

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN THE MATTER OF:)	GPA Docket 11-08
)	
The Application of the Guam Power Authority to Approve the Proposed Settlement Agreement for the Payment in Lieu of Taxes Assessed by the Department of Administration)	PUC COUNSEL REPORT

INTRODUCTION

1. This matter comes before the Guam Public Utilities Commission [PUC] upon GPA’s Application for PUC approval of the Proposed Settlement Agreement for the Payment in Lieu of Taxes Assessed by the Department of Administration.¹

BACKGROUND

2. On March 31, 2011, the Department of Administration (DOA) billed GPA for \$12.25M as amounts due to the government “as payments in lieu of taxes (PILOT)” for a period of fourteen years.²
3. Pursuant to Public Law 18-15 and successive amendments [most recently Public Law 27-110: (4)], three utilities, the Port, the Airport, and GPA, are required, in accordance with certain statutory prerequisites, to make such payments to the government in lieu of taxes.³
4. The theory of the law, now embodied as 5 GCA §22421 [Transfer of Autonomous Agency Revenues to Autonomous Agency Collections Fund] is that “non-tax paying utilities” benefit from services provided by the general fund, such as police and fire protection, road systems and other governmental facilities. Rather than an assessment of taxes, a “fund transfer policy” should be instituted as a General Fund Reimbursement.⁴
5. In Resolution No. 2011-32, the Guam Consolidated Commission on Utilities [CCU] approved a PILOT settlement of \$2,625,000, with DOA, an FY12

¹ GPA Application to Approve the Proposed Settlement Agreement for the Payment in Lieu of Taxes Assessed by the Department of Administration, GPA Docket 11-08, filed June 15, 2011.

² Id. at p. 1.

³ Id.

⁴ 5 GCA §22421(3).

assessment of \$875,000, and a further continuing yearly surcharge to cover future annual PILOT assessments.⁵

6. The CCU authorized the General Manager of GPA to petition the PUC for approval of the proposed settlement agreement, for a surcharge to recover the cost of the initial PILOT settlement and the FY12 assessment, and the continuing annual surcharge.⁶
7. The PILOT settlement is subject to review and prior approval by the PUC in accordance with the Contract Review Protocol for Guam Power Authority, which requires PUC to approve any GPA financial obligation in excess of \$1,500,000.⁷
8. On June 27, 2001, PUC Counsel issued the first set of "Requests for Information" to GPA concerning its Petition for Approval of the Pilot Settlement and the Establishment of Surcharges.⁸
9. On July 11, 2011, PUC Counsel submitted a second set of Requests for Information to the Guam Power Authority concerning the proposed PILOT settlement and surcharges.⁹

ANALYSIS

10. For the reasons stated herein, PUC Counsel recommends that the Commissioners of the PUC take no action at the present time on GPA's Petition for Approval of Pilot settlement and the establishment of surcharges. An order deferring action at the present time is the appropriate course of action for the PUC.
11. On July 20, 2011, the PUC received GPA's responses to the two sets of requests for information.¹⁰

⁵ Consolidated Commission on Utilities Resolution No. 2011-32, adopted on June 7, 2011.

⁶ Id.

⁷ Contract Review Protocol for Guam Power Authority, Administrative Docket, §1d.

⁸ Letter from PUC Counsel to GPA Counsel dated June 27, 2011, GPA Docket 11-08, first set of "Requests for Information".

⁹ Letter from PUC Counsel to GPA Counsel, GPA Docket 11-08, dated July 11, 2011.

¹⁰ PILOT Settlement/GPA Responses, GPA Docket 11-08, filed July 20, 2011.

12. In the GPA Responses to Request for Information, submitted on July 20, 2011, PUC Counsel learned that GPA proposes two PILOT surcharge assessments: one to be effective December 1, 2011, which would include the PILOT Settlement and the FY12 Assessment, and a second surcharge effective October 1, 2012, which would collect the FY13 and annual assessments thereafter.¹¹
13. GPA also indicated its intent that “the proposed PILOT surcharge would apply to the Navy.”¹²
14. GPA did not serve the Navy with its initial Petition in this matter, nor was Navy otherwise advised by GPA of GPA’s intent to seek surcharge payments from Navy to reimburse PILOT payments.
15. On July 29, 2011, PUC Counsel forwarded GPA’s Petition and Responses to the Sets of Requests for Information to the DOD/Navy.¹³ Counsel requested a preliminary indication of what Navy’s general view would be of the proposed PILOT settlement and the surcharges anticipated to be assessed against the Navy.¹⁴
16. Preliminarily, the Navy Rate Consultant has indicated that there is nothing in the current Customer Service Agreement that allows GPA to collect proposed PILOT surcharges from the Navy. Navy does not concur with GPA’s position to have the PUC assess a surcharge for PILOT against Navy.¹⁵
17. The PUC should not proceed ahead with the consideration or resolution of this matter until the Navy has had a full and fair opportunity to present its position on the matters of the appropriateness of the settlement and the assessment of surcharges for PILOT reimbursement against the Navy.

