

PUBLIC UTILITIES COMMISSION
OF GUAM

Vice Speaker
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Harry M. Boertzel
Administrative Law Judge

Lourdes R. Palomo
Administrator

February 2, 2006

VIA HAND DELIVERY

The Honorable Felix P. Camacho
Governor of Guam
Post Office Box 2950
Hagåtña, Guam 96932



The Honorable Mark Forbes
Speaker, 28th Guam Legislature
155 Hesler Place
Hagåtña, Guam 96910

Office of the Speaker

MARK FORBES

Date: 02/07/06

Time: 2:40

Rec'd by: [Signature]

Print Name: [Signature]

RE: **FY05 Annual Report**

Gentlemen:

In accordance with the mandate of 12 GCA 12003, the Guam Public Utilities Commission PUC] respectfully submits its annual report for fiscal year 2005. In November 2005, PUC launched its website [*guampuc.com*], which is intended to make the regulatory process transparent and to provide the public with access to the regulatory process as it occurs. The site also contains a reference center, which contains PUC orders and business minutes since 2000.

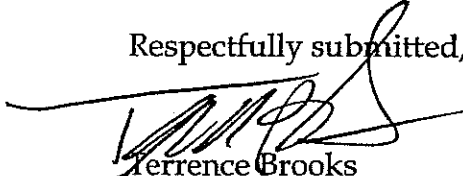
Attachment A summarizes the significant regulatory actions taken by PUC in FY05. Further information about these actions can be obtained from the referenced documents, which are available on PUC's website.

The only legislative matter, which PUC would like to call to your attention, is the government of Guam's appropriation and use of E911 surcharge revenues for purposes other than support of the E911 system. Mr. Blair's October 17, 2005 letter on this subject is enclosed for your information.

PUC currently only has four sitting commissioners and three vacancies [*open position categories are CPA; telephone, water or wastewater expertise and community representative*]. Commissioner Joe McDonald's term expires on April 18 2006. He

has expressed interest in being reappointed. 12 GCA 12006 provides that PUC cannot act without the affirmative vote of 4 commissioners. Given the important regulatory agenda before PUC this year [*DPW landfill bonding, rate relief and privatization procurement; GWA final financial plan; GPA semi-annual LEAC fuel expense adjustments; and a spectrum of telecommunications issues*] it is essential that additional commissioners be promptly appointed. Governor, I will contact your office to discuss this matter.

Respectfully submitted,



Terrence Brooks
Chairman

Attachment A
Significant Regulatory Actions - FY05

Date	Docket	Action
Guam Waterworks Authority 10/14/04	04-1	Approval of financing for system wide water meter replacement.
10/14/04	04-1	Order: a] approving 6.5% rate increase with revenues restricted in Rate Stabilization Trust Account; and b] increasing Supplemental Annuities surcharge to fund retiree benefits mandated by P.L. 27-106.
9/23/05	98-1	Order authorizing GWA limited access to Rate Stabilization Trust Account and authorizing GWA to borrow \$4.7 million from GPA.
Guam Power Authority 11/5/04	94-4	Order authorizing tax-exempt a commercial paper program in amount not to exceed \$30 million to fund short term cash requirements.
4/22/05	02-4	Order establishing generation performance standards and terms for GPA recovery of deferred fuel expenses.
7/27/05	02-4	Interim LEAC adjustment order increasing fuel charges in response to increased fuel expenses.
Telecommunications 2/1/05	05-3	Order prohibiting TeleGuam from assessing its local exchange customers a charge to recover gross receipts tax liability.
4/22/05	05-3	Declaratory ruling that PUC approval required for certificate of authority transfer.
4/22/05	05-3	Order approving TeleGuam's general exchange tariff.
4/22/05	05-1	Order adopting interim certification and confidentiality rules.
7/25/05	05-3	Order authorizing TeleGuam to transfer its certificate of authority to GTA Telecom.
7/27/05	05-3	Order establishing verification and certification procedures for eligible telecommunications carriers.
7/27/05	05-1	Order adopting rules governing certificates of authority, payphone service, protection of confidential information and regulatory fees.

