

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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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)

**REPLY COMMENTS  
OF THE DIVISION OF RATEPAYER ADVOCATES  
TO THE RESPONSE OF NOVATEL LTD, INC. TO NOVEMBER 28, 2011  
ADMINISTRATIVE LAW JUDGE'S RULING**

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## I. INTRODUCTION AND SUMMARY

Pursuant to the Administrative Law Judge's Ruling Reopening Rulemaking 09-07-009 and Confirming the Granting of an Extension of Time for NovaTel Ltd, Inc. (NovaTel) to Provide Additional Information and for Parties to Comment, issued February 8, 2012, the Division of Ratepayer Advocates (DRA) respectfully submits these reply comments to NovaTel's Response to November 28, 2011 Administrative Law Judge's Ruling.

In its response, NovaTel asserted that the reason it has had difficulty in obtaining a performance bond is due to the fact that the financial institutions NovaTel does business with do not offer performance bonds as part of their current portfolio of services.<sup>1</sup> NovaTel also identified the specific features an irrevocable letter of credit (LOC) must have to provide an equal or better assurance of collection than a performance bond if a carrier goes bankrupt, and discussed whether the Commission has the discretion to accept other financial security instruments as alternatives to the performance bond required by Cal. Pub. Util. Code § 1013(e).<sup>2</sup> In addition, NovaTel attached a Proposed Letter of Credit Form to its response.<sup>3</sup>

Although NovaTel asserts that its difficulties in obtaining a performance bond are not due to its financial position, the Commission should nonetheless carefully consider whether such alternatives are functionally equivalent to and provide the same (or better) level of protection as a performance bond. As DRA has stated throughout this proceeding, the bonding requirement in D.10-09-017 is designed to protect consumers against unscrupulous carriers, by requiring a performance bond that can be collected by the Commission if a carrier goes bankrupt owing taxes, fees, fines, or restitution. The Commission should carefully review the specific features of alternative financial

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<sup>1</sup> NovaTel's Response to November 28 Ruling (February 29, 2012), at 2-3.

<sup>2</sup> *Ibid*, at 3-4.

<sup>3</sup> *Ibid*, at Exhibit A.

instruments to determine whether they provide equal or better protection than a performance bond.

These reply comments address three key issues raised by NovaTel's response, as follows:

- DRA notes that the Commission is considering the question of whether to require performance bonds for Certificate of Public Convenience and Necessity (CPCN) and Wireless Identification Registration (WIR) holders in R.11-11-006 (CPCN Registration proceeding). In that proceeding, the Commission is also addressing the issue of whether there are alternatives to a performance bond that would provide the same level of protection.<sup>4</sup> There, as here, DRA's position is that if the Commission were to accept an irrevocable LOC as an alternative to the performance bond required pursuant to §§ 1013(e) or 1013(f),<sup>5</sup> then the Commission should carefully consider whether LOCs are functionally equivalent to a performance bond. Any finding the Commission makes in this proceeding should be consistent with the determination the Commission makes in the CPCN Registration Proceeding.
- If the Commission determines that an irrevocable LOC provides functionally equivalent protection to a performance bond, then DRA recommends that the Commission modify some specific language in NovaTel's attached Proposed Letter of Credit Form to make it consistent with the goals of protecting consumers in the event a carrier goes bankrupt owing taxes, fees, fines or restitution.
- If the Commission decides to accept an irrevocable LOC as an alternative to a performance bond, DRA also recommends that the Commission require non-dominant interexchange carriers (NDIECs) to replace any terminated LOC with a new irrevocable LOC within 30 days of receiving written notice of termination from the Lender.

## II. DISCUSSION

### A. Any Determinations Made in this Proceeding About the Acceptance of Alternatives to a Performance Bond Should Be Consistent with the CPCN Registration Proceeding.

In the CPCN Registration proceeding, R.11-11-006, the Commission is considering whether to modify the CPCN and WIR registration processes to address

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<sup>4</sup> OIR 11-11-006 (CPCN Registration proceeding), *mimeo*, at 3, 17.

<sup>5</sup> All statutory references are to the California Public Utilities Code.

concerns about carrier fitness and financial responsibility.<sup>6</sup> In R.11-11-006, the Commission is considering whether performance bonds or other forms of financial security should be required for CPCN and WIR applicants, and whether to allow alternatives to a performance bond, such as an irrevocable letter of credit, site draft letter of credit, or escrow agreements.<sup>7</sup> In that proceeding, as in this one, DRA has posited 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.<sup>8</sup> In both proceedings, the Commission should ensure that any alternatives to a performance bond meet the Commission’s goal “to improve the Commission’s ability to successfully collect fines and bring about restitution,”<sup>9</sup> and to facilitate the collection of taxes and fees, including the Public Utility Reimbursement Fee (or PUC User Fee) and Public Purpose Program surcharges.<sup>10</sup> In order to accept alternative financial arrangements from NDIECs, the Commission should find that such alternative financial arrangements provide equal or better protection than a performance bond, and should ensure that its determinations in this proceeding are consistent with its determinations in the CPCN Registration proceeding.

