

GUAM PUBLIC UTILITIES COMMISSION
REGULAR MEETING
November 19, 2009
SUITE 202 GCIC BUILDING, HAGATNA



MINUTES

The Guam Public Utilities Commission [PUC] conducted a special business meeting commencing at 6:00 p.m. on November 19, 2009 pursuant to due and lawful notice. Commissioners Cantoria, Johnson, Perez, and McDonald were in attendance. The following matters were considered at the meeting under the agenda made *Attachment "A"* hereto.

1. Pacific Data Systems

This matter came before the Commission upon the Administrative Law Judge Findings of Fact and Conclusions of Law, PDS Docket 09-03, Pacific Data Systems, Inc. and GTA Teleguam LLC/Delayed Service. Legal Counsel presented the ALJ Findings of Fact and Conclusions of Law to the Commissioners. In this Docket, the ALJ acted as an Arbitrator of certain disputes between PDS and GTA concerning implementation of their Interconnection Agreement. The ALJ's Findings of Fact and Conclusions of Law constitute a recommendation of the Arbitrator in this proceeding. The Commission is required to issue a final order accepting or rejecting the Arbitrator [i.e. ALJ] recommendation within 10 days after the recommendation has been filed, Rule 4h (10) of the Interconnection Implementation Rules.

Counsel reported that the ALJ had conducted a hearing between PDS and GTA on November 11, 2009, concerning alleged violations of the Interconnection Agreement and the Interconnection Implementation Rules [IIRs]. At the hearing, PDS presented argument and evidence alleging that GTA had violated various provisions of the IIRs. Based upon the evidence and argument presented at the hearing, ALJ Mair found that GTA committed numerous violations of the IIR provisions, including the following: (1) Failure to Produce Firm Order Commitments within two business days of receipt of the service order; (2) Failure to Timely Deliver Service Orders, as required by IIR 7(h)(1); (3) Provision of services to PDS worse than those that GTA provides to itself; (4) Failure to Maintain Records of each instance in which it fails to supply essential facilities and services to an interconnecting telecommunications carrier, as required by IIR 7(1)(7); (5) Failure to Produce Order Completion Notices; (6) Failure to Produce Monthly Monitoring Reports to the GPUC, specifying, among other matters, the "average completion interval" to provide service to GTA customers.

According to the ALJ, GTA admitted some of these violations, including its failure to produce or provide to the GPUC the reports required by the IIRs. Based upon the record, the ALJ rejected various defenses presented by GTA, found that GTA had failed to act in good faith, and had violated Guam Law, the ICA and the IIRs both "deliberately and willfully." Based upon his findings and conclusions of law, the ALJ recommended that further hearings be conducted to determine the appropriate penalties, that GTA be ordered to process and complete all pending and projected service orders from PDS within 15 days, that GTA process all future orders from PDS within the timeframes required by the IIRs, and that monthly hearings be conducted for the purpose of determining whether GTA has completed the PDS service orders required by the IIRs, as well as other relief.

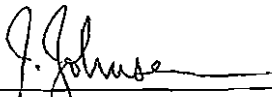
Counsel recommended that the Commission approve and adopt the findings and conclusions of the ALJ; Counsel indicated his belief that the ALJ's findings and conclusions constitute a fair and reasoned consideration of the evidence and argument presented at the hearing.

The Commissioners asked various questions concerning implementation of the ALJ's recommendations and where the applicable timelines for action are found in the rules. Counsel stated that implementation is undertaken by the ALJ in enforcement proceedings, and that the timelines for required actions are established in the IIRs. The parties were then given an opportunity to give brief presentations to the PUC. The CEO of GTA, Dan Moffat, indicated, among other things, his belief that GTA did not act in bad faith. John Day, the president of PDS indicated that GTA services had not been adequate and that there have been many violations of the IIRs.

Counsel presented a draft order to the Commissioners for consideration and covered its major provisions. Upon motion duly made, seconded and unanimously carried, the Commission adopted and approved the Findings of Fact and Conclusions of Law issued by the ALJ in this Docket on November 9, 2009, which ordered various forms of relief and further proceedings. The Order adopted by the Commission is made *Attachment "B"* hereto.

2. Other Business

There being no further business to conduct, upon motion duly made, seconded and unanimously carried, the meeting was adjourned.



