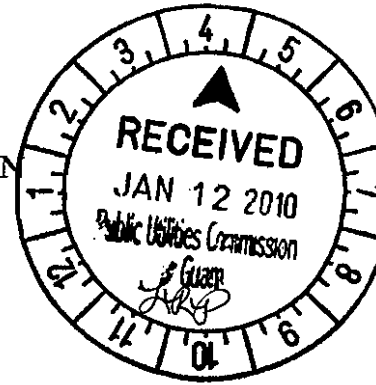


BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

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

PDS DOCKET 09-02



PUC LEGAL COUNSEL REPORT

Background and the Course of the Proceedings

On September 4, 2009, Pacific Data Systems ["PDS"] submitted a request that the Guam Public Utilities Commission ["PUC"] undertake a Rulemaking Proceeding to adopt an amendment to the Commission's Rules Governing Regulatory Fees for Telecommunications Companies [hereinafter the "Rules"].<sup>1</sup> Therein, PDS indicated that Section 1(b) (iii) of the Commission's Rules only allows for "equal" allocation of the PUC's regulatory expenses in regulatory proceedings. Thus, in every such proceeding, the existing Rule requires that the parties thereto share the PUC regulatory expenses on an equal basis.

PDS submits that "the greater burden of covering the regulatory expenses should rightfully be borne by the party ultimately found at fault in course of adjudicating Complaint involving an infraction of the Commission's Rules."<sup>2</sup> According to PDS, if one party's conduct in violating rules or orders of the Commission necessitated the filing of a complaint by another party, Commission expenses in the proceeding should be assessed against the party in violation of the Commission's rules or orders.<sup>3</sup> Furthermore, PDS submits that, if a losing party in a docket requests reconsideration or rehearing of the matter by the GPUC, then that party should bear all GPUC costs associated with its request.<sup>4</sup>

In Docket 08-11, Arbitration of Interconnection Disputes between Pacific Data Systems, Inc. and GTA Telecomm LLC, the Commission Regulatory Consultant, Georgetown Consulting Group, Inc., recognized that Section 1(b)(iii) of the PUC's Rules Governing Regulatory Fees for Telecommunications Companies specifically requires that regulatory expenses be allocated equally among the parties. GCG questioned whether such a result is equitable in all proceedings under Rule 4 of the Interconnection Implementation Rules ["IIRs"].<sup>5</sup> Furthermore, in his Arbitration report issued in Docket

<sup>1</sup> Letter from Robert J. Maloney, Chairman & CEO of PDS, to Jeffrey C. Johnson, Chairman PUC, dated September 4, 2009.

<sup>2</sup> Id. at p. 1.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> See Letter from Jamshed K. Madan to Harry Boertzel, Esq., ALJ, dated September 23, 2008; in accordance with Rule 4 of the Interconnection Implementation Rules in Connection with Interconnection Agreements

08-11 on October 22, 2008, ALJ Boertzel indicated his agreement with the recommendation of GCG that a rulemaking proceeding should be commenced to examine whether PUC should maintain the ability to make an equitable assignment of regulatory expenses between parties in IIR §4 proceedings.<sup>6</sup>

On September 30, 2009, Legal Counsel reported to the PUC at its Special Meeting that PDS has requested a rule change whereby the Commission would be able, in its discretion, to decide which party should bear the regulatory expenses and costs in a proceeding. Counsel requested that the PUC authorize the undertaking of a proceeding to consider such a rule change. The Commission, through motion duly made and carried, approved the institution of a docket to investigate the propriety of such a rule change.<sup>7</sup> On October 5, 2009, Counsel advised incumbent local exchange carrier, GTA, and the other major local exchange carriers, that the PUC had approved commencement of a rulemaking proceeding in consideration of the apportionment of regulatory expenses proceedings. Counsel advised the parties of the request of PDS for such rule change and invited such parties to participate in the proceeding. Counsel further requested that interested carriers comment on certain issues, including whether there was a need for the rule change proposed by PDS, proceedings to which an equitable assignment or apportionment of regulatory expenses should apply and any specific language that the parties suggested for the rule change.<sup>8</sup>

