

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN RE: PACIFIC DATA SYSTEMS, INC.) PDS Docket 09-03
AND GTA TELEGUAM LLC/)
DELAYED SERVICE)
_____)

ORDER

This matter comes before the Guam Public Utilities Commission ["GPUC"] upon the ORDER issued by Administrative Law Judge ["ALJ"] David A. Mair on December 15, 2009, which is made *Attachment A* hereto. ¹ Therein, ALJ Mair addresses GTA Teleguam LLC's ["GTA"] Verified Petition for Clarification or Rehearing of GPUC's November 19, 2009 Order ["Petition"], Pacific Data Systems, Inc.'s ["PDS"] Request for a Pre-Hearing Conference Regarding Damages, Attorneys' Fees and Penalties, and PDS's Motion for Sanctions Against GTA. ²

On November 19, 2009, Commission adopted a final Order approving the findings of fact and conclusions of law of the ALJ regarding the PDS Complaint ["Delayed Service"].³ Therein the Commission ordered GTA: to process and complete all pending and rejected service orders from PDS within fifteen (15) days, to process and complete all future orders from PDS within the timeframe set forth under the Interconnection Implementation Rules [IIRs], to immediately commence maintaining certain records required by the IIRs, and to comply with other ordered relief. ⁴

On November 30, 2009, GTA filed its Petition seeking clarification or rehearing of the Commission's November 19, 2009 Order in this Docket pursuant to Rule 37 of the Commission's Rules of Practice and Procedure. ⁵ GTA's Petition argues that the ALJ's November 16, 2009 Findings of Fact and Conclusions of Law, and the GPUC's November 19, 2009 Order, are merely "interim" in nature and that another hearing should be conducted. The ALJ rejects this argument as "lacking merit", as the case was heard under Rule 4(i) of the IIRs and not under the "interim" provisions of Rule

¹ Order issued by ALJ David A. Mair on December 15, 2009, in PDS Docket 09-03.

² *Id.*

³ Order of the GPUC issued on November 19, 2009, in PDS Docket 09-03.

⁴ *Id.* at pgs. 3-4.

⁵ GTA Verified Petition for Clarification or Re-Hearing, filed November 30, 2009, in PDS Docket 09-03.

4(j). Thus, the ALJ holds that neither his findings nor the Commission's Order were "interim", and that the relief granted was not "interim" in nature. ⁶

Furthermore, the ALJ finds that GTA's Petition is defective and fails to specify any particular erroneous findings of fact or conclusions of law in the Findings or the GPUC Order. ⁷ In addition, the ALJ denies arguments by GTA that it did not have an opportunity to present evidence in the case, finding instead that GTA failed to generate the information and documents that it was required to produce and maintain pursuant to the IIRs. The ALJ finds that there was no denial of due process, and recommends that the GPUC deny the Petition.

With regard to PDS' Request for Pre-Hearing Conference Regarding Damages and Attorneys' Fees, the ALJ instructs PDS to file a separate petition if it wishes to seek recovery of damages and/or attorneys fees. ⁸ The ALJ indicates that he would not make any recommendations to the GPUC regarding an award for damages and/or attorneys fees without first affording GTA a hearing to present evidence supporting any defense. ⁹

The Order of the ALJ also addresses scheduling of the monthly hearings on compliance, authorized by the GPUC Order of November 19, 2009, the penalty hearings, and PDS' Motion for Sanctions. The ALJ intends to consider these matters further at a hearing scheduled on January 11, 2010. At the present time, with regard to any consideration of penalties, the ALJ intends to focus on prospective conduct of GTA subsequent to the GPUC's Order and not on retrospective conduct prior to the Order. ¹⁰

Having considered the record of the proceedings herein, the pleadings of the parties, and the Order issued by the ALJ on December 15, 2009, and good cause appearing, the Guam Public Utilities Commission hereby Orders as follows:

1. The December 15, 2009 ALJ Order is well reasoned and is hereby adopted and approved. GTA's Petition for Clarification or Re-Hearing did not state any proper basis for either clarification or rehearing. The Orders issued by the ALJ and the Commission were not "interim" in nature, and

⁶ ALJ Order issued in Docket No. 09-03, at pgs. 2-3.

⁷ Id. at p. 2.

⁸ Id. at p. 4.

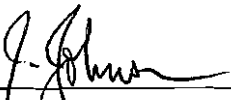
⁹ Id. at p. 4.