Jeffrey C. Johnson,
Chairman

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

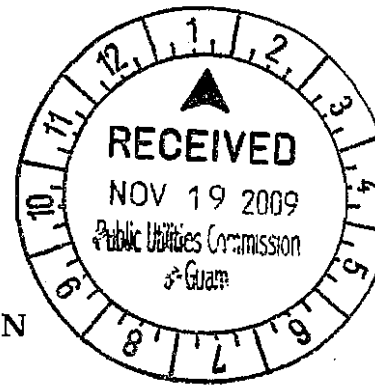
**REGULAR MEETING
SUITE 202 GCIC BUILDING
414 W. SOLEDAD AVE. HAGATNA, GUAM
12:30 p.m. November 19, 2009**

Agenda

1. Pacific Data Systems

- PDS Docket 09-03, Pacific Data Systems, Inc. and GTA Teleguam LLC/Delayed Service; Administrative Law Judge Findings of Fact and Conclusions of Law, and Proposed PUC Order;

2. Other Business



BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN RE: PACIFIC DATA SYSTEMS, INC.)
AND GTA TELEGUAM LLC/) PDS Docket 09-03
DELAYED SERVICE)
_____)

ORDER

This matter comes before the Guam Public Utilities Commission ["GPUC"] upon the Findings of Fact and Conclusions of Law issued by the Administrative Law Judge ["ALJ"] David A. Mair on November 16, 2009, which is made *Attachment A* hereto.¹ Therein ALJ Mair addresses issues raised in Pacific Data Systems, Inc.'s ["PDS"] October 28, 2009 Complaint ["the Complaint"] against GTA TeleGuam LLC ["GTA"].²

On September 28, 2006, GTA and PDS entered into an Interconnection Agreement ["ICA"].³ The ICA was approved by the GPUC on October 4, 2006 pursuant to 47 U.S.C. §252.⁴ Subsequently, on February 1, 2007 the GPUC authorized rule making proceedings concerning implementation of the interconnection agreements between GTA and new entrants into the market. The stated purpose of such rules was to provide new entrants with a fair and reasonable opportunity to compete in the local exchange market, and to establish a monitoring system by which GPUC could be assured that GTA was taking appropriate action to accommodate competitors (such as PDS). The GPUC approved the Interconnection Implementation Rules ["IIR" or "IIRs"] on August 13, 2007.⁵

In its Complaint, PDS alleged that GTA has committed numerous violations of the IIR provisions. A hearing was conducted before ALJ Mair on November 11, 2009, at which time submissions, testimony, evidence and argument were presented by the parties and considered by ALJ Mair.⁶ Subsequent to the hearing ALJ Mair issued his Findings of Fact and Conclusions of Law (*Attachment A*). Therein, the ALJ makes various

¹ Findings of Fact and Conclusions of Law issued by ALJ David A. Mair on November 16, 2009, *Attachment A* hereto (hereinafter referred to as "ALJ Findings and Conclusions").

² PDS Complaint against GTA Teleguam LLC, filed October 28, 2009 in PDS Docket 09-03.

³ Agreement by and between PDS and GTA Telecom (September 28, 2006).

⁴ GPUC Order October 4, 2006.

⁵ GPUC Order approving Interconnection Implementation Rules, Docket 05-01, August 13, 2007.

⁶ ALJ Findings and Conclusions, pg. 1

recommendations to the GPUC pursuant to Interconnection Implementation Rule 4(i)(4).

ALJ Mair finds that GTA committed numerous violations of the IIR provisions, including the following: (1) Failure to Produce Firm Order Commitments within two business days of receipt of the service order; (2) Failure to Timely Deliver Service Orders, as required by IIR 7(h)(1); (3) Provision of services to PDS worse than those that GTA provides to itself; (4) Failure to Maintain Records of each instance in which it fails to supply essential facilities and services to an interconnecting telecommunications carrier, as required by IIR 7(1)(7); (5) Failure to Produce Order Completion Notices; (6) Failure to Produce Monthly Monitoring Reports to the GPUC, specifying, among other matters, the "average completion interval" to provide service to GTA customers.⁷

GTA admitted some of these violations, including its failure to produce or provide to the GPUC the reports required by the IIRs.⁸

Based upon the record, the ALJ found that various defense presented by GTA were not persuasive. The ALJ rejected GTA defenses that the alleged default in payment by PDS justified GTA not providing service; that GTA has not in fact provided worse service to PDS than it has provided to itself; that the number of service orders at issue must be "individually scrutinized" and that it is unfair to require GTA to explain the reasons for delay; and that PDS has failed to comply with the ICA by not submitting a "pre-qualification certificate" to GTA, thereby excusing GTA's obligation to provide the requested service.⁹

The ALJ concluded as follows:

"...GTA has failed to act in good faith and has violated Guam law, the ICA and IIRs by deliberately and willfully: (a) omitting material information and facts that GTA is required to maintain and/or produce; (b) refusing to use commercially reasonable efforts in implementing the ICA in regard to PDS; (c) engaging in anti-competitive action, conduct or behavior toward PDS; (d) consistently failing to complete PDS service orders in a timely fashion; (e) consistently failing to provide PDS with FOCs; (f)

⁷ ALJ Findings and Conclusions, pgs. 4-8.

