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**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

February 9, 2023

**Agenda ID #21347**

TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-436:

This is the draft Resolution of Administrative Law Judge Jeffrey Lee Resolving K.22-10-008. 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 draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the draft resolution. Comments shall be served (but not filed) within 20 days of the date that the draft Resolution was mailed and published on the Commission's website [link], as provided in Rule 14.5 of the Commission's Rules of Practice and Procedure. Comments shall be served upon all persons on this proceeding's service list and on ALJ Jeffrey Lee at JYL@cpuc.ca.gov.

/s/ MICHELLE COOKE

Michelle Cooke

Acting Chief Administrative Law Judge

MLC:mph

Attachment

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Resolution ALJ-436  
Administrative Law Judge Division  
[Date]

**R E S O L U T I O N**

RESOLUTION ALJ-436 Resolving K.22-10-008 and Sustaining Citation CD-2022-09-003 issued to Bandwidth IG, LLC (U7336C), by the Communications Division Pursuant to T-17601.

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**SUMMARY**

This resolution resolves K.22-10-008, the Appeal of Bandwidth IG, LLC (U7336C) from Citation CD-2022-09-003. We deny the appeal and sustain Citation CD-2022-09-003 and the assessed penalty in the amount of \$1,000. Proceeding K.22-10-008 is closed.

**BACKGROUND**

The California Public Utilities Commission's (Commission) Communications Division (CD) oversees compliance of telecommunications carriers and has the authority to issue citations and impose penalties for violation of Commission requirements.<sup>1</sup> Bandwidth IG, LLC (Bandwidth IG) is a seller of dark fiber optic network facilities, including to large enterprises and data centers.

On September 27, 2022, CD issued Citation CD-2022-09-003 (Citation) to Bandwidth IG for failing to file the annual Affiliate Transaction Report on California operations for the calendar year (CY) 2021 in a timely manner, as required by Commission General Order (GO) 104-A and Decision (D.) 93-02-019. The Citation directed Bandwidth IG to pay a penalty of \$1,000.

On October 18, 2022, Bandwidth IG appealed that Citation. The appeal notice admits that the company failed to file the report in a timely manner, identifying two instances of inadvertence by the company's general counsel with respect to the original and extended filing deadlines. In its appeal, the company contests only the imposition of a

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<sup>1</sup> Resolution T-17601, June 22, 2018, p. 1; Cal. Pub. Util. Code §§ 2101, 2107, 2108.

\$1,000 penalty, contending that the circumstances of the violation warrant no penalty or a reduction in the penalty amount.

On November 1, 2022, CD filed the compliance filing.

On December 22, 2022, the Administrative Law Judge held a remote appeal hearing in San Francisco, California. Bandwidth IG and CD appeared as parties at the hearing.

The following are undisputed facts:

- Bandwidth IG's March 1, 2018 grant of authority to operate in California under Commission Certificate of Public Convenience and Necessity (CPCN), per D.18-03-007, identified the deadline for filing its annual Affiliate Transaction Report as May 1 each year.
- On January 7, 2022, CD sent an email to all telecommunication carriers with operating authority in California (including Bandwidth IG), identifying their obligations and due dates to file annual reports, including CY 2021 Affiliate Transaction Reports required under D.93-02-019 that were due May 1, 2022.
- On February 7, 2022, CD sent a second reminder directly to Bandwidth IG via email to its general counsel, Abigail Dayton, again informing Bandwidth IG that it was obligated to file annual reports pursuant to its grant of operating authority in California and providing a link to the January 7, 2022 reminder notice.
- Bandwidth IG did not file its CY 2021 Affiliate Transaction Report by the May 1, 2022 deadline or seek an extension of time.
- On July 8, 2022, CD sent a Notice of Noncompliance to Bandwidth IG directed to Bandwidth's general counsel; however, that notice misidentified the Annual Performance Bond Requirement as the outstanding annual filing, instead of the CY 2021 Affiliate Transaction Report.<sup>2</sup>
- Through an exchange of email correspondence on July 13 and 14, 2022, between Bandwidth IG general counsel Abigail Dayton and CD regulatory analyst James Hyden, CD (1) determined that CD's July 8, 2022 Notice of Noncompliance identified the incorrect report as outstanding and (2) extended Bandwidth IG's deadline to file its Affiliate Transaction Report to July 21, 2022.

