



BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN RE: FINANCIAL INCENTIVE PLAN)
FOR INCUMBENT LOCAL) GTA Docket 10-02
EXCHANGE CARRIERS AND)
COMPETITIVE LOCAL)
EXCHANGE CARRIERS)
_____)

ORDER

Introduction

This matter comes before the Guam Public Utilities Commission [PUC] upon the Order of the Administrative Law Judge [ALJ] dated June 8, 2010.¹ There the ALJ recommends that incumbent local exchange carriers and competitive local exchange carriers adopt certain provisions in their Interconnection Agreements [ICAs]. These recommended provisions would allow the parties to recover consequential damages and attorneys fees in dispute resolution proceedings before the ALJ and the PUC. The ALJ also requests that the PUC authorize him to commence proceedings which would mandate the modification of ICAs between telecommunications parties to reflect these recommended provisions, and to require such parties to include these remedy provisions in ICAs negotiated hereafter.²

The PUC, in its Order issued January 29, 2010 in Docket 08-11, authorized the ALJ to commence appropriate proceedings to solicit comments and testimony from the telecommunications companies and thereafter propose a “financial incentive” or “remedy provision” to the PUC for consideration, which would assess fines or fees to be paid to CLECs when service failures occur.³ Subsequently the ALJ issued a Notice in this docket soliciting Comments and Testimony by interested parties concerning the need for a financial incentive plan and/or remedy provisions.⁴ The parties, including GTA, PDS, and MCV, responded with comments, which are a part of the record herein.

¹ ALJ Order In Re: Financial Incentive Plan, GTA Docket 10-02, issued June 8, 2010.

² Id. at p. 18.

³ PUC Order Re: Arbitration of Interconnection Disputes, Docket No. 08-11, issued January 29, 2010.

⁴ Notice issued by ALJ Soliciting Comments and Testimony, GTA Docket 10-02, February 18, 2010.

There is a need for the adoption of Remedy Provisions in the ICAs

Both the ALJ Order and the PUC Counsel Report filed herein⁵ establish that the PUC has broad authority over interconnection agreements entered into between telecommunications companies. Under both the federal Telecommunications Act of 1996 and the Guam Telecommunications Act, the Commission must review and approve all interconnection agreements entered into by ILECs and CLECs. The PUC has a special role in ensuring that interconnection agreements adequately promote competition in the telecommunications market.⁶

PUC has established Interconnection Implementation Rules [IIRs] to provide for Commission resolution of disputed issues arising under or pertaining to ICAs approved by the Commission.⁷ Under the IIRs the ALJ acts as an “arbitrator” of disputes including the “terms and conditions in the ICA” and the “implementation of activities explicitly provided for, or implicitly contemplated in the ICA.”⁸

Existing remedy provisions in the ICAs do not allow a competitive local exchange carrier to recover lost revenues, profits or attorneys fees from an ILEC in circumstances where the ILEC fails to provide required network elements or services.⁹ An ILEC has little incentive to comply with the ICA if it is only required to reimburse the CLEC for amounts already paid by the CLEC for such services or network elements. There is a need for remedy provisions which will insure that ILECs provide services and facilities to wholesale customers that are both adequate and nondiscriminatory.¹⁰

Interconnection Agreements are not ordinary commercial contracts. Their creation is mandated by the federal Telecommunications Act. The PUC can impose terms in such agreements through involuntary arbitration and can disapprove such agreements where their terms are unacceptable.¹¹ The PUC has broad authority to approve or reject any interconnection agreement. PUC has the authority to determine that, in the interest of promoting competition and adequate remedies to CLECs, that consequential damage and attorney’s fee provisions should be included in ICAs.¹² Inclusion of a provision in the ICA providing for consequential damages will clarify that parties do not waive

⁵ PUC Legal Counsel Report, GTA Docket 10-02, filed on June 15, 2010.

⁶ *Global Naps, Inc. v. Massachusetts Dep’t of Telecommunications and Energy*, 427 F.3d 34, 47 (1st Cir. 2005).

⁷ *Id.* at p. 10; IIR 4(a).

⁸ ALJ Order at p. 11; IIR 4(b)(1)-(4).

⁹ ALJ Order, GTA Docket 10-02, p. 3.

¹⁰ ALJ Order, p. 4.

¹¹ See e.g. *WorldNet Telecommunications, Inc. v. Puerto Rico*, 497 F.3d 1, 7 (1st Cir. 2007).

¹² ALJ Order, p. 14.

liability for special, incidental, or consequential damages. However, any loss of “anticipated profits or revenues” will continue to be unavailable as a remedy.¹³

The new attorney’s fee provision recommended for inclusion in the ICA by the ALJ would authorize the award of attorney’s fees, costs, and expert witness fees, to a “prevailing party in any action to enforce or interpret the terms of an ICA.”¹⁴ Paragraph 25 in the ICA between the incumbent local exchange carrier and competitive local exchange carriers should be revised as set forth in Exhibit A hereto, which is incorporated herein by reference.¹⁵

The ALJ Order dated June 8, 2010, as well as the recommendations made therein, should be adopted and approved by the PUC. The PUC should also approve the revisions recommended by the ALJ to existing ¶25 of the ICA, and require the incumbent local exchange carrier and competitive local exchange carriers [including the parties hereto] incorporate such provisions into their Interconnection Agreements. The provisions recommended, which provide for consequential damages and attorneys fees, should serve as an incentive for compliance by the ILEC with the ICA. In addition, CLECs will have a more adequate remedy to recover the damages and fees incurred by them as a result of a service failure by the ILEC.

Ordering Provisions

Having considered the record of the proceedings herein, the pleadings of the parties, and the Order of the ALJ issued on June 8, 2010, and good cause appearing, the Guam Public Utilities Commission hereby ORDERS as follows:

1. The Order issued by the ALJ on June 8, 2010 is hereby adopted and approved.
2. The recommendations of the ALJ contained in his Order are also approved. All ICAs entered into between an ILEC and a CLEC shall contain a consequential damages provision, as well as a provision for attorneys’ fees. Paragraph 25 of such ICAs shall be in the form set forth in Exhibit A hereto.

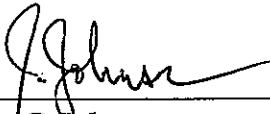
¹³ ALJ Order, p. 17.

¹⁴ ALJ Order, p. 25.

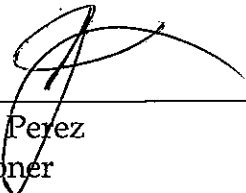
¹⁵ Exhibit A, revision of Liability Provisions in ¶25 of the ICA.

3. The ALJ is authorized to undertake such proceedings as are necessary to mandate the modification of ICAs submitted for the PUC's approval to reflect the remedy provisions set forth in Exhibit A hereto.
4. The ALJ may also commence any proceedings required under law to incorporate and/or mandate such remedy provisions in the existing rules and regulations.
5. All future ICAs reviewed and approved by the PUC shall include the remedy provisions set forth in Exhibit A hereto.
6. All local telecommunications parties shall pay, in equal shares, the regulatory fees and expenses incurred in this Docket, including, without limitation, consulting and counsel fees and expenses, and the fees and expenses for conducting the hearing process.

Dated this 27th day of July 2010.



Jeffrey C. Johnson
Chairman




Rowena E. Perez
Commissioner

Michael A. Pangelinan
Commissioner



Joseph M. McDonald
Commissioner



Filomena M. Cantoria
Commissioner