⁸ Id. at pg. 8.

⁹ ALJ Findings and Conclusions, pgs. 8-11.

consistently failing to provide PDS with OCNs; (g) engaging in acts, conduct, or behavior with the sole purpose of delaying implementation of the ICA; and (h) systematically and deliberately providing services at intervals to itself that are worse than those provided to PDS. These actions constitute violations of IIR 7(h)(1); IIR 5(c)(1)(i)(ii)(iii) and (vi); IIR 5(c)(2)(vi); IIR 7(j), (k), and (m); IIR 5(c)(3), and ICA Section 3.2.2 at 65.”¹⁰

GPUC is required to issue a final order accepting or rejecting, in whole or in part, the recommendation of the arbitrator [ALJ] within ten [10] days after the recommendation has been filed.¹¹ Having considered the record of the proceedings herein, the pleadings of the parties, and the Findings of Fact and Conclusions of Law issued by the ALJ on November 16, 2009, and good cause appearing, the Guam Public Utilities Commission hereby ORDERS as follows:

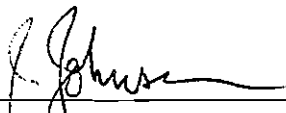
1. The Findings of Fact and Conclusions of Law issued by the ALJ on November 9, 2009 are hereby adopted and approved.
2. The ALJ is authorized to notice and conduct a hearing pursuant to Title 12 GCA Section 12108 for the purpose of determining and recommending to the GPUC whether penalties should be assessed against GTA and, if so, in what amount;
3. GTA is ordered to process and complete all pending and rejected service orders from PDS within fifteen (15) days from the date of this Order;
4. GTA is ordered to process and complete all future orders from PDS within the timeframes set forth under the IIRs’;
5. For a period of one calendar year from the date of this Order, the ALJ shall conduct monthly hearings with GTA and PDS for the purpose of determining whether GTA has in fact completed PDS service orders as required by the IIRs; the ALJ shall make monthly reports and recommendations to the GPUC regarding GTA’s compliance or non-compliance with the IIRs and ICA;

¹⁰ Id at pg. 15.

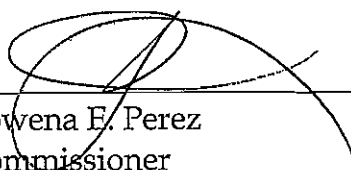
¹¹ IIR 4(h)(10).

6. GTA is ordered to immediately commence submitting monthly performance monitoring reports as required by IIR 7(j), (k), and (m); overdue monthly performance monitoring reports shall be submitted by GTA within sixty (60) days from the date of this Order;
7. GTA is ordered to immediately commence maintaining the records required by IIR 7(i)(7), which should indicate, among other matters, "each instance when it fails to supply essential facilities and services to an interconnecting telecommunications carrier in accordance with the provisioning intervals established by the Rule," and "the reason for the delay;"
8. GTA is prohibited from requiring that PDS service orders be "pre-qualified" pursuant to the provisions of ICA Network Elements Section 3.2 until GTA first conducts the "manual survey" required by ICA Network Elements Section 3.2.2 at 65; and
9. GTA and PDS are ordered to pay for the GPUC's regulatory fees and expenses incurred in this Docket, including, without limitation, consulting and counsel fees and expenses, and the fees and expenses for conducting the hearing process. Assessment of GPUC's regulatory fees and expenses is authorized pursuant to 12 GCA §§ 12002(b), 12024(b), 12104, 12109, the Rules Governing Regulatory fees for the Telecommunications Companies, and Rule 40 of the Rules of Practice and Procedure before the GPUC.

Dated this 19th day of November, 2009.

