

GUAM PUBLIC UTILITIES COMMISSION
SPECIAL MEETING
APRIL 11, 2012
SUITE 202, GCIC BUILDING, HAGATNA



MINUTES

The Guam Public Utilities Commission [PUC] conducted a special meeting commencing at 7:25 p.m. on April 11, 2012, pursuant to due and lawful notice. Commissioners Johnson, McDonald, Perez, and Pangelinan were in attendance. The following matters were considered at the meeting under the agenda made *Attachment "A"* hereto.

1. Approval of Minutes

The Chairman indicated that the minutes for the meeting conducted on March 26, 2012, were not yet ready for consideration for approval; approval thereof will be tabled until the next meeting.

2. TeleGuam Holdings, LLC

The Chairman announced that the first order of business was GTA Docket 11-06, the Bureau of Information Technology [BIT] Petition Re: GTA Metro Ethernet Services, ALJ Report, and Proposed Order.

Counsel indicated that a lengthy ALJ Report had been submitted in this Docket. The Bureau of Information Technology filed its Petition in June of 2011. It alleged that GTA had been awarded a competitive bid for the provision of Metro Ethernet Services to the government of Guam in October 2007 in a certain procurement; and that furthermore, GTA had provided those services to the government without filing an appropriate tariff relating to telecommunications services, in violation of 12 GCA §12106(c). Finally, BIT contended that it was entitled to a refund from GTA, presumably of all amounts that it paid for the Metro Ethernet Services.

On January 30, 2012, the ALJ issued a preliminary order which denied the portion of BIT's petition that requested a refund; however, BIT was permitted to raise the issue of whether GTA was required, on a going forward basis, to file a tariff for the provision of 5-Megabit Metro Ethernet Services. In the January 30, Order, the ALJ recommended that BIT's refund claim for services, which had admittedly been provided since 2007, was barred by statute of limitations as untimely. Such claim was brought by BIT years after the contract had been entered into, the prices accepted, and the services performed. The doctrines of laches and estoppel also barred the claim.

In the Proposed Order before the Commission for this evening, the ALJ recommends that the PUC find that GTA did not have to file a tariff for the 5-Megabit Metro Ethernet Services.

A number of hearings on these issues were conducted with the parties, BIT, PDS, and GTA. Testimony was presented over three days. A major issue was whether the Metro Ethernet Transport Services constitute "intrastate" or "interstate" telecommunications. Most of the services sought by the government under the 2007 procurement were interstate, non-regulated services. In fact most of the services provided under the procurement were interstate services, non-regulated services. The ALJ has concluded that the Metro Ethernet services are in the nature of interstate services and not regulated intrastate services.

The Metro Ethernet Services were provided for the delivery of the voice-over internet protocol, video conference, and data. The government agencies are connected to each other through the GGWAN. The internet is provided through the GGWAN through GTA transport, which is where the Metro Ethernet Network is located. Under this system, there is both interstate and intrastate traffic; however a significant amount of the traffic is internet. The nature of the traffic that's transported over the network clearly involves the internet. The Metro Ethernet Network should be characterized as a special facility because more than the 10% of the traffic is interstate.

If at least the 10% is interstate, then the facility traffic is considered to be interstate. Many government of Guam agencies ordered access to the internet through the 5 Megabit Bandwidth from GTA. The internet was carried over the 5-Megabit Metro Ethernet Service. The System & Program Administrator for the Department of Administration, Benigno Camacho, testified that a study conducted showed that the government had "heavy usage" of the internet. Furthermore GTA more recently did prepare a study to determine usage. While issues were raised by BIT and PDS concerning the reliability of the study, the study indicated that most of the traffic transported was between the internet into the GGWAN through the Metro Ethernet Network.

There was a dispute between the parties as to whether the provider of the Metro Ethernet services was GTA Telecom or GTA Services. Since more than 10% of the traffic was interstate, it doesn't really matter whether the provider was GTA Telecom or GTA Services. GTA presented credible evidence that, when it examined the 2007 government procurement, it concluded that Metro Ethernet Services were "interstate" and should be provided out of the federal NECA tariff. The ALJ recommends that the Commission find that GTA Services was the provider. Furthermore, under local law, telecommunications services regulated by the PUC are those where communications services are offered between originating and terminating points in Guam. Traffic transmitted over the Metro

Ethernet Network largely does not originate and terminate in Guam. The network does not solely transmit intrastate telecommunications, but transfers internet communications which are interstate.

In addition, the Report of the PUC consultants, Georgetown, indicated that all of the services provided to the government included provision of access to the internet; internet traffic was routed through the GGWAN. Furthermore Georgetown indicated that internet traffic is considered interstate if it constitutes more than 10% of the total amount of traffic. Under FCC standards, a special access facility used for more than 10% interstate is to be classified as interstate for "jurisdictional separations." The ALJ recommends that the PUC adopt the FCC standards. Here neither BIT nor the government ever questioned the nature of the traffic until after the contract had been completed.

The ALJ asked the Commission to find that it lacks jurisdiction over the 5-Megabit Metro Ethernet Services, as such services are non-regulated and interstate. The 10% requirement clearly was met, meaning that the Metro Ethernet Services should be provided under the Federal NECA tariff. The ALJ recommends that the PUC adopt his conclusion that GTA was not required to file a local tariff for the 5-Megabit Metro Ethernet Services; he also asked that the Commission adopt the January 30, 2012 Order indicating that BIT's claims for a refund are barred. The expenses of this proceeding should be shared equally by the three entities, BIT, GTA, and PDS.

The Chairman then proceeded to give the parties an opportunity to respond to the ALJ Report. The President of PDS, John Day, stated that the whole 10% argument is dismissed in that there never was a traffic study. The August 2011 GTA Traffic study included circuits that weren't even a part of the docket. While there may be some interstate traffic, the percentage is inconclusive because no one has looked at it. It is the government of Guam who is entitled to indicate whether the circuits were intrastate or interstate. PDS believes that it would be a very bad precedent by the Commission to say that it doesn't have jurisdiction in this case.

Ms. Elyze Iriarte, Legal Counsel of GTA, proceeded to comment on behalf of GTA. She indicated that the issue raised by PDS related to the nature of the evidence and the traffic study. However since the government did not raise this issue for a long time, GTA was unable to produce an accurate traffic study when the contract was ongoing. That evidence cannot be recreated from this point, as to what happened in 2007 and 2008. The best GTA could do was to take a photograph of what happened between 2010 and 2011. During that period, 60% of the traffic was interstate. GTA concurs with the findings and conclusions of the ALJ both in the January 30 Order and the most recent Order. The PUC should adopt those orders.

Commissioner Pangelinan asked Mr. Day whether it's possible to reconstruct or to produce a study about the percentage of traffic that was interstate versus intrastate. Mr. Day stated that he didn't. However the GTA study was discredited. There were 97 DSL circuits that GTA included in its study which are not even a part of this Docket. There were 45 Metro Ethernet circuits, and probably only 15 to 18 circuits that were specifically 5-Megabit circuits that are a part of this docket. PDS proved that the pipe over which GTA was going out to the internet was only 12 megabits; that's the maximum capacity of the pipe that went from DOA to the Internet. It's physically impossible to put out 66 megabits of internet over a 12-megabit pipe.

Maria Cenzone, Legal Counsel for BIT, responded to GTA's comments. She stated that she doesn't even get to the issue of whether 10% of the traffic was interstate; it is the customer, the government, that has the right to determine whether the traffic is interstate or intrastate. That was never done. GTA evidence cannot recreate what happened during the relevant time period. GTA should have asked the government whether the service was interstate or intrastate. However, Legal Counsel stated that the ALJ found that the government never determined whether the usage was interstate or intrastate. Nothing in the record indicated that the government had ever made that type of determination. BIT itself never specifically indicated whether the services would be interstate or intrastate; however the bid did provide that there was a substantial amount of internet usage.

In response to the Chairman's question, Mr. Day agreed that the 10% hurdle of interstate tariff is a low hurdle to meet; however it should be based upon a traffic study. FCC rules are clear that in this case, the government is the one that establishes what the nature of the traffic is. PDS doesn't think that the 10% even applies in this case because the customer is the government. The government made it clear that these were intrastate or local loops. The circuits ran between 11 government agencies to DOA data. GTA had no paperwork that documented the percentage usage of the services. GTA couldn't produce the required paperwork.

Commissioner McDonald asked whether there are any documents that the government could provide stating that the services requested were intrastate. Ms. Cenzone replied that the evidence is in the bid documents. They included detailed diagrams indicating that the circuits terminated at DOA. Eleven local government agencies required internet services. The evidence is that the majority of the services that were to be provided were all intrastate.

Commissioner Pangelinan asked Counsel whether there are regulated entities that provide services over lines that originally terminate and that also provide internet traffic over the same lines? In other words, do some regulated entities

provide both types of services. Counsel stated that local telephone services were regulated; generally internet appears to be a different type of service in Federal Communications decisions. Long distance is interstate. The Chairman asked whether the government was still using the services with GTA at this time. Ms. Iriarte of GTA replied that it was. The Chairman asked whether the government was measuring its usage at this time. Ms. Cenyon of BIT indicated that it was not.

