

IN THE SUPREME COURT OF GUAM

THOMAS C. ADA, Senator
Plaintiff-Appellant

vs.

**GUAM TELEPHONE AUTHORITY, PAUL D. UNTALAN,
LESLIE D. MORENO, PEDRO R. MARTINEZ,
EDWARD L.G. AGUON, NORA P. HITOSIS, RENA B.
WANG, and ROMAN L. CEPEDA, personally and in
their capacities as members of the Guam Telephone
Authority Board of Directors, and VICENTE M.
CAMACHO, personally and in his capacity as the
Guam Telephone Authority General Manager,**
Defendants-Appellees

OPINION

Supreme Court Case No. CVA98-012
Superior Court Case No. SP0265-96

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Appeal from the Superior Court of Guam
Argued and submitted on 29 January, 1999
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice¹, JANET HEALY WEEKS and BENJAMIN J.F. CRUZ, Associate Justices.

SIGUENZA, C.J.:

[1] This is an appeal of the Superior Court's decision and order dismissing the Plaintiff's complaint on the pleadings. The court below ruled that the Plaintiff had standing to prosecute the instant action. Further, the court found that the Guam Telephone Authority, an autonomous agency of the government of Guam, had acted within its statutory authority to procure Federal Communications Commission (FCC) licenses for Personal Communications Services (PCS) in Guam and the Commonwealth of the Northern Marianas (CNMI). We agree that the procurement of FCC licenses is within the statutory authority of the Guam Telephone Authority. We therefore AFFIRM the Superior Court's decision.

BACKGROUND

[2] The underlying facts are not disputed. Plaintiff-Appellant, Thomas C. Ada, a Senator of the Twenty-Third Guam Legislature, had filed suit on October 2, 1996. Appellant claimed that the Guam Telephone Authority (GTA) did not have the

¹The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

authority to participate in a bidding process with the FCC to obtain licenses to provide and operate PCS² in Guam and the CNMI. He further alleged that the agency's use of public funds in the procurement of the license, without prior legislative approval, was in contravention of law. Appellant named GTA, its Board of Directors and General Manager, personally and in their respective official capacities, as defendants.

[3] The suit asked for the following relief: (1) a declaratory judgment that GTA does not have the authority to open and operate a PCS business in the CNMI; (2) a permanent injunction enjoining GTA from taking further action towards operation of PCS in the CNMI; (3) that GTA return all public monies improperly spent toward securing the licenses and permits and other expenses associated with establishing a PCS business in the CNMI; and (4) attorney's fees and costs.

[4] On October 4, 1996, GTA removed the action to the District Court of Guam and on October 9, 1996, filed a motion to dismiss or stay proceedings pending referral to the FCC. Appellant filed a motion to remand on October 22, 1996. By order issued on January 13, 1997, the District Court granted Appellant's motion, while denying

²PCS, established by the FCC, is a wireless telecommunications service that combines features of cellular telephones with advanced digital technologies. PCS licenses are in the 1900 MHz band. The FCC has divided the available spectrum for PCS into six blocks: A, B, C, D, E, and F. The licenses are restricted to Major trading Areas (for blocks A, B, and C) and Basic Trading Areas (for blocks D, E, and F). Since August 26, 1996, GTA placed bids in the FCC auction to provide PCS in the D, E, and F frequency blocks to the CNMI.

GTA's motion to dismiss or stay proceedings and Appellant's request for attorney's fees and costs. That court found the following: (1) that Appellant's causes of action do not arise under federal law; (2) that the defense of preemption may not form the basis for removal; and (3) that the action did not fall within the extraordinary complete preemption exception.

[5] On March 18, 1997, GTA filed a motion to dismiss in the Superior Court of Guam, pursuant to Rule 12(b)(6) of the Guam Rules of Civil Procedure. GTA alleged that Appellant lacked standing as a senator to sue for enforcement of the law. Further, GTA filed a motion to dismiss or to stay proceedings pending referral to the FCC under the Doctrine of Primary Jurisdiction. The parties filed their respective responses. The lower court heard argument on the matter on June 26, 1997, and took the case under advisement. By that date, however, the FCC awarded GTA a license to operate a PCS system in Guam and the CNMI.

[6] The trial court rendered its decision and order on January 30, 1998. The court ruled that Appellant had no standing to prosecute the suit as a legislator; however, it found that he did have standing, as a taxpayer, to bring the action. With reference to the motion to dismiss or to stay, the court found no need to rule on the preemption issue. It reasoned that the FCC had seen fit not only to entertain GTA's bid for a PCS

license, but to grant it. The court further observed the preemption mandate of the Telecommunications Act of 1996 was not implicated because there was no statute or regulation to preempt.

[7] Finally, the lower court found, as a matter of law, GTA had acted within its statutory authority in taking measures to procure the FCC licenses and the permits needed to serve Guam PCS customers travelling to the CNMI. The court reasoned that GTA's enabling statute conferred broad powers to GTA so that it may provide telephone services to individuals, firms, corporations and the government of Guam. It noted that while there are certain restrictions placed on the manner in which GTA operates, there were no geographical limitations on its area of service nor was there any limitation on the type of telephone service to be provided.