### **The Necessity and Justification for Rulemaking**

Only one party (GTA) through its General Counsel Terrence M. Brooks, submitted a comment on the request for rulemaking by PDS in Docket 09-02.<sup>9</sup> Therein, GTA took the position that this docket and rulemaking are unnecessary. In GTA's opinion, Guam law sets forth the rules for assessment of costs and fees in proceedings before the PUC. According to GTA, both ALJ Boertzel and PUC Consultant GCG determined that 12 GCA §12107(d) requires that the costs of PUC proceedings be borne equally by the parties unless there is a finding of bad faith. GTA believe that the PUC cannot, by a rulemaking proceeding, amend a section of the Guam Code duly enacted into law.<sup>10</sup>

Legal Counsel does not concur with the position of GTA concerning the necessity for this rulemaking proceeding. Initially, it is evident that 12 GCA §12107(d) has no

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between GTA and Competing Local Exchange Carriers and CMRS Operators, the Administrative Law Judge of the PUC acts as a mediator and/or arbitrator in such proceeding.

<sup>6</sup> Arbitration Report issued by ALJ Boertzel in Docket 08-11 on October 22, 2008, pgs. 5-6.

<sup>7</sup> Minutes of Special Meeting of September 30, 2009, par. 6.

<sup>8</sup> Email from PUC Legal Counsel to Robert J. Maloney, John Day, Eric Votaw, Craig Thompson, John Wu, and Steve Carrara, dated October 5, 2009, concerning "PDS Docket 09-02, Request for GPUC Rule Change".

<sup>9</sup> Letter from Terrence M. Brooks, General Counsel for GTA, to Fred Horecky, Esq., PUC Counsel, in PDS Docket 09-02, dated October 30, 2009.

<sup>10</sup> Id.

applicability to the allocation of PUC expenses or costs to a proceeding under Rule 4 of the Interconnection Implementation Rules. Section 12107(d) only applies to petitions or complaints filed pursuant to 12 GCA §12107(a), which concern a violation of the Telecommunications Act, rules, regulations or orders of the Commission. In its letter dated September 23, 2008, GCG determined that Section 12107(d) is not applicable to Rule 4 proceedings: "...Section 12107(d) only concerns that failure to act in good faith in proceeding concerning a violation of law - not a dispute resolution proceeding for an ICA covered by Rule 4 of the Interconnection Implementation Rules." <sup>11</sup>

Furthermore, a close reading of Section 12107(d) indicates that it has no applicability to the issue of which party bears that regulatory expenses or costs of the PUC in regulatory proceedings. The section specifically indicates that "under certain circumstances the Commission may order a party to pay damages to the complainant, and may also impose attorneys fees and penalties against a party if the Commission determines, after notice and opportunity for hearing, that a party has failed to act in good faith." <sup>12</sup> Section 12107(d) 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. <sup>13</sup>

### **The Authority of the Commission to Apportion its Expenses**

Counsel submits that the PUC has broad authority and discretion to determine the rules for the apportionment of its expenses among telecommunications companies. 12 GCA §12104(c)(7), relative to jurisdiction and authority of the Commission, states as follows:

"Without limiting the scope of subsection (a), the Commission shall have the authority and jurisdiction to: ...  
(7) Adopt reasonable rules to apportion the Commission's necessary operating expenses among telecommunications companies for the regulation of such companies and the administration of this article..."

The Commission also has the authority to establish by rule that each regulated public utility shall be assessed the costs incurred by the Commission for professional services

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<sup>11</sup> Letter from Jamshed K. Madan to Harry Boertzel, Esq., ALJ, in Docket 08-01, dated September 23, 2008.

<sup>12</sup> 12 GCA §12107(d).