¹¹ GPA First Set of Responses to PUC Requests for Information, set 1-24, GPA Docket 11-08, filed July 20, 2011.

¹² GPA Second Set of Responses to PUC Requests for Information, set 2-1, GPA Docket 11-08, filed July 20, 2011.

¹³ Email from PUC Counsel to Steven Daugherty [Navy Counsel], GPA Docket 11-08, dated July 29, 2011.

¹⁴ Id.

¹⁵ Email from Dr. K.K.Y. Davoodi, P.E., Utility Rates and Studies Office, to John Aguon, USN Pacaf, dated August 4, 2011.

18. The Navy is entitled to Notice and Opportunity to be heard before surcharges are ordered against it. In accordance with the Organic Act of Guam, no person shall be deprived of property without due process of law. 48 U.S.C. §1421(e). If a party is denied a hearing prior to his property being taken, a violation of due process has occurred. Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820 (1969).
19. In the second set of Requests for Information, PUC Counsel asked GPA whether the imposition of a surcharge for PILOT is subject to the provisions of the Ratepayer Bill of Rights. GPA indicated that the proposed PILOT surcharge is subject to the Ratepayer Bill of Rights, and that the proposed surcharge was listed on GPA's May [sic, June] 22, 2011, Ratepayer Bill of Rights Notice, in conjunction with GPA's base rate filing.¹⁶ GPA also indicated that the proposed PILOT surcharge was subject to the Ratepayer Bill of Rights, and that PUC should schedule the necessary public hearings accordingly.¹⁷
20. Pursuant to the Ratepayer Bill of Rights, GPA is not permitted to file its request for establishment of the PILOT surcharges with unless it gives at least threemonths' notice.¹⁸ Thus, GPA cannot file its request for the establishment of PILOT surcharges until on or about September 22, 2011.
21. In addition, the Commission must hold *at least* three (3) public hearings on GPA's request for establishment of PILOT surcharges.¹⁹
22. PUC Counsel concludes that it would be inappropriate for the PUC to take further action on this matter until such time as the Navy has a full and fair opportunity to present its position concerning the PILOT settlement and the establishment of the surcharges. In addition there must be full compliance with the requirements of the Ratepayer Bill of Rights before the Commission approves any new surcharges for the establishment of PILOT.

¹⁶ GPA's Response to Second set of Requests for Information, set 2-7, GPA Docket 11-08, filed July 20, 2011.

¹⁷ Id. set 2-8.

¹⁸ 12 GCA §12001.2(b)

¹⁹ 12 GCA §12016

23. There is also no harm to GPA in deferring PUC action on this matter. The surcharges which GPA contemplated would not be effective until December 2011 and October 2012 in any event.²⁰

RECOMMENDATION

24. GPA has requested approval of both the settlement of past charges from the government for PILOT *and* establishment of PILOT surcharges for FY11 and each year thereafter. Counsel believes that these issues should be considered together and not separately.
25. Were the PUC to approve the PILOT settlement for past charges due, such would be tantamount to recognition of the need to provide revenues to GPA to fund such settlement. If the PUC recognizes that GPA has a financial obligation to pay a PILOT settlement to the government, it is required to insure that rates will be sufficient to cover such obligation.²¹
26. The Commission should make no decision prior to the conduct of public hearings on the proposed settlement or, the validity of and necessity for, the PILOT surcharges. Otherwise, the public hearings would be an empty exercise. Thus, the PILOT settlement proposed by GPA, as well as the establishment of surcharges to fund the settlement, should be deferred at the present time and only considered after GPA has filed its rate case, and after the mandatory hearings have been conducted.
27. A Proposed Order is submitted herewith for the consideration of the Commissioners.

Dated this 8th day of August, 2011.

Frederick J. Horecky
PUC Legal Counsel

²⁰ See GPA Response to First set of Requests for Information, set 1-24, GPA Docket 11-08, filed July 20, 2011,

²¹ 12 GCA§12004