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Decision 98-12-026 December 3, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Establish a Simplified Registration Process for Non-Dominant Telecommunications Firms.	Rulemaking 94-02-003 (Filed February 3, 1994)
Investigation on the Commission's Own Motion to Establish a Simplified Registration Process for Non-Dominant Telecommunications Firms.	Investigation 94-02-004 (Filed February 3, 1994)

ORIGINAL

OPINION MODIFYING DECISION (D.) 97-06-107

Background

On June 3, 1998, the Commission's Consumer Services Division (CSD) filed a Petition to Modify D.97-06-107 in which it alleged that the Commission's decision contained legal error in that it did not require all carriers which obtained operating authority via the registration procedure to obtain a performance bond to cover taxes or fees collected and held by the carrier as required by Public Utilities Code § 1013 and that the decision lacked sufficient findings to support the directive that all advances or deposits be held in trust.

On June 17, 1998, the Telecommunications Resellers Association and the California Association of Competitive Telecommunications Companies (TRA and CALTEL) filed their response to CSD's petition in which they questioned why CSD waited a year to present its interpretation of the bond requirement, stated the Section 1013 did not apply to the decision, and, even if it did, the Commission complied with it. TRA and CALTEL state that the Commission did not create a true registration process because the current system retains all the substantial requirements of the certificate of public convenience and necessity (CPCN)

process and, indeed, the Commission issues a CPCN at the conclusion of the process. They also noted that no carrier nor any consumers have filed complaints or suggested in any way that the current registration system is not working well. TRA and CALTEL concluded by suggesting that the Commission's, CSD's, and the parties' resources would be far better employed with more pressing matters than rehashing the registration procedure.

On July 2, 1996, Sprint Communications Company (Sprint) filed its response in which it carefully analyzed the statute and concluded that CSD was correct that the decision reflected legal error and that the Commission should have allowed carriers the option of using a performance bond, which the decision appeared to foreclose by declaring that all advances or deposits must be held in escrow or trust. Sprint did not suggest that any carrier had sought such an option.

On November 16, 1998, the assigned Commissioner sought comments on this draft decision. CSD filed such comments on November 24, 1998, in which they did not oppose the legal analysis of the draft decision but they noted three differences between the registration process and the CPCN process. Those purported differences are addressed below.

Discussion

Performance Bond

In considering CSD's petition and the responsive comments, we have reviewed D.97-06-107, subsequent decisions in this docket, and decisions issued in response to registration applications. Our review has led us to agree with TRA and CALTEL's observation in their comments that we did not create a traditional registration system in D.97-06-107 but rather simplified the process, for eligible interexchange carriers, to obtain a CPCN. As such, it appears we did not rely on

the authority granted to us in § 1013 and consequently did not need to comply with the requirements for a registration system contained in § 1013.

A registration system generally involves an entity providing extremely limited information to the Commission, i.e., name, address, and telephone number. Upon receipt of this information, the Commission assigns a number to the entity and it may begin providing service immediately. This is the system applicable to intrastate wireless telecommunications services, where the Commission has been pre-empted from regulating rates and entry. Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications, I.93-12-007, D.94-10-031. With such sketchy filings from prospective service providers, the Legislature could reasonably have concluded that a performance bond was necessary to protect the public.

In contrast to the limited registration filings, the Commission has adopted specific showings which an applicant must make to obtain a CPCN: The applicant must disclose its organizational structure and, if an out-of-state corporation, its authority to do business in California. In addition, the applicant must demonstrate that it meets the Commission standards for (1) financial resources, (2) expertise, and (3) the ability to comply with regulatory law and policy. In the case of applicants for CPCNs, neither the Commission nor the Legislature require a performance bond, presumably due to the higher level of scrutiny applicants receive.

Although we simplified the process for obtaining a CPCN in D.97-06-107, we did not exempt carriers using this system from any of the showings required for a CPCN. Applicants which use the registration process must make the same substantive showings as applicants which use the traditional application process. Where these showings can be accomplished with an uncomplicated filing, e.g.,

where there are no previous bankruptcy filings to explain, the applicants can use the simplified system to obtain a CPCN.

The Legislature recognized that substantive exemptions would be necessary to create a registration system; for example, to remove the financial and expertise requirements, and replace it with just the registrant's name and address. In the public process which led up to D.97-06-107, with the help of the parties, we were able to craft a system which maintains all the substantive showings but which does so with simplified documents and an abbreviated timetable. One technique used to accomplish this result was to exclude applicants which could not plainly meet our standards. These excluded applicants are required to make their showings in the procedurally more exacting traditional application process in which exception requests can be considered and other applicable processes, e.g., California Environmental Quality Act (CEQA) review, undertaken.