Commissioner McDonald asked Counsel whether the government's damages are barred because of the statute of limitations in their entirety, or just a few years back. The ALJ indicated that the claim arose when the bid was issued. So, all of the government's claims under the contract would be barred. There is no further claim for refund. Commissioner Pangelinan asked what information Georgetown was provided with, such as the bid documents. Counsel indicated that Georgetown was provided with such documents. Georgetown was given the pleadings of the parties, memoranda, and the bid documents. The ALJ relied heavily upon the GCG Report and accepted a lot of Georgetown's conclusion and determination that all of these services were intertwined.

Mr. Day of PDS stated his belief that GCG was limited by the ALJ in the scope of its response. It did not look at GTA's books. The ALJ indicated that the GCG report did conclude that the services were interstate. The Chairman indicated to PDS that the Commission often limits GCG Reports; previously PDS had asked the PUC to use Georgetown more, as it has done in this case. The Chairman indicated that he was comfortable with the GCG results at this point.

Commissioner McDonald asked GTA whether the government agreed that it was internet service or interstate service in the original bid. Ms. Iriarte indicated that the bid documents stated at several points that the government was asking for internet. The government would need internet going into the GGWAN such that the services would be interstate in nature. Upon motion duly made, seconded and unanimously carried, the Commissioners approved the Order proposed by the ALJ, and made *Attachment "B"* hereto.

3. PUC Website

The Chairman announced that the next item for consideration was the PUC Website. Administrator Palomo indicated that she had met with one of the proposed providers, but was waiting to schedule a meeting with the other provider. The Chairman indicated that the Commission would wait for the Administrator to meet with the other provider and then have a further report concerning procurement.

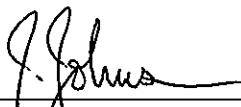
4. Administrative Matters

Counsel indicated that he was awaiting a further evaluation before a determination could be made on the PUC procurement for telecommunications consulting services. Counsel also discussed that there was a letter from Senator Vicente Pangelinan requesting an additional hearing at the Legislature on the GPA Rate Case. Counsel indicated that the three statutorily required public hearings had already been held. There was good attendance at the hearings and a broad presentation of public input. Commissioner Perez asked whether proper notices for the hearings were sent out on time. Counsel indicated that they had been. Commissioner Perez further confirmed from Counsel that the hearings were interactive and showed an increased public awareness. Many people had a full opportunity to present their issues. Another public hearing would not necessarily add to that at this point.

Commissioner Perez indicated that she believes that the hearings were properly conducted and that the responses had encouraged the Senators to go back into the community to obtain further comment. Commissioner Pangelinan indicated that the holding of such additional hearing could be political, but that a decision not to hold an additional hearing might open the process to criticism and complaints. Commissioner Pangelinan clarified that there are only three hearings required in the Ratepayer Bill of Rights. The Chairman indicated that he has a concern with the proposed venue for an additional hearing, the Legislature. The holding of a hearing there could make the process political. Commissioner Perez concurred that the PUC is supposed to be independent.

Then a discussion of the pending GPA rate case ensued. The Commissioners discussed a response to Senator Pangelinan's letter. The Commission determined not to hold an additional hearing. Upon motion duly made, seconded and unanimously carried, the Commissioners agreed not to hold an additional hearing and requested that Counsel respond to Senator Pangelinan's request.

There being no further business, the Commissioners moved to adjourn the meeting.



Jeffrey C. Johnson
Chairman

**BEFORE THE GUAM PUBLIC UTILITIES COMMISSION
SPECIAL MEETING
SUITE 202, GCIC BUILDING
414 W. SOLEDAD AVE. HAGATNA, GUAM
7:00 p.m. April 11, 2012**

Agenda

- 1. Approval of Minutes of March 26, 2012.**
- 2. GTA Teleguam Holdings LLC**
 - **GTA Docket 11-06, BIT Petition Re: GTA Metro Ethernet Services, ALJ Report, Proposed Order**
- 3. PUC Website**
 - **Procurement of Small Purchase for Website Services; continued Counsel Report and Commission action**
- 4. Administrative Matters**
 - **Counsel Report on Status re: RFP 11-02 (PUC Consulting Services regarding Telecommunications); Commission Action**
- 5. Other Business**

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN THE MATTER OF:

GTA Docket 11-06

THE PETITION OF THE
GOVERNMENT OF GUAM BUREAU
OF INFORMATION TECHNOLOGY
RE: METRO ETHERNET SERVICES
PROVIDED BY GTA

ORDER



INTRODUCTION

1. This matter comes before the Administrative Law Judge ("ALJ") of the Guam Public Utilities Commission ("GPUC") upon the Petition of the Bureau of Information Technology ("BIT"), Office of the Governor of Guam, against GTA TeleGuam Holdings LLC ("GTA").

BACKGROUND

2. BIT filed its Petition herein on June 13, 2011; it indicated that GTA had been awarded a competitive bid for the provision of Metro Ethernet Services to the Government of Guam in October of 2007 in procurement GSA032-07. BIT alleges that GTA provided Metro Ethernet services to the Government of Guam without filing an appropriate tariff relating to such "telecommunications services", in violation of 12 GCA § 12106(c).
3. BIT further contends that it is entitled "an appropriate refund" in accordance with a previous GPUC Order in Docket 08-09.
4. At a Preliminary Conference on July 6, 2011, Pacific Data Systems, Inc. ("PDS"), a competitive local exchange carrier, was permitted to intervene in the proceedings.
5. On August 16, 2011, a hearing was conducted by the ALJ on issues relating to jurisdiction, including whether the Metro Ethernet services provided by GTA to the Government of Guam were "interstate" or "intrastate" telecommunications services, and whether such services were required to be filed as a tariff under local law.

6. Subsequently, the parties addressed issues concerning certain defenses raised by GTA to this proceeding, such as laches, statute of limitations, and waiver/estoppel.
7. On January 30, 2012, the ALJ issued a Preliminary Order which denied that portion of BIT's Petition that requested a refund. The ALJ further ruled that BIT is authorized to request a determination as to whether GTA is required, on a going forward basis, to file a tariff for its provision of 5 MB Metro Ethernet Services. Said Order is attached hereto as Exhibit "A" and incorporated herein by reference
8. Thereafter, by Motion dated March 21, 2012, the Government of Guam requested to intervene in this Docket. The Government of Guam was granted a **limited** right to intervene to protect its interests concerning the disclosure of certain information. However, it was determined that BIT could adequately present issues relative to the alleged need for GTA to file, on a going forward basis, a tariff for its provision of 5MB Metro Ethernet Services.
9. On March 28, 2012, and on April 4 and 5, 2012, hearings were conducted by the ALJ, at which hearings all parties presented witness testimony and exhibits. During the hearing on March 28, the ALJ indicated that the "record" in this Docket would include all documents and exhibits previously filed of record by the parties. The record shall also include all testimony presented during the hearings and exhibits submitted into evidence, as well as all recordings of the proceedings in this Docket.
10. In the ALJ Order issued on January 30, 2012, four issues were identified for determination at hearing: (a) Is GTA Services LLC the provider of the 5Mb Metro Ethernet Services, or is the provider GTA Telecom LLC? (b) Are the Metro Ethernet Services used to transport interstate or intrastate traffic? (c) Is at least 10% of the traffic transported by the Metro Ethernet Services "interstate," meaning that such services should be obtained through the NECA tariff? (d) If under 10% of the Metro Ethernet Services traffic is interstate, should the Metro Ethernet Services be provided through the local tariff rate elements or as an ICB?
11. The ALJ now issues his Findings of Fact and Conclusions of Law and makes his recommendations to the GPUC.

FINDINGS OF FACT

The Parties

12. BIT is the petitioner herein and alleges that GTA is required to file a tariff for the provision of 5Mb Metro Ethernet Services; in accordance with Executive Order 2005-25, BIT was established as an entity under the Office of the Governor to work for the improvement of communications, data processing, and information technology within the Executive Branch. BIT has "managing authority" over all "wide area networks" within the Executive Branch.
13. The Government of Guam is that governmental entity vested with certain powers pursuant to the Organic Act of Guam. The Government of Guam was allowed to intervene for limited purposes herein. Both it and BIT, during the relevant time period, were customers of Respondent TeleGuam.
14. TeleGuam Holdings LLC ["GTA"] is the Respondent and that entity which was awarded a bid to provide Long Distance Telecommunication, Internet, Bandwidth, Active Directory, Microsoft Exchange, and Monitoring Services by the Government of Guam in 2007. The services required to be provided under the bid include the provision of new 5MB metro Ethernet services. GTA is a holding company for certain affiliates through which it operates, including GTA Telecom LLC and GTA Services LLC. GTA Telecom is an incumbent local exchange carrier ("ILEC") operating within the Territory of Guam, and which is licensed to provide intrastate facilities based and resold local exchange telecommunications services in Guam.
15. PDS is a competitive local exchange carrier ("CLEC") that provides telecommunications services, and other communications services in Guam.

