

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

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| IN THE MATTER OF: |) | |
| |) | GTA DOCKET 15-05 |
| |) | |
| Formal Complaint of Teleguam Holdings, LLC, Regarding PDS Informal Complaint of June 22, 2015 Disputing <u>UNE Loop Invoices</u> |) | AMENDED RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE |

INTRODUCTION

This matter comes before the Administrative Law Judge [“ALJ”] of the Guam Public Utilities Commission [“PUC”] upon the hearing, pursuant to the Formal Complaint of Teleguam Holdings, LLC [“GTA”] regarding the refusal of Pacific Data Systems [“PDS”] to pay certain Unbundled Network Element [“UNE”] Loop Invoices. The Complaint alleges that PDS has ignored GTA’s repeated requests to pay undisputed invoices related to Agana Local Loops and refused to withdraw the billing dispute in light of the ALJ’s Order of August 17, 2015, in PDS Docket 14-01.¹ On October 12, 2015, PDS filed its Answer, which denied that PDS had violated the payment provisions of Section 6.3 of the PDS-GTA Interconnection Agreement [“ICA”]. PDS alleges that, in January of 2015, GTA changed the characterization of the loop services that it was providing to PDS from “local loops” to “sub-loops”.² It contends that the current PDS-GTA ICA does not include any interim pricing for sub-loops, and that PDS is therefore entitled to withhold any payment for such sub-loop services until payment rates are established in PDS Docket 14-01.³

On December 30, 2015, the ALJ conducted a hearing on this matter and received testimony, evidence and argument from the parties. On January 6, 2016, both Parties submitted briefs.⁴ The ALJ now issues his recommendation to the PUC pursuant

¹ GTA Formal Complaint, GTA Docket 15-05, filed September 18, 2015, at p. 1.

² PDS Answer to GTA Formal Complaint, GTA Docket 15-05, filed October 12, 2015, at p. 2; the underlying issues between the parties relate to a long standing dispute in PDS Docket 14-01 concerning the appropriate network infrastructure for GTA’s telecommunications system. GTA submits that its TELRIC (total element long-run cost) study and rates should be based upon the existence of only one “wire center”, the Agana Central Office. Only UNE “loops” from the central office would be “loops”; loops from all other locations would be “sub-loops.” PDS, however, contends that there should be as many as 19 wire centers, and that loops from each of these locations would be “loops” and not “sub-loops.” A “local loop” is the physical link or circuit that connects from the demarcation point of the customer premises to the edge of the service provider’s network. The local loop terminates in a circuit switch housed in an incumbent local exchange carrier’s central office facility. See definition of “local loop” in [Wikipedia](#).

³ Id. at p. 3.

⁴ PDS Brief, GTA Docket 15-05, filed January 6, 2016; GTA Brief, GTA Docket 15-05, filed January 6, 2016.

to the Rules for Practice and Procedure before the Commission and Interconnection Implementation Rule 4 (h).⁵

STATEMENT OF THE FACTS

PDS first disputed UNE charges by GTA in a letter dated June 22, 2015, which was filed pursuant to Dispute Resolution procedures of the ICA.⁶ Therein PDS stated:

“GTA has stated that the UNE circuits being provided to PDS under the new ICA are UNE Sub-loops and not UNE Local Loops. However, GTA is billing these circuits as UNE Local Loops. This is a significant change in definition by GTA regarding these services; from UNE Local Loops to UNE Sub-loops. The current PDS-GTA ICA has no rate information for UNE Sub-loops and the ICA states that the parties have agreed not to implement these services until such time as permanent rates have been established. For these reasons, PDS is disputing any and all billings from GTA related to UNE Local Loops or UNE Sub-loops.”