[8] It further found that nothing in the plain language of the statute, 12 GCA § 7104, read together with 1 GCA §§ 400 and 401, spoke to the authority of GTA to provide for PCS service to its customers while they are in the CNMI. It held the latter two provisions were fundamental declarations of Guam's political authority and not statements restricting the geographical operations of autonomous agencies acting within their statutory mandate. Finally, the court ruled that in any PCS operations in the CNMI, GTA would be acting as a provider of commercial mobile services and

only incidently as an instrumentality of the government of Guam. Thus, the court ordered judgment for GTA on the pleadings.

STANDARD OF REVIEW

[9] This court has jurisdiction pursuant to 7 GCA §§ 3107 and 3108 (1994). Dismissals pursuant to Guam Rule of Civil Procedure 12(c) are reviewed *de novo*. *Marx v. Loral Corp.*, 87 F.3d 1049, 1053 (9th Cir. 1996); *Merchants Home Delivery Serv. Inc. v. Hall & Co.*, 50 F.3d 1486, 1488 (9th Cir. 1995); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993). A “[j]udgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.” *Merchants Home Delivery*, 50 F.3d at 1488.

[10] Issues of statutory interpretation are reviewed *de novo*. *People v. Quichocho*, 1997 Guam 13, ¶ 3. In addition, an agency’s interpretation of a statute is a question of law reviewed *de novo*. *Conlon v. United States Dep’t of Labor*, 76 F.3d 271, 274 (9th Cir. 1996). In reviewing an agency’s construction of a statute, the court must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement. *Chevron, U.S.A., Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 2781 (1984); *Trustees of the Cal. State Univ. v. Riley*, 74 F. 3d 960, 963 (9th Cir. 1996); *Citizens for Clean Air v. EPA*, 959 F. 2d 839, 844 (9th Cir. 1992). If a statute is silent or ambiguous on a particular point, however, the court may defer to the agency's interpretation. *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782; *Citizens for Clean Air*, 959 F. 2d at 844. Review is limited to "whether the agency's conclusion is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782.

DISCUSSION

[11] The court is of the opinion that, at its irreducible minimum, the instant case turns on the issue of whether GTA had the authority to engage in the bidding process for the acquisition of the PCS licenses from the FCC.³ As has been observed:

Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.

Francis O. Day Co., Inc. v. The West Virginia Reclamation Board of Review, 424

³Our disposition of the issue further obviates the need to address the issues of GTA's expenditures for procurement of the license and of preemption raised by Appellees.

S.E. 2d 763, 766-766 (W.Va. 1992)(citations omitted); *Ayala v. Hill*, 664 P. 2d 238, 241 (Ariz. Ct. App. 1983). The statutory provisions with respect to the Guam Telephone Authority are found in Chapter 7 of Title 12 of the Guam Code Annotated.

[12] The powers that GTA shall have and exercise are enumerated in 12 GCA § 7104 and provide as follows:

The Authority shall have and exercise each and all of the following powers:

(a) To install, maintain, sell and supply to individuals, firms, corporations and governments, including the government of Guam, telephone services;

(b) Acquire, subject to the laws of the territory of Guam, by grant, purchase, gift, devise or lease, or by the exercise of the right of eminent domain in accordance with the provisions and subject to the limitations of Title V of Part III of the Code of Civil Procedure of Guam, and hold and use any real or personal property necessary or convenient or useful for the carrying on of any of its powers pursuant to the provisions of this Article. The provisions of Title VII-A of the Government Code shall be applicable to the Authority except when requirements of federal law or federal loans with respect to the expenditure of federal funds are inconsistent with the provisions of Title VII-A of this Code and under such conditions federal law or federal requirements shall control;

(c) Establish its internal organization and management and adopt regulations for the administration of its operations;

(d) Establish and modify from time to time, with approval of the Public Utility Commission, reasonable rates and charges for the telephone service, at least adequate to cover the full cost of such service, including the cost of debt service and collect money from customers using such service, all subject to any contractual obligations of the Board to the

holders of any bonds, pursuant to any such contractual obligation; and refund charges collected in error.

(e) Enter into contracts and execute all instruments necessary or convenient in the exercise of its powers, adopt a seal, and sue or be sued in its own corporate name;

(f) Construct works along or across any street or public highway or watercourse, or over any of the lands which are the property of the Territory; and with respect to federal lands, the Authority shall have the same powers with respect to the construction of such works as possessed by the government of Guam. The Authority shall restore any such street or highway to its former state as near as may be, and shall not use it in a manner to impair unnecessarily its usefulness;

(g) At any time or from time to time, incur indebtedness pursuant to Article 2 of this Chapter;

(h) Enter into contracts with government of the Territory, with the United States or with a reputable institution for loans or grants;

(i) Employ, retain or contract for the services of qualified managers, specialists or experts, as individuals or as organizations, to advise and assist its Board of Directors and employees;

(j) Adopt such rules and regulations as may be necessary for the exercise of the powers and performance of the duties conferred or imposed upon the Authority or the Board by this Article;

(k) Control, operate, improve, equip, maintain, repair, renew, replace, reconstruct, alter and insure the telephone system subject to compliance with any applicable regulations of the territory of Guam;

(l) Do any and all other things necessary to the full and convenient exercise of the above powers.

