

BEFORE THE GUAM PUBLIC UTILITES COMMISSION

IN RE: PACIFIC DATA SYSTEMS, INC. )  
AND GTA TELEGUAM, LLC/ ) PDS Docket 10-02  
REQUEST FOR ARBITRATION )  
OF ICA )  
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**PUC COUNSEL REPORT**

*Introduction*

This matter comes before the Guam Public Utilities Commission [PUC] upon the Order of the Administrative Law Judge [ALJ] issued June 8, 2010. In the Order, the ALJ, sitting as an Arbitrator, determines certain issues arising under the proposed new Interconnection Agreement [ICA] between Pacific Data Systems, Inc. [PDS] and GTA Teleguam, LLC [GTA].<sup>1</sup> PDS filed its request for arbitration on February 23, 2010, pursuant to Section 252(b)(1) of the federal Telecommunications Act of 1996.<sup>2</sup> PDS requested arbitration of open issues between PDS and GTA related to their negotiations for a new interconnection agreement between them.<sup>3</sup>

Under the Interconnection Implementation Rules [IIRs] parties can request that the ALJ and PUC arbitrate unresolved issues.<sup>4</sup> The PUC 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.<sup>5</sup>

Initially, GTA moved to dismiss the petition of PDS for arbitration.<sup>6</sup> GTA contended that PDS did not supply sufficient information with the Petition, in compliance with the requirements of 47 U.S.C. §252(b)(2)(A) and 12 GCA §12107(b). The ALJ rejected the argument that the petition filed by PDS was insufficient or failed to contain necessary information. Attached to the Petition was an exhibit outlining the various provisions of

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<sup>1</sup> ALJ Order, In Re: PDS/GTA Request for Arbitration of ICA, PDS Docket 10-02, issued June 8, 2010.

<sup>2</sup> PDS Petition for Arbitration, PDS Docket 10-02, filed February 23, 2010.

<sup>3</sup> ALJ Order, p. 1.

<sup>4</sup> See 47 U.S.C. §252(b)(1).

<sup>5</sup> IIR 4(h)(10).

<sup>6</sup> GTA Response to Petition, PDS Docket 10-02, filed March 19, 2010.

the ICA in dispute, as well as indicating the positions of the parties, with respect to each of the disputed provisions.<sup>7</sup>

The ALJ also found that there was no prejudice to GTA; GTA was aware of the relevant documents, and some of the documents were superseded by the subsequent exchanges of drafts by the parties.<sup>8</sup> The ALJ found that PDS had substantially complied with the notice requirements of Section 252(b)(2).<sup>9</sup> PDS had duly submitted the necessary and relevant documents to its petition for arbitration in satisfaction of both federal and local laws.<sup>10</sup> GTA also indicated that there had been insufficient time for the parties to negotiate the outstanding issues, rendering the submission of these issues to arbitration “premature.”<sup>11</sup> The ALJ found that both of the parties were responsible for some delay in negotiating the ICA; the timeframe prescribed under federal law [i.e. 9 months after the request for negotiations is made] necessitated the dismissal of GTA’s motion: “... arbitration of these open issues must be conducted now.” The ALJ recommends that the PUC deny GTA’s motion to dismiss the instant arbitration.<sup>12</sup>

*Certain Issues were resolved by the Parties without the necessity of arbitration by the ALJ*

The parties resolved certain issues without the need for arbitration by the ALJ: the definition of “dark fiber”, and the termination and term provisions of the ICA.<sup>13</sup>

*Recommendations by the ALJ on Arbitrated Issues*

1. Pre-Billing.

PDS argued in its petition that GTA may not lawfully bill PDS for a service in advance of providing that service.<sup>14</sup> GTA bills PDS in advance for certain services. PDS further argued that the current ICA does not provide for pre-billing. Therefore a party was only authorized to bill for a service after the service was provided.<sup>15</sup> The ALJ rejected the argument of PDS and accepted the contention of GTA that “pre-billing is an

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<sup>7</sup> ALJ Order, p. 5.

<sup>8</sup> Id. at p. 6.

<sup>9</sup> Id. at p. 7.

<sup>10</sup> Id. at p. 7.

<sup>11</sup> Id. at p. 8.

<sup>12</sup> Id. at pgs. 9-10.

<sup>13</sup> Id. at pgs. 10 and 12.

<sup>14</sup> PDS Brief, PDS Docket 10-02, at p. 1-2, filed April 8, 2010.

<sup>15</sup> Id. at p. 2.

accepted industry practice.”<sup>16</sup> PDS cited no authority which precluded local exchange carriers from billing the other party in advance.<sup>17</sup> According to the ALJ, provisions permitting billing in advance or “pre-billing”, are “just, reasonable, and non-discriminatory and not in violation of law.” The ALJ recommends that provisions permitting pre-billing be incorporated into the ICA.<sup>18</sup>

2. Section 25.

The Commission is familiar with controversies between the parties concerning the “liability” or “remedy” provisions in Section 25 of the existing ICA. This subject has been addressed in detail by the ALJ in his Order dated June 8, 2010, in GTA Docket 10-02 regarding Financial Incentive Plan and Remedy Provisions.<sup>19</sup> He recommends that provisions providing for consequential damages remedies and attorneys fees be incorporated into the ICA. A PUC Counsel Report has also been filed concerning Section 25 of the ICA, and a proposed Order will be considered by the PUC in GTA Docket 10-02 at its meeting on June 16, 2010.<sup>20</sup> In his Order in this Docket, the ALJ incorporates his recommendations concerning the liability/remedy provisions in Section 25 from GTA Docket 10-02.<sup>21</sup> The ALJ also recommends that the PUC adopt his suggested revisions to Section 25 as a part of the Order in this arbitration proceeding.