The parties subsequently engaged in Dispute Resolution pursuant to Section 14 of the ICA. On July 20, 2015, the parties met at GTA’s Accounting Offices to discuss the dispute. PDS contends that, at such meeting, GTA acknowledged that it had converted PDS circuits from Local Loops to Sub-loops as part of the network changes that GTA had made early in 2015. At the meeting, PDS requested an inventory of all UNE circuits, which GTA agreed to provide.⁷ During the meeting GTA also raised the issue that PDS’ dispute improperly included UNE loop services ordered by PDS out of GTA’s Agana Central Office. GTA requested that PDS pay for those undisputed loops.⁸

On August 17, 2015, the Administrative Law Judge of the PUC issued an Order in PDS Docket 14-01 on issues involving the TELRIC Study.⁹ In Phase I of that Arbitration Proceedings, the PUC had approved the Interconnection Agreement [ICA] between GTA and PDS. Such agreement established “interim rates” for certain unbundled network elements [UNEs]. The parties agreed that rates for 10 loops and 2 sub-loops would be determined in Phase II of the Arbitration Proceedings. During the Phase I

⁵ At the commencement of the hearing, the ALJ stated to the parties that the Record in this Docket would include all documents filed of record, Exhibits attached thereto, emails between the parties and/or the ALJ, testimony and exhibits introduced by the parties at the hearing, briefs submitted, and the argument presented by the parties at the hearing. Both parties concurred with the statement of the record in this Docket as presented by the ALJ.

⁶ GTA Formal Complaint, Attachment 1.

⁷ PDS Answer at p. 2.

⁸ GTA Formal Complaint at p. 2.

⁹ ALJ Order on Issues Involving TELRIC Study, PDS Docket 14-01, dated August 17, 2015.

Proceedings, at a hearing on July 30, 2014 at the PUC Office, PDS stated, on the record, that there was no present need to arbitrate the two UNEs for sub-loops, as “sub-loops do not exist at present and PDS will not be using them in the near future.”¹⁰ The ALJ agreed with PDS’ interpretation of “existing wire centers” and held that the applicable definition of the network’s “existing wire centers” meant such wire centers as were in existence as of August 28, 2014. As of that date, GTA indicated that there were three existing wire centers. In Phase II, GTA was required to provide a TELRIC Study for services that existed as of August 28, 2014 and for the 10 loops and 2 sub-loops which it had previously agreed to provide.¹¹

Specifically, the ALJ held as follows in Ordering Provision No. 4:

Upon development of permanent prices, GTA is free to incorporate the new terminology “sub-loop” in the interconnection agreement and to alter its billing and provisioning terminology as necessary to reflect its network architecture. However, such changes must be accomplished in accordance with applicable FCC Rules and Regulations, the ICA, and PUC Order/Guam law. (Emphasis added).¹²

Also, Ordering Provision No, 5 held that, until such time as permanent rates were in effect, GTA shall continue to furnish PDS with the 10 unbundled loops and 2-sub-loops delineated in the Orders and the ICA.¹³ The ICA indicated that there were no sub-loops in effect, and that no orders could be made for such loops until permanent rates were established. This ruling clearly indicated that GTA could not incorporate “sub-loops” in its billing procedures until permanent prices were developed in Phase II. To date, the parties still have not agreed to “permanent prices”. As indicated in the PUC Order approving Interconnection Agreement, dated August 28, 2014, sub-loops do not presently exist under the ICA.¹⁴

On August 26, 2015, GTA provided a detailed GTA Circuit Inventory, which listed in detail “PDS Loops and Sub-loops” as of May 1, 2015. In the listing, all loops out of the Agana Wire Center location were listed as “Loops”. All loops out of locations other than Agana were listed as “Sub-loops”.¹⁵ To the extent that such listing indicated that “sub-loop” service was in fact being provided, such listing was inconsistent with the prior PUC Orders, which established that there was no sub-loop service. However, at the same time it sent the Listing of Circuits to PDS, GTA also sent a letter to PDS on August 26, 2015 which stated as follows:

¹⁰ Hearing on July 30, 2014, at the PUC Office, PDS Docket 14-01.

¹¹ ALJ Order on Issues Involving TELRIC Study, PDS Docket 14-01, dated August 17, 2015. at p. 7.

¹² Id,

¹³ Id.

¹⁴ PUC Order Approving Interconnection Agreement, PDS Docket 14-01, dated August 28, 2014, at p. 4.