**B. The Commission Should Revise the Language in NovaTel’s Attached Sample Letter of Credit Form.**

If the Commission finds that an irrevocable LOC provides functionally equivalent protection to a performance bond, and finds that it has discretion to accept alternatives to

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<sup>6</sup> OIR 11-11-006, at 4-9.

<sup>7</sup> *Id.*, at 17-18.

<sup>8</sup> *See e.g.* DRA Response to the Petition for Modification of D.10-09-017 by NovaTel (September 2, 2011); Comments of DRA on ALJ’s Ruling Directing NovaTel to Provide Additional Information and Inviting Parties to Comments (January 9, 2012); *see also*, Opening Comments of DRA Regarding Revisions to the Process for Telephone Corporations Seeking or Holding CPCNs and Wireless Carriers Seeking or Holding Registration filed in R.11-11-006 (January 12, 2012), at 9-12.

<sup>9</sup> D.10-09-017 at 8; DRA Response to the Petition for Modification of D.10-09-017 by NovaTel, at 3 (September 2, 2011).

<sup>10</sup> D.11-09-026 at 5; *See e.g.* Comments of DRA on ALJ’s Ruling Directing NovaTel to Provide Additional Information and Inviting Parties to Comments (January 9, 2012) at 2-4.

the performance bond required by § 1013(e), then the Commission should modify the language in NovaTel's attached Proposed Letter of Credit Form in order to ensure that it meets the Commission's goal of protecting consumers in the event a carrier fails to pay taxes, fees, fines, or restitution. Specifically, DRA is concerned with the following language in the first paragraph of NovaTel's attached Proposed Letter of Credit Form:

The purpose of this letter of credit is to secure payment of any monetary fines, penalties, restitution, taxes and fees required of or imposed against the Company, its representatives, successor or assigns, in any **enforcement proceeding brought under D.10-09-017 and D.97-06-107, Rule R.09-07-009, on behalf of the CAPUC.** (Emphasis added.)<sup>11</sup>

DRA believes this language is too narrow and ambiguous. It appears to limit the purpose of the irrevocable LOC only to enforcement actions brought under the NDIEC proceeding. It does not provide that the Commission has the authority to draw on the LOC upon presentation of Commission document(s) showing default by the carrier. Defaults or triggering events that are not currently covered under this language would include such items as refusal to return customer deposits when due, refusal to pay appropriate Public Purpose Program fees, or an announcement that the carrier will cease operations. Thus, DRA recommends the following broader language:

The purpose of this letter of credit is to secure payment of any monetary fines, penalties, restitution, taxes and fees required of or imposed against the Company, its representatives, successor or assigns in any action brought against the Company, its representatives, successor or assigns pursuant to the Commission's jurisdiction.

**C. The Commission Should Require NDIECs to Replace Any Lender-Terminated Irrevocable LOC with a New LOC within 30 Days of Receiving Written Notice of Termination from the Lender.**

In its response, NovaTel states that the LOC "may not be modified or revoked by the applicant for the LOC ('applicant') or the Commission without full agreement."<sup>12</sup>

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<sup>11</sup> NovaTel's Response to November 28 Ruling (February 29, 2012), Exhibit A, at 7.

<sup>12</sup> *Ibid.*, at 3-4.

NovaTel further maintains that since the LOC is not applicable to a single, definitive transaction but rather offered as continuing security over what could be a period of years, the lender may find itself in a position of having to terminate the LOC in its ordinary course of business.<sup>13</sup> NovaTel asserts that the fact that the lender may terminate the LOC upon notice would not affect any liability that may have accrued prior to the termination of the LOC. While NovaTel states that the applicant would be required to replace the terminated LOC with a new LOC under the same terms and conditions, NovaTel does not provide any timeframe for this requirement to take place. DRA urges the Commission to specifically impose a timeframe on obtaining a new LOC should a termination occur and recommends that all NDIECs replace the terminated irrevocable LOC with a new one (under the same terms and conditions) within 30 days of receiving the written notice of termination from the lender. A thirty-day window is a reasonable timeframe to obtain a new LOC and would help ensure that the Commission accomplishes its goal to improve its ability to collect fines, fees, and taxes, and bring about restitution.

### **III. CONCLUSION**

DRA continues to urge the Commission to carefully consider whether irrevocable LOCs are functionally equivalent to a performance bond before it accepts them as approved alternatives in order to protect consumers. Any determinations made in this proceeding about the functional equivalency of alternatives should be consistent with those in the CPCN Registration proceeding. If the Commission determines it has discretion to accept an irrevocable LOC as an alternative to a performance bond, it should adopt DRA's recommended revisions to the "purpose language" in NovaTel's attached Proposed Letter of Credit and adopt a timeframe for obtaining a new LOC should a termination occur.

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<sup>13</sup> *Ibid.*

Respectfully submitted,

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