Consistent with devising a means to simplify the process but maintain the substantive standards, D.97-06-107 does not contain any exemptions "from the certification requirements of [P.U. Code] section 1001" as was authorized by the Legislature in § 1013(a). Such exemptions would certainly be necessary to create a registration system but were not needed because all substantive elements of a CPCN remained.

The plain words of D.97-06-107 show that the Commission awarded a successful "registrant" a CPCN: "The registration form set out as Attachment A to this decision is hereby adopted as the form that qualified applicants may use to obtain a Certificate of Public Convenience and Necessity (CPCN) to provide interLATA and intraLATA telecommunications service." Ordering Paragraph 1. The Commission has consistently acknowledged that the registration process results in a CPCN. See, e.g., D.97-08-050 (authorizing to Executive Director to

sign orders granting a CPCN after successful completion of registration process). Most importantly, the decisions which result from the registration process explicitly grant a CPCN. Ordering Paragraph 1 of all the decisions states "a certificate of public convenience and necessity is granted to (name of applicant)." See, e.g., D.98-08-042 (granting a CPCN to Cable and Wireless Global Card Services, Inc.).

In sum, contrary to the statements in D.97-06-107 and the nomenclature, in retrospect it appears that the Commission did not exercise its authority under § 1013 to create a registration system. Rather, the Commission simplified the process but not the substantive showings needed for obtaining a CPCN, and indeed issues successful registrants a CPCN. Accordingly, the requirements for a registration system, including a performance bond, are simply not applicable. This system which retains all the consumer protection of a CPCN, but uses simplified process is a step towards but not actual registration. At some point in the future, the Commission may determine that registration is appropriate. At that time, the Commission will address the requirements of § 1013.

The nomenclature remains problematic. A correct name for the "registration" system we have adopted would be "Simplified Application Process for Qualified Applicants to Obtain a CPCN to Provide Inter- and IntraLATA Telecommunications Service." The current name is, as noted above, not entirely consistent with the statute but conveys the image of a simplified process. Given that we have fully acknowledged that the registration process is misnamed, any conclusions to be drawn from the name would blatantly amount to elevating form over substance. Moreover, the process has been in place for over a year and many decisions have been issued referring to the process by that name. For these reasons, we will persist with the efficient but inaccurate name and refer to the process as registration.

3. On page 13, mimeo., delete Finding of Fact 9 and Conclusions of Law 1 and 2.

Clarification to Registration Form

Commission staff have determined that Direction 4 on the registration form may be unclear as to the need for facilities-based carriers to obtain CEQA approval from the Commission for all facilities which are not CEQA exempt. Although carriers with exempt facilities may obtain a CPCN via the registration process, subsequent construction of nonexempt facilities requires a formal application to the Commission and CEQA review by the Commission. The revised Direction 4 set out in Attachment A clarifies these obligations.

CSD's Comments on Draft Decision

In their comments on the draft decision, CSD stated that the registration system differs from the CPCN in three respects. First, CSD contends that the registration system allows for unaudited financial statements, while the CPCN process requires audited statements. Registration instruction seven states:

> "attach audited balance sheet for most recent fiscal year, an unaudited balance sheet as of the most recent fiscal quarter, a bank statement as of the month prior to the date of filing the application, or a third-party undertaking to provide the required amounts on behalf of applicant. If the balance sheet shows current liabilities in excess of current assets or negative equity, explain how applicant will be able to maintain sufficient liquidity for its first year of operations."

CSD is correct that the "or" in the first sentence creates the impression that an unaudited quarterly statement is sufficient. This is a grammatical error. The first comma should be replaced with the word "and." Together the audited annual report and unaudited quarterly report present the up-to-date cash flow statement required by D.91-10-041. The second sentence of the instruction confirms that the Commission anticipated a single, current balance sheet. As

corrected, instruction seven clearly requires audited statements, but allows unaudited statements only for the most recent period. Such an allowance is necessary to allow time to perform an audit which is usually done on an annual basis. Thus, the registration system requires audited financial statements to show cash flow consistent with D.91-10-041.

Second, the registration form requires that the applicant attest under penalty of perjury that it possesses the "required expertise to operate as an interexchange carrier, which CSD contends is a lower standard than is applicable to the application system." The decision indicates that the Commission intended to apply existing expertise standards to the registration system. D.97-06-107, at p. 8-9. CSD's contention that the Commission lowered the standards is not consistent with plain words of the decision. CSD appears to be taking issue with the process the Commission requires for this showing. Rather than requiring the "considerable detail" the CPCN process, the registration process simply requires a sworn statement. The same substantive standard, however, applies to both.