<sup>13</sup> ALJ Mair has indicated that the time limits and remedies available in proceedings under Rule 4 and Section 12107 are different, and are not governed by the same rules and procedures. See Order in PDS Docket 09-03, filed December 15, 2009, at pgs. 3-4.

rendered by the attorney, and for the Commission's expense to procure the review of technical or professional individuals or firms.<sup>14</sup>

Legal Counsel submits that the current rule requiring equal allocation of PUC expenses for telecommunications companies in a regulatory proceeding should be amended to allow for an allocation by the Commission in such manner as it deems appropriate. It is not fair or equitable that PUC regulatory expenses must be shared equally by the parties in every proceeding. As suggested by PDS, if one party's violation of Commission rules, or orders, or the provisions of an Interconnection Agreement, necessitated the filing of a complaint, 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. It would be reasonable for the Commission to assess its regulatory expenses against a party whose conduct has been found to be in violation of Commission rules, orders or the provisions of an Interconnection Agreement.

Similarly, where a losing party in a regulatory proceeding requests reconsideration or rehearing of the matter by the PUC, and does not prevail upon such request, such party should bear the PUC regulatory expenses associated with its request.

### **The Discretion of Arbitral Tribunals to apportion Expenses**

It is common in articles or rules of various arbitration proceedings that costs can be awarded by an arbitral tribunal "in such a manner as it considers appropriate." The allocation of costs can provide a useful tool to encourage efficient behavior and discourages unreasonable behavior.<sup>15</sup> In ICC Arbitration, the Arbitral Tribunal fixes the costs of the arbitration in the award and decides which of the parties should bear them or in what proportion should be borne by the parties.<sup>16</sup> Some arbitration rules provide that the arbitration fees should be borne by the party which loses the dispute.<sup>17</sup> The Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association provide that, in the final award, the arbitrator may apportion the fees, expenses and compensation among the parties "in such amounts as the arbitrator determines is appropriate."<sup>18</sup> Arbitration rules may provide that the arbitrator allocates the costs of the arbitration in the award of "costs", which includes

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<sup>14</sup> See 12 GCA §12002(b) and §12024(b); the Commission may exercise the same powers in the aforementioned sections with respect to telecommunications companies pursuant to 12 GCA §12104(a).

<sup>15</sup> Techniques for Controlling Time and Costs in Arbitration: Report from the International Chamber of Commerce Arbitration, ICC Publication 843, par. 85.

<sup>16</sup> ICC Article 31(3)

<sup>17</sup> Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (Principles Governing the Costs of Arbitral Proceedings in Domestic Disputes). Section 5a, Allocation of the Arbitration Fee, provides "...the Arbitration Fee shall as a rule be borne by the party which loses the dispute...".

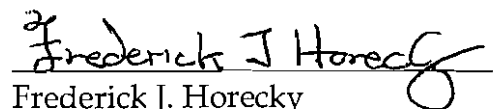
<sup>18</sup> AAA Commercial Arbitration Rules and Mediation Procedures, R-43(c), Scope of Award.

the fees of the arbitrator.<sup>19</sup> The American Arbitration Association's Rules generally provide that arbitrator's compensation and related administrative fees are subject to allocation by the arbitrator in the award.<sup>20</sup>

There is substantial authority to allow the PUC Administrative Law Judge and the Commission to allocate PUC expenses to the parties in an arbitration or other regulatory proceeding, both in the Guam Telecommunications Act and precedent from other types of arbitration proceedings. The potential risk of being assessed the Commission's regulatory expenses could encourage parties to avoid conduct which may be in violation of law or PUC rules and orders. 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.

### **Recommendation of Legal Counsel**

Legal Counsel hereby proposes the following Amended Section 1(b)(iii) to the PUC 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." The proposed rule should apply to both proceedings under Rule 4 of the Interconnection Implementation Rules as well as complaints filed pursuant to 12 GCA §12107(a). Counsel recommends that the PUC adopt such rule after a duly noticed public hearing on this matter.



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Legal Counsel  
Guam Public Utilities Commission

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<sup>19</sup> Independent Film and Television Alliance Arbitration: Rules for International Arbitration, Rule 14 (June 1, 2009).

<sup>20</sup> Virginia Lawyer, April 2002: Matthew B. Kirsner, "Arbitration: Which Party Should Bear the Cost?" p. 25.

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.”