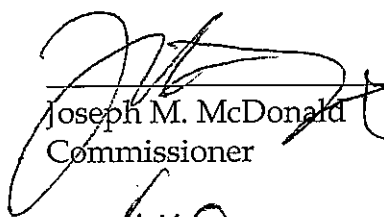


Jeffrey C. Johnson
Chairman




Rowena E. Perez
Commissioner

Michael A. Pangelinan
Commissioner



Joseph M. McDonald
Commissioner



Filomena M. Cantoria
Commissioner



BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN RE: **PACIFIC DATA SYSTEMS, INC.**
AND GTA TELEGUAM LLC /
DELAYED SERVICE

Docket No. 09-03

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before the Administrative Law Judge (“ALJ”) of the Guam Public Utilities Commission (“GPUC”) for a hearing pursuant to Pacific Data Systems, Inc.’s (“PDS”) October 28, 2009 Complaint (the “Complaint”) against GTA TeleGuam, LLC (“GTA”). PDS requested expedited dispute resolution and interim relief under Interconnection Implementation Rules 4(i) and (j). On November 5, 2009 the ALJ determined that the issues in PDS’s Complaint warranted expedited resolution. A Pre-hearing Conference was conducted on November 6, 2009; and the hearing was conducted on Wednesday, November 11, 2009.

Upon considering the submissions, testimony, evidence and argument presented by the parties, the ALJ finds in favor of PDS on its Complaint, and concludes that PDS has shown that GTA has violated numerous provisions of the Interconnection Agreement and the Interconnection Implementation Rules. The ALJ now issues his Findings of Fact and Conclusions of Law and makes his recommendations to the GPUC pursuant to Interconnection Implementation Rule 4(i)(4).

FINDINGS OF FACT

A. The Parties.

1. GTA is an incumbent local exchange carrier (“ILEC”) operating within the Territory of Guam, which provides local and long distance telecommunications services, as well

as other communications services, such as wireless telecommunications and broadband Internet access service in the Territory of Guam.

2. PDS is a competitive local exchange carrier (“CLEC”) that provides telecommunications services, and other communications services in Guam.

B. Interconnection Agreement and Interconnection Implementation Rules.

3. On September 28, 2006, GTA and PDS entered into an Interconnection Agreement (“ICA”).¹

4. The next day, on September 29, 2006, GTA and PDS amended the ICA, but the amendments are not at issue in this proceeding.²

5. The ICA and Amended ICA were approved by the GPUC on October 4, 2006 pursuant to 47 U.S.C. § 252.³

6. On February 1, 2007 the GPUC authorized and directed the commencement of rule making proceedings under 12 G.C.A. § 12104 to propose rules, consistent with Federal Communications Commission policy to establish timelines, conditions and standards which GTA should meet in order to implement GPUC-approved interconnection arrangements and to provide new entrants with a fair and reasonable opportunity to compete in the local exchange market. Another stated purpose of the rules was to establish a monitoring system by which the GPUC

¹ Agreement by and between Pacific Data Systems and GTA Telecom (September 28, 2006).

² Amended Agreement by and between Pacific Data Systems and GTA Telecom (September 29, 2006).

³ See GPUC Order, (October 4, 2006).

could be assured that GTA was taking appropriate action to accommodate competitors (such as PDS) as well as its own customer base in the future.⁴

7. Thereafter, on August 13, 2007 the GPUC approved certain Interconnection Implementation Rules (“IIR” or “IIRs”). Prior to the approval of the IIRs, GTA was provided with a copy of the proposed rules and afforded an opportunity to submit comments regarding them.⁵

C. GTA Violations of IIR Provisions.

8. **Failure to Produce FOCs.** Upon receipt of a service order from a CLEC (such as PDS), GTA is required to return a Firm Order Commitment (“FOC”) to the CLEC within two business days of receipt of the service order.⁶ Mr. John Day, the President of PDS (“PDS President”) testified that the FOC is important because it reflects the date of expected delivery, which, understandably, is significant to CLEC customers. PDS submitted documentary evidence and testimony showing that since July 19, 2007, GTA has provided PDS with an FOC only 38% of the time.⁷ GTA did not dispute these statistics. According to PDS’s President, GTA’s failure to provide FOCs has created serious competitive problems for PDS because it is unable to notify its customers when service may be expected. He also testified that many PDS customers are former GTA customers. Hence, when GTA delays acting on PDS service order requests, GTA

⁴ *Id.* at 1.

⁵ *Id.*

⁶ IIR 7(b).

⁷ PDS Exhibit 1A at 9.

retains customers longer and continues to draw a revenue stream from such customers. GTA did not dispute that most PDS customers are former GTA customers.

9. **Failure to Timely Deliver Service Orders.** IIR 7(h)(1) establishes timelines within which GTA is required to deliver the service orders of PDS.⁸ Under the IIRs, the delivery time for almost all PDS orders is five (5) or seven (7) days. PDS submitted documentary evidence and testimony showing that since July 19, 2007, PDS has submitted hundreds of service orders to GTA, and that only five (5) of those service orders were delivered by GTA within the timelines required by the IIRs. The remaining orders were delivered late or were not delivered at all. PDS provided statistics to show that since July 19, 2009, the average delivery time for PDS service orders is sixty-five (65) days, not five (5) or seven (7) days.⁹ GTA submitted no statistics to dispute this contention.

