

Decision 12-01-003 January 12, 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 WORLDWIDE MARKETING SOLUTIONS, INC.'S
PETITION FOR MODIFICATION OF DECISION 10-09-017**

Summary

This decision denies the petition of Worldwide Marketing Solutions, Inc., for exemption from the performance bond requirement established in Decision 10-09-017.

Background

The authorization for the Commission's Non-dominant Interexchange Carrier (NDIEC) registration process was established by Public Utilities Code Section 1013.¹ Section 1013 was adopted in 1995 (SB, 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 process for the

¹ All statutory references are to the Public Utilities Code.

streamlined registration of NDIECs, pursuant to the authority granted in § 885 and § 1013.²

In 2007, the State Controller's Office completed an audit of the Commission's consumer protection enforcement activities. In the State Controller's 2007 Audit Report³, the State Controller's Office noted an increasing incidence of fraudulent or inappropriate practices among carriers in the telecommunications industry.⁴ Rulemaking 09-07-009 was initiated in response to the issues raised in the 2007 Audit Report, and, on September 2, 2010, the Commission issued D.10-09-017, adopting revisions to the requirements for the registration of NDIECs initially established in D.97-06-107.

Among the issues addressed in D.10-09-017 were the need for a performance bond and what aspects of financial responsibility would be covered by any adopted performance bond requirement.⁵ D.10-09-017 adopted

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 The State Controller's Office commented that the Commission is slow in rendering decisions imposing fines and restitution, and found 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. The State Controller's Office recommended, among other things, that the Commission conduct more stringent background and financial viability reviews of individuals or companies registering with the Commission, and require the posting of a performance bond for NDIEC registration.

⁵ Section 1013, among other things, provides for performance bonds for specified purposes. 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

Footnote continued on next page

requirements for NDIEC registrants to obtain a performance bond, pursuant to § 1013(f), 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.

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's) petition for modification. D.11-09-026 acknowledged that the performance bond requirement of § 1013(e) is mandatory. As a result, D.11-09-026 modified D.10-09-017 to allow the performance bond required pursuant to D.10-09-017 to 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).

Worldwide Marketing Solutions, Inc.'s Petition to Modify D.10-09-017

On April 29, 2011, Worldwide Marketing Solutions, Inc. (WWMS) filed its petition (Petition). The Petition does not actually request that D.10-09-017 be modified but instead requests that WWMS be granted an exemption from the performance bond requirement established in D.10-09-017.

According to the Petition, an exemption for WWMS is justified because (1) WWMS provides a different type of service and is differently situated than

deposits the telecommunications company may collect from its customers, or order that those 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 Assembly Bill 2578 (Ch. 552, Stats. 2008).

other NDIECs,⁶ (2) WWMS has only incidental intrastate revenues in California, and (3) the required performance bond would present a financial hardship to WWMS.

On May 26, 2011, the DRA filed a response in opposition to the Petition. DRA recommends that the Petition be denied because WWMS has not offered a persuasive reason for exempting it from the performance bond requirement.

Discussion

WWMS' request to be exempt from the performance bond requirement established in D.10-09-017 is denied.

WWMS' argument lacks merit that an exemption from the performance bond requirement is justified because WWMS provides a different type of service and is differently situated than other NDIECs. The Commission considered and rejected similar arguments in D.10-09-017.⁷

As stated in D.10-09-017, the Commission does not limit the types of customers that NDIECs may serve. Thus, an NDIEC serving one type of customer today may choose to serve other types of customers at any time without additional Commission authorization. Because NDIECs may change their business strategy at any time, it would be administratively impossible to exempt certain registrants based on their business strategy or the type of customers served.

⁶ WWMS states that it only provides international PIN free calling services, and any intrastate revenues it receives are the result of customers misdialing phone numbers.

⁷ D.10-09-017 at 12-13.

WWMS' argument lacks merit that it should be exempt from the performance bond requirement because it has only incidental intrastate revenues and should not be penalized for customer dialing errors.⁸

The Audit Report found that it was inherently difficult for the Commission to collect fines and to provide for restitution to customers if the offending parties are no longer operating or have filed for bankruptcy. D.10-09-017 determined that requiring registrants to post a bond to facilitate the collection of fines, penalties and restitution was appropriate due to this inherent difficulty.

D.10-09-017 concluded that it was reasonable to base the amount of the performance bond on a registrant's reported annual intrastate revenues and to establish a minimum bond amount of \$25,000 for registrants that have not reported or do not report annual intrastate revenues to the Commission.⁹ WWMS' argument that it has only incidental intrastate revenues does not persuade us that this determination should be changed.

As discussed above, D.10-09-017, as modified by 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 to 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). The mandatory performance bond

⁸ WWMS states that, in 2010, it had only \$183 in "erroneous intrastate revenue...caused by retail consumer error in their dialing." Petition at 7.

⁹ D.10-09-017 determined that it was appropriate to establish a minimum bond amount for all registrants 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.

requirement of § 1013(e) does not provide for exemptions or other exceptions due to incidental revenues or for other reasons.

WWMS provides no support for its claim that obtaining a performance bond would be a financial hardship. Commission records show that more than 100 NDIECs registrants have provided the Commission evidence of the performance bond required pursuant to D.10-09-017.

Comments on 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 in support of the proposed decision were received from DRA on December 19, 2011. No reply comments were filed.

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. On April 29, 2011, WWMS filed its Petition requesting an exemption from the performance bond requirement established in D.10-09-017.
2. On May 26, 2011, DRA filed a response in opposition to the Petition.
3. The Commission does not limit the types of customers that NDIECs may serve, and an NDIEC serving one type of customer today may choose to serve other types of customers at any time without additional Commission authorization.
4. The 2007 Audit Report found that it was inherently difficult for the Commission to collect fines and to provide for restitution to customers if the offending parties are no longer operating or have filed for bankruptcy.

5. Commission records show that more than 100 NDIECs registrants have provided the Commission evidence of the performance bond required pursuant to D.10-09-017.

6. WWMS provides no support for its claim that obtaining a performance bond would be a financial hardship.

Conclusions of Law

1. D.10-09-017 determined that requiring registrants to post a bond to facilitate the collection of fines, penalties and restitution was 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.

2. D.10-09-017 concluded that it was reasonable to base the amount of the performance bond on a registrant's reported annual intrastate revenues and to establish a minimum bond amount of \$25,000 for registrants that have not reported or do not report annual intrastate revenues to the Commission. WWMS' argument that it has only incidental intrastate revenues does not persuade us that this determination should be changed.

3. The Commission considered and rejected arguments in R.09-07-009 that NDIECs providing a different type of service or that are differently situated than other NDIECs should be exempt from the from the requirements established by D.10-09-017.

4. Because NDIECs may change their business strategy at any time, it would be administratively impossible to exempt certain registrants based on their business strategy or the type of customers served.

5. Section 1013(e) of the Public Utilities Code is mandatory in requiring carriers registering under this section to secure a performance bond to cover taxes or fees or both. The mandatory performance bond requirement of § 1013(e) does not provide for exemptions or other exceptions due to incidental revenues or for other reasons.

6. WWMS' request to be exempt from the performance bond requirement established in D.10-09-017 should be denied.

O R D E R

IT IS ORDERED that:

1. The petition of Worldwide Marketing Solutions, Inc., for exemption from the performance bond requirement established in Decision10-09-017 is denied.
2. Rulemaking 09-07-009 is closed.

This order is effective today.

Dated January 12, 2012, at San Francisco, California.

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