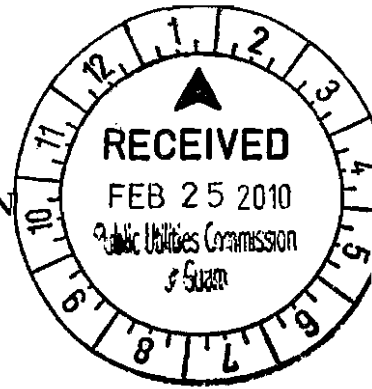


BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN RE:
PACIFIC DATA SYSTEMS, INC.
REQUEST FOR RULEMAKING

PDS DOCKET 09-02



SUPPLEMENTAL PUC LEGAL COUNSEL REPORT

Procedural Background

On January 12, 2010, PUC Counsel submitted his Report herein, which recommended that the Commission adopt a rule which would enable the Commission to allocate PUC regulatory expenses in a proceeding against such party or parties as the Commission deems appropriate.¹ This Supplemental Report traces the developments in this docket since that time. The present rule, Section 1.b.iii of the Commission's Rules Governing Regulatory Fees for Telecommunications Companies, only allows for "equal" allocation of the PUC's regulatory expenses in regulatory proceedings.²

On January 13, 2010, the PUC published a Notice of Proposed Rule Making in the Pacific Daily News.³ The Notice advised interested parties and the public that written comments would be in concerning the proposed rule, which should be submitted to the PUC on or before January 26, 2010. In addition, the Commission advised that it would afford any interested person or party an opportunity to present comment at the PUC business meeting held on January 29, 2010.⁴

On January 26, 2010, GTA submitted additional written comments, disagreeing with the rule change recommended by PUC Counsel.⁵ PDS also submitted written comments in support of the proposed rule change.⁶

Public Comment

At the PUC meeting of January 29, 2010, there was public comment from the legal counsel for GTA and PDS. For GTA, its counsel Terry Brooks raised concerns that present law requires the PUC to allocate administrative costs and regulatory fees "on a pro rata basis." He also indicated that if such a rule were implemented, there should be standards to determine how and when fees would be allocated in a particular case.

¹ PUC Legal Counsel Report PDS Docket 09-02, filed January 12, 2010, p. 5.

² Id. at p. 1.

³ Notice of Proposed Rule Making, PDS Docket 09-02, dated January 13, 2010.

⁴ Id. at p. 1.

⁵ GTA Comments on Legal Counsel Report, PDS Docket 09-02, filed January 26, 2010.

⁶ See letter from Attorney Bill Mann to Chairman Johnson, PDS Docket 09-02, dated January 27, 2010.

Attorney for PDS Bill Mann stated that this rule change has already been recommended by Georgetown Consulting Group and PUC Counsel. In his opinion, arbitrators have to exercise discretion all the time in arbitration proceedings. PDS recommends that the Commission adopt the rule change.

Analysis

PUC Counsel does not concur with the arguments of GTA that the PUC lacks the authority to adopt the proposed rule. In no manner does 12 GCA §12024 require the PUC to apportion regulatory costs and expenses in a regulatory proceeding on a “pro rata” basis. 12 GCA §12024(b) refers solely to the “operating expenses” of the Commission, also known as the administrative assessment. The “operating expenses”, or administrative fees, of the Commission are assessed on a pro rata basis against telecom companies at the beginning of each fiscal year.⁷ However, the statute doesn’t require “pro rata” allocation of regulatory expenses or fees in a regulatory proceeding.

Technically, 12 GCA §12024(b) applies to assessments against each “public utility.” Telecom companies are not specifically within the definition of “utility” contained in the Act.⁸ The assessments and fees charged to telecommunications companies are set forth in the Rules Governing Regulatory Fees for Telecommunications Companies.⁹ Therein, the share of the administrative expenses previously borne by Guam Telephone Authority are now allocated among the carriers in accordance with the methodology set forth therein.¹⁰ When the PUC itself undertakes regulatory activities, regulatory expenses are allocated among the carriers in the manner described in Rule 2.b.¹¹ However, when the PUC conducts regulatory proceedings which involve one or more carriers as parties, fees are allocated pursuant to Rule 1.b.iii (the Rule which is the subject of the amendment herein).¹²

Even if we assume that 12 GCA §12024(b) applies to telecom companies, that statute expressly provides that the Commission may order additional payments against “any special public utilities regulated hereunder in rate cases or other complex matters which require the Commission to secure the review of technical or professional individuals or firms for preparation and hearing of such matters and proceedings.”¹³ In other words,

⁷ See Rule 1.b of the Rules Governing Regulatory Fees for Telecommunications Companies, Docket 05-01, adopted July 27, 2005.