10. **Providing PDS With Services Worse Than Those GTA Provides Itself.** IIR 5(c)(3) provides that: "The failure of the ILEC [in this case GTA] to meet the Quality of Service intervals specified in the ICA or in Rule 7 shall not be deemed to be evidence of failure to implement the ICA in good faith unless the ILEC systematically and deliberately provides services at intervals that are worse than those the ILEC provides to its self [sic], its own customers or the ILEC's affiliates." PDS presented compelling evidence that GTA has systematically and deliberately provided itself with better service than has been provided to PDS:

⁸ IIR 7(h)(1).

⁹ PDS Exhibit 1A at 9.

(a) Ms. CrenaMarie P. Byerly, a GTA Senior Account Manager in Sales, testified that in 2009 GTA provided 90% of its customers with service within fifteen (15) days. In contrast, according to the evidence presented, GTA consistently failed to provide PDS customers with service within those time frames.

(b) PDS's President described three (3) separate occasions where a PDS service order was not timely completed or was rejected by GTA. He also submitted documents relating to those instances.¹⁰ When those customers dropped PDS, and instead ordered the same service from GTA, the services were provided by GTA on two occasions within five (5) days, and on one occasion the very next day.

(c) PDS produced GTA Quality of Service charts indicating that during 2008 GTA completed primary service orders to its customers in less than five (5) days between 78% and 95% of the time. A similar Quality of Service Chart for 2009 indicated completion of service orders for GTA customers in less than five (5) days anywhere from 40% to 87% of the time.¹¹ The statistics presented by PDS established that GTA had failed to complete PDS service orders during 2008 and 2009 in anything close to a similar fashion.

(d) PDS produced a GTA Newsletter for GUDTV stating that: "Our install intervals have been reduced from 3 weeks to 3 days with the GTA family working hard to reduce install intervals."¹² In another form, GTA claimed that "[u]nder normal circumstances, it takes

¹⁰ PDS Exhibits 12, 13 and 14.

¹¹ PDS Exhibit 18.

¹² PDS Exhibit 21.

one week to set the service up” for GUdTV. PDS’s President testified that it was much more difficult for GTA to install its GUdTV service than it was to complete PDS service orders, and yet PDS was not being provided the level of response that GTA claimed to provide its GUdTV customers.

(e) Mr. Max Zeller, the GTA representative in charge of completing PDS orders, testified that the GTA crew assigned to PDS was “overworked” and that the size of the crew had been “reduced.” Mr. Zeller also testified that GTA had recently “demoted” him, although he remained in charge of fulfilling PDS service orders.

11. **Failure to Maintain Records.** IIR 7(i)(7) requires GTA to “maintain a record, by wire center, of each instance when it fails to supply essential facilities and services to an interconnecting telecommunications carrier in accordance with the provisioning intervals established by this Rule.”¹³ The record is to specify “the reason for the delay.”¹⁴ At the hearing and in its exhibits, GTA did not produce the “record” required by IIR 7(i)(7)(iv). Moreover, GTA conceded in its briefs that there were “cases where it has not delivered orders to PDS in accordance with the terms of the ICA.”¹⁵ GTA also did not present any statistics of its own regarding the number of times that it had provided services either timely or untimely to PDS. It

¹³ IIR 7(i)(7).

¹⁴ IIR 7(i)(7)(iv).

¹⁵ GTA’s Answer to PDS Formal Complaint (“GTA Answer”), p. 2 (November 4, 2009).

should be noted also that a subpoena was issued by PDS requesting that GTA produce such documentation.¹⁶

12. **Failure to Produce OCNs.** Once GTA has completed an order from PDS, it is required to provide “notice” of that fact in “electronic or manual form that a service order has been completed.” This form is referred to as an Order Completion Notice (“OCN”).¹⁷ PDS presented documentary evidence and testimony showing that since July 19, 2009, GTA has provided PDS with OCNs only 19% of the time.¹⁸ According to the PDS President, instead of issuing OCNs, GTA personnel would verbally inform PDS that installation was completed. When PDS would check whether the lines met the required technical specifications, the lines would frequently fail inspection. This would result in further delays, additional personnel costs to PDS, and frustration to PDS customers who were expecting service. GTA did not rebut PDS’s statistics regarding GTA’s failure to provide OCNs. The only evidence submitted by GTA regarding OCNs was from Ms. Lucia Perez, a GTA representative. Ms. Perez testified that certain PDS service orders had been completed, but upon further questioning she admitted that she could not locate OCNs for those orders, and was unable to confirm that PDS had even been verbally advised that those service orders had been completed. Ms. Perez also agreed that OCNs were required under the IIRs in order for a service order to be considered “completed.”