Government of Guam Procurement: GSA-IFB-032-07

16. On September 6, 2007, the General Services Agency, Government of Guam ("GSA") issued Bid Invitation No. GSA-032-07 for Long Distance Telecommunication, Internet, Bandwidth, Active Directory, Microsoft Exchange and Monitoring Services (the "Bid").
17. Item 3.1 of the IFB procured 512K bandwidth internet services and T1 bandwidth services.
18. Item 3.1 imposed a number of special requirements, including:

- a. "All Internet services must be connected to Government of Guam Wide Area Network (GGWAN) via Department of Administration Data Processing. No direct internet services will be connected at the agency unless approved in writing by BIT." Ex. 1, p. 5.
 - b. "Bidder must provide the bandwidth requested by an agency. If the agency procures T1 bandwidth, it must be provided through the GGWAN to the Internet." Ex. 1, p. 6.
 19. Item 3.1 establishes that an agency which procured T1 bandwidth was to receive such services over the GGWAN.
 20. The GGWAN connects various government users to each other through the Department of Administration (DOA) Data Center.
 21. Item 5.1 procured an upgrade of the existing T1 bandwidth circuit to 5Mb bandwidth. At the time, the existing T1 circuit was used to transport Internet.
 22. Item 6.1 procured "New 5Mb Bandwidth Services."
 23. The Government did not specify in the Invitation for Bid that the 5Mb bandwidth would connect solely local point-to-point traffic. Instead, the Government gave several indications that it expected the traffic to include Internet access, such as the requirements in Item 3.1 to provide Internet over the existing GGWAN T1 circuit, which was to be upgraded to 5Mb.
 24. As a further example, among their special requirements, Items 5.1 and 6.1 stated: Bidder will be required to prioritize traffic and QOS bandwidth in the following order unless otherwise instructed by GovGuam IT personnel:
 1. VOIP
 2. Video Conference - Min: 384K
 3. Data
-
25. VOIP stands for "Voice Over Internet Protocol," and by definition, may utilize the internet.
 26. Video Conference may also be utilized over the internet.

27. Items 5.1 and 6.1 also required the bidder to have a Service Provider Identification Number (SPIN) as required by USAC.
28. On September 20, 2007, GSA issued answers to questions posed by potential bidders to GSA-032-07. In response to the question as to the list of entities that subscribe to T1 circuits, GSA provided a list entitled "**Agency Listing T1 Local Loop Customers.**" Under that list, GSA identified three agencies requiring Internet: Public Health, Revenue & Taxation, and GPD. Ex. 24, p. 5.
29. GTA submitted a bid as "Teleguam Holdings, LLC." The bid was for "Long Distance Telecommunication Internet and Bandwidth." It is not disputed that many of the services requested in the bid, such as long distance telecommunications and Internet, are either "interstate" or non-regulated services.
30. Under Item 3.1 of its bid, GTA offered to provide "Internet connectivity to the Government of Guam Wide Area Network (GGWAN) via the Department of Administration Data Processing. No direct services will be connected at the agency unless approved in writing by BIT." Also, GTA stated that "Bandwidth requested by an agency will be provided through GGWAN to the internet." Ex. 2, pp. 11, 12.
31. Under Items 5.1 and 6.1 of its bid, GTA offered to install, provision, manage and maintain a CISCO router and Ethernet transport services, otherwise known as Metro Ethernet.
32. GTA's bid contained an illustration of the proposed network services. See Ex. 2, pp. 26, 27. Benigno Camacho, the systems and programming administrator for DOA, confirmed the illustration as an accurate representation of GTA's network. Mr. Camacho testified that the agencies shown on the left hand of the illustration were connected to each other through the GGWAN. He further testified that Internet is provided to the GGWAN through a cloud marked as "GTA Transport," where the Metro Ethernet network is located.
33. To satisfy the requirement of having a USAC SPIN, GTA offered services under SPIN #143002715. SPIN #143002715 is assigned to a subsidiary of Teleguam, GTA Telecom, LLC.

Acceptance of GTA's Bid

34. In evaluating the bids submitted by GTA and IT&E, Benigno Camacho found

that IT&E did not meet the specifications of Item 3.1 because it did not provide a primary and alternate circuit of Internet into the GGWAN to withstand a major disaster. This also indicates that the Government intended Internet to be provided to the GGWAN over the Metro Ethernet network.

35. The Government found that GTA met all specifications for Items 3.1, 5.1, and 6.1. Exs. 3, 26.
36. On October 4, 2007, the Government awarded TeleGuam Holdings LLC the contract for item numbers 1.1; 2.1; 3.1 a,b,c,d, &e; 4.1 a,b,c,d &e; 5.1 and 6.1. TeleGuam, not GTA Telecom, was the bidder to whom the contract was awarded.
37. By accepting GTA's bid, the Government accepted GTA's provision and understanding that Internet connectivity would go over the GGWAN through the Metro Ethernet network.
38. Until the filing of its Petition, nearly four years after GTA initiated services to the Government, the Government never questioned, complained of, or required GTA to obtain a local tariff for the 5Mb Metro Ethernet services.
39. Until the filing of its Petition, nearly four years after GTA initiated services to the Government, the Government never questioned whether the SPIN identified in GTA's bid, as belonging to Telecom, also belonged to the bidder, Teleguam.
40. During the course of the performance of its services from 2007 and continuing over the next three years, the Government never notified GTA that it was in default on any of its services.

Internet Usage

41. Internet access is required for the Government to operate. Ex. 26, p. 4. Among other uses, government employees utilize the Internet for work-related email and research, as well as personal uses such as personal email and music streaming.
42. In only a few instances, the Government imposes restrictions on websites, such as pornographic sites. Otherwise, the Government never blocked access from the GGWAN to the Internet.
43. BIT's current Chief Information Officer, Ed Cruz, and BIT's prior Chief Information Officer, Jim Lacson, both testified that Internet was carried on the

Metro Ethernet network. Cruz indicated that VOIP service and video conferencing could be over the internet. Lacson testified that "Internet Traffic flowed on the [GGWAN] network."

44. Benigno Camacho, the drafter of the technical aspects of GSA-032-07, testified that the Metro Ethernet network carried Internet. He also testified that a user who wished to access the Internet did so through the Metro Ethernet network, depicted as the GTA Transport cloud on Exhibit 2, page 26.
45. As testified to by GTA's Sales Director, Jennifer Sgambelluri, since the services under GSA-032-07 began, the following agencies ordered access to the Internet through the 5 Mb bandwidth: Guam Environmental Protection Agency, the Governor's office, Department of Labor, Department of Public Works, Department of Youth Affairs, Customs & Quarantine Department, Department of Land Management (DLM), Department of Mental Health, General Services Agency, and DOA-Data.
46. For example, the Governor's Office, which oversees the Bureau of Information Technology (BIT), was the consignee of Purchase Orders seeking "5 Mb Internet Connectivity" under Items 5.1 and 6.1. Ex. 25.
47. Sgambelluri understood the Government's bid to require that Internet would be carried over the 5Mb, including VOIP and Video Conferencing. All internet services would be connected to the GGWAN. According to her, the Metro Ethernet provides access for all Government agencies into the GGWAN to provide data and access to the Internet. Connectivity is not limited to "point to point."
48. Between 2009 and 2010, the Government engaged a third party vendor to conduct a study of internet traffic for the Government under a federal grant. Benigno Camacho testified that the study showed that the Government had "heavy usage" of the Internet.
49. During the time that GTA provided the Metro Ethernet services under GSA-032-07, GTA allowed the Government to monitor bandwidth usage through an access portal featuring a daily, monthly, and yearly timeframe.
50. A number of government agencies, such as DLM, DOA-Data, GPD, Department of Homeland Security, and the Department of Public Health used the access portals. Mr. Camacho also accessed the portals, and never required GTA to clarify the information supplied therein. The Government did not require any

further reports to monitor bandwidth usage on the Metro Ethernet network, and never complained of not having the ability to monitor bandwidth usage.