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<sup>2</sup> The Annual Performance Bond Requirement was due for submission on March 31, 2022.

- Bandwidth IG did not file its CY 2021 Affiliate Transaction Report by the new extended July 21, 2022 deadline or seek an extension of time.
- On September 27, 2022, CD served Bandwidth IG with Citation CD-2022-09-003, imposing a penalty in the amount of \$1,000, via email and registered United States Postal Service mail. The Citation was served on Bandwidth IG's general counsel, Abigail Dayton.
- The next morning, on September 28, 2022, Bandwidth IG's general counsel emailed CD with an email attachment of its CY 2021 Affiliate Transaction Report and stated in that email that Bandwidth IG intended to appeal the Citation.

At the hearing, regulatory analyst James Hyden testified that CD sent Bandwidth IG two reminder notices before the Affiliate Transaction Report's May 1, 2022 deadline and then extended the filing deadline to July 21, 2022. He also testified that CD's standard practice was to abstain from issuing a citation for an overdue annual report if the outstanding report is filed prior to the service of the citation, effectively extending a grace period to file such report. Mr. Hyden testified that Bandwidth IG could have filed its Affiliate Transaction Report without penalty at any time before CD issued the September 27, 2022 Citation. He further testified that CD's Citation imposed a \$1,000 penalty because CD policy and practice did not provide discretion to modify that amount, as specified in Commission Resolution T-17601, Appendix A.

Bandwidth IG general counsel Abigail Dayton appeared and testified from personal knowledge on behalf of Bandwidth IG. Ms. Dayton did not deny or challenge any of Mr. Hyden's testimony. She admitted that Bandwidth IG failed to file the Affiliate Transaction Report until the day after receiving the Citation.<sup>3</sup> Nonetheless, Ms. Dayton argued against the imposition of a penalty here. Specifically, she opined that the \$1,000 penalty constituted the maximum penalty allowed and that the circumstances of the first-time violation warranted either no penalty or a reduction of the penalty.

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<sup>3</sup> Ms. Dayton testified that she mistakenly believed that her predecessor general counsel (who left Bandwidth IG in 2021) had prepared and filed annual reports due in 2021, prior to leaving Bandwidth IG. She also testified that she was confused by CD's July 8, 2022 violation notice because that notice misidentified as outstanding another annual report that the company had already filed. Ms. Dayton further testified that she then misread her July 13-14, 2022 email exchange with CD and, as a result, did not realize that Bandwidth IG's CY 2021 Affiliate Transaction Report was outstanding and due for filing on July 21, 2022.

**RESOLUTION OF THE APPEAL**

As discussed below, the appeal of Bandwidth IG from Citation CD-2022-09-003 is denied and the Citation is sustained.

Pursuant to GO 104-A and D.93-02-019, all public utilities, including telecommunication carriers in California, such as Bandwidth IG, are required to submit to the Commission an annual Affiliate Transaction Report detailing all transactions with affiliate companies. Bandwidth IG's March 1, 2018 CPCN, issued by the Commission in D.18-03-007, requires the company to submit an annual Affiliate Transaction Report to the CD every May 1, in accordance with D.93-02-019.

Bandwidth IG admits that it missed the May 1, 2022 deadline and a July 21, 2022 extension date to submit the Affiliate Transaction report for CY 2021. Our review of the evidence in this proceeding does not warrant a reduction or waiver of the \$1,000 penalty assessed by CD in its Citation number CD-2022-09-003.

We recognize that Bandwidth IG had a counsel change in 2021 which may have contributed to some confusion. However, we note that CD afforded Bandwidth IG extra time to cure this violation after it missed the May 1, 2022 deadline. Bandwidth IG again failed to file its report despite the July 14, 2022 corrected Noncompliance Notice from CD providing an extension of the compliance deadline to July 21, 2022. Although CD misidentified the outstanding report in its July 8, 2022 Noncompliance Notice, that error was corrected promptly. In its July 14, 2022 email communication from Mr. Hyden, CD provided direct, unambiguous, written statements acknowledging the error, identifying the CY 2021 Affiliate Transaction Report as outstanding, and affording the company the July 21, 2022 filing deadline. Bandwidth IG's general counsel acknowledged that she received that corrected notice but simply misread it, resulting in a second missed deadline.