¹⁰ Id. at p. 5.


the Petition states no basis for "re-hearing" pursuant to Rule 37 of the Commission's Rules of Practice and Procedure.

2. The ALJ properly found that GTA was not denied the opportunity to present evidence, nor was it denied due process.
3. The ALJ is authorized to schedule further proceedings concerning damages and/or attorneys fees, monthly compliance hearings, and penalty hearings, and PDS' Motion for Sanctions, in the manner as set forth in his December 15, 2009 Order.
4. PDS and GTA are ordered to pay for the PUC's regulatory fees and expenses incurred in this Docket, including, without limitation, consulting and counsel fees and expenses. Assessments of PUC's regulatory fees and expenses is authorized pursuant to 12 GCA §12002(b) and 12024(b), 12104, 12103, the Rules Governing Regulatory fees for Telecommunications Companies, and Rule 40 of the Rules of Practice and Procedure before the PUC.


Dated this 23rd day of December, 2009.



Jeffrey C. Johnson
Chairman




Joseph M. McDonald
Commissioner



Rowena E. Perez
Commissioner

Filomena M. Cantoria
Commissioner



Michael A. Pangelinan
Commissioner



BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

**IN RE: PACIFIC DATA SYSTEMS, INC.
AND GTA TELEGUAM LLC /
DELAYED SERVICE**

**Docket No. 09-03
ORDER**

This matter comes before the Administrative Law Judge (the "ALJ") of the Guam Public Utilities Commission ("GPUC") in response to the GPUC's Order dated November 19, 2009, GTA TeleGuam L.L.C.'s ("GTA") Verified Petition for Clarification or Rehearing of the GPUC's November 19, 2009 Order, Pacific Data Systems, Inc.'s ("PDS") Request for a Pre-Hearing Conference Regarding Damages, Attorneys' Fees and Penalties, and PDS's Motion for Sanctions against GTA. Having reviewed the above, and the record before the GPUC in this matter, the ALJ determines the following.

1. GTA's Petition for Rehearing

GTA's Verified Petition for Clarification or Rehearing ("Petition") argues that the ALJ's November 16, 2009 Findings of Fact and Conclusions of Law ("Findings") and the GPUC's November 19, 2009 Order ("Order") are merely "interim" in nature and that another hearing should be conducted. Petition, p. 2 (November 30, 2009). Thus, GTA "seeks confirmation that the rulings in the Order entered by the GPUC were, in fact, 'interim.'" *Id.* For the reasons discussed herein, the ALJ finds this argument to lack merit.

A. Rule 4(j)

While PDS sought "interim" relief under Rule 4(j) of the GPUC's Interconnection Implementation Rules ("IIRs") in its October 28, 2009 Formal Complaint, this case was heard

under Rule 4(i), which provides for expedited dispute resolution. The case was neither heard nor scheduled pursuant to the “interim” provisions of Rule 4(j). This was made plainly evident in the Order scheduling the case issued on November 5, 2009, as well as the Order from the GPUC dated November 19, 2009, which stated, “the ALJ makes various recommendations to the GPUC pursuant to Interconnection Implementation Rule 4(i)(4).” Order, p. 1-2 (November 19, 2009). Nothing in Rule 4(i) makes reference to “interim” relief. Furthermore, the Findings make no reference to “interim” relief. Thus, the relief granted was not “interim” in nature.

B. Rule 37

GTA’s Petition has been filed pursuant to Rule 37 of the GPUC Rules for Practice and Procedure, which requires that any Petition for Rehearing “based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error.” The Petition is defective inasmuch as it fails to specify any particular erroneous findings of fact or conclusions of law in the Findings or the Order.

C. Presentation of Evidence

In the Petition, GTA also maintains that “[t]he expedited hearing process should not be allowed to strip a party of the ability to make discovery and build a case.” Petition, at 3. The primary reason, however, that GTA was unable to timely present evidence on the responsiveness of GTA to PDS service orders was that GTA failed to generate the information and documents that it was required to produce and maintain. For instance, it is undisputed that GTA: (a) repeatedly failed to issue FOCs as required by IIR 7(b); (b) failed to create the records required by IIR 7(i)(7), which, if generated as required, would have specified the “reason for delay” in providing service to PDS; (c) repeatedly failed to issue OCNs as required by IIR 7(b)

and the Definitions; and, (d) failed to compile the monthly monitoring reports required by IIR 7(j),(k) and (m), which, if created, would have specified the “average completion interval.” GTA cannot fail to generate information and documents that it was required by applicable rules and regulations to maintain, and then complain that it needs additional time to gather such information.