Nothing contained in this Section or elsewhere in this Article

shall be construed directly or by implication to be in any way in derogation or limitation of powers conferred upon or existing in the Authority or the Board by virtue of any provisions of the Organic Act of Guam or statutes of the Territory or any other provisions of this Chapter.

12 GCA § 7104 (1993).

[13] We find that a plain reading of subsection (a) provides that GTA has the authority to “install, sell and supply to individuals, firms, corporations and governments, including the government of Guam, telephone services.” *Id.* PCS is a wireless telecommunications service that combines features of cellular telephones with advanced digital technologies. It is not unexpected that a broad grant of authority would be necessary in order for GTA to adapt to and acquire new telecommunications technologies and fulfill its purpose of providing and enhancing these services to its customers.

[14] Neither party disputes the fact that GTA has the authority to bid for a license and ultimately become a PCS carrier; however, they disagree whether GTA’s authority permits it to provide these services to the CNMI as well.⁴ In our opinion, however, this issue is not ripe for review by this court unless and until GTA engages in the conduct of business outside of the boundaries of Guam. The U.S. Supreme

⁴Our understanding of the licenses is that they are issued for discrete bands of the frequency spectrum, irrespective of geographical demarcation.

Court has stated that:

[The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 1515 (1967).

With respect to the first aspect, this court must assess the fitness of the issues for judicial decision by focusing on whether the issues presented are purely legal ones and whether we are presented with final agency action. *Id.* at 149, 87 S.Ct. at 1515-1516. We must then balance these considerations against the respective hardships upon the parties. *Id.* at 149, 87 S.Ct. at 1515.

[15] In this case, the Appellant has attempted to frame the issue as a purely legal one calling for the assessment of whether GTA's enabling statute allows its participation in business ventures outside the boundaries of Guam. However, no decision by GTA to so operate has been made for this court to consider. GTA has not undertaken any steps to actually operate PCS: it has merely acquired the license from the FCC. Moreover, rendition of the PCS service in the CNMI is not a foregone conclusion. Alternative options may be pursued by GTA that do not include its

provision of services in the CNMI. GTA's acquisition of the license allows it to enhance its marketability should the privatization of the agency occur, or it may sell the license to another provider. Unless and until there is some action by GTA, this issue is not justiciable at this time. Judicial appraisal of the issue may stand on a much surer footing in the context of a specific application of the agency's broad grant of authority. *See e.g., Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164, 87 S.Ct. 1520, 1524 (1967).

[16] We also reject Appellant's allegation that GTA's participation in the bidding process was procedurally defective. Appellant argues that prior approval from the Board, made in the course of a public hearing, was not given to allow GTA to bid on the PCS licenses. GTA responds that if there was any defect, the Board had cured the error when it ratified the conduct of GTA. We agree. The general rule with respect to ratification is that:

[r]atification of a contract or other act will be implied if the corporation, represented by the board of directors, who have knowledge of the facts accepts and retains the benefits of the contract or act, or recognizes it as binding, or acquiesces in it. They may ratify by acquiescence, and need not act at a meeting regularly called, but may ratify without any formal action. . . .

Ulloa v. GEDA, 580 F. 2d 952, 956 (9th Cir. 1978)(citations omitted). In order for the ratification to be effective, it must first be determined that the Board even had the

authority to so act. *Id.*; See also *Haggerty v. City of Oakland*, 161 Cal.App.2d 407, 326 P.2d 957, 962 (1958) and *Mott v. Horstmann*, 36 Cal. 2d 388, 391, 224 P.2d 11, 12 (1950) (“It is the general rule that a governmental body may effectively ratify what it could therefore have lawfully authorized.”)

[17] In this case, we find GTA had the authority to engage in the bidding process and that the Board’s passage of the resolution adopting and affirming GTA’s conduct effectively ratifies GTA’s participation in bidding for and procuring the PCS licenses.

CONCLUSION

[18] In conclusion, we find that GTA had the authority to bid for and acquire the PCS license from the FCC. However, we also conclude that the issue of whether GTA is authorized to offer PCS in the CNMI is not ripe for this court’s review unless and until GTA takes some action to operate a business in the CNMI. Finally, we reject the contention that GTA had acted improperly because we conclude its conduct was ratified by the passage of the Board’s approval.

[19] We therefore **AFFIRM** the trial court’s order of dismissal.

JANET HEALY WEEKS
Associate Justice

BENJAMIN J. F. CRUZ
Associate Justice

PETER C. SIGUENZA
Chief Justice