In addition to the July 21, 2022 extension, CD also deferred issuance of the Citation for 68 days, after that deadline passed, to September 27, 2022. During that time, Bandwidth IG could have avoided the Citation by submitting its Affiliate Transaction Report. Instead, the company remained in violation and filed that report the day after receiving the Citation, September 28, 2022.

At no time before issuance of the Citation did Bandwidth IG request an extension of time to file its report, and it is undisputed the company twice failed to meet the Commission's annual reporting requirement prior to issuance of the Citation.

The Citation was issued pursuant to Public Utilities Code sections 702, 2101, 2107 and 2108, and Commission Resolution T-17601. Code section 2107 sets a statutory penalty

range of \$500 to \$100,000 for each violation of a Commission order, decision, decree, rule, direction, demand, or requirement in the absence of a specified penalty.<sup>4</sup>

Based on those legislatively authorized authorities and broad statutory penalty range, the Commission adopted Resolution T-17601, including Appendix A, and set forth a schedule of specific penalties. For failure of a public utility to file an Affiliate Transaction report, Resolution T-17601, Appendix A, specified a penalty of \$1,000 for the first offense with each subsequent notice increasing the penalty by \$200.<sup>5</sup> Appendix A identifies no alternate penalty amount or range to apply. The terms of Resolution T-17601 do not provide CD with discretion to issue a citation that imposes a first offense penalty that is greater than the specified \$1,000 amount or that disregards the penalty provision by issuing a citation that declines to fine the violator.

Under the circumstances, the \$1,000 penalty is consistent with the laws and regulations of the Commission.<sup>6</sup>

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<sup>4</sup> “Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case *in which a penalty has not otherwise been provided*, is subject to a penalty of not less than five hundred dollars (\$500), nor more than one hundred thousand dollars (\$100,000), for each offense.” Pub. Util. Code § 2107 (emphasis added).

<sup>5</sup> Resolution T-17601, Appendix A.

<sup>6</sup> Bandwidth IG’s argument that CD imposed the maximum penalty possible is unavailing considering the facts of this case. CD did not penalize Bandwidth IG for a second violation after the company failed to file the CY 2021 Affiliate Transaction Report by the July 21, 2022 deadline. Each subsequent notice of non-compliance would have imposed an increased penalty under Resolution T-17601, Appendix A.

Moreover, CD did not calculate Bandwidth IG’s penalty as separate and distinct daily continuing violations under Cal. Pub. Util. Code §2108 (“Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.”). One-hundred and fifty (150) days elapsed between the missed May 1, 2022 filing date and the company filing its CY 2021 Affiliate Transaction Report on September 28, 2022. Sixty-nine (69) days passed between the missed July 21, 2022 deadline and September 28, 2022.

**SAFETY**

The Commission has broad authority to regulate public utilities, particularly regarding safety concerns. The public interest in knowing the affiliates and transactions through which a company provides public utility services and the integrity of the regulatory process were harmed by Bandwidth IG's disregard for statutory and Commission directives. The penalty is imposed as a deterrent to future disregard of the Commission's regulatory requirements.

**COMMENTS**

Cal. Pub. Util. Code §311(g)(1) requires that a draft resolution be served on all parties and be subject to a public review and comment period of 30 days or more, prior to a vote of the Commission on the resolution. Accordingly, this draft resolution was timely mailed for comments.

**ASSIGNMENT OF PROCEEDING**

Jeffrey Lee is the assigned Administrative Law Judge for this citation appeal.