⁸ 12 GCA §12000.

⁹ Rules Governing Regulatory Fees for Telecommunications Companies, Docket 05-01, adopted July 27, 2005.

¹⁰ *Id.*, at Rules 1.b.1 and 2.a.

¹¹ *Id.*, Rules 1.b.ii & 2.b.

¹² Rule 1.b.iii.

¹³ 12 GCA §12024(b).

this statute is express authority for the proposition that the Commission may impose regulatory fees against any utility.¹⁴

Furthermore, the Commission has broad rule making authority pursuant to 12 GCA §12104(a),(b),& (c). The Commission has authority and jurisdiction to implement and enforce the provisions of the Telecommunications Act of 2004 through rule making; the only limitation is that the Commission “shall make no rule that is contrary to the provisions of this Act.”¹⁵ The proposed amended rule is not contrary to the Act.

GTA raises extensive argument concerning the provisions of 12 GCA §12107(d) and somehow infers that such provision only allows an equal allocation of regulatory fees and expenses; such argument is based upon the language that §12107(d) allows the Commission to impose “attorneys fees” against a party and penalties if the Commission determines, after notice and opportunity for hearing, that a party has failed to act in good faith. However, such provision is inapplicable to any issue of whether the Commission has the authority to determine which party or parties should bear regulatory fees and expenses. Section 12107(d) simply does not address the issue of which party should bear the regulatory expenses and costs of the PUC in a regulatory proceeding, either in a proceeding pursuant to 12 GCA §12107(a) or under Rule 4 of the Interconnection Implementation Rules.

For the foregoing reasons, PUC Counsel continues to support the recommendations set forth in his initial Report. The proposed rule change should be adopted. There are clearly cases in which one party should bear responsibility for the regulatory fees and expenses in a proceeding. If a party has violated Commission rules or orders, provisions of an Interconnection Agreement, acted in bad faith or otherwise necessitated the filing of a complaint by another party through its conduct, the Administrative Law Judge and the Commission should have the discretion to require the party whose conduct necessitated the filing of such proceedings to bear the cost of the regulatory expenses.

The concept that an Arbitral Tribunal should have the discretion to apportion fees, expenses and compensation in such amounts as the arbitrator determines is appropriate exists in the proceedings of many such arbitral entities. In disputes arising under the Interconnection Implementation Rules the PUC essentially does sit as an arbitrator. The existence of a rule authorizing the PUC to allocate regulatory expenses as it deems appropriate may also discourage parties from filing unnecessary proceedings or proceedings with little likelihood of success. The allocation of costs is a useful tool to encourage efficient behavior and to discourage unreasonable behavior.

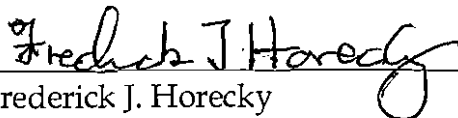
¹⁴ 12 GCA §12024(a)&(b).

¹⁵ 12 GCA §12104(b).

Supplemental PUC Counsel Report
PDS Docket 09-02
February 25, 2010

The PUC should adopt the proposed amended Rule 1.b.iii of the Rules Governing Regulatory Fees for Telecommunications Companies attached hereto as Exhibit "A". Responsibility for the payment of regulatory fees and expenses in proceedings where telecom companies appear as parties should be determined by the Commission on a case by case basis.

Dated this 25th day of February, 2010.



Frederick J. Horecky
PUC Counsel
Guam Public Utilities Commission

PROPOSED AMENDED RULE 1.b.iii (RULES GOVERNING REGULATORY FEES FOR TELECOMMUNICATIONS COMPANIES).

“From time to time, PUC will conduct regulatory proceedings, including dispute resolution under Rule 4 of the Interconnection Implementation Rules, which involve one or more carriers as parties. PUC’s regulatory expenses in such proceedings shall be allocated against such party or parties as the Commission deems appropriate.”