51. The Government never measured internet usage on the Metro Ethernet network between 2007 and 2010. The Government also never certified their percentage interstate usage (PIU) during the performance of the contract, conducted their own traffic study, or required GTA to conduct a traffic study.
52. GTA never blocked Internet access over the Metro Ethernet network into the GGWAN. It was only when BIT filed the instant Petition nearly four years after the contract was awarded that the parties have looked into the extent to which the Metro Ethernet network carried Internet traffic.
53. Due to the passage of time, it is not possible to recover or recreate Internet usage data from 2007 to 2010.
54. Upon the filing of this matter, GTA conducted a study to determine bandwidth going from the Internet into the DOA network, and then from DOA over the Metro Ethernet network to the government users. *See* Ex. 15.
55. The study captured internet usage from July 12, 2011, until August 12, 2011, and from August 2010 until July 2011.
56. Between July 12 and August 12, 2011, an average amount of 19.58 Mb of traffic per day was transported between the Internet into the GGWAN through the Metro Ethernet network. Between the same period, an average of 11.66 Mb of traffic per day was transported over the GGWAN network.
57. Between August 12, 2010, and August 12, 2011, an average amount of 18.79 Mb of traffic per day was transported between the Internet into the GGWAN through the Metro Ethernet network. Between the same period, an average of 9.77 Mb of traffic per day was transported over the GGWAN network.
58. It is logical that the traffic going into the GGWAN from the Internet, which was not restricted either by the Government or GTA, went beyond DOA, over the Metro Ethernet network and into the various agencies.
59. However, the testimony of David Duenas, GTA Vice President of Network Operations, raised possible issues concerning the reliability of the traffic data, as the study charts include both DSL and Metro Ethernet circuits, and the amount of traffic seemed to exceed the “pipe” capacity of the network. To the present

time, GTA continues to provide Internet access into the GGWAN over the Metro Ethernet network.

The "Service Provider" of 5Mb Metro Ethernet Services

60. The Parties presented a considerable amount of evidence concerning which entity within GTA was the provider of the 5Mb Metro Ethernet Services to the Government of Guam.
61. As required by the Government of Guam's solicitation, GTA identified the service provider under the Proposal as "GTA Service Provider Information by SPIN #143002715."
62. GTA Telecom LLC, or Telecom, is the service provider identified with SPIN# 143002715.
63. GTA did not provide any documentary evidence to establish that GTA Services provided the 5Mb Metro Ethernet Services to the Government of Guam.
64. BIT and PDS presented various Exhibits which sought to establish that GTA Telecom was the applicable Service provider. GTA was unable to produce any "Access Service Requests" ("ASR) or "Local Service Requests" establishing that GTA Services ordered the Metro Ethernet services from GTA Telecom LLC. ASR forms include specification by the carrier of the percentage of interstate and local usage.
65. GTA submits that there is no mandate in federal law that it use ASRs. GTA indicated that it likely had an ASR, but that such ASR was lost or misplaced.
66. PDS presented other billing information establishing that GTA Telecom LLC certified in a form to the federal Rural Health Care Division that it was the provider of the 5Mb Metro Ethernet service to the Government of Guam Department of Public Health and Social Services, and specifically referred to the SPIN number assigned to GTA Telecom LLC.
67. GTA did file with the PUC a tariff for Metro Ethernet Service on September 29, 2007, which tariff was approved by the PUC on November 2, 2007. Said tariff established an "Individual Case Basis" filing requirement for Metro Ethernet Services. However, no tariff requirement was specified for 5Mb Metro Ethernet Services. Tariff requirements were set forth for 10Mbps and upward. Eric Votaw, Vice President of Regulatory for GTA, testified that the tariff for Metro

Ethernet Service was filed in anticipation of providing such service to the Bank of Guam, but that GTA later learned that the BOG service would be interstate in character.

68. GTA Services is a subsidiary of Teleguam. GTA Services is a deregulated entity, meaning that it does not fall under the PUC's jurisdiction to set pricing or tariff conditions.
69. Teleguam Holdings, LLC is the holding company of its subsidiaries, Pulse Mobile, LLC, GTA Services LLC, and GTA Telecom LLC. Its various subsidiaries hold different licenses allowing the parent, Teleguam, to provide a variety of services such as wireless (Pulse Mobile), long distance and internet data services (GTA Services), and residential phone services (GTA Telecom).
70. GTA employees Leilani Castro, John Kim, and Roland Certeza all testified they worked at "GTA," and were unaware of the differences between the services provided by the various GTA subsidiaries.
71. Eric Votaw testified that when GTA was exploring the cost of its bid, its sales team approached him and inquired whether any local or federal tariffs applied. Roland Certeza, who was Sales Director at the time of the Government Bid, testified that he provided a "NECA" price workup from Eric Votaw for the response to the Government Bid. "NECA" is the National Exchange Carrier Association, Inc., and it provides Federal Communications Commission Tariffs for interstate services, including Metro Ethernet Services. See GTA's Exhibit D, attached to its Reply Comments filed herein on June 28, 2011.
72. Because GTA understood that the Metro Ethernet network would carry Internet, GTA's regulatory department concluded that it did not need to issue a local tariff under the purview of the PUC. GTA believed the applicable tariff was under NECA, as there was a NECA tariff on file with the FCC authorizing Ethernet services.
73. GTA states that it concluded that Telecom, as a SPIN holder, could provide the Metro Ethernet services to GTA Services, which would then resell the services to the Government at a price marked up from the NECA rate.
74. Eric Votaw testified that GTA's intent was to do an intracompany sale of Metro Ethernet services, then a resell from GTA Services to the Government. GTA alleges that this arrangement is reflected in the pricing of the 5Mb Metro Ethernet services. GTA bid the services at \$800 per month, which included a

markup from the NECA tariff rate of approximately \$500. If GTA Telecom were the provider, it would be required to charge the Government no more than \$500 per month. Once Telecom sold the services to GTA Services, GTA Services became the customer and could resell with a markup.

75. The bills provided to the Government were under the header "GTA Teleguam." The bills consolidated all services provided to the Government, including long distance, managed router services, as well as Metro Ethernet services. This reflects GTA's practice to consolidate services to customers under the "GTA" umbrella.
76. As Jim Lacson testified, the Government understood the provider to be "GTA," and never questioned GTA as to which of GTA entities were providing any of the specific services provided under GSA-032-07.
77. Carriers such as GTA are required to pay into the Universal Service Fund (USF) for interstate services. While a Universal Service Fund (USF) charge to a customer may indicate an understanding that such services are interstate, a carrier is not required to pass on a USF charge to a customer. 45 CFR § 54712. GTA did not pass on the USF charges to the Government and was not required to do so.

CONCLUSIONS OF LAW

78. The PUC has jurisdiction to determine the just and reasonable rates, charges, classifications, terms and conditions for any telecommunications service. 12 G.C.A. § 12104(c)(2).
79. 12 G.C.A. § 12106, **Tariffs of Rates and Charges**, provides in pertinent part:
 - (a) Unless otherwise ordered by the Commission, all telecommunications companies, except commercial mobile service providers, shall file a tariff indicating the rates and charges and the classifications, terms, and conditions of its telecommunications services. The tariff shall be in such form, contain such other information, and be made available to the public in such manner as the Commission may require by rule or order.
80. A "telecommunications service" means the offering of telecommunications, between originating and terminating points in Guam, for a fee directly to the general public, or to such classes of users as to be effectively available directly to

the public, regardless of facilities used." 12 G.C.A. § 12102(i).

The Services are Interstate

81. Initially, the nature of the Government Bid itself, GSA-032-07, suggests that many of the services sought by the government thereunder were non-regulated and/or interstate services: long distance and long distance fax, internet services and video conference bandwidth.
82. That the Invitation for Bids sought distinct services, i.e. Internet Services in Item 3.1 and Bandwidth Improvements in Item Nos. 5.1(Upgrade of existing T1 circuit to the 5Mb Bandwidth) and 6.1(New 5Mb Bandwidth Services) does not suggest that the 5Mb Metro Ethernet Services were "intrastate."
83. The Invitation for Bid contains several references to the requirements to route Internet traffic through the GGWAN. Norman Okamura, a University of Hawaii Consultant who testified for PDS, and the University of Hawaii, have recognized that internet capacity for the sites that are connected through the GGWAN are using the Internet Access that is originating from the DOE Data Center. University of Hawaii, Assessment of Telecommunication Services in the Government of Guam, p. 17, f.n. 31, June 2011.
84. Regardless of whether the Metro Ethernet Transport Service connects sites or physical agency locations in Guam, it does provide for the transmission of Internet traffic which does not originate and terminate in Guam. The Metro Ethernet does not solely transmit intrastate telecommunications, but also transfers internet communications which are interstate. While some connections may be purely intranet, others are interstate.
85. BIT's arguments address the contention that the Metro Ethernet Network consists of point to point locations in Guam and local circuits; however, the pertinent inquiry is the type of traffic on the Network. The traffic on the Network does consist of Internet Communications and interstate telecommunications.
86. 12 GCA §12106(c) prohibits a telecommunications company from providing or reselling any telecommunications service unless tariffs relating to that telecommunications service have been filed and the notice period has expired. However, a "telecommunications service" means the offering of telecommunications, between originating and terminating points in Guam. 12 G.C.A. § 12102(i).