D. Due Process Considerations.

The ALJ and the GPUC have complied with all of the due process requirements relating to a hearing conducted under IIR 4(i). As shall be discussed herein, the ALJ will not recommend that the GPUC impose any penalties on GTA without first giving notice to GTA of a penalty hearing as required under Guam law and affording GTA an opportunity to be heard and present evidence. Furthermore, the ALJ is requiring that PDS file a separate petition should it wish to seek the recovery of any attorneys’ fees or damages. Should such a petition be filed, GTA would of course be given notice of any hearing in that case and likewise afforded an opportunity to be heard and present evidence. Hence, prior to the imposition of any penalties, attorneys’ fees or damages, GTA would be afforded ample due process and the benefit of another hearing.

Accordingly, the ALJ hereby finds that the Petition is without merit and, therefore, recommends that the GPUC deny the Petition.

2. PDS’s Request for Pre-Hearing Conference Regarding Damages and Attorneys Fees

In its October 28, 2009 Formal Complaint, PDS also sought relief under Sections 12107 and 12108 of the Guam Telecommunications Act. See PDS’s Formal Complaint, p. 7, ¶5

(October 28, 2009). However, as expressed in the Findings, the ALJ concluded that the time limits for expedited relief under Rule 4(i) and Sections 12107 and 12108 were incompatible. Accordingly, the ALJ ruled that “[s]hould PDS seek to recover damages or attorneys fees under Sections 12107 and 12108, then it should file a separate petition under those sections.” The Order from the GPUC did not authorize the ALJ to conduct a hearing in this docket to award damages or attorneys’ fees to PDS under Sections 12107 or 12108. The Order merely authorized the ALJ to conduct a hearing under Section 12108 for the purpose of determining whether penalties should be imposed against GTA.

Therefore, PDS is hereby instructed to file a separate petition if it wishes to seek recovery of damages and/or attorneys’ fees. At this time, neither the ALJ nor the GPUC have made any findings or rulings regarding whether PDS is entitled to recover damages and/or attorneys’ fees. To be clear, the ALJ will not make any recommendations to the GPUC regarding an award for damages and/or attorneys’ fees without first affording GTA a hearing to present evidence supporting any defense.

3. Monthly Hearings

The Order has authorized the ALJ to conduct monthly hearings to determine whether GTA has in fact completed PDS service orders as required under the IIRs and the GPUC’s Order. Inasmuch as the Christmas and New Year holidays are only a few days away, the ALJ will schedule the first monthly hearing on Monday, January 11, 2010 at 1:30 p.m. As part of the hearing, GTA shall address whether it has commenced submitting the monthly performance reports as required under IIR 7(j), (k), and (m). In addition, GTA shall also address whether it has commenced maintaining the records required by IIR 7(i)(7).

Prior to the first monthly hearing, however, PDS and GTA shall submit the following to the ALJ: (a) on December 28, 2009, PDS shall submit any briefs or evidence relating to GTA's compliance or non-compliance with the GPUC's Order; (b) on January 4, 2010, GTA shall respond to PDS's filing and submit any briefs or evidence relating to such compliance or non-compliance; and, (c) on January 7, 2010, PDS shall respond to GTA's filing.

4. Penalty Hearing

In the Order, the GPUC authorized the ALJ to conduct a penalty hearing pursuant to Title 21 G.C.A. Section 12108 for the purpose of "determining and recommending to the GPUC whether penalties should be assessed against GTA and, if so, in what amount." *See* Order, at 3. Although the ALJ does not waive the right to recommend that the GPUC impose penalties for conduct that pre-dates the Order, the ALJ presently intends to focus on prospective conduct subsequent to the GPUC's Order, and not on retrospective conduct prior to the Order.

Simply stated, in the event that GTA has complied with the GPUC's Order, the ALJ will recommend that no penalties should be assessed. However, should GTA fail to prospectively comply with the GPUC's Order, the ALJ will look at both prospective and retrospective conduct to determine what penalties should be recommended to the GPUC. Accordingly, the ALJ will decide after each monthly hearing, discussed above, whether it is necessary to schedule a Section 12108 penalty hearing.

Should the ALJ determine after any monthly hearing that a penalty hearing should be scheduled, both GTA and PDS will be provided with the required notice of such a hearing. To be clear, however, the ALJ will not make any recommendations to the GPUC regarding the

imposition of penalties without first providing GTA with notice and an opportunity to present evidence supporting any defense.