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JAMES F. BALDWIN
OF COUNSEL
J. BRADLEY KLEMM

October 17, 2005

VIA FACSIMILE\HAND DELIVERY
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Harry M. Boertzel, Esq.
Administrative Law Judge
PUBLIC UTILITIES COMMISSION OF GUAM
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RE: USE OF E911 SURCHARGE REVENUES

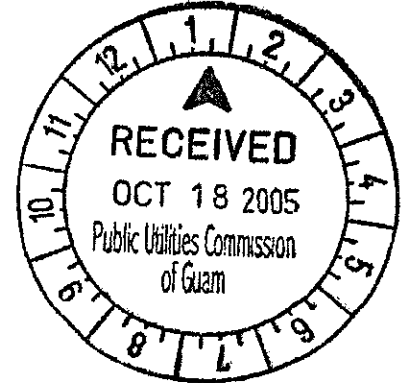
Dear Harry:

This is in response to your request that I provide a legal memorandum regarding certain provisions of the GovGuam FY06 budget bill, Bill 114 as enacted into law as Guam PL 28-28.

The Guam PUC, pursuant to PL 25-55, the PUC was mandated by the Guam Legislature to establish a monthly surcharge to be imposed on local exchange telephone and CMRS customers. The stated purpose of the surcharge is to "fund the just and reasonable expenses of operating and maintaining the '911' system" operated by the Guam Fire Department. PL 25-55:2(d). The PUC subsequently established a monthly surcharge in the amount of \$1.00 per month, the maximum amount permitted by the statute.

Revenues derived from the surcharge are required to be deposited into a special fund that was to be created separate and apart from all other funds of the Government of Guam called the "Enhanced 911 Emergency Reporting System Fund" (the "E911 Fund"). PL 25-55:4.

The revenues from the surcharge imposed on telephone and CMRS customers have been collected by the various collection agents and remitted periodically remitted to the Department of Administration where they have presumably been deposited into the E911 Fund, all as required by PL 25-55 and the implementing PUC orders.



To Harry M. Boertzel, Esq.

Date October 17, 2005

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The GovGuam budget bill was passed into law on September 30, 2005, the last possible date. Certain provisions of that statute, which did not receive, to my knowledge, the benefit of a public hearing, raise questions whether the surcharge revenues are being used as intended.

Specifically, in part II of Chapter II of PL 28-68, the Legislature provided that the September 30, 1994 balance in the E911 Fund (\$1,574,228), together with the balances in several other separate funds, should be transferred to a new fund created by the budget bill called the "Unreserved Fund Balance Fund." PL 28-68:II:II:2:6 and 7. A portion of the funds in the E911 Fund are thus to be commingled with other funds derived from other fees, charges and, perhaps, taxes. (I have not studied the specifics of all the other funds to be transferred to the Unreserved Fund Balance Fund.)

In addition to requiring that the FY04 balance in the E911 Fund be transferred and commingled in the Unreserved Fund Balance Fund, the budget bill appropriates the transferred funds to purposes other than funding the 911 system. \$67,216 is appropriated to the Guam Police Department to support its general operations; \$602,378 is appropriated to support GFD general operations not related to the 911 system; a total of over \$755,000 is appropriated to GFD to support its Advanced Life Support System; \$217,104 is appropriated to GFD for equipment and supplies not related to the 911 system; and \$125,176 is appropriated to the Department of Corrections to support its operations. Additional appropriations are made from the Unreserved Fund Balance Fund for community health centers, DPW operations and to the village mayors for maintenance of sports facilities.

The budget bill also appropriates the sum of \$2,082,787 from the E911 Fund to GFD for personnel and operations for the 911 system. It may be assumed that this amount reflected the FY05 year end balance in the E911 Fund together with projected surcharge revenues for FY06. However, I do not have that information.

The diversion of surcharge revenues to uses other than supporting the operations of the 911 system raises the issue as to whether the surcharge should be viewed as a "fee" or a "tax" and, if it should be viewed as a tax, whether the tax is being uniformly applied. The ratepayers who are required to pay the E911 surcharge are supposedly paying only the just and reasonable costs of operating the 911 system. That makes it look resemble a fee. If the surcharge revenues are being used to subsidize other unrelated government operations, then the surcharge begins to take on the characteristics of a tax, not

To Harry M. Boertzel, Esq.