3. Assurance of Payment.

PDS seeks to remove provisions in existing Section 9 of the ICA which authorize GTA to require PDS to make certain deposits and “assurance of payments.” PDS argues that such provisions violate the Interconnection Implementation Rules and should therefore not be incorporated into the ICA.<sup>22</sup> PDS argues that interconnection agreements between GTA and other carriers do not include deposit or assurance of payment provisions and that such provisions are unnecessary because the ICA allows for a hold on pending orders and termination of existing services when payments are not being made.<sup>23</sup>

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<sup>16</sup> ALJ Order p. 11.

<sup>17</sup> Id. at p. 12.

<sup>18</sup> Id. at p. 12.

<sup>19</sup> ALJ Order, In Re: Financial Incentive Plan, GTA Docket 10-02, filed June 8, 2010.

<sup>20</sup> PUC Counsel Report, GTA Docket 10-02, filed June 15, 2010, and Proposed Order.

<sup>21</sup> ALJ Order, p. 12.

<sup>22</sup> ALJ Order, p. 13.

<sup>23</sup> ALJ Order, p. 13.

GTA contends that the issue of Section 9 and Assurance of Payments has already previously been arbitrated by the parties, and that such provision was included in the ICA at the recommendation of the PUC's Consultant Georgetown Consulting Group. GTA argues that it should have the authority to require such payments as "not one-size fits all." The ALJ adopts GTA's position and finds that the assurance of payment provisions in Section 9 have already been the subject of arbitration between the parties. Upon arbitration of the existing ICA, PDS expressly agreed that GTA was entitled to an assurance of payment from PDS amounting to a one-month assurance. Ultimately, PUC's consultant recommended a two month assurance of payment, which is adopted in Section 9.

The ALJ also finds that the provisions related to assurance of payment are consistent with industry practice.<sup>24</sup> GTA has not extended any services or products on more favorable terms to its affiliates or to any other carrier: the "one size fits all" formula is neither practical nor required under the law.<sup>25</sup> Therefore, the ALJ finds that Section 9, and the Assurance of Payment provisions, do not violate Guam's IIRs or the federal Telecommunications Act. Section 9 should remain in the ICA.

#### 4. Pricing.

The parties had previously represented to the ALJ that there were certain disputed "pricing" issues. Subsequently, the parties indicated to the ALJ that they would enter into a stipulation requesting that the ALJ initiate a separate docket for the determination of permanent pricing for three particular services, and agreeing on interim pricing rates for such services. However, the parties subsequently advised the ALJ that they had not reached a stipulation.<sup>26</sup> Since no agreement was reached by the parties, the ALJ recommends that the current pricing rates and conditions under the existing ICA should remain in effect. The parties can petition the PUC to modify such prices if they desire.<sup>27</sup>

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<sup>24</sup> ALJ Order, p. 14.

<sup>25</sup> ALJ Order, p. 15.

<sup>26</sup> ALJ Order, p. 16.

<sup>27</sup> ALJ Order, p. 17.

5. Dispute Resolution.

PDS has requested that the language of Section 14 of the ICA be modified to define a failure by a party to meet its good faith obligations. The proposed language to be added in Section 14 would define bad faith as the failure of one party to meet with the other party within the dispute resolution period. Section 14 generally provides that any dispute between the parties regarding the interpretation or enforcement of any of the ICA's provisions must be addressed by parties in good faith within forty-five (45) days notice of such dispute.<sup>28</sup>

The ALJ finds that a party's failure to negotiate after a dispute has been lodged by the other party is a show of bad faith. In such instance, the burden should rest on the non-negotiating party to show why the failure to meet within the dispute resolution period is excusable or not in bad faith.<sup>29</sup> The presumption of bad faith would "serve to positively motivate the offending party not to ignore its obligations."<sup>30</sup> The ALJ finds that the language proposed by PDS is acceptable, with certain exceptions: (1) the forty-five (45) day dispute resolution period should be expanded to sixty (60) days to allow both parties more time to meet and confer; and (2) the failure of one party to meet with the other party during the dispute resolution period shall constitute *rebuttable* evidence of a failure to meet its good faith obligation to negotiate the dispute.<sup>31</sup>

*Recommendation*

PUC Counsel recommends that the PUC adopt the ALJ Order dated June 8, 2010 and approve all of the recommendations contained therein. In particular: (1) the PUC should deny GTA's motion to dismiss the instant Petition; (2) the provisions permitting pre-billing should be incorporated into the ICA; (3) Section 9, including the Assurance of Payment provisions, should continue to be incorporated into the ICA; (4) the language proposed by the ALJ with regard to dispute resolution, expanding the dispute resolution period to sixty (60) days, and providing that the failure of one party to meet with the other party during the dispute resolution period shall constitute *rebuttable* evidence of a failure to negotiate in good faith, should be adopted; (5) the recommendations of the ALJ concerning Financial Incentive Plan and/or Remedy Provisions with regard to Section 25, as set forth in GTA Docket 10-02, should be

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<sup>28</sup> ALJ Order, p. 17.

<sup>29</sup> ALJ Order, p. 18.

<sup>30</sup> *Id.*

<sup>31</sup> ALJ Order, p. 19.

incorporated into this Order in this Docket; the PUC should adopt the recommendations of the ALJ concerning recommended provisions in Section 25 of the ICA and require their inclusion in the ICA between the parties; (6) since the parties have failed to stipulate to interim rates and pricing conditions, the PUC should accept the ALJ recommendation that the current pricing rates under the existing ICA remain in effect; and (7) since the parties have stipulated to a definition of dark fiber and the termination and term provisions, no further action by the PUC is required regarding those subject matters.

A proposed Order is submitted herewith.

Dated this 15<sup>th</sup> day of June, 2010.

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PUC Legal Counsel