

BEFORE THE GUAM PUBLIC UTILITES COMMISSION

IN RE: FINANCIAL INCENTIVE PLAN)
FOR INCUMBENT LOCAL) GTA Docket 10-02
EXCHANGE CARRIERS AND)
COMPETITIVE LOCAL)
EXCHANGE CARRIERS)
_____)

PUC COUNSEL REPORT

Introduction

This matter comes before the Guam Public Utilities Commission [PUC] upon the Order of the Administrative Law Judge [ALJ] dated June 8, 2010.¹ There the ALJ recommends that all incumbent local exchange carriers and competitive local exchange carriers adopt certain remedy provisions for incorporation into their Interconnection Agreements [ICAs]. These recommended provisions would allow the parties to recover consequential damages and attorneys fees in dispute resolution proceedings before the ALJ and the PUC. The ALJ also requests that the PUC authorize him to commence proceedings which would mandate the modification of ICAs between telecommunications parties, submitted for PUC approval, to reflect these remedy provisions.²

The PUC, in its Order issued January 29, 2010 in Docket 08-11, authorized the ALJ to commence appropriate proceedings to solicit comments and testimony from the telecommunications companies and thereafter propose a "financial incentive" or "remedy provision" to the PUC for consideration, which would assess fines or fees to be paid to CLECs when service failures occur.³ Subsequently the ALJ issued a Notice in this docket soliciting Comments and Testimony by interested parties concerning the need for a financial incentive plan and/or remedy provisions.⁴ The parties, including GTA, PDS, and MCV, responded with comments.

¹ ALJ Order In Re: Financial Incentive Plan, GTA Docket 10-02, issued June 8, 2010.

² Id. at p. 18.

³ PUC Order Arbitration of Interconnection Disputes, Docket No. 08-11, issued January 29, 2010.

⁴ Notice issued by ALJ Soliciting Comments and Testimony, GTA Docket 10-02, February 18, 2010.

The ALJ has established a need for the adoption of Remedy Provisions in the ICAs

The ALJ indicates that the PUC has broad authority over interconnection agreements entered into between telecommunications companies. Such agreements are not ordinary commercial contracts. Under both the federal Telecommunications Act of 1996 and the Guam Telecommunications Act, such agreements do not even become effective between telecommunications companies before they have been reviewed and approved by the Commission. The Commission must review and approve all interconnection agreements entered into by ILECs and CLECs. The PUC has a special role in ensuring that interconnection agreements adequately promote competition in the telecommunications market.

PUC has established Interconnection Implementation Rules [IIRs] to provide for Commission resolution of disputed issues arising under or pertaining to ICAs approved by the Commission.⁵ Under the IIRs the ALJ acts as an “arbitrator” of disputes including the “terms and conditions in the ICA” and the “implementation of activities explicitly provided for, or implicitly contemplated in the ICA.”⁶

Existing remedy provisions in the ICAs do not allow a competitive local exchange carrier to recover lost revenues, profits or attorneys fees from an ILEC in circumstances where the ILEC fails to provide required network elements or services.⁷ An ILEC has little incentive to comply with the ICA if it is only required to reimburse the CLEC for amounts already paid by the CLEC for such services or network elements. There is a need for remedy provisions which will insure that ILECs provide services and facilities to wholesale customers that are both adequate and nondiscriminatory.⁸

The PUC can impose terms in interconnection agreements through involuntary arbitration and can disapprove such agreements where their terms are unacceptable.⁹ The PUC has broad authority to approve or reject any interconnection agreement. PUC has the authority to determine that, in the interest of promoting competition and adequate remedies to CLECs, that consequential damage and attorney’s fee provisions should be included in ICAs.¹⁰ Inclusion of a provision in the ICA providing for consequential damages will clarify that parties do not waive liability for special,

⁵ Id. at p. 10; IIR 4(a).

⁶ ALJ Order at p. 11; IIR 4(b)(1)-(4).

⁷ ALJ Order, GTA Docket 10-02, p. 3.

⁸ ALJ Order, p. 4.

⁹ See e.g. *WorldNet Telecommunications, Inc. v. Puerto Rico*, 497 F.3d 1, 7 (1st Cir. 2007).

¹⁰ ALJ Order, p. 14.

incidental, or consequential damages. However, any loss of “anticipated profits or revenues” will continue to be unavailable as a remedy.¹¹

The existing contract remedies between the parties to the ICA are not sufficient to bring the ILEC into full compliance.¹² The grant to the PUC under both federal and local law of plenary authority “to approve or disapprove interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.”¹³

Recommendations of the ALJ

The ALJ concludes that the Financial Incentive Plan or Remedy Provisions adopted should not unnecessarily overburden ILECs and CLECs, as well as the system, with excessive penalty schedules and additional administrative hurdles. Rather than implementing an FIP with mandatory penalty schedules, he suggests that consequential damage and attorney’s fee provisions should be included in ICAs.¹⁴ Inclusion of a provision in the ICA providing for consequential damages would clarify that parties do not waive liability for special, incidental, or consequential damages. Parties would be able to engage in dispute resolution for such claims.¹⁵ However, any loss of “anticipated profits or revenues” would continue to be unavailable as a remedy.¹⁶ With the proposed modification, if a CLEC was unable to provide services to a customer under an existing contract as a result of the ILEC’s service failure, the CLEC could recover consequential damages; however, the CLEC would be unable to recover damages “anticipated” or speculative damages which it claims it could have earned from anticipated revenues.

With regard to attorneys fees, the present provision [12 GCA §12107 (d) only authorizes attorneys fees to be imposed against a party found to have “failed to act in good faith.” The new provision recommended for inclusion in the ICA by the ALJ would authorize the award of attorney’s fees, costs, and expert witness fees, to a “prevailing party in any action to enforce or interpret the terms of an ICA.”¹⁷ The ALJ recommends that the paragraph 25 in the ICA between the parties be revised as set forth in Exhibit A to the

¹¹ ALJ Order, p. 17.

¹² ALJ Order, p. 12.

¹³ ALJ Order, p. 13.

¹⁴ ALJ Order, p. 14.

¹⁵ ALJ Order, p. 15.

¹⁶ ALJ Order, p. 17.

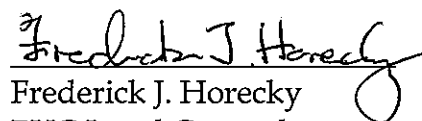
¹⁷ ALJ Order, p. 25.

ALJ Order.¹⁸ He also recommends that the PUC authorize him to commence proceedings to mandate the inclusion of revised paragraph 25 in ICAs between telecommunications parties which are submitted to the PUC for approval.¹⁹

Recommendation to PUC by Legal Counsel

The ALJ Order dated June 8, 2010, as well as the recommendations made therein, should be adopted and approved by the PUC. The PUC should also approve the revisions recommended by the ALJ to existing ¶25 of the ICA, and require the incumbent local exchange carrier and competitive local exchange carriers [including the parties hereto] to incorporate such provisions into their Interconnection Agreements. The remedy provisions recommended, which provide for consequential damages and attorneys fees, should serve as an incentive for compliance by the ILEC with the ICA. In addition, CLECs will have a more adequate remedy to recover the damages and fees incurred by them as a result of a service failure by the ILEC. Counsel has submitted a proposed Order which would adopt the recommendations of the ALJ.

Dated this 15th day of June, 2010.


Frederick J. Horecky
PUC Legal Counsel

¹⁸ Exhibit A, revision of Liability Provisions in ¶25 of the ICA.

¹⁹ ALJ Order p. 18.