**FINDINGS OF FACT**

1. Bandwidth IG's March 1, 2018 grant of authority to operate in California under CPCN D.18-03-007, identified the deadline for filing its annual Affiliate Transaction Report as May 1 each year.
2. On January 7, 2022, CD sent an email to all telecommunication carriers with operating authority in California (including Bandwidth IG), identifying their obligations and due dates to file annual reports, including CY 2021 Affiliate Transaction Reports required under D.93-02-019 that were due May 1, 2022.
3. On February 7, 2022, CD sent a second reminder directly to Bandwidth IG via email to its general counsel, Abigail Dayton, again informing Bandwidth IG that it was obligated to file annual reports pursuant to its grant of operating authority in California and providing a link to the January 7, 2022 reminder notice.
4. Bandwidth IG did not file its CY 2021 Affiliate Transaction Report by the May 1, 2022 deadline or seek an extension of time.
5. On July 8, 2022, CD sent a Notice of Noncompliance to Bandwidth IG via email through its general counsel; however, that notice misidentified the Annual Performance Bond Requirement as the outstanding annual filing, instead of the CY 2021 Affiliate Transaction Report.

6. Through an exchange of email correspondence on July 13 and 14, 2022 between Bandwidth IG general counsel Abigail Dayton and CD regulatory analyst James Hyden, CD (1) determined that CD's July 8, 2022 Notice of Noncompliance identified the incorrect report as outstanding and (2) extended Bandwidth IG's deadline to file its Affiliate Transaction Report to July 21, 2022.
7. Bandwidth IG did not file its CY 2021 Affiliate Transaction Report by the July 21, 2022 deadline or seek an extension of time.
8. On September 27, 2022, CD issued Citation CD-2022-09-003, imposing a \$1,000 fine on Bandwidth IG for failing timely to file the Affiliate Transaction Report on California operations for the calendar year 2021.
9. On September 27, 2022, CD notified Bandwidth IG of the Citation due to the failure to file a timely Affiliate Transaction report for 2021 via email and registered United States Postal Service mail to general counsel Abigail Dayton.
10. On September 28, 2022, Bandwidth IG submitted its CY 2021 Affiliate Transaction Report and notified CD that it would appeal the Citation.
11. No personal harm or property damage resulted from Bandwidth IG's violation.

### CONCLUSIONS OF LAW

1. The Appeal of Bandwidth IG, LLC (U7336C) from Citation CD-2022-09-003 should be denied.
2. Citation CD-2022-09-003 should be sustained.
3. Bandwidth IG failed to comply with Commission regulations and statutory obligations as a telecommunications provider in California.
4. Bandwidth IG failed timely to submit the Affiliate Transaction report for 2021 by the May 1, 2022 deadline or the July 21, 2022 extended deadline.
5. The \$1,000 fine is reasonable and consistent with Public Utilities Code Sections 702, 2101, 2107 and 2108, and Commission Resolution T-17601.
6. Proceeding K.22-10-008 should be closed.

### **IT IS THEREFORE ORDERED that:**

1. Citation CD-2022-09-003 is sustained.
2. Bandwidth IG, LLC's (Bandwidth IG) appeal of Citation CD-2022-09-003 is



denied. Bandwidth IG shall make full payment of the \$1000 penalty within 30 days of the effective date of this Resolution. Bandwidth IG shall pay the penalty of \$1,000 by check or money order be payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, San Francisco, California 94102. Bandwidth IG shall write on the face of the check or money order, "For deposit to the State of California General Fund pursuant to Resolution ALJ-436."

3. K.22-10-008 is closed.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on \_\_\_\_\_, the following Commissioners voting favorably thereon:

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Rachel Peterson  
Executive Director

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

RESOLUTION ALJ-436 Resolving K.22-10-008 and Sustaining Citation CD-2022-09-003 issued to Bandwidth IG, LLC (U7336C), by the Communications Division Pursuant to T-17601.

**INFORMATION REGARDING SERVICE**

I have electronically served all persons on the attached official service list who have provided an e-mail address for K.22-10-008.

Upon confirmation of this document's acceptance for filing, I will cause a copy of the filed document to be served by U.S. mail on all parties listed in the "Party" category of the official service list for whom no e-mail address is provided.

Dated February 9, 2023, at San Francisco, California.

/s/ MARILOU HIPOLITO  
\_\_\_\_\_  
Marilou Hipolito

**N O T I C E**

Persons should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.

\*\*\*\*\* SERVICE LIST \*\*\*\*\*  
Last Updated on 09-FEB-2023 by: AMT  
K2210008 LIST

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