¹⁵ PDS Hearing Exhibit B.

GTA requests a meeting with PDS to discuss the impact of the recent ALJ Order of August 17, 2015 in PDS Docket 14-01 on your dispute. Consistent with the ALJ's Order, GTA has continued to provide services to existing PDS UNE loops and has filled new orders under the existing ICA terms. Further consistent with the ALJ's Order, PDS should resume payments for UNE loops and withdraw its present dispute.(Emphasis added).¹⁶

On August 31, 2015, GTA provided the UNE loop inventory in an excel spreadsheet.¹⁷ In an email to PDS GTA stated: "designation of loops and sub-loops should be viewed in light of ALJ Horecky's recent order." (Emphasis added).¹⁸ This was a clear indication to PDS that GTA accepted the ALJ Ruling: there was no sub-loop service in effect. On September 10, 2015, in an email, GTA followed up with PDS on its dispute and GTA's request that PDS resume payments for UNE loops in light of the ALJ's Order of August 17, 2015. PDS was advised that GTA would seek resolution before the PUC if PDS failed to respond.¹⁹ On September 18, 2015, GTA filed its formal Complaint in this Docket. PDS, since submitting its UNE loop dispute in June, has continued to order UNE loops and has not paid any of the invoices for such services. GTA has not terminated any UNE loop service and has continued to provision new orders. Most of the UNE services were existing circuits that have been delivered by GTA without interruption both prior to the dispute over sub-loops and after the dispute was raised. No changes have been made to the services and PDS and its customers have continued to enjoy the benefits of such GTA services. During the hearing, when Mr. Day was asked whether there was any change in the services provided by GTA, the only "difference" cited was that sub loop service was technically delivered from a point other than a wire center.

On October 13, 2015, PDS made certain payments to GTA for the September 2015 billing and three previous amounts in dispute pertaining to UNE circuits out of the Agana CO.²⁰ PDS indicated that billings for UNE circuits out of the Agana CO location were no longer in dispute. PDS continues to dispute UNE circuit billings for other locations outside of the Agana CO where GTA was allegedly delivering UNE Sub-loop service.

DISCUSSION

There are no rates established for "Sub-loops" under the ICA and to date the parties have not agreed to any rates for "Sub-loops". There is not now, nor has there ever been, any service for "Sub-loops" approved by the PUC. During Phase I of the Arbitration in

¹⁶ Id.

¹⁷ GTA Formal Complaint at p. 2.

¹⁸ Id. at Attachment 4.

¹⁹ Id. at Attachment 5.

²⁰ Letter from PDS to GTA dated October 13, 2015.

PDS Docket 14-01, the parties agreed to certain Interim Pricing regarding Unbundled Network Element Rates.²¹ The parties agreed that they would arbitrate rates for 10 UNE Loop services and 2 “Sub-loop” services in Phase II of the Arbitration.²² PDS stated during Phase I that there was no present need to arbitrate the two UNE’s for sub-loops, that sub-loops did not exist at present, and that PDS would not be using sub-loops in the near future.²³ In their Pricing Attachment, submitted to the PUC along with their negotiated ICA, on August 11, 2014, the parties agreed that the two sub-loop service rates to be arbitrated in Phase II were for services for which no interim rates have been established.

PDS and GTA further agreed to suspend any orders for these sub-loop services until permanent rates are established pursuant to GPUC Order in Docket 14-01.²⁴ Essentially, the Pricing Attachment indicated that there would be no sub-loop services until permanent rates were established by the PUC in PDS Docket 14-01. In approving the Pricing Attachment, the PUC approved the agreement of the parties that no interim rates had been established for any sub-loop services, and no sub-loop services would be available until Permanent rates were established pursuant to PUC Order in Docket 14-01. In addition, on January 7, 2015, GTA and PDS signed a Stipulation regarding permanent pricing negotiations for UNE rates. PDS agreed that rates for two sub-loop services would be based upon Permanent Rates established through the TELRIC Study and the PUC Rate Arbitration.²⁵

