing Res. T-17228.) In July 2009, we revoked 83 WIRs for failure

[3] R.11-11-006, Reply Comments of the Division of Ratepayer Advocates Regarding Revisions to the Process for Telephone Corporations Seeking or Holding Certificates of Public Convenience and Necessity, and Wireless Carriers Seeking or Holding Registration, filed Jan. 27, 2012. The Division of Ratepayer Advocates was renamed the Office of Ratepayer Advocates effective September 26, 2013, pursuant to Senate Bill No. 96 (Budget Act of 2013: public resources), which was approved by the Governor on September 26, 2013.

to remit applicable fees. (*Id.* at p. 4, citing Res. T-17206.) Thus, the bond requirement serves the Commission's legitimate interest in ensuring fees, fines and restitution are paid, and D.13-05-035 correctly determines that wireless carriers should be subject to the same consumer protection measures, such as the bond requirement, as wireline companies.

B. Imposing a bond requirement on wireless carriers does not conflict with state law.

Joint Wireless Carriers allege that Public Utilities Code section 1013(m) exempts wireless carriers from the bond requirement, and therefore, the Commission lacks the statutory authority to impose such an obligation.[4] (Rehrg. App., p. 9.) This allegation is without merit. We rely on our authority under sections 709 (state telecommunications policies) and 701 (Commission may do all things necessary in exercise of regulatory authority over public utilities) to impose the bond requirement on wireless carriers. (D.13-05-035, pp. 20, 52 [Conclusion of Law 12].) Although section 701 does not confer upon the Commission powers contrary to express restrictions placed on its authority by the Public Utilities Code (see *Assembly v. CPUC* (1995) 12 Cal.4th 87; *Pacific Tel. & Tel. Co. v. CPUC* (1965) 62 Cal. 2d 634, 653), there is no such express restriction here. Section 1013(m) states that the provisions of that section do not apply to commercial mobile radio service ("CMRS"), but it does not expressly prohibit us from imposing on wireless providers a bond requirement or any other requirements in Section 1013. The legislative history of the amendments to Section 1013 shows that the Legislature did not intend to exempt wireless providers from the bond requirement, or to require further legislative action to extend that requirement to wireless providers. (*See* Senate Judiciary Committee, Bill Analysis, Assembly Bill ("AB") 2578 (2007-2008 Reg. Sess.), As Amended June 12, 2008, Hearing Date: June 26, 2008, at p. 5;[5] Senate Rules

[4] Subsequent section references are to the Public Utilities Code, unless otherwise specified.

[5] This document is available at <ftp://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2551-2600/ab_2578_cfa_20080626_164533_sen_comm.html>. *See also* Reply Comments of the

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Committee, Bill Analysis, AB 2578, Third Reading, Amended Aug. 20, 2008.[6]) Moreover, Section 1013 did not deprive us of any jurisdiction we already had under state law. We had already established registration requirements for wireless carriers, and the passage of the statute did not do away with these existing requirements.

C. The record supports the exemptions to the bonding requirement.

Joint Wireless Carriers allege that it is error for the Commission to exempt Carriers of Last Resort ("COLRs") and certain of their affiliates from the bonding obligation, while not similarly exempting others such as Joint Wireless Carriers. (Rehrg. App., p. 10.) While Joint Wireless Carriers state that the exemption is discriminatory and based on an arbitrary and capricious standard, they do not actually oppose exempting COLRs from the bond requirement, but object to the exemption being based on the fact that COLRs must provide notice to the Commission before ceasing operations. (Rehrg. App., pp. 10-11.)

Contrary to Joint Wireless Carriers' allegation, there is record evidence to support the determination warranting the exemptions to the bonding requirement. For example, the record demonstrates that the COLRs have substantial physical facilities, local personnel, and regular and ongoing interactions with the Commission. (*See* Opening Comments of Small Local Exchange Carriers ("LECs"), p. 2;[7] Opening

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[ORA] Regarding the Proposed Decision Addressing Revisions to the Certification Processes for Telephone Corporations Seeking or Holding Certificates of Public Convenience and Necessity, and Wireless Carriers Seeking or Holding Registration, Nov. 13, 2012, pp. 2-3; Reply Comments of The Utility Reform Network on the Proposed Decision of Commissioner Sandoval, Nov. 13, 2012, pp. 2-3.

[6] This document is available at <ftp://www.lhc.ca.gov/pub/07-08/bill/asm/ab_2551-2600/ab_2578_cfa_20080825_155644_sen_floor.html>.

[7] Comments of Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company, and Winterhaven Telephone Company ("Small LECs"), filed Jan. 13, 2012.

Comments of SureWest, p. 2.[8]) Further, during the proceeding, the Commission considered that it had previously adopted specific criteria to ensure that a COLR had a stake in the outcome, that it would be unlikely to abandon its customers, and that it was committed to promoting universal service (*see* D.96-10-066, p. 191).[9] Further, under Commission rules adopted in D.96-10-066, Uniform Regulatory Framework ("URF") and General Rate Case ("GRC") local exchange carriers must notify the Commission before ceasing operations, such that a COLR that is not the sole COLR in a geographic service area must notify the Commission via advice letter, and a COLR that is the only COLR in a geographic service area must file with the Commission an application to withdraw as a COLR, but must continue to provide service until its application is granted or a new COLR designated. (D.96-10-066, Appendix A, Rule 6.D6.) Based on these considerations, we concluded that, given these characteristics of COLRs, a performance bond is not needed to ensure the Commission's ability to protect consumers or facilitate collection prior to a URF or GRC carrier's ceasing operations. (D.13-05-035, pp. 26-27.)

III. CONCLUSION

For the reasons discussed above, good cause for rehearing has not been demonstrated. Accordingly, Joint Wireless Carriers' application for rehearing is denied.

THEREFORE, it is ordered:

1. The application for rehearing of Decision 13-05-035 filed by Joint Wireless Carriers is denied.

2. Rulemaking 11-11-006 remains open for Phase II, to address other issues related to the performance bond requirement.

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[8] Comments of SureWest Telephone (U 1015 C), SureWest Long Distance (U 5817 C), and SureWest TeleVideo (U 6324 C) ("SureWest"), filed Jan. 13, 2012.

[9] *Re Universal Service and Compliance with the Mandates of Assembly Bill 3643* (1996) (1996) 68 Cal.P.U.C.2d 524.

This order is effective today.

Dated October 16, 2014, at San Francisco, California.

MICHAEL R. PEEVEY
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
MICHAEL PICKER
Commissioners