5. **PDS's Motion for Sanctions**

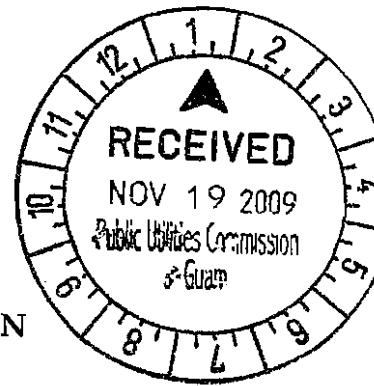
On December 11, 2009, PDS filed a Motion for Sanctions against GTA based on an alleged failure of GTA to comply with the GPUC's Order. After the January 11, 2010 monthly hearing, the ALJ will either issue an order scheduling this motion as part of a penalty hearing, or the ALJ will otherwise rule on the motion or hold it in abeyance.

SO ORDERED this 15th day of December, 2009.



DAVID A. MAIR
Administrative Law Judge

P098171.JRA



BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN RE: PACIFIC DATA SYSTEMS, INC.)
AND GTA TELEGUAM LLC/) PDS Docket 09-03
DELAYED SERVICE)

ORDER

This matter comes before the Guam Public Utilities Commission ["GPUC"] upon the Findings of Fact and Conclusions of Law issued by the Administrative Law Judge ["ALJ"] David A. Mair on November 16, 2009, which is made *Attachment A* hereto.¹ Therein ALJ Mair addresses issues raised in Pacific Data Systems, Inc.'s ["PDS"] October 28, 2009 Complaint ["the Complaint"] against GTA TeleGuam LLC ["GTA"].²

On September 28, 2006, GTA and PDS entered into an Interconnection Agreement ["ICA"].³ The ICA was approved by the GPUC on October 4, 2006 pursuant to 47 U.S.C. §252.⁴ Subsequently, on February 1, 2007 the GPUC authorized rule making proceedings concerning implementation of the interconnection agreements between GTA and new entrants into the market. The stated purpose of such rules was to provide new entrants with a fair and reasonable opportunity to compete in the local exchange market, and to establish a monitoring system by which GPUC could be assured that GTA was taking appropriate action to accommodate competitors (such as PDS). The GPUC approved the Interconnection Implementation Rules ["IIR" or "IIRs"] on August 13, 2007.⁵

In its Complaint, PDS alleged that GTA has committed numerous violations of the IIR provisions. A hearing was conducted before ALJ Mair on November 11, 2009, at which time submissions, testimony, evidence and argument were presented by the parties and considered by ALJ Mair.⁶ Subsequent to the hearing ALJ Mair issued his Findings of Fact and Conclusions of Law (*Attachment A*). Therein, the ALJ makes various

¹ Findings of Fact and Conclusions of Law issued by ALJ David A. Mair on November 16, 2009, *Attachment A* hereto (hereinafter referred to as "ALJ Findings and Conclusions").

² PDS Complaint against GTA Teleguam LLC, filed October 28, 2009 in PDS Docket 09-03.

³ Agreement by and between PDS and GTA Telecom (September 28, 2006).

⁴ GPUC Order October 4, 2006.

⁵ GPUC Order approving Interconnection Implementation Rules, Docket 05-01, August 13, 2007.

⁶ ALJ Findings and Conclusions, pg. 1

recommendations to the GPUC pursuant to Interconnection Implementation Rule 4(i)(4).

ALJ Mair finds that GTA committed numerous violations of the IIR provisions, including the following: (1) Failure to Produce Firm Order Commitments within two business days of receipt of the service order; (2) Failure to Timely Deliver Service Orders, as required by IIR 7(h)(1); (3) Provision of services to PDS worse than those that GTA provides to itself; (4) Failure to Maintain Records of each instance in which it fails to supply essential facilities and services to an interconnecting telecommunications carrier, as required by IIR 7(1)(7); (5) Failure to Produce Order Completion Notices; (6) Failure to Produce Monthly Monitoring Reports to the GPUC, specifying, among other matters, the "average completion interval" to provide service to GTA customers.⁷

GTA admitted some of these violations, including its failure to produce or provide to the GPUC the reports required by the IIRs.⁸

Based upon the record, the ALJ found that various defense presented by GTA were not persuasive. The ALJ rejected GTA defenses that the alleged default in payment by PDS justified GTA not providing service; that GTA has not in fact provided worse service to PDS than it has provided to itself; that the number of service orders at issue must be "individually scrutinized" and that it is unfair to require GTA to explain the reasons for delay; and that PDS has failed to comply with the ICA by not submitting a "pre-qualification certificate" to GTA, thereby excusing GTA's obligation to provide the requested service.⁹

