

Decision 11-09-026 September 22, 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 Section 1013.<sup>1</sup>

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<sup>1</sup> 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.

Performance bonds for Non-dominant Interexchange Carrier (NDIEC) registration applicants and existing NDIECs must state in the body of the bond that the purpose of the bond is to facilitate the collection of fines, penalties, restitution to customers, taxes, and fees. Existing NDIECs must obtain a new performance bond with an effective date of January 1, 2012 to reflect the inclusion of taxes and fees, and must submit the new bond with the Communications Division no later than 120 days from the date of this order. Performance bond submissions shall be made with an Advice Letter Information-Only filing pursuant to General Order 96-B General Rule 6. Because Information-Only filings are public records and open for public inspection, these filings are to be made using the Communications Division’s advice letter process, which includes among other things that the filing be made on compact disc. Details for which can be accessed at the following web address:

<http://www.cpuc.ca.gov/PUC/Telco/Information+for+providing+service/pal.htm>.

Failure to obtain and submit a performance bond as directed in this decision may result in revocation of the carrier's operating authority.

For the purposes of the bond requirement, we interpret the statutory phrase in Section 1013(e) "taxes or fees or both, collected from customers and held for remittance" to include the Public Utility Reimbursement Fee (sometimes referred to as the PUC User Fee) and the current and future Public Purpose Program Surcharges that fund the Commission's various universal telephone service programs. The current Public Purpose Programs are: California High Cost Fund - A, California High Cost Fund - B, California Teleconnect Fund, California Advanced Services Fund, Deaf and Disabled Telecommunications Program, and the California Lifeline Program.

### **Comments of Proposed Decision**

The proposed decision of 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 by DRA on September 15, 2011. No reply comments were filed. DRA supports the proposed decision and does not request any changes.

### **Assignment of Proceeding**

Catherine J.K. Sandoval is the assigned Commissioner and Richard Smith is the assigned Administrative Law Judge 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.

5. For the purposes of the bond requirement, we interpret the statutory phrase in Section 1013(e) "taxes or fees or both, collected from customers and held for remittance" to include the Public Utility Reimbursement Fee (sometimes referred to as the PUC User Fee) and the current and future Public Purpose Program Surcharges that fund the Commission's various universal telephone service programs. The current Public Purpose Programs are: California High Cost Fund - A, California High Cost Fund - B, California Teleconnect Fund, California Advanced Services Fund, Deaf and Disabled Telecommunications Program, and the California Lifeline Program.

### **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.

3. Ordering Paragraphs 4 and 5 of Decision 10-09-017 are modified to read as follow:

4. Registration license holders must obtain a performance bond equal to or greater than 10 percent of intrastate revenues reported on the Commission's User Fee Statement during the preceding calendar year or \$25,000, whichever is greater. The performance bond must state in the body of the bond that the purpose of the bond is to facilitate the collection of fines, penalties, restitution to customers, taxes and fees. The performance bond must be a continuous bond (i.e., there is no termination date on the bond) issued by a corporate surety company authorized to transact surety business in California, and the Commission must be listed as the obligee on the bond. Within 120 days after the effective date of this decision modifying Decision 10-09-017, all registration license holders must submit an Information-Only advice letter to the Director of the Communications Division containing a copy of the registration license holder's executed performance bond with an effective date no later than January 1, 2012, to reflect the inclusion of taxes and fees. Performance bond submissions shall be made with an Advice Letter Information-Only filing pursuant to General Order 96-B General Rule 6. Because Information-Only filings are public records and open for public inspection, these filings are to be made using the Communications Division's advice letter process, which includes among other things that the filing be made on compact disc. Details for which can be accessed at the following web address: <http://www.cpuc.ca.gov/PUC/Telco/Information+for+providing+service/pal.htm>.

5. New registration license applicants applying for the first time which have not previously reported revenues or submitted surcharges to the Commission must obtain a performance bond in the amount of \$25,000 for the first year. In the affidavit included in its application, the registration applicant must attest to the amount of the bond that will be obtained and that the

required performance bond will be executed within five business days after the effective date of the issuance of a registration license. The performance bond must state in the body of the bond that the purpose of the bond is to facilitate the collection of fines, penalties, restitution to customers, taxes and fees. The performance bond must be a continuous bond (i.e., there is no termination date on the bond) issued by a corporate surety company authorized to transact surety business in California, and the Commission must be listed as the obligee on the bond.