During the hearing, PDS argued that it was justified in refusing to pay GTA for UNE services because GTA, on January 20, 2015, had changed its network infrastructure from loops to sub-loops at locations outside of Agana. PDS argued that in accordance with the agreement of the parties under the ICA, sub-loops were not to be offered at all until permanent rates were established. GTA and PDS approved these stipulations. In effect “sub-loops were off the table until permanent rates were established.”²⁶ PDS is correct in recognizing the holding of the PUC that there were no sub-loop rates in effect. Regardless of any statements by GTA or positions taken in dockets, such actions by GTA were ineffective to in fact create new “sub-loops” or to implement a new network infrastructure which includes sub-loops. PDS has seemingly understood all along in this proceeding that GTA was precluded from requiring PDS to accept sub-loop service, and that such service would simply not exist at all until permanent rates were established for sub-loop services.

²¹ See PDS Hearing Exhibit C, ICA Pricing Attachment p. 1.

²² Id.

²³ PUC Order Approving Interconnection Agreement, PDS Docket 14-01, dated August 28, 2014, at p. 4.

²⁴ See PDS Hearing Exhibit C, ICA Pricing Attachment p. 1.

²⁵ See PDS Hearing Exhibit D, PDS-GTA Stipulation regarding Permanent Pricing Negotiations from PDS Answer to GTA Complaint.

²⁶ Testimony of John Day, Hearing on Merits in GTA Docket 15-05, December 30, 2015.

Based upon the precedent of the PUC as set forth in its prior holdings, there is no basis upon which PDS could reasonably have concluded that GTA had established new sub-loop service or rates. Regardless of any statements made by GTA concerning its belief that sub-loops were in effect, the PUC had already established that there was no sub-loop service. In light of the arguments during the hearing, PDS clearly recognized the holding of the PUC and was aware that there were no sub-loop rates in the ICA, that the parties had not agreed to the establishment of sub-loop rates, and that the PUC had held that there would be no sub-loops until permanent rates for such services were established in Phase II of the Arbitration Proceedings. PDS argued at the hearing that, since GTA was allegedly billing PDS for sub-loop rates, and as no rates have been established for sub-loops, it should owe “zero” for such services. Any statements by GTA concerning its belief of what services were being provided could not change the nature of such services to “sub-loops.”

In addition, a review of all of the applicable billings from GTA to PDS indicates that the billings themselves do not in any manner indicate that PDS was being billed for “sub-loop” service. PDS submitted all of the GTA billings through August 2015.²⁷ PDS admits that: “Our review of the GTA UNE Billings (See Exhibit C) that have been made to PDS since January 2015 show that GTA has been billing all UNE circuits as local loops consistent with past GTA billings.”²⁸ PDS’ brief submitted on January 6, 2016, also indicates that “GTA had continued billing PDS at the local loop rate...”²⁹

PDS’ actual “dispute” has little, if anything, to do with the GTA billings; it has more to do with the “technical” description that is given to the loops provided. During the hearing, Mr. John Day, the President of PDS, testified that PDS had continued to receive the disputed services without interruption (with a possible exception of a two week period in October where GTA would not process orders). All the services which GTA had previously provided to PDS and its customers, continued to be provided. Mr. Day was asked whether PDS intended to deliver services to its customers without any payments to GTA. Mr. Day indicated that since there were no sub-loop rates established, there should be no payment at all to GTA until permanent rates for sub-loops were established.

PDS’ alleged justification for non-payment to GTA is without merit or basis. The position that PDS should be able to derive the benefit of the loop service provided by GTA, yet pay nothing, is unpersuasive. A “Maxim of Jurisprudence” is that “the law respects form less than substance.”³⁰ The substance here is that PDS has continued to receive services from GTA. It cannot be allowed to refuse to make any payment upon a

²⁷ Exhibit C to PDS Answer, GTA Docket 15-05, filed October 12, 2015.

²⁸ PDS Answer, GTA Docket 15-05 filed October 12, 2015, at p. 2.

²⁹ PDS Brief, GTA Docket 15-05, filed January 6, 2016.