Third, the registration form excludes from the registration process all carriers where any officer, director, general partner, affiliate or owner of more than 10% held a similar position with a carrier that filed for bankruptcy. The Commission intended this list to include anyone that might exercise significant control over an applicant. CSD alleges that the CPCN rule covers a broader range of individuals, i.e., anyone "associated with" such a carrier. The decision adopting the registration definition states no intention to narrow the types of relationships included but seeks only to address allegations of vagueness and redundancy in the use of the phrase "associated with" and its definition. In D.97-06-107, the Commission simply increased the clarity of the previously applied standard. In fact, the registration definition is now used in all decisions which grant interexchange authority through the formal application process. See,

e.g., Mystic Alliance Group, D.98-09-031. Thus, the same standard is applied in both the registration and application processes.

Finding of Fact

Continuing to refer to the process created by D.97-06-107 as the registration system is more administratively efficient than changing it to a legally accurate but lengthy and cumbersome name.

Conclusions of Law

1. We are not persuaded to modify D.97-06-107 as requested by CSD and its petition to modify D.97-06-107 is denied.

2. Contrary to the statements in D.97-06-107 and the nomenclature, the Commission did not exercise its authority under § 1013 to create a registration system.

3. In D.97-06-107, the Commission simplified the process but not the substantive showings needed for a CPCN.

4. The Commission issues successful registrants a CPCN.

5. The requirements for a registration system found in § 1013, including a performance bond, are not applicable to the process created by D.97-06-107.

6. Drawing any legal conclusions from the name of the registration process elevates form over substance.

7. All references to § 1013 listed above as the basis for the Commission's authority to establish the registration system should be excised from D.97-06-107.

8. No changes in the ordering paragraphs of D.97-06-107 are required.

9. Direction 4 to the registration form should be modified as set out in Attachment A.

10. Good cause has been shown to exempt carriers qualified to use the registration system from Article 5 of the Commission's Rules of Practice and Procedure.

ORDER

Therefore, IT IS ORDERED that

1. Pursuant to Rule 47(h) of the Commission's Rules of Practice and Procedure, Consumer Services Division's petition to modify Decision (D.) 97-06-107 is denied.

2. D.97-06-107 shall be modified by deleting the sections listed above.

3. Direction 4 for the registration form shall be modified to conform to Attachment A.

4. Direction 7 for the registration form shall be corrected by replacing the first comma with the word "and."

5. Pursuant to Rule 87 of the Commission's Rules of Practice and Procedure, all interexchange carriers which are qualified to use the registration system are exempt from Article 5 of the rules.

This order is effective today.

Dated December 3, 1998, at San Francisco, California.

JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

I will file a written dissent.

/s/ RICHARD A. BILAS
Commissioner

I dissent.

/s/ P. GREGORY CONLON
Commissioner

ATTACHMENT A

A reseller does not own its facilities but rather uses only the facilities of another carrier. A facilities-based carrier owns some or all of the facilities it uses. Resellers may use the registration process. Only those facilities-based carriers with facilities that are exempt from the California Environmental Quality Act (CEQA) are eligible to use the registration system. Categorical exemptions are set out in Rule 17.1(h) of the Commission's rules of Practice and Procedure. Any questions about CEQA applicability should be directed to the Commission's Environmental section.

(END OF ATTACHMENT A)

R.94-02-003, I.94-02-004
D.98-12-026

PRESIDENT RICHARD A. BILAS, DISSENTING:

I believe the decision voted upon by the majority is legally sound. Yet, I am unable to support this decision because I find that it circumvents legislative intent. Public Utilities Code Section 1013 codified the intent of the Legislature to enable the California Public Utilities Commission to register non-dominant interexchange carriers. The streamlining process envisioned by the Legislature is optional for this Commission to embrace. The only restriction is that if the Commission did institute a registration process, then a performance bond established by the registrant would be required.

Today's decision sets the procedures for a streamlined Certificate of Public Convenience and Necessity. The decision does not set rules for a registration process and therefore a performance bond is not necessary. I agree with the rationale of the decision and do not question its soundness. I do, however, disagree with the direction of the decision which is not to have a registration process.

In summary, I believe that the California Public Utilities Commission should do everything in its power to implement the intent of the Legislature.

Dated December 7, 1998, in San Francisco, California

/s/ RICHARD A. BILAS
RICHARD A. BILAS
Commissioner