

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

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| 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 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

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

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

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

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.

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

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.

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.

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.

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

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.

ORDER
Petition of BIT regarding
Metro Ethernet Services
GTA Docket 11-06
January 30, 2012

SO ORDERED this 30th day of January, 2012.

Frederick J. Horecky
Administrative Law Judge