87. The ALJ adopts the conclusion of the Georgetown Consulting Group in its October 6, 2011 Report, that there is an interrelationship between the GGWAN 5Mb circuits, Metro Ethernet services, and DSL services. All appear to be used to provide access to the Internet. Internet traffic is routed through the GGWAN. Contrary to the statement of the University of Hawaii that these circuits are intrastate services, they are used at least partially to provide access to the Internet.
 88. As determined by the FCC, Internet traffic is considered interstate if it constitutes more than ten percent of the total amount of traffic. *See* Georgetown Consulting Group, Inc.'s (GCG) Oct. 6, 2011 Letter, p. 5.
 89. The ALJ adopts the portion of GCG's October 6, 2011 Letter stating: By a Decision and Order released July 20, 1989, the FCC concluded that any special access facility used for more than 10% interstate was to be classified as interstate for jurisdictional separations. A traffic study was not generally required. Instead, customers were allowed to certify their percentage of interstate usage (PIU). LECs were to require verification only when the customer representation appeared questionable and verification was to be limited to general information on system design and functions whenever possible.
 90. A customer generally has the right to determine the jurisdiction of the traffic over its links. However, the right to determine jurisdiction is not absolute. *See* GCG's Mar. 14, 2012 Letter, p. 3. A carrier has the right to challenge the customer's claims. *Id.* John Day, President of PDS, testified that if there is a disagreement between a customer and a carrier as to whether service is intrastate or interstate, the matter must "go to the regulatory authority to determine whether the service is local or interstate."
 91. BIT's position is that the Government alone determines the nature of the traffic over the Metro Ethernet network. In response to questions from the ALJ, it appears that the Government never made any specific determination as to the nature of the traffic over the Metro Ethernet Network.
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92. BIT's position must be viewed in light of several facts. First, the Government never advised GTA to restrict the traffic over the Metro Ethernet network to strictly local traffic. Second, the Government never specified in its bid requirements that such traffic would only be local point-to-point. Third, the Government indicated that Internet would be transported over the Metro Ethernet network. Fourth, the Government never certified its PIU during the

performance of the contract, conducted its own traffic study, or required GTA to conduct a traffic study. Fifth, the Government (and BIT) did not distinguish between local or interstate traffic going across the Metro Ethernet network. Sixth and most important, the Government admits that Internet was transported over the Metro Ethernet network.

93. Therefore, while a customer such as the Government has the right to determine the nature and jurisdiction of the traffic over its links, the conclusion of this evidence and other evidence presented to the PUC is that the Government never exercised the right to determine the nature of the traffic, and instead allowed both intrastate and interstate traffic to be transported over the Metro Ethernet network.
94. Even if the Government is considered the customer of the Metro Ethernet Services, the Government has not shown that the nature of the traffic over the Metro Ethernet network remained strictly local, nor can it make such a showing as the passage of time prohibits the recovery and recreation of such data.
95. David Duenas' study constitutes the most reliable, if not the only, evidence attempting to recreate the quality of the traffic over the Metro Ethernet network during the initial three years of GTA's performance under GSA-032-07. Ex. 15. That study, which included results from the last two months of the three year term for services, indicates that in a one-year span, at least 68% of the traffic over the Metro Ethernet network and the DSL lines constituted Internet traffic. Because Internet was not blocked over the Metro Ethernet network, it is logical (and cannot be disproved otherwise) that more than ten percent, at least, of the traffic was Internet. Although some issues were raised as to the reliability of the study, it is the only measure available concerning the nature of the traffic over the Metro Ethernet network.
96. The ALJ accepts the testimony of Benigno Camacho that Internet use is critical for the Government, and has increased greatly from 2006 to present. The totality of the evidence showed that there is a substantial amount of Internet traffic.
97. The ALJ adopts the position of GCG that if a government user used the Metro Ethernet network to access the internet, the end point of the call would not be DOA, but rather would be a point on the internet, deeming it interstate.
98. As there has been no evidence that internet traffic was at any time blocked on the Metro Ethernet network, and that Internet traffic did flow over the Metro Ethernet traffic, the traffic over the Metro Ethernet network necessarily

constitutes interstate traffic. Because government agencies had unrestricted access to the Internet over the Metro Ethernet network, and because such access is critical to the Government's operations, the Government more likely than not transported more than ten percent of internet traffic over the Metro Ethernet network. This deems the traffic to be interstate.

99. The PUC therefore lacks jurisdiction over the provided interstate services. The 5Mb Metro Ethernet Services are interstate services, and GTA need not file a local tariff with the PUC for the provision of such services.
100. As the PUC does not have jurisdiction, it is not required to delve into the remaining issues. However, the ALJ now addresses those issues.

Who is the Provider of Services

101. A SPIN is used to collect contact, remittance, and payment information for service providers that receive support from any of the federal Universal Service Fund programs. GCG's Mar. 14, 2012 Letter, p. 2.
102. The ALJ agrees with GCG that a SPIN identifies the entity which will act as the point of contact with USAC for remittance and payment of funds. GCG's Mar. 14, 2012 Letter, p. 2.
103. The ALJ agrees with GCG that, invoices for the Metro Ethernet services which were prepared and signed by GTA Telecom as the carrier and billing party for the purposes of seeking federal subsidies for the 5Mb Metro Ethernet services, do not conclusively establish that GTA Telecom was the provider of such services. GCG's Mar. 14, 2012 Letter, p. 2.
104. The ALJ agrees with GCG that after GTA Telecom obtained its SPIN, there was no need to apply for a separate SPIN once GTA Services was formed. GCG's Mar. 14, 2012 Letter, p. 2.
105. Moreover, GTA's various entities and subsidiaries share the same management team and billing system, and their employees consider the various entities to fall under one "GTA" corporate umbrella. This has caused confusion for GTA, which has since sought the approval of the PUC in streamlining its business by essentially merging all operations and assets of the subsidiaries into Teleguam. *See* Docket No. 11-14. The PUC has found that GTA's streamlining of operations has been in good faith. *See* Docket No. 05-01. This confusion over which entity held the SPIN, and whether an affiliate entity could utilize the SPIN, is another

example of the unintentional consequence of GTA's corporate structure, which, under Docket No. 11-14, has since changed.

106. The ALJ agrees with GCG that GTA Telecom held SPIN 143002715, and was the point of contact for USAC purposes. However, this did not preclude Telecom's affiliate, GTA Services, from providing the Metro Ethernet services under the same SPIN. It appears that both Telecom and GTA Services operate with the same management and employees through the corporate "umbrella" of GTA.
107. GTA intended that GTA Services would be the provider of Metro Ethernet services, as indicated by its pricing structure. Both Eric Votaw and Roland Certeza testified that the 5Mb Metro Ethernet services were priced under the NECA tariff with a markup. The ALJ finds their testimony on this issue to be credible.
108. Further evidence that GTA Services was the provider of the Metro Ethernet services could be presented through an ASR. However, the inability of GTA to produce an ASR is not dispositive as to which entity was the Services Provider. GTA suggested that the ASR may have been lost or misplaced. Moreover, as GCG noted in its March 14, 2012 Letter, page 4, when employees and facilities are shared between affiliates, ASRs may not be required. The Alliance for Telecommunications Industry Solutions also does not mandate that ASRs be submitted. The ALJ agrees with GCG that an ASR, or lack thereof, is not determinative of the identity of the provider.
109. GTA has been audited by USAC, NECA, and third party auditors who have not found there to be any issue with GTA's, or any of its subsidiaries, provision of the Metro Ethernet services to the Government, or the internal handling thereof.
110. 45 CFR § 54.712 allows a carrier to pass on the USF to end users, but does not make such carryover of charges mandatory. The ALJ finds no significance in GTA's decision not to pass on USF charges to the Government.
111. Any USF issues which may arise out of the Metro Ethernet services are vested with USAC and beyond the jurisdiction of the PUC.
112. If GTA has failed to properly report to or pay fees to USAC, that is beyond the jurisdiction of the PUC to enforce. The PUC's jurisdiction does not extend to carriers' compliance with USAC.

Whether GTA Must File a Tariff or ICB

113. This issue is moot given the PUC's lack of jurisdiction.

RECOMMENDATIONS


114. In summary, the questions posed are answered as follows:

- a. Is GTA Services LLC the provider of the 5Mb Metro Ethernet Services, or is the provider GTA Telecom LLC? GTA's record keeping concerning which entity was the provider of Metro Ethernet Services was less than ideal. However, GTA has provided sufficient evidence that it was GTA's intent that GTA Services would be the provider of the Metro Ethernet services as reflected in the marked up price and the discussions between Votaw and Certeza. GTA provided evidence that the Metro Ethernet Services were provided out of the NECA tariff. Although BIT and PDS presented evidence from which they sought to infer that GTA Telecom was the provider, such evidence does not directly establish that Telecom was in fact the provider of such services. Accordingly, the ALJ finds that the provider was GTA Services. While there was evidence presented that GTA Telecom held a SPIN which would allow it to provide the Metro Ethernet services, GTA Telecom's affiliate, GTA Services, could use the SPIN and was not required to obtain its own SPIN.
- b. Are the Metro Ethernet Services used to transport interstate or intrastate traffic? The undisputed evidence shows that the Metro Ethernet network transported both local point-to-point, or intrastate, traffic and internet, or interstate, traffic.
- c. Is at least 10% of the traffic transported by the Metro Ethernet Services "interstate," meaning that such services should be obtained through the NECA tariff? It was also shown that approximately 68% of traffic over the Metro Ethernet network was interstate between 2010 and 2011, and that the Government has heavy usage of the Internet. It was also shown that very limited restrictions on Internet were placed by the Government. None of the parties dispute that the Metro Ethernet network carries interstate traffic. Accordingly, the only reasonable conclusion is that at least 10% of the traffic is interstate. In accordance with the GCG Report, even if GTA Telecom LLC were in fact the provider of the Metro Ethernet Services, the NECA tariff would still apply in light of the finding that at least 10% of the traffic is interstate. Thus, based upon the ALJ's determination that the Metro Ethernet Services are "interstate", the issue

of which entity was the provider of the services has little, if any significance, in the final resolution of the issues herein.

