



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED

01-09-12
04:59 PM

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)

**COMMENTS
OF THE DIVISION OF RATEPAYER ADVOCATES
ON ADMINISTRATIVE LAW JUDGE'S RULING
DIRECTING NOVATEL LTD, INC. TO PROVIDE ADDITIONAL
INFORMATION AND INVITING PARTIES TO COMMENT**

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January 9, 2012

I. INTRODUCTION AND BACKGROUND

The Division of Ratepayer Advocates (“DRA”) respectfully provides these comments in response to the Administrative Law Judge’s Ruling Directing NovaTel Ltd, Inc. (“NovaTel”) to Provide Additional Information and Inviting Parties to Comment issued November 28, 2011 (“ALJ Ruling”).

Section 1013 of the California Public Utilities Code governs the certification and registration of telephone corporations.¹ Among other things, § 1013 requires a performance bond as a precondition to registration sufficient to cover taxes or fees (*see* § 1013(e)), and provides that the Commission may require a performance bond to sufficient to facilitate the recovery of fines, penalties, and restitution (*see* § 1013(f)). In Decision (“D.”) 10-09-017, the Commission adopted revisions to the requirements initially established in D.97-06-107 for the registration of non-dominant interexchange carriers (“NDIECs”). Among other things, D.10-09-017 adopted requirements for NDIEC registrants to obtain a performance bond, pursuant to § 1013(f). All NDIECs are required to obtain a \$25,000 performance bond or a bond equal to 10% of intrastate revenues, whichever is greater.² The Commission subsequently issued D.11-09-026, modifying D.10-09-017 in response to a petition to modify filed by DRA. D.11-09-026 acknowledged that the performance bond requirement of § 1013(e) was mandatory, and allowed the performance bond established in D.10-09-017 to cover taxes or fees or both, in addition to fines, penalties, or restitution.³

On August 5, 2011, NovaTel filed its petition for modification of D.10-09-017, requesting that D.10-09-017 be modified to permit an irrevocable letter of credit (“LOC”) to serve as an alternative to posting a performance bond. DRA filed a response on

¹ All statutory references are to the Public Utilities Code.

² D.10-09-017, *mimeo*, at 2-3.

³ D.11-09-026, *mimeo*, at 4.

September 2, 2011, conditionally opposing NovaTel's petition on the grounds that NovaTel has not carried its burden to demonstrate that it has not been able to obtain a performance bond.⁴ DRA also recommended that the Commission carefully consider whether LOCs are functionally equivalent to a performance bond before it accepts them as approved alternatives.⁵

In the ALJ Ruling, parties are now directed to identify the specific features an irrevocable LOC must have to provide an equal or better assurance of collection than a performance bond if a carrier goes bankrupt. Specifically, the ALJ Ruling requests comments relating to the specific language that should be included in an irrevocable LOC and an explanation of why parties believe the Commission has or does not have the discretion to accept other financial security instruments as alternatives to the performance bond required pursuant to § 1013(e).⁶

II. DISCUSSION

A. **An Irrevocable Letter of Credit Must Meet the Criteria and Serve the Same Purposes as Set Forth in D.10-09-017 and Public Utilities Code Sections 1013(e) and (f).**

As a policy matter, DRA recommends that if the Commission were to accept other financial security instruments (such as irrevocable LOCs) as alternatives to the performance bond required pursuant to §§ 1013(e) or 1013(f), the Commission should carefully consider whether LOCs are functionally equivalent to a performance bond. The Commission's goal was "to improve the Commission's ability to successfully collect fines and bring about restitution,"⁷ and to also facilitate the collection of taxes and fees, including the Public Utility Reimbursement Fee (or PUC User Fee) and Public Purpose

⁴ DRA Response to the Petition for Modification of D.10-09-017 by NovaTel, at 1 (September 2, 2011).

⁵ *Ibid* at 7.

⁶ ALJ Ruling at 5-6.

⁷ D.10-09-017, *mimeo*, at 8; DRA Response to the Petition for Modification of D.10-09-017 by NovaTel, at 3 (September 2, 2011).