¹⁶ PDS’ Subpoena Duces Tecum to Eric Votaw (“Votaw Subpoena”) (November 10, 2009).

¹⁷ IIR 7(b) and Definitions.

¹⁸ PDS Exhibit 1A at 9.

13. **Failure to Produce Monthly Monitoring Reports.** IIR 7(j), (k), and (m) require GTA to provide the GPUC with monthly “performance monitoring reports” specifying, among other matters, the “average completion interval” to provide service to GTA customers.¹⁹ GTA admitted that it has neither produced nor provided to the GPUC the reports required by these sections in IIRs. Ms. Lucia Perez, a GTA representative, testified that she was aware that GTA was required to produce performance monitoring reports, but that she did not want to sign any such reports because she could not verify their accuracy. Mr. Eric Votaw, another GTA representative, testified that he was unaware that such reports were even required.

D. Defenses of GTA.

14. GTA presented the following defenses to the claims of PDS, none of which the ALJ found to be persuasive:

(a) **Defaults in Payments.** GTA argued that PDS was in default in paying its bills to GTA, and, as a consequence, GTA was justified in not providing service. The testimony, however, was that the defaults in payments only occurred for a few days in May, and approximately thirteen (13) to fourteen (14) days in late June and early July of 2009. PDS promptly cured those defaults in payments to GTA and has not since been in default for non-disputed billings from GTA. A brief period of default during short time frames in May, June and July of 2009 does not excuse GTA’s consistent failure to timely provide services to PDS since July 19, 2007. It should also be noted that PDS did not count the default days -- during which

¹⁹ IIR 7(j), (k) and (m).

time GTA was excused from not providing service to PDS -- in its statistics regarding the failure of GTA to deliver on PDS service orders.²⁰

(b) **Equality of Service.** GTA insists that it has in fact not provided worse service to PDS than it has provided to itself. In support of this contention, GTA noted that its employee, Mr. Max Zeller, who was in charge of the GTA crew completing PDS service orders, testified that PDS was not treated differently. The ALJ, however, based on the appearance and demeanor of the witnesses who testified, and the documentary evidence presented by PDS, is more persuaded by the factual evidence to the contrary on this subject. It should also be noted that GTA failed to prepare the monthly performance monitoring reports required by IIR 7(j), (k), and (m), which would have been the best evidence it could have offered on this subject. It is unreasonable for GTA to ignore its legal obligation to prepare reports, and then expect the ALJ and the GPUC to simply accept its verbal assurances, especially in light of the compelling testimony and documentary evidence presented by PDS.

(c) **Number of Service Orders At Issue.** GTA claims that the “complaint lists hundreds of events” and each event must be “individually scrutinized so that GTA can present a logical and accurate response.”²¹ GTA insists that it is “unfair” to require it to explain the reasons for delays of hundreds of PDS orders.²² GTA, however, is required by IIR 7(i)(7) to “maintain a record, by wire center, of *each instance* when it fails to supply essential facilities and

²⁰ PDS Exhibit 1A.

²¹ GTA Answer, at 1.

²² GTA Answer, at 2.

services to an interconnecting telecommunications carrier in accordance with the provisioning intervals established by this Rule.”²³ The record is to provide “the reason for the delay.”²⁴ Had GTA kept the records it is required to maintain, it could have presented evidence to “individually scrutinize” each service order of PDS and explain the “reason for the delay.” GTA failed to produce these records at the hearing even though they were subpoenaed by PDS.²⁵

(d) **Pre-Qualification Certificates.** GTA argues that PDS has itself failed to comply with the ICA by not submitting a pre-qualification certificate to GTA as discussed in ICA Section 3.2.²⁶ PDS’s President testified that in 2007 GTA and PDS agreed to the process for PDS to submit service orders, and that pre-qualification certificates were not part of that process. GTA did not dispute this testimony. To the contrary, GTA agreed that it never requested any pre-qualification certificates from PDS until early October 2009. At that time, GTA started rejecting all PDS service orders for failure to include a pre-qualification certificate. GTA also agreed at the hearing that the ICA required that it “conduct a manual survey of existing Loop facilities” and that only loops “not listed on that database” require a pre-qualification certificate. GTA admitted that it has never conducted the “manual survey” required and offered no excuse for failing to do so. GTA cannot complain that PDS has failed to submit a pre-qualification certificate as required by ICA Section 3.2 when GTA itself has failed to

²³ IIR 7(i)(7).