- d. If under 10% of the Metro Ethernet Services traffic is interstate, should the Metro Ethernet Services be provided through the local tariff rate elements or as an ICB? In light of the prior conclusion, this issue is moot.
115. In consideration of the above findings and conclusions, the ALJ recommends that the PUC issue Findings of Fact and Conclusions of Law as set forth above.
116. The PUC should find it has no jurisdiction over the interstate services provided by GTA Services. GTA should not be required to file a tariff with the PUC for its provision of the 5Mb Metro Ethernet Services.
117. Acceptance by the PUC of the recommendations herein that it lacks jurisdiction over GTA's provision of the 5Mb Metro Ethernet services also renders moot any claims by the BIT/Government of Guam for a refund (based upon the failure of GTA to have a tariff for such services). The PUC should also adopt the Order of the ALJ issued on January 30, 2012, and the findings therein, including the findings that BIT's claims for refund/damages are barred by lack of standing, statute of limitations, laches, and waiver.
118. The PUC should dismiss the BIT Petition.
119. The ALJ has prepared an Order for the Commissioners' consideration which would approve and adopt the Findings of Fact and Conclusions of Law contained herein.

Dated this 10th day of April, 2012.


FREDERICK J. HORECKY
Administrative Law Judge

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN THE MATTER OF:

GTA Docket 11-06

THE PETITION OF THE
GOVERNMENT OF GUAM BUREAU
OF INFORMATION TECHNOLOGY
RE: METRO ETHERNET SERVICES
PROVIDED BY GTA

ORDER

INTRODUCTION

1. This matter comes before the Administrative Law Judge ("ALJ") of the Guam Public Utilities Commission ("GPUC") upon the Petition of the Bureau of Information Technology ("BIT"), Office of the Governor of Guam, against GTA TeleGuam Holdings LLC ("GTA").

BACKGROUND

2. BIT filed its Petition herein on June 13, 2011; therein, it indicated that GTA had been awarded a competitive bid for the provision of Metro Ethernet Services to the Government of Guam in October of 2007. Therein, BIT alleges that GTA provided Metro Ethernet services to the Government of Guam without filing an appropriate tariff relating to such "telecommunications services", in violation of 12 GCA §12106(c).
3. BIT further contends that it is entitled "an appropriate refund" in accordance with a previous GPUC Order in Docket No. 08-09. The amount of the refund sought, or the specific charges for which refund is sought, has not been specified.
4. At a Preliminary Conference on July 6, 2011, Pacific Data Systems Inc., a competitive local exchange carrier, was permitted to intervene in the proceedings.
5. At said Conference, the ALJ indicated that the Reply Comments of GTA, filed on June 28, 2011, should be treated as preliminary procedural and jurisdictional objections to the PUC's ability to entertain this proceeding. Such objections would be considered first, and deemed to be a motion to dismiss this proceeding.
6. On August 16, 2011, a hearing was conducted by the ALJ on issues relating to jurisdiction, including whether the Metro Ethernet Services provided by GTA to the

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Government of Guam were "interstate" or "intrastate" telecommunications services, and whether such services were required to be filed as a tariff under local law.

7. Subsequently, the parties addressed issues concerning certain defenses raised by GTA to this proceeding, such as laches, statute of limitations, and waiver/estoppel.
8. After substantial briefing by the parties, on October 6, 2011, the PUC Consultant, the Georgetown Consulting Group Inc., provided its comments relative to the jurisdictional issues raised in this Docket. The parties herein were all given an opportunity to respond to the GCG Comments on jurisdiction and filed further comments herein.
9. The ALJ now issues his ruling concerning the preliminary objections raised by GTA.

FINDINGS OF FACT

10. The facts addressed herein regarding the preliminary/jurisdictional issues appear to be undisputed.
11. On or about September 6, 2007, the Government of Guam issued Invitation for Bids No. GSA032-07. There the Government of Guam sought certain long distance telecommunications services, including Internet, Bandwidth, etc. One of the services sought by the Government was "new" 5Mb Bandwidth Services, including installation and setup, and management of Network Services.
12. On September 27, 2007, GTA submitted a Response to the Bid of the Government of Guam for Long Distance Telecommunication, Internet and Bandwidth. GTA offered fixed prices for the new 5Mb Bandwidth Services, including \$800.00 monthly for 5Mb Bandwidth Services, onetime charges of \$1,500.00 for setup; Managed Network Services of \$188 monthly for 5Mb and onetime setup charges of \$495.
13. On September 28, 2007, the General Services Agency of the Government of Guam, **with the concurrence of the Chief Information Officer of BIT**, issued a finding that GTA met the specifications for all items; specifically, GTA was found to meet the bid requirements of Item 6.1 for new 5Mb Bandwidth Services.
14. On October 1, 2006, the GSA Buyer recommended that GTA be awarded the bid for New 5Mb Bandwidth services in accordance with the prices proposed by GTA, and

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the recommendation was approved by the Chief Procurement Officer of GSA. On October 2, 2007, GSA awarded the bid to GTA for a three-year contract agreeing to the provision of the new 5Mb Bandwith services at the prices offered by GTA in its response to the bid.

15. On October 4, 2007, GSA confirmed the bid award to GTA in writing.
16. At no time between the issuance of the bid award to GTA for the 5Mb Bandwith Services (also known as "Metro Ethernet Services") in October 2007 and the filing of the BIT Petition on June 13, 2011, did GSA or BIT request that GTA obtain a tariff for the 5Mb Metro Ethernet Services offered and provided by GTA under IFB GSA-032-07. Until June of 2011, BIT never requested that the PUC order GTA to file a tariff for the services provided under the IFB, or to pay BIT a refund. When BIT filed its Petition for refund in June of 2011, the contract between the government and GTA had already been performed by the parties. GTA had already provided the Metro Ethernet Services contemplated by Bid Invitation No. GSA-032-07; the term of the contract was from October 4, 2007 until on or about October 3, 2010.
17. The BIT Petition was filed in this case approximately three years and nine months after the contract was entered into and eight months after the contract between the government and GTA expired. Under the Contract, GTA provided the Metro Ethernet services to the government specified in the IFB.

CONCLUSIONS OF LAW

18. Although this is an administrative proceeding, the resolution of issues herein should be guided by applicable legal standards for review of complaints/petitions in judicial proceedings. Various rules in judicial proceedings allow for disposition of jurisdictional issues or other affirmative defenses by motion. Under Guam Rule of Civil Procedure (GRCP) 12 (b) (6), a party such as GTA may move to dismiss a petition for failure to state a claim upon which relief can be granted. See Taitano v. Calvo Finance Corp., 2009 Guam 9 at ¶[6]; First Hawaiian Bank v. Manley, 2007 Guam 2 at ¶[9]. Also, "summary judgment" may be granted pursuant to GRCP 56 where there is no genuine issue as to any material fact. Guam Yun Shan Enter., Inc. v. Shenzhen Dev. Bank Ltd., 1998 Guam 21 at ¶4.
19. Certain jurisdictional and/or affirmative defenses are appropriately decided by motion herein. The basic facts, aside from issues concerning whether the 5Mb Services provided hereunder should be tariffed through local or federal tariff, are undisputed. Pursuant to the facts alleged in the BIT Petition, and agreed to the

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parties through their submissions, the issue of whether the PUC should grant the "refund" remedy sought by BIT in its Petition is now ripe for review and decision.

