

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN THE MATTER OF:)
) **GTA Docket 11-06**
)
THE PETITION OF THE)
GOVERNMENT OF GUAM BUREAU) **ORDER**
OF INFORMATION TECHNOLOGY)
RE: METRO ETHERNET SERVICES)
PROVIDED BY GTA)
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)
)

INTRODUCTION

1. This matter comes before 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. On August 16, 2011, a hearing was conducted by the Administrative Law Judge (“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.
5. 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.

6. 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.
7. On April 10, 2012, the ALJ issued his proposed Findings of Fact and Conclusions of Law, and makes recommendations therein to the GPUC.

FINDINGS OF FACT

The Parties

8. The PUC adopts the statement of the "Parties" contained in the ALJ Report. The Parties hereto are the Bureau of Information Technology (BIT), the Petitioner; TeleGuam Holdings LLC., the Respondent; and Intervenor Pacific Data Systems Inc ["PDS"] and the Government of Guam

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

9. The PUC adopts the findings of fact in the ALJ Order relative to the above referenced procurement.
10. The GGWAN connects various government users to each other through the Department of Administration (DOA) Data Center.
11. 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.
12. 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.
13. GTA's bid contained an illustration of the proposed network services. See Ex. 2, pp. 26, 27. The testimony of Benigno Camacho established that the agencies shown on the left hand of the illustration were connected to each other through the GGWAN, and that Internet is provided to the GGWAN through a cloud marked as "GTA Transport," where the Metro Ethernet network is located.

Acceptance of GTA's Bid

14. The PUC adopts the findings of fact in the ALJ Order relative to the government's acceptance of GTA's Bid.
15. The Government found that GTA met all specifications for all Items in the Bid. Exs. 3, 26.
16. 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.
17. 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.
18. 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.
19. Until the filing of its Petition, nearly four years after GTA initiated services to the Government, the Government never questioned whether the SPIN number identified in GTA's bid, as belonging to Telecom, also belonged to the bidder, Teleguam.
20. 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

21. The PUC adopts the findings of fact in the ALJ Order relative to Internet Usage.
22. 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.
23. Internet was carried on the Metro Ethernet network. VOIP service and video conferencing could also be over the internet. Jim Lacson, the former CEO of BIT,

testified that "Internet Traffic flowed on the [GGWAN] network."

24. 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.
25. Various agencies of the government of Guam ordered access to the Internet through the 5 Mb bandwidth, including: 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.
26. In preparing its bid, GTA understood that the Government's bid required that Internet would be carried over the 5Mb, including VOIP and Video Conferencing. All internet services would be connected to the GGWAN.
27. 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.
28. 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.
29. 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.
30. Due to the passage of time, it is not possible to recover or recreate Internet usage data from 2007 to 2010.
31. 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.*
32. The study captured internet usage from July 12, 2011, until August 12, 2011, and from August 2010 until July 2011. The study demonstrated that there was a

substantial amount of internet traffic into the GGWAN through the Metro Ethernet network.

33. 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.
34. 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

35. The PUC adopts the findings of fact in the ALJ Order relative to which entity within GTA was the "Service Provider" of the 5Mb Metro Ethernet Services.
36. 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 (GTA Telecom LLC or GTA Services LLC). For reasons stated in the ALJ Order, the issue of which entity within GTA provided the 5Mb Metro Ethernet Services is not critical to a determination as to whether GTA is required to file a local tariff for such services.
37. When GTA officials were exploring the cost of its bid, its sales team raised the issue as to whether any local or federal tariffs applied. Roland Certeza, the Sales Director at the time of the Government Bid, provided a "NECA" price workup for Vice President of Regulatory 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.
38. 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.
39. 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.
40. Eric Votaw testified that GTA's intent was to do an intracompany sale of Metro

Ethernet services (from GTA Telecom to GTA 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.

41. 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.

DETERMINATIONS

42. The PUC adopts the conclusions of law set forth in the ALJ Order.
43. 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).
44. 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.
45. 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

46. 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.

47. The Invitation for Bid contains several references to the requirements to route Internet traffic through the GGWAN. Internet capacity for the sites that are connected through the GGWAN are using the Internet Access that is originating from the DOE Data Center.
48. 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.
49. 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.
50. 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).
51. The PUC 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.
52. 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.
53. 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.
54. 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."
55. 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.
56. 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.
57. 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.
58. 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.

59. 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.
60. 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.
61. The PUC 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.
62. 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, 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.
63. 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.

Who is the Provider of Services

64. 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.
65. The PUC 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.
66. The PUC 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.
 67. 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.
 68. 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.
 69. The PUC 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.
 70. 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 PUC adopts the ALJ finding that their testimony on this issue was credible.
 71. 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.

72. 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.
73. 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 PUC finds no significance in GTA's decision not to pass on USF charges to the Government.
74. Any USF issues which may arise out of the Metro Ethernet services are vested with USAC and beyond the jurisdiction of the PUC.
75. 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

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

SUMMARY

77. 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 PUC 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 PUC'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.
78. The PUC finds that it has no jurisdiction over the interstate services provided by GTA Services. GTA is not required to file a tariff with the PUC for its provision of the 5Mb Metro Ethernet Services.
79. Acceptance by the PUC of the ALJ recommendation 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 also adopts 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.

80. All rulings and orders of the ALJ in this proceeding are confirmed and ratified. All motions not heretofore granted or denied are denied. No other matters currently require discussion.
81. The BIT Petition is dismissed.
82. BIT, GTA, and PDS are ordered and directed to pay, in equal shares, the PUC's regulatory expenses and fees in this docket.

Dated this 11th day of April, 2012.

Jeffrey C. Johnson
Chairman

Rowena E. Perez
Commissioner

Filomena M. Cantoria
Commissioner

Joseph M. McDonald
Commissioner

Michael A. Pangelinan
Commissioner