²⁴ IIR 7(i)(7)(iv).

²⁵ Votaw Subpoena.

²⁶ ICA Section 3.2, pp. 65 - 66.

complete the “manual survey” that is an integral part of the procedure. Furthermore, Mr. Max Zeller from GTA testified that his staff currently checked the PDS lines after they were connected to assure compliance with technical standards. PDS’s President noted that a pre-qualification procedure (requiring that the proposed PDS line also be checked before service is installed) would add additional workload to GTA’s already strained staff, and further slow GTA’s response time to PDS service orders. In any event, the pre-qualification issue only arose in early October 2009, and, therefore, does not excuse GTA’s tardy performance beforehand, stretching back all the way to July 19, 2009.

E. Exhausting Dispute Resolution Procedures.

15. PDS presented evidence that it had attempted to exhaust its dispute resolution remedies as discussed in IIR 4(d) before filing this complaint. For instance, PDS submitted as exhibits certain communications with GTA dated March 6, 2009, and September 3, 2009, wherein PDS advised GTA of the problems associated with its service orders, GTA’s reporting requirements, and GTA’s failure to deliver services to PDS according to mandated order deliver timelines.²⁷ PDS and GTA were unable to informally resolve their differences.

CONCLUSIONS OF LAW

A. The Federal Telecommunications Act of 1996.

16. “Seeking to spur competition in the telecommunications industry,” Congress “passed the Telecommunications Act of 1996” (hereinafter the “Act”).²⁸

²⁷ PDS Exhibits 15 and 16.

²⁸ Worldnet Telecom., Inc. v. Puerto Rico Tel. Co., 497 F.3d 1, 3 (1st Cir. 2007).

17. The Act is “designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local phone service (known as ‘incumbent local exchange carriers’ or ‘incumbent LECs’) to facilitate the entry of competing companies into the local telephone service markets across the country.”²⁹

18. “Congress recognized that without allowing new entrants to use the incumbent’s local exchange networks and other technology and service, the incumbents would maintain a stranglehold on local telephone service; no new entrant could realistically afford to build from the ground up the massive communications grid the incumbents had developed through years of monopolistic advantage.”³⁰

19. “The Act seeks, with regard to its rate-setting and other features, to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents’ property.”³¹

20. “The Act not only permitted competitors to operate their own local exchange networks in competition with the local telephone company, but also obliged the local incumbent to assist new entrants in several respects.”³²

B. The Guam Telecommunications Act of 2004.

21. Guam’s Legislature enacted the Guam Telecommunications Act of 2004 (hereinafter the “Guam Act”) to create a “new regulatory environment conducive to competition”

²⁹ Iowa Utilities Board v. FCC, 120 F.3d 753, 791 (8th Cir. 1997).

³⁰ Indiana Bell Telephone Co. v. McCarthy, et. al., 362 F.3d 378, 382 (7th Cir. 2004).

³¹ Indiana Bell, 362 F.3d at 382.

³² Worldnet Communications, 497 F.3d at 3 (internal citations omitted).

that would “promote the development of modern, innovative, accessible, and affordable telecommunications services and products for the people of Guam.”³³

22. The Guam Act exists to “[e]ncourage the entry of new providers of telecommunications services, encourage the introduction of new telecommunications services and products for the consumers of Guam, and increase investment in telecommunications infrastructure in Guam”³⁴

C. Jurisdiction of ALJ and GPUC to Resolve ICA Disputes.

23. The GPUC established the IIRs to provide “administrative procedures for Commission resolution of disputed issues arising under or pertaining to ICAs approved by the Commission pursuant to its authority under the Federal Telecommunications Act of 1996 and the Guam Telecommunications Act.”³⁵

24. Under the IIRs, the GPUC’s “ALJ shall act as arbitrator” of disputes involving the “terms and conditions in the ICA” and the “[i]mplementation of activities explicitly provided for, or implicitly contemplated in the ICA.”³⁶

25. “Expedited dispute resolution may be requested when the dispute directly affects the ability of a party to provide uninterrupted service to its customers or precludes the provisioning of any service, functionality or network element. The arbitrator [ALJ] has the

³³ 12 G.C.A. § 12101(a)(3).

³⁴ 12 G.C.A. § 12101(b)(3).

³⁵ IIR 4(a).

³⁶ IIR 4(b)((1) – (4).

discretion to determine whether the resolution of the complaint may be expedited based on the complexity of the issues or other factors deemed relevant.”³⁷ In this case, the ALJ has determined that the issues and disputes warrant expedited resolution.