³⁰ §3528 of the Civil Code of the Territory of Guam (1970)

formalistic, technical basis. PDS should also be required to make payment under what has been referred to as the “constructive order doctrine.” Under such doctrine, a party receiving services is deemed to have ordered the services “when the receiver of services (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of services; and (3) does in fact receive such services.³¹ As in the Alliance Communications case, PDS was interconnected to receive the services, it took no steps to prevent the receipt of such loop services, and it did in fact receive such services. It is required to pay for such services.³² Also, here PDS did order all of the services that GTA was providing to it.

Any issue concerning “sub-loops” was resolved in the ALJ Order on Issues Involving TELRIC Study, issued on August 17, 2015.³³ The ALJ held that when permanent prices were developed and implemented, only then could GTA incorporate the “sub-loop” terminology into the interconnection agreement and alter its billing. The ALJ held that GTA was required to utilize the network infrastructure that was in effect when the PUC adopted the ICA on August 28, 2014. This holding rendered PDS’ argument that GTA had implemented “sub-loops” as “moot.” PDS should have withdrawn its dispute and immediately commenced repayment of invoices for all loop services provided by GTA.

PDS argued in its Answer, during the hearing, and in its brief that the ALJ Order on Issues Involving the TELRIC Study “was limited to the GPUC Docket 14-01 Phase II Proceedings.....”³⁴ To the contrary, the Order applied broadly to the issue of when GTA could lawfully implement rates for sub-loops. New sub-loop service would not be available to parties until permanent rates were established in Phase II of the arbitration.³⁵ The ALJ Order broadly held that the GTA network infrastructure in effect was that which existed as of August 28, 2014. If PDS had any doubt about GTA’s position concerning the provisioning of loops, such doubts should have been resolved by GTA’s August 26, 2015 letter. GTA indicated to PDS that it requested a meeting “to discuss the impact of the recent ALJ Order of August 17, 2015 in PDS Docket 14-05 on its dispute.”³⁶ GPA indicated that it had continued to provide services to existing PDS UNE loops and that, consistent with the ALJ’s Order, PDS should resume payments for UNE loops and withdraw its present dispute.³⁷

³¹ Alliance Communications Cooperative, Inc. v. Global Crossing Telecommunications, Inc. et al., 2007 WL 1964271 (2007).

³² *Id.* at p. 4.

³³ ALJ Order on Issues Involving TELRIC, PDS Docket 14-01, issued August 17, 2015.

³⁴ PDS Answer at p. 3.

³⁵ PUC Order Approving Interconnection Agreement, PDS Docket 14-01, dated August 14, 2014; see also PDS Hearing Exhibit “C”.

³⁶ GTA Complaint, GTA Docket 15-05, filed September 18, 2015, Attachment 3.

³⁷ *Id.*

GTA recognized that it would not allege that “sub-loops” were in effect, consistent with the ALJ Order. Since the ALJ had reaffirmed the PUC holding that there was no sub-loop service at present, PDS was required to pay GTA for the loop services that were provided.

From the commencement of PDS’ Dispute in June 2015, there was no basis for PDS to refuse to pay for loop services out of the Agana Central Office. There was never a reasonable basis for contending that such services were “sub-loop” services and not “loop” services. PDS claims that it “did not understand the nature and the scope of the GTA infrastructure changes” until it received GTA’s Circuit Listing in August 2015. An alleged “lack of understanding” does not offer a valid reason as to why PDS should not have paid the undisputed Agana UNE loop services. Given the PUC history of rulings on the matter, there was no basis for such lack of understanding. PDS’ failure to pay for the undisputed Agana UNE loops since June 2015 was a violation of ICA General Terms and Conditions Section 6.3, which requires payment of undisputed billing amounts. Based upon GTA’s August 26, 2015 statement that it would continue billing for loop services, as it has always done, and not sub-loops, there was no justification for PDS’ failure to pay GTA for the loop services that GTA provided to it. Even where a party receiving a bill disputes the amount purportedly due, the ICA does not permit that party to refuse to pay anything at all for the billed services. Rather, the party remains obligated to “pay all **undisputed** amounts.”³⁸