20. Even assuming that a telecommunications company has provided services without a filed tariff, approved by the PUC, whether "refund" is an appropriate remedy in a given case is a matter addressed to the discretion of the PUC. There is no mandatory requirement in the statute or elsewhere that the PUC grant a "refund" remedy in any particular case; conversely, no party has an entitlement to a "refund" under the statute for violations of tariff provisions. Where the Commission finds a violation on the part of a telecommunications company and determines that the complainant is entitled to an award of damages sustained in consequence of such violation, "it may order the telecommunications company to pay the complainant the sum to which the complainant is entitled."
21. Initially, BIT does not have standing to seek damages (i.e. a refund) on behalf of all Government of Guam agencies that received 5Mb Metro Ethernet Services from GTA under GSA Bid No. GSA-032-07. The contract awarded under the GSA Bid to GTA was between the Government of Guam and GTA. There does not appear to be any provision in law giving BIT the right to seek a refund against GTA or damages for services provided to the Government of Guam.
22. Under Executive Order 2005-25, BIT is responsible for overseeing "Information Technology (IT) planning, procurement, development, implementation, and infrastructure within the executive branch of the Government of Guam." However, neither the Executive Order nor any other statutory authority grant BIT standing to act as a representative of the Government of Guam in this proceeding or to seek damages on behalf of the government.
23. A claim for refund by the Government of Guam must be brought in the name of, and under the authority of, the Government of Guam. In general it is the Attorney General of Guam that has "legal cognizance of all legal matters...involving the Executive Branch of the Government of Guam..." 5 GCA §30102. A Petition to recover refunds on behalf of the Government of Guam could be brought by the government through the Attorney General. Here, the Office of the Attorney General indicates that it does not represent BIT (or any party in this proceeding). BIT's claim for refund must fail because it has not demonstrated standing to bring a claim for monetary damages on behalf of the government.
24. BIT bases its claim for "refund" upon the allegation that GTA violated 12 GCA §12106. That section requires that telecommunications companies such as GTA file

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new tariffs indicating the rates and charges, classifications, terms, and conditions of their telecommunications services. BIT alleges that GTA was required to file a tariff for its 5Mb Metro Ethernet Services, and that, as a consequence of its failure to do so, there should be a required refund of all fees paid for such service by the government to GTA.

25. In addition, 12 GCA §12106(c) provides that no telecommunications company shall provide or resell telecommunications services unless tariffs relating to that telecommunications service have been filed and the notice period has expired.
26. GTA claims that BIT's cause of action for "damages" or "refund" is barred by the applicable statute of limitations. Since BIT's cause of action is based "upon a liability created by law..." [7 GCA §11305(a)], a three year statute of limitations is provided for such cause of action.
27. In general, a statute of limitations to enforce a liability created by law begins when the liability is created. Richardson v. Barnum, 11 Cal. 2d 775, 776 (Cal. 1940). A claim accrues upon the occurrence of the last element essential to the cause of action, even if the plaintiff is unaware of the cause of action. Brandon G. v. Gray, 3 Cal. Rptr. 3d 330, 334 (Cal. Ct. App. 2003).
28. If GTA, in fact, violated 12 GCA §12106 by providing the 5Mb Metro Ethernet Services without a tariff, this violation occurred when services under the contract were commenced and charged by GTA to the Government of Guam in October of 2007. If a tariff was required for such services, GTA would have been required to file such tariff and obtain the approval of the PUC prior to providing the 5Mb Metro Ethernet Services in October of 2007.
29. In addition, GTA had a tariff in effect when it commenced the provision of Metro Ethernet services to the government in October of 2007. GTA also filed certain revisions to its general exchange tariff regarding Metro Ethernet Services on November 2, 2007. At that time, no tariff was filed for 5Mb Metro Ethernet Services. At no time has there ever been a tariff for 5Mb Metro Ethernet Services included within GTA's General Exchange Tariff. Had BIT reviewed GTA's general exchange tariff when GSA awarded GTA the bid for Metro Ethernet Services in October 2007, BIT would clearly have known and discovered that there was no applicable tariff for 5Mb Metro Ethernet Services. Thus, BIT's alleged "lack of discovery" of the absence of a tariff for the Metro Ethernet Services in October 2007 does not delay the commencement of the running of the limitations period.

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30. BIT claims that the applicable statute of limitations for refund recovery is four years, based upon its claim that GTA violated the contract between GTA and BIT by not providing Metro Ethernet Services in accordance with the contract requirement of "Compliance with Laws". [Entry 35 on page 25 of 28 of the Invitation for Bid No. GSA-032-07]. However, a refund claim premised upon statutory violation of 12 GCA §12106 is not a contract claim; BIT has no contractual right to a refund. A "liability created by statute" is one which the law creates in the absence of an agreement and that would not exist but for the statute. Cal. Jur. 3d, Limitations of Actions, §72 at p. 123. In any event, the PUC does not have jurisdiction to determine claims for breach of contract.
31. BIT has also alleged that in this case the statute of limitations was "tolled" because GTA's "violation is a 'continuous offense' by omission". BIT alleges that GTA failed to properly file a tariff in accordance with 12 GCA §12106(c) and continues to do so for the Metro Ethernet Services that it provides. The wrong is allegedly "continuing".
32. However, any specific duty of GTA to file a tariff for Metro Ethernet Services is fixed and finite pursuant to 12 GCA §12106(c); if it was required to file a tariff for provision of 5Mb Metro Ethernet Services, GTA was required to do so before it began providing such services to BIT in October of 2007. Any cause of action or claim by BIT for refund based upon GTA's alleged violation of statutory duty accrued in October 2007. In the instant case, BIT did not file its Petition alleging a violation of statutory duty by GTA until June of 2011, approximately three years and nine months after the alleged statutory violation by GTA. BIT's claim for a refund is barred by its failure to bring a claim within three years from the alleged occurrence of the statutory violation.
33. The "Continuing Wrong Doctrine" is not applicable to the facts and circumstances of this case. The injuries and "wrongs" cited by BIT in other cases are dissimilar to the statutory violation of duty alleged in this case. The Continuing Wrong Doctrine has been applied in certain contract and/or nuisance cases where plaintiff has a right to recover past and prospective damages, and there is a continuing wrong and "new-periodic-injury-to-the-plaintiff." Cal. Jur. 3d, Limitation of Actions, §32 at p. 68. Here, unlike the continuing wrong cases, there is no right to damages to BIT afforded by 12 GCA §12106(a) or (c). If a tariff is required for telecommunications services, the party providing such services is required to file the tariff before the services are provided--the duty is fixed and time specific. BIT has not demonstrated any specific or actual "injury" in this case from the alleged non-filing of the tariff; no "periodic new injury" is alleged, only the same alleged failure to file

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a tariff for Metro Ethernet Services. Generally, a cause of action accrues for purposes of the statute of limitations, and the period begins to run, when the plaintiff has suffered damages from a wrongful act; once the damage is such that the cause of action accrues, **additional damages from the same wrong does not alter the accrual of the cause of action or otherwise extend the limitations period.** Cal. Jur. 3d, Limitation of Actions, §31 at p. 67, citing Hammond v. County of Los Angeles, 73 Cal. Rptr. 3d 690 (Cal. App. 2d Dist. 2008).

34. Unlike the Guam Supreme Court case of Limtiaco v. Guam Fire Department, 2007 Guam 10, where the government made repeated assurances that an employee's pay would be corrected, here there was no contemplation by GTA or the Government of Guam that a tariff would be implemented for the 5Mb Metro Ethernet Services. GTA is not alleged to have made misleading or false representations to induce BIT or the Government of Guam to accept the terms, prices, and services offered in the 2007 contract in the absence of a specific tariff.
35. Furthermore, Hemlani v. Gayle, 2000 Guam 26, states the general principle that the continuing wrong doctrine **"cannot be utilized where a plaintiff's injury is definite and discoverable, and nothing prevents him from coming forward to seek redress."** Id. at ¶33. The injury alleged by BIT involves a specific failure to file a tariff before providing services in October of 2007. Such alleged violation of a statutory duty under Guam law was definite and discoverable and should have been discoverable by BIT in October of 2007.
36. BIT also alleges that it should be entitled to recover a refund of all payments made from the day it first raised the issue to PUC "back to the date falling thirty-six months prior." As previously indicated, 12 GCA §12106 does not, on its face, establish any right of BIT to recover refunds for payments it made. BIT has no right to recover refunds, nor does the provision establish a three year right of recovery or right of recovery for any other period. No provision establishes that BIT's alleged right to recover refunds goes back for three years. Even if the three year statute of limitations did not bar BIT's claim for refunds in this case, the "refund" remedy is not appropriate herein.
37. It was the Government of Guam and BIT that requested and induced GTA to provide a fixed price bid for 5Mb Metro Ethernet Services. It would be inherently unfair to allow BIT to disavow its request that GTA provide services at a fixed fee, but to then award it refunds for service payments which it expressly agreed to.