4. All Ordering Paragraphs from Decision 10-09-017, as modified by this order, are republished in Attachment A.

This order is effective today.

Dated September 22, 2011, at San Francisco, California.

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

## ATTACHMENT A

1. The simplified registration process set forth in Decision 97-06-107 is revised as specified in the Ordering Paragraphs below.

2. The authorization granted through the simplified registration process pursuant to § 1013 is renamed a “registration license.”

3. Registrants that are granted a new or transferred registration license must provide the Director of the Communications Division a written acceptance of the registration license before exercising the authority granted by that license.

4. Registration license holders must obtain a performance bond equal to or greater than 10 percent of intrastate revenues reported on the Commission’s User Fee Statement during the preceding calendar year or \$25,000, whichever is greater. The performance bond must state in the body of the bond that the purpose of the bond is to facilitate the collection of fines, penalties, restitution to customers, taxes and fees. The performance bond must be a continuous bond (i.e., there is no termination date on the bond) issued by a corporate surety company authorized to transact surety business in California, and the Commission must be listed as the obligee on the bond. Within 120 days after the effective date of this decision modifying Decision 10-09-017, all registration license holders must submit an Information-Only advice letter to the Director of the Communications Division containing a copy of the registration license holder’s executed performance bond with an effective date no later than January 1, 2012, to reflect the inclusion of taxes and fees. Performance bond submissions shall be made with an Advice Letter Information-Only

filing pursuant to General Order 96-B General Rule 6. Because Information-Only filings are public records and open for public inspection, these filings are to be made using the Communications Division's advice letter process, which includes among other things that the filing be made on compact disc. Details for which can be accessed at the following web address:

<http://www.cpuc.ca.gov/PUC/Telco/Information+for+providing+service/pal.htm>.

5. New registration license applicants applying for the first time which have not previously reported revenues or submitted surcharges to the Commission must obtain a performance bond in the amount of \$25,000 for the first year. In the affidavit included in its application, the registration applicant must attest to the amount of the bond that will be obtained and that the required performance bond will be executed within five business days after the effective date of the issuance of a registration license. The performance bond must state in the body of the bond that the purpose of the bond is to facilitate the collection of fines, penalties, restitution to customers, taxes and fees. The performance bond must be a continuous bond (i.e., there is no termination date on the bond) issued by a corporate surety company authorized to transact surety business in California, and the Commission must be listed as the obligee on the bond.

6. Each registration license holder must submit an Information-Only advice letter to the Director of the Communications Division containing a copy of the registration license holder's executed performance bond at least annually not later than March 31. Within five business days after the effective date of the issuance of a registration license, a new registration

holder must submit an Information-Only advice letter to the Director of the Communications Division a copy of the registration license holder's executed bond.

7. A registration license holder must not allow its performance bond to lapse during any period of its operation. During all periods of operation a registration license holder must continue to possess the requisite legal, technical, and financial qualifications.

8. The Communications Division is authorized grant to requests for additional time for registration license holders to submit a copy of the executed bond if the license holder makes a written request to the Communications Division before license holder is deemed delinquent. A registration license holder must provide an explanation in its request for additional time that demonstrates good cause for the additional time needed to comply with the requirement to submit to the Commission a copy of the executed bond.

9. The Communications Division must prepare for Commission consideration a resolution revoking the registration license of any registration license holder that is more than 120 days late in providing the Director of the Communications Division a copy of its executed performance bond and that has not been granted an extension of time by the Communications Division.

10. Applicants for registration licenses must submit, as part of the application, resumes, listing all employment, from officers and directors of registration applicants.

11. Applicants for registration licenses must state when the applicant expects to begin providing service in California.

12. The revised Application Form and instructions in Attachment B to this Decision are adopted.

13. Applicants seeking to transfer registration licenses must verify compliance with all Commission reporting, fee, and surcharge transmittals.

14. The application fee for new and transferred registration licenses is set at \$250.

15. A minimum annual user fee for registration license holders is established and set at \$100. Registration license holders must pay an annual user fee based on the Commission-established rate in effect at the time (currently 0.18% of gross intrastate revenue) or \$100, whichever is greater.

16. Rulemaking 09-07-009 is closed.

This order is effective today.

**(END OF ATTACHMENT A)**