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a fee. As such, the "fundamental constitutional constraints" on the imposition of taxes become implicated, including the uniformity requirement. If the surcharge is a tax, it is a tax imposed only on telephone and CMRS customers, not on other classes of taxpayers.

Previously, I looked the question of how the E911 surcharge should be viewed in the context of whether or not the federal government was exempt from paying it or not. I found a number of reports and decisions issued by the General Accounting Office regarding this issue. The GAO has uniformly found that a 911 surcharge structured like Guam's is a tax, not a fee. See, e.g., GAO decisions, B-288161, dated April 6, 2002, and B-302230, dated December 30, 2003. Both are easily accessible on the GAO's website, www.gao.gov. These cases arose in the District of Columbia. There are a number of other, earlier decisions related to various state charges. See in particular, GAO decision B-301126, dated October 22, 2003, which involved a statute remarkably similar to Guam's. In that matter, the GAO determined that the surcharge was a tax (and the federal government therefore exempt from paying it).

On the other hand, the surcharge has some of the characteristics of a regulatory fee. It is imposed on ratepayers to cover the cost of a service provided to them by GFD. See, e.g., Carrillo v. City of Ocean Shores, 94 P.3d 961 (Wash.App. 2004), applying Washington law.

Local governments have the authority to require payment of fees that are "akin to charges for services rendered." [Citation omitted.] But such payments must be deposited into a segregated fund directly related either to the provision of a service received by the entities paying the fees or to alleviating a burden to which the entities paying the fee contribute. [Citations omitted.] These charges, which Washington courts collectively refer to as "regulatory fees," include a wide assortment of utility customer fees, utility connection fees, garbage collection fees, local storm water facility fees, user fees, permit fees, parking fees, registration fees, filing fees, and license fees. [Citation omitted.] These fees are not taxes and are exempt from fundamental constitutional constraints on governmental taxation authority, including the tax uniformity requirement. [Citation omitted.]

To Harry M. Boertzel, Esq.

Date October 17, 2005

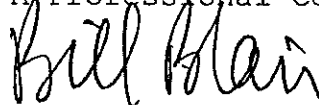
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94 P.3d at 966, emphasis in original.¹

At this point we do not have performed sufficient research upon which to base a firm opinion on the legal issues. There are also some factual uncertainties. However, based solely on the provisions of the budget bill it would appear that there was an unused surplus in the E911 Fund. This raises the question of whether the amount of the surcharge is greater than necessary to fund the operation of the 911 system, i.e. is the level of the surcharge "just and reasonable." Under PL 25-55, the PUC has the authority, at any time, to examine the adequacy of the surcharge. PL 25-55:2(d). It would be appropriate, in my view, for the PUC to initiate such an examination and, depending on the results of that examination, take appropriate action.²

Very truly yours,

KLEMM, BLAIR, STERLING & JOHNSON
A Professional Corporation


WILLIAM J. BLAIR

cc: Mr. Jamshed K. Madan (via fax)

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(FAX-HD) 911 SURCHARGE.DOC

¹ You can contrast the Legislature's imposition of the obligation on GWA and GPA to pay supplemental retirement annuities for certain retirees, which obligation is renewed by PL 28-28. That obligation is passed on to the ratepayers, even though it is in no way related to the cost of service. There can be no argument that, from the ratepayers' perspective, this obligation is a fee, not a tax. The Attorney General's office has issued an unpersuasive opinion that imposing onto GWA and GPA the obligation to pay the supplemental benefits is lawful. That opinion does not even discuss, much less analyze, the legal distinction between a tax and a fee. Instead, the opinion relies entirely on an inapposite U.S. Supreme Court decision dealing with impairment of contract issues. The opinion is unpersuasive.

² It is possible, if not probable, that the "surplus" in the E911 Fund reflected unreimbursed expenses paid from the General Fund, and is, therefore, ephemeral. Based on the limited formation available to it, GCG has concluded that the E911 surcharge are insufficient to fund fully the E911 system.