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38. GTA provided the bid requested by the Government of Guam, and the Government accepted the fixed prices offered by GTA **for the duration of the three-year contract period**. The Government of Guam and BIT expressly agreed that the prices offered by GTA would remain in full force and effect for the three-year contract period. Since the Government of Guam and BIT agreed to pay the price offering of GTA for the 5Mb Metro Ethernet Services for a the three year period, it is not appropriate for BIT to be allowed to now disavow the agreed upon price schedule and recover payments from GTA which BIT had agreed to.
39. The "refund" remedy is discretionary with the PUC; it is not prudent for the PUC to require a refund by GTA when the Government of Guam and BIT expressly agreed to accept the fixed prices for the 5Mb Metro Ethernet Services provided by GTA in the bid. It would be an extremely punitive remedy for the PUC to require a full refund for all services provided in a three year period and deprive GTA of any compensation for the Metro Ethernet Services it provided.
40. The PUC should decline to order refund of fees provided for services which were agreed to by GTA and the Government of Guam for the entire three-year period, and which services were in fact provided.
41. GTA's arguments that the refund remedy sought by BIT should be barred by the doctrines of laches and waiver should also be adopted. The Commission previously held in one docket that "refund" for violations of tariff requirements may be awarded under the facts and circumstances of that case, but there is no legal requirement for such award. BIT's alleged lack of actual knowledge of GTA's violation of 12 GCA §12106(c) does not excuse its failure to raise such issue in a timely manner. Had BIT raised the tariff issue prior to the commencement of the Government's contract with GTA, GTA could have taken corrective action if necessary. BIT/Government of Guam knew or should have known of the alleged violation and would have so known had they reviewed GTA's General Exchange Tariff or the applicable provisions of law.
42. BIT waited until after GTA had already fully provided the 5Mb Metro Ethernet Services required under the three-year contract before bringing its petition in the instant case. As previously mentioned, BIT specifically approved GTA's bid for Metro Ethernet Services in the GSA memorandum dated September 27, 2007. BIT accepted GTA's pricing for the provision of the 5Mb Metro Ethernet Services without any request that GTA obtain a tariff for such services. At no time during the course of the three year contract did BIT or the Government of Guam ever request that GTA obtain a tariff for the 5Mb Metro Ethernet Services.

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43. The requirements for finding "laches", or undue delay, against BIT in bringing its claims, as set forth in Duenas v. Guam Election Commission, 2008 Guam 1 ¶16, are satisfied. BIT has shown a "lack of diligence" in bringing its claims of statutory violation against GTA in the instant case. Certainly, BIT's delay has prejudiced GTA's ability to respond in a number of ways. Had BIT or the Government of Guam raised the statutory violation issue at any time during the term of the contract, GTA could have taken steps to correct such violation (if in fact there was a violation). Since BIT never raised an issue, GTA continued to charge the Government of Guam for the Metro Ethernet Services in accordance with the contract prices, and the Government of Guam paid the agreed upon prices. To now require GTA to refund all payments it received for services actually provided would be highly prejudicial to GTA and deprive it of compensation for services it actually provided.
44. BIT also alleges that a "refund" in the instant case is an appropriate remedy pursuant to the PUC Decision and Order in Docket No. 08-09, in the matter of GTA TeleGuam, Complainant, v. Pacific Data Systems Inc., Defendant. For the reasons subsequently set forth herein, that Decision is not applicable in the instant case.
45. In Docket No. 08-09, as opposed to the instant case, there was no dispute but that Pacific Data Systems [PDS] was required to file a tariff in order to provide certain local exchange services to GTA and other telecommunications companies. In that docket, both PDS and GTA agreed that the particular services provided were subject to a tariff. However, PDS began to charge GTA before the 30 day notice period set forth in 12 GCA §12106 had expired. PUC had not authorized or approved the tariff. In that case the ALJ found that "small monetary sums" were involved and ordered PDS to refund "all revenues received from test customers (approximately \$1300) as well as revenues received during the period from June 4, 2008 to July 4, 2008."
46. This case does not involve the charging of tariffs within the 30 day notice period, nor are the circumstances in any manner similar. BIT has also not alleged or demonstrated that the agreed prices with GTA for Metro Ethernet Services were in any manner unfair or unjustified.
47. In this case, both BIT/Government of Guam and GTA agreed that the Government of Guam would pay GTA the prices submitted by GTA in the bid for the 5Mb Metro Ethernet Services. At no time during the term of the contract did BIT/Government of Guam raise a claim that charges for such services, as un-tariffed, were improper.

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BIT/Government of Guam, unlike GTA in Docket No. 08-09, voluntarily and willingly paid the prices agreed upon to GTA for the 5Mb Metro Ethernet Services. In Docket 08-09, GTA's claim for refund was timely made. GTA challenged PDS' billings for services during the notice period soon after such billings were issued.

48. The statute of limitations and the other equitable doctrines referenced by GTA should bar BIT's refund claims. In the exercise of its discretion, PUC should find that refund is not an appropriate remedy for BIT in the instant case. However, as BIT points out in its Brief on the Statute of Limitations, there remains a question as to whether GTA is required to file a tariff for the provision of 5Mb Metro Ethernet Services on a going forward basis. Aside from the claims made by BIT regarding the provision of such services by GTA under the prior contract, there is still a present issue as to whether GTA is required to file a tariff before it can provide 5Mb services to customers.
49. To the extent that the BIT petition seeks a determination as to whether GTA must file a tariff for the 5Mb Metro Ethernet Services on a going forward basis, it is appropriate for the PUC to address such request pursuant to 12 GCA §12106(a). On the other hand, to address the "refund" issue raised by BIT would essentially require the PUC to go far back in time and determine whether GTA was required to file a tariff for Metro Ethernet Services provided over four years ago, in October 2007.
50. Any interested person, including BIT, may file a petition with the Commission pursuant to 12 GCA §12107 complaining of anything done or omitted to be done by any telecommunications company in violation of the Guam Telecommunications Act of 2004.
51. BIT is authorized by 12 GCA §12107 to file a petition requesting a determination as to whether GTA is required, on a going forward basis, to file a tariff for its provision of 5Mb Metro Ethernet Services.
52. In addition, PUC has the power, *sua sponte*, to determine whether a telecommunications company is required to implement a tariff pursuant to 12 GCA §12004: "The Commission shall conduct such investigation and hearings as to any such rate changes as it deems necessary."
53. The PUC does have jurisdiction over the BIT Petition to determine whether GTA is now required to file a tariff for its 5Mb Metro Ethernet Services. The PUC has broad discretion in the review and approval of tariffs, and may even, in its

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discretion and for good cause shown, modify any requirement in 12 GCA §12106 either in particular instances or by general order applicable to special circumstances or conditions.

54. The parties have already submitted a substantial amount of documentary evidence and briefing concerning whether Metro Ethernet Services are "intrastate" or "interstate" telecommunications services, whether in fact such services are "information" services as opposed to "telecommunications services", and whether such services should be the subject of a local tariff or a NECA tariff. These jurisdictional issues have, to some extent, been argued, including presentations at the hearing conducted on August 16, 2011. The materials presented to the Commission, and filed to date, will be included as a part of the record in this proceeding.
55. In a letter to the PUC dated December 30, 2011, PDS Counsel indicated that the parties have not have the opportunity to undertake discovery in this proceeding or have "a hearing on the merits of the BIT petition." While a substantial amount of information has already been submitted on the jurisdictional issues [i.e. whether the PUC has jurisdiction over the 5Mb Metro Ethernet Services] the resolution of such issue is not appropriate upon a motion to dismiss or for summary judgment, as there may be factual issues remaining. A final opportunity should be given to the parties to submit any additional information on the jurisdictional issue to the PUC.
56. At present, the parties have only agreed to extend the 180 day period for resolution of complaints under 12 GCA §12107 until March 19, 2012. Therefore, a further conference is hereby set for February 3, 2012 at 10:00 a.m. at the PUC Office in the GCIC Building to address the procedure for resolving any further relevant matters herein. At such time the parties should be prepared to address the following issues:
 - (a) What discovery, if any, should be permitted, and what is the time schedule for submission of discovery requests and filing of responses;
 - (b) When should the further hearing on this matter be scheduled;
 - (c) Issues which should be addressed at the subsequent hearing include:
 - (1) Is GTA Services LLC the provider of the 5Mb Metro Ethernet Services, or is the provided GTA Telecom LLC?
 - (2) Are the Metro Ethernet Services used to transport interstate or intrastate traffic?

- (3) Is at least 10% of the traffic transported by the Metro Ethernet Services "interstate", meaning that such services should be obtained through the NECA Tariff?
- (4) If under 10% of the Metro Ethernet Services traffic is interstate, should the Metro Ethernet Services be provided through the local tariff rate elements or as an ICB?

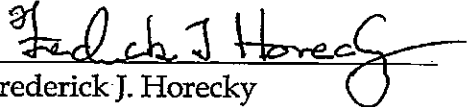
CONCLUSION

The ALJ hereby makes the following recommendations to the PUC:

1. The PUC should, upon conclusion of the proceedings before the ALJ, adopt the Findings of Fact and Conclusions of Law set forth herein.
 2. For the reasons set forth, the PUC should determine, in its discretion, that "refund" to BIT for amounts paid by the government of Guam for 5Mb Metro Ethernet services to GTA is not an appropriate remedy herein.
 3. BIT should be determined to lack standing and authorization to seek a refund/damages remedy on behalf of the government of Guam.
 4. BIT's claim for refund/damages should be barred by the three year statute of limitations applicable to liabilities created by law.
 5. The refund remedy sought by BIT should also be barred by the equitable doctrines of laches and waiver.
 6. The PUC should further determine whether GTA must file a Guam Tariff for 5Mb Metro Ethernet Services, or whether such services are "interstate" services governed by the NECA tariff.
 7. Upon conclusion of the proceedings in this matter, the PUC should review and approve the determinations of the ALJ herein and such further determinations as may be issued.
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SO ORDERED this 30th day of January, 2012.


Frederick J. Horecky
Administrative Law Judge