26. In the event that the ALJ determines that expedited resolution is warranted, he is required to “commence” the hearing “no later than seventeen days after filing of the complaint.”³⁸ The PDS Complaint was filed on October 28, 2009, and the hearing was conducted on November 11, 2009.

27. “The recommendation of the arbitrator shall be filed with the Commission within three days after the close of the hearing and shall be distributed to all parties of record in the dispute resolution proceeding.”³⁹

28. Proceedings under Rule 4 of the IIRs and 12 G.C.A. Sections 12107 and 12108 are subject to different procedures and timelines. For this reason, the ALJ is not resolving herein the award of damages, penalties or attorneys’ fees under Sections 12107 and 12108. However, as discussed subsequently, the ALJ recommends that the GPUC authorize the ALJ to notice and conduct a hearing pursuant to Section 12108 for the purpose of determining and recommending to the GPUC whether penalties should be assessed against GTA. Should PDS seek to recover damages or attorneys fees under Sections 12107 and 12108, then it should file a separate petition

³⁷ IIR 4(i).

³⁸ IIR 4(i)(3).

³⁹ IIR 4(i)(4).

under those sections. The ALJ makes no findings herein on whether PDS is in fact entitled to such remedies.

D. Violations of GTA.

29. For all the foregoing reasons, the ALJ finds that GTA has failed to act in good faith and has violated Guam law, the ICA and IIRs by deliberately and willfully: (a) omitting material information and facts that GTA is required to maintain and/or produce; (b) refusing to use commercially reasonable efforts in implementing the ICA in regard to PDS; (c) engaging in anti-competitive action, conduct or behavior towards PDS; (d) consistently failing to complete PDS service orders in a timely fashion; (e) consistently failing to provide PDS with FOCs; (f) consistently failing to provide PDS with OCNs; (g) engaging in acts, conduct, or behavior with the sole purpose of delaying implementation of the ICA; and (h) systematically and deliberately providing services at intervals to itself that are worse than those provided to PDS. These actions constitute violations of IIR 7(h)(1); IIR 5(c)(1)(i)(ii)(iii) and (vi); IIR 5(c)(2)(vi); IIR 7(j), (k), and (m); IIR5(c)(3), and ICA Section 3.2.2 at 65.

E. Assessment of Regulatory Fees.

30. GTA and PDS are ordered to pay for the GPUC's regulatory fees and expenses incurred in this Docket, including, without limitation, consulting and counsel fees and expenses, and the fees and expenses for conducting the hearing process. Assessment of GPUC's regulatory fees and expenses is authorized pursuant to 12 GCA §§ 12002(b), 12024(b), 12104, 12109, the Rules Governing Regulatory fees for Telecommunications Companies, and Rule 40 of the Rules of Practice and Procedure before the GPUC.

CONCLUSION

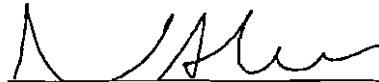
Having found in favor of PDS on its Complaint, the ALJ hereby makes the following recommendations to the GPUC:

1. That the GPUC authorize the ALJ to notice and conduct a hearing pursuant to Title 12 GCA Section 12108 for the purpose of determining and recommending to the GPUC whether penalties should be assessed against GTA and, if so, in what amount;
2. That GTA be ordered to process and complete all pending and rejected service orders from PDS within the fifteen (15) days after the GPUC approves the recommendations of the ALJ set forth herein;
3. That GTA be ordered to process and complete all future orders from PDS within the time frames set forth under the IIRs;
4. That the ALJ for a period of one calendar year conduct monthly hearings with GTA for the purpose of determining whether GTA has in fact completed PDS service orders as required by the IIRs, and that the ALJ make monthly reports and recommendations to the GPUC regarding GTA's compliance or non-compliance with the IIRs and ICA;
5. That GTA be ordered to immediately commence submitting monthly performance monitoring reports as required by IIR 7(j), (k), and (m), and that overdue monthly performance monitoring reports be submitted within sixty (60) days after the GPUC approves of the recommendations of the ALJ set forth herein;
6. That GTA be ordered to immediately commence maintaining the records required by IIR 7(i)(7), which should indicate, among other matters, "each instance when it fails to supply

essential facilities and services to an interconnecting telecommunications carrier in accordance with the provisioning intervals established by this Rule,” and “the reason for the delay;” and,

7. That GTA be prohibited from requiring that PDS service orders be “pre-qualified” pursuant to the provisions ICA Network Elements Section 3.2 until GTA first conducts the “manual survey” required by ICA Network Elements Section 3.2.2 at 65.

Dated this 16th day of November, 2009.



DAVID A. MAIR
Administrative Law Judge

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