

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

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

**AMENDED ORDER**

*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 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>

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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).

*GTA's Motion to Dismiss*

Initially, the ALJ recommends that the PUC deny GTA's motion to dismiss PDS' Petition for arbitration. He concludes that PDS' Petition did, in compliance with the requirements of 47 U.S.C. §252(b)(2)(A) and 12 GCA §12107(b), adequately address the various provisions of the ICA in dispute, as well as indicating the positions of the parties, with respect to each of the disputed provisions.<sup>6</sup> There was no lack of notice or prejudice to GTA.<sup>7</sup> PDS had substantially complied with the notice requirements of Section 252(b)(2).<sup>8</sup> Based upon a finding that both parties shared responsibility for some delay in negotiating the ICA, and the need to complete the arbitration within the timeframe prescribed under federal law [i.e. 9 months after the request for negotiations is made], the ALJ recommends that the PUC deny GTA's motion to dismiss the instant arbitration.<sup>9</sup> For the reasons set forth in the ALJ's Order, the PUC determines that GTA's motion to dismiss should be denied.

*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>10</sup> No further action by the PUC is required on these issues.

*Recommendations by the ALJ on Arbitrated Issues*

The ALJ has made a number of recommendations to the PUC in his Order concerning certain arbitrated issues: Pre-billing, Assurance of Payment, Pricing, and Dispute Resolution. The Commission determines that the ALJ has presented reasoned determinations and conclusions for each recommendation made on the foregoing issues. Furthermore, PUC Counsel, in his Report filed June 15, 2010, recommends that the PUC approve and adopt the ALJ's Order.<sup>11</sup> As to the ALJ recommendations on Section 25 Liability and other remedy provisions, the PUC does not have a quorum of Commissioners at its meeting of June 16, 2010 that can address this issue. Commissioner Pangelinan has recused himself. Thus, the PUC cannot take action on the ALJ recommendations on Section 25 at the present time.

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<sup>6</sup> ALJ Order, p. 5.

<sup>7</sup> Id. at p. 6.

<sup>8</sup> Id. at p. 7.

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

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

<sup>11</sup> PUC Counsel Report, PDS Docket 10-02, filed June 15, 2010.

1. Pre Billing

GTA should be able to “pre-bill” PDS for certain services in advance of providing that service: “pre-billing is an accepted industry practice.”<sup>12</sup> Provisions permitting billing in advance, or “pre-billing”, are “just, reasonable, and non-discriminatory and not in violation of law.”<sup>13</sup>

2. Assurance of Payment.

Section 9 of the ICA authorizes GTA to require PDS to make certain deposits and “assurance of payments.” Although PDS now objects to such provision, PDS expressly agreed in prior arbitration with GTA on this issue that GTA was entitled to an assurance of payment from PDS. The provisions related to assurance of payment are consistent with industry practice.<sup>14</sup> Sections 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.

3. Pricing.

No agreement was reached by the parties on certain disputed “pricing” issues.<sup>15</sup> The parties did not present such pricing issues to the ALJ, nor did he arbitrate such issues. Therefore, the current pricing rates and conditions under the existing ICA should remain in effect.<sup>16</sup>

4. Dispute Resolution.

The language of Section 14 of the ICA should be modified to define a failure by a party to meet its good faith obligations. 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>17</sup> The presumption of bad faith would “serve to positively motivate the offending party not to ignore its obligations.”<sup>18</sup> The

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<sup>12</sup> ALJ Order p. 11.

<sup>13</sup> Id. at p. 12.

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

<sup>15</sup> ALJ Order, p. 16.

<sup>16</sup> ALJ Order, p. 17.

<sup>17</sup> ALJ Order, p. 18.

<sup>18</sup> Id.

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>19</sup>

#### *Ordering Provisions*

Having considered the record of the proceedings herein, the pleadings of the parties, and the Order of the ALJ issued on June 8, 2010, and good cause appearing, the Guam Public Utilities Commission hereby ORDERS as follows:

1. The Order issued by the ALJ on June 8, 2010 is hereby approved and adopted (with the exception of the ALJ recommendations on Section 25 of the ICA, upon which the PUC does not have a quorum of Commissioners to act).
2. GTA's Motion to Dismiss the Petition of PDS requesting arbitration is denied.
3. Provisions in the ICA permitting Pre-billing shall continue to be incorporated into the ICA between the parties.
4. Section 9, including the assurance of payment provisions, shall continue to be incorporated into the ICA between the parties.
5. The ICA between GTA and PDS shall contain a sixty (60) day dispute resolution period, and shall provide 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.
6. Since there has been no agreement between the parties as to interim rates and pricing conditions, nor presentation of such issue to the ALJ, the current pricing rates under the existing ICA shall remain in effect.
7. As a result of the stipulation of the parties as to a definition of dark fiber and termination and term provisions of the ICA, no further decision by the PUC is required on those issues.

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

8. PDS and GTA shall equally share the 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/arbitration process.

Dated this 16<sup>th</sup> day of June, 2010, NUNC PRO TUNC.

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Jeffrey C. Johnson  
Chairman

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Joseph M. McDonald  
Commissioner

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Rowena E. Perez  
Commissioner

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Filomena M. Cantoria  
Commissioner

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Michael A. Pangelinan  
Commissioner