Program surcharges.⁸ Jurisdictional issues aside, DRA believes that accepting LOCs in lieu of a performance bonds would be consistent with the spirit and purpose of the Public Utilities Code only if a carrier is allowed to provide alternatives to a bond that are better than (or at least equivalent to) a performance bond. Namely, alternatives should facilitate the collection of fines, penalties, restitution, taxes and fees. In its earlier comments, DRA identified a non-exclusive list of characteristics that an irrevocable letter of credit must have to provide an equal or equivalent assurance of collection if a carrier goes bankrupt.² DRA reiterates that list here:

- The LOC must guarantee payment amount equal to or greater than 10% of intrastate revenues reported on the CPUC’s User Fee Statement during the preceding calendar year or \$25,000, whichever is greater.
- The LOC would serve the same purpose as the performance bond requirement:
 - To facilitate the collection of taxes or fees, and customer advances or deposits as described in PU Code §1013(e), and
 - To facilitate the collection of fines, penalties and restitution related to enforce actions as described in PU Code §1013(f).
- The LOC must be irrevocable, and not subject to modification, except upon the consent of the CPUC.
- The LOC must be issued by a bank or other entity (a federal or state chartered financial institution) which does business in California
- The LOC must name the CPUC as the beneficiary.
- The issuer must authorize draw on the LOC upon presentation of Commission document(s) (order, ruling or decision) showing default by the carrier (defaults or triggering events would include bankruptcy, failure to comply with CPUC rules applicable for NDIEC, refusal to return customer deposits when due, refusal to pay appropriate PUC user

⁸ D.11-09-026, *mimeo*, at 5.

² See DRA Response to the Petition for Modification of D.10-09-017 by NovaTel, at 6 (September 2, 2011).

fees or Public Purpose Program fees, or an announcement that the carrier will cease operations).

- Automatic renewal without amendment for additional one year period.
- The LOC shall be governed by and interpreted under California laws.

In D.10-09-017, the Commission appropriately concluded that the bond requirement is intended to protect consumers and the state from unscrupulous NDIECs. DRA remains concerned about the underlying reasons why certain NDIECs may experience difficulties in obtaining a bond. We have the following basic questions that require further consideration:

- Why would an irrevocable LOC be easier to obtain than a performance bond if the same amount is at stake? It seems the same standards for ability to pay would apply (if the issuing bond is reputable).
- How does an irrevocable LOC work if it is not tied to a specific transaction?

DRA will reserve further comment on these questions as well as the functional equivalence of irrevocable LOCs to performance bonds until it reviews NovaTel's evidence and comments on the matter.

B. The Commission May Have the Discretion to Accept Alternative Financial Arrangements if They are Equal to or Superior to a Performance Bond.

Section 1013 provides for two different kinds of performance bonds. While the bond provided in §1013(f) is permissive, the language in § 1013(e) is mandatory, and provides only for a “performance bond”, and not any other type of suretyship. Although the Commission may have discretion to accept an LOC in lieu of a performance bond to facilitate the collection of fines, penalties and restitution pursuant to § 1013(f), it is unclear whether the Commission has the authority to do so under § 1013(e).

As the Commission noted in D.10-09-017, “performance bonds” are surety bonds issued by an insurance company or bank to guarantee satisfactory completion of a project

by a contractor.¹⁰ The statute’s use of the word “performance bond” is not exactly appropriate for the circumstances. It may be that carriers are experiencing difficulties in obtaining performance bonds because they are not suited for the purposes intended by the statute. In that case, although the statute does not provide for another means of suretyship, it may be reasonable for the Commission to exercise its jurisdiction under § 701 to “do all things” necessary to execute the statute and protect consumers, and accept another form of surety obligation if it provides equal or better protection than a performance bond.¹¹

On the other hand, if an LOC is easier to obtain because it does not provide the same financial guarantees as a performance bond, then DRA does not believe the Commission would have the discretion to allow it as a substitute. DRA notes that California Civil Code § 2787, for example, states that “a letter of credit is not a form of suretyship obligation.” DRA again reserves further comment on this issue until it has reviewed NovaTel’s comments on this matter. If the Commission has any reservations about its authority to require something other than a performance bond to satisfy the requirements of § 1013(e), it may wish to retain the performance bond requirement to satisfy the purpose of § 1013(e) and allow irrevocable LOCs to satisfy the purpose of § 1013(f).

III. CONCLUSION

DRA appreciates the Commission’s efforts to help carriers that may be experiencing some difficulties in obtaining the bond. However, DRA urges the Commission to carefully explore the reasons why it may be easier to obtain an LOC than

¹⁰ D.10-09-017, *mimeo*, at 19.

¹¹ DRA notes that in OIR 11-11-006 to Revise the Certification Process for Telephone Corporations and the Registration Process for Wireless Carriers, the Commission defines “performance bond” as a commercial surety or financial guarantee bond, which is issued by an insurance company or a bank, for the purpose of facilitating collection of any monetary sanction (i.e. tax, surcharge, fee, fine, penalty and restitution). OIR 11-11-006, *mimeo*, at 5, n. 4.

a performance bond, and ensure that LOCs are functionally equivalent to a performance bond before it accepts them as approved alternatives in order to protect consumers and fulfill Commission's goals.

Respectfully submitted,

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