

**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
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**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.
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 (andBIT) 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 MetroEthernet 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 theDSL 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.

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FREDERICK J. HORECKY  
Administrative Law Judge