At a practical level, it is not fair or equitable that PDS could continue to receive UNE loop services from GTA for nothing. GTA is entitled to be compensated for the loop services provided to PDS, regardless of the “technical” denomination of such services. During the hearing there was no proof offered by PDS that the nature, quality, or extent of the services received by it from GTA, were any different prior to January 2015 as compared to thereafter. The only “difference” PDS could point to was that the “origin” point of sub-loop services was different from that of loop services. However, PDS never alleged any real or practical difference in terms of the quality or scope of the service provided by GTA before and after January 2015. PDS cannot use a technical distinction in the definition of the services as a basis for refusing to pay GTA for the services provided. The actual UNE service provided to PDS and its customers was always the same. GTA should not be obligated to provide free services to PDS. GTA should not be required to wait to be paid for the services that it has provided since January 2015 until “permanent rates” are determined at some point in the future.

³⁸ Cortel Virginia LLC v. Verizon LLC et al., 2015 WL 7075479, p. 10.

CONCLUSION

The ALJ recommends that the PUC rule in favor of GTA on its Formal Complaint. Regardless of “statements” by GTA concerning “sub-loop” service, there has never been sub-loop service in effect nor does such service exist to date. The ICA between the parties explicitly indicates that there will be no “sub-loop” service unit such time as the PUC establishes permanent rates for such services. The services provided by GTA to PDS have always been “loop” services and never became “sub-loop” services. GTA is entitled to be paid for the services it has provided to PDS since January 2015. PDS’ argument that it is entitled to receive services and order new services, but withhold all payment, is not justified. Instead of unilaterally withholding payments to GTA for services actually rendered, PDS could have immediately requested the assistance of the PUC in addressing any issues concerning the services provided to it by GTA.

RELIEF

The ALJ recommends that the PUC award the following relief:

1. PDS’ “dispute regarding billings”, filed on June 22, 2015, and subsequently filed each month thereafter, should be dismissed.
2. PDS should be ordered to immediately pay to GTA all arrears and unpaid amounts owed for UNE loop services outside of Agana with interest at the rate of one and one half percent (1-1/2%) per month from the date each such amounts were due until the date upon which they are paid in full.
3. PDS should be ordered to immediately pay to GTA interest at the rate of one and one half percent (1-1/2%) per month on all arrears and unpaid amounts on the Agana UNE loops from June through October 2015.
4. The PUC should order that, if PDS fails to pay any amounts due hereunder within 30 days from the date upon which the PUC Order is issued, GTA may request authorization from the PUC, on an expedited basis, to terminate UNE loop services for PDS and to decline to accept any new orders from PDS in accordance with the procedures of Section 6.2.1 of the ICA .
5. All payments by PDS hereunder should be subject to true-up in accordance with applicable FCC Rules and Regulations, the ICA, PUC Orders and Guam law.

6. GTA may request an assurance of payment in accordance of Section 9 of the ICA if payments by PDS are not made in accordance with the payment deadline in the PUC Order.
7. In accordance with Amendment Rule 1.B.III (RULES GOVERNING REGULATORY FEES FOR TELECOMMUNICATIONS COMPANIES), the PUC's regulatory expenses may be allocated against each party as the PUC deems appropriate. The PUC should allocate all of the regulatory expenses in this proceeding to PDS. In this case GTA was required to bring its formal complaint against PDS due to PDS' failure to pay for services actually rendered by GTA.
8. GTA has requested an award of its attorney's fees. Within 3 days after the issuance of this Recommendation, GTA shall present such statements or evidence concerning its entitlement to attorney's fees and the amount thereof. PDS shall have two days thereafter to file any response disputing such entitlement or the amount thereof. The ALJ will, if appropriate, recommend an award of attorney's fees to the PUC.
9. The ALJ will prepare a Proposed Order for consideration of the Commissioners.

SO ORDERED this 20th day of January, 2016.

Frederick J. Horecky
Administrative Law Judge
Guam Public Utilities Commission