The ALJ concluded as follows:

"...GTA has failed to act in good faith and has violated Guam law, the ICA and IIRs by deliberately and willfully: (a) omitting material information and facts that GTA is required to maintain and/or produce; (b) refusing to use commercially reasonable efforts in implementing the ICA in regard to PDS; (c) engaging in anti-competitive action, conduct or behavior toward PDS; (d) consistently failing to complete PDS service orders in a timely fashion; (e) consistently failing to provide PDS with FOCs; (f)

⁷ ALJ Findings and Conclusions, pgs. 4-8.

⁸ Id. at pg. 8.

⁹ ALJ Findings and Conclusions, pgs. 8-11.

consistently failing to provide PDS with OCNs; (g) engaging in acts, conduct, or behavior with the sole purpose of delaying implementation of the ICA; and (h) systematically and deliberately providing services at intervals to itself that are worse than those provided to PDS. These actions constitute violations of IIR 7(h)(1); IIR 5(c)(1)(i)(ii)(iii) and (vi); IIR 5(c)(2)(vi); IIR 7(j), (k), and (m); IIR 5(c)(3), and ICA Section 3.2.2 at 65.”¹⁰

GPUC is required to issue a final order accepting or rejecting, in whole or in part, the recommendation of the arbitrator [ALJ] within ten [10] days after the recommendation has been filed.¹¹ Having considered the record of the proceedings herein, the pleadings of the parties, and the Findings of Fact and Conclusions of Law issued by the ALJ on November 16, 2009, and good cause appearing, the Guam Public Utilities Commission hereby ORDERS as follows:

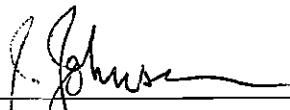
1. The Findings of Fact and Conclusions of Law issued by the ALJ on November 9, 2009 are hereby adopted and approved.
2. The ALJ is authorized to notice and conduct a hearing pursuant to Title 12 GCA Section 12108 for the purpose of determining and recommending to the GPUC whether penalties should be assessed against GTA and, if so, in what amount;
3. GTA is ordered to process and complete all pending and rejected service orders from PDS within fifteen (15) days from the date of this Order;
4. GTA is ordered to process and complete all future orders from PDS within the timeframes set forth under the IIRs’;
5. For a period of one calendar year from the date of this Order, the ALJ shall conduct monthly hearings with GTA and PDS for the purpose of determining whether GTA has in fact completed PDS service orders as required by the IIRs; the ALJ shall make monthly reports and recommendations to the GPUC regarding GTA’s compliance or non-compliance with the IIRs and ICA;

¹⁰ Id at pg. 15.

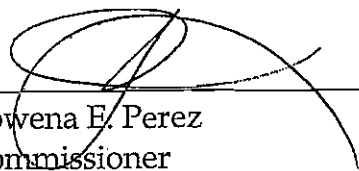
¹¹ IIR 4(h)(10).

6. GTA is ordered to immediately commence submitting monthly performance monitoring reports as required by IIR 7(j), (k), and (m); overdue monthly performance monitoring reports shall be submitted by GTA within sixty (60) days from the date of this Order;
7. GTA is ordered to immediately commence maintaining the records required by IIR 7(i)(7), which should indicate, among other matters, "each instance when it fails to supply essential facilities and services to an interconnecting telecommunications carrier in accordance with the provisioning intervals established by the Rule," and "the reason for the delay;"
8. GTA is prohibited from requiring that PDS service orders be "pre-qualified" pursuant to the provisions of ICA Network Elements Section 3.2 until GTA first conducts the "manual survey" required by ICA Network Elements Section 3.2.2 at 65; and
9. GTA and PDS are ordered to pay for the GPUC's 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. Assessment of GPUC's regulatory fees and expenses is authorized pursuant to 12 GCA §§ 12002(b), 12024(b), 12104, 12109, the Rules Governing Regulatory fees for the Telecommunications Companies, and Rule 40 of the Rules of Practice and Procedure before the GPUC.

Dated this 19th day of November, 2009.




Jeffrey C. Johnson
Chairman




Rowena E. Perez
Commissioner

Michael A. Pangelinan
Commissioner



Joseph M. McDonald
Commissioner



Filomena M. Cantoria
Commissioner