

BEFORE THE PUBLIC UTILITIES COMMISSION

In the matter of the Public Utilities Commission Act 1990 (No. 26 of 1990).

- and -

In the matter of the Advisory Fees paid or agreed to be paid by the Guyana Telephone & Telegraph Company Limited to the Atlantic Tele-Network, Inc.

PAMADATH J. MENON, A.A.	-	CHAIRMAN
HUGH GEORGE	-	MEMBER
JOHN WILLEMS, A.A.	-	MEMBER
ERROL HANOMAN	-	MEMBER
A.M.B. SANKIES	-	MEMBER

REPRESENTATION -

The Guyana Telephone & Telegraph Company Limited	-	Mr Joseph Sanders, Attorney-at-Law.
The Guyana Consumers' Association	-	Miss Lily Ferdinand, Attorney-at-Law.
The Guyana Consumers' Advisory Bureau	-	Miss Eileen Cox, Vice-Chairman.

DECISION

Notice dated 2nd December, 1996, was given by the Secretary (ag.) of the Public Utilities Commission ("the PUC"), to the Guyana Telephone & Telegraph Company Limited ("GT&T"), the Guyana Consumers' Association, the Consumers' Advisory Bureau of Guyana and the general public under section 56(2) of the Public Utilities Commission Act 1990 (No. 26 of 1990) ("the PUC Act"), to the effect that a public hearing will be held on 12th December, 1996, commencing at 6:00 p.m. at the Ocean View International Hotel and Convention Centre, Liliendaal, Greater Georgetown, East Coast Demerara, to investigate various matters mentioned in the notice. One of the matters mentioned in the notice as the subject of investigation was -

"the continuation of the payment of Advisory Fees by GT&T, a joint venture company, to one of its shareholders, namely Atlantic Tele-Network Inc. ("ATN") notwithstanding the finding of the PUC in its decision dated 12th November, 1991, that it can find little justification for payment of the same to ATN".

A copy of the above notice is marked as Exhibit C1.

2. The above matter was, as stated in the above-mentioned notice, heard by the PUC on 12th December, 1996 and this decision deals only with the above matter. This matter had earlier been heard by the PUC in the public hearings consequent on a tariff notice filed by GT&T in April, 1991. The other matters mentioned in the aforesaid notice will be heard and dealt with separately.

3. The question for this decision arises from the earlier decision of this Commission dated 12th November, 1991, consequent on the tariff notice filed by GT&T on 15th April, 1991, to increase the rates for the services made available by it with effect from May 20, 1991. Section 35(1) of the PUC Act provides that -

"For the purpose of determining the cost of providing any service by a public utility, so as to determine the rate a public utility is entitled to demand and receive, the Commission shall have power and authority to investigate and decide whether any expenditure incurred by the public utility is justified or reasonable".

4. GT&T is jointly owned by the Government of Guyana ("the Government") and ATN. The Government owns 20% of the shares in GT&T and the ATN owns 80% of that company. The expenditure in issue is the Advisory Fees paid and agreed to be paid by GT&T to ATN. GT&T has not declared any dividend in its six years of operations though it has paid up to September, 1996, G\$3,555,064,918 to ATN, one of its two shareholders, by calling it Advisory Fees.

5. All the matters arising from the Tariff Notice filed by GT&T in April, 1991, have not been fully disposed of up to the date of this Order. For the purposes of this decision, it is not necessary to apportion blame; but the fact remains that the revision of rates for calls to all countries applied for has not so far been finalised. By its decision dated 23rd December, 1991, the PUC, inter alia, ordered -

"(1) The collection charges for telephone calls to the countries listed in the Annex to this Order (Antigua, Britain, Canada and the U.S.A.) shall be as set out in the Annex.

(2) The collection charges for all telephone calls to all other foreign destinations and for telex and telegram services to all foreign destinations shall remain unchanged."

6. By letter dated 20th August, 1993, GT&T requested a review of the PUC's decision denying the rates in respect of certain foreign destinations and submitted additional information for the PUC's consideration. The request for review sought increase in rates relating to 170 countries. However, the PUC, by its decision dated 21st January, 1994, granted only temporary increase in rates and that too only in respect of 83 countries.

7. By its decision dated 31st October, 1994, increase in rates requested for on account of the devaluation of the Guyana dollar in April, 1991, was agreed to by the PUC in respect of the above-mentioned 83 countries. Final decision in respect of the remaining countries on the request for increase in rates consequent on the devaluation of the Guyana dollar in April, 1991, is yet to be taken by the PUC.

8. Besides, the PUC is of the view that the pendency of a rate application is not a condition precedent for the exercise of the powers conferred on it by section 35(1) of the PUC Act, though in exercising the power conferred by that section the PUC is to be guided by the impact the expenditure is likely to have on the rate structure, particularly having regard, in the present case, to the minimum rate of return guaranteed to GT&T by the Agreement entered into between the Government and ATN on 18th June, 1990 ("Acquisition Agreement").

9. In this connection attention is also drawn to the following statement in the decision of the PUC dated 12th November, 1991, (Page 42) -

"The Commission considers it necessary to undertake, in the near future, a special investigation into the Advisory Contract arrangements and unless satisfactory evidence can be given to justify the six per cent management fees as bringing meaningful benefits to GT&T, commensurate with the payments made, the Commission will have no alternative but to regard such payments as a gratuitous cash flow to ATN to be set off against future profits for all rate fixing purposes. The Commission will also consider whether the agreement should be terminated or modified as necessary, to ensure that arrangements for advisory services are conducted on an arms length basis."

10. A copy of the report submitted by the Financial Analyst of the PUC regarding, inter alia, the Advisory Fees is marked as Exhibit C2. A copy of this report was forwarded to GT&T for its comments by the PUC along with letter dated 2nd December, 1996. A copy of the reply of the General Manager of GT&T, dated 6th December, 1996, offering GT&T's comments on Exhibit C2 report is hereby marked as Exhibit C3. Copies of the documents referred to in the reply, namely, the Acquisition Agreement, a letter dated 16th January, 1991, by the then Deputy Prime Minister W.H. Parris, Legal Opinion dated 28th January, 1991, by the then Solicitor General Julian C. Nurse, S.C., the Advisory Contract dated 28th January, 1991, between GT&T & ATN, resolution of the Board of Directors of GT&T dated 28th January, 1991, the order of the High Court, dated 3rd August, 1995, are respectively marked as Exhibits C4, C5, C6, C7, C8 and C9. The PUC has not been able to trace any resolution approving the Advisory Contract unanimously adopted allegedly at a meeting of the Board of Directors of GT&T on 18th January, 1991.

11. The Financial Analyst of the PUC has subsequently submitted to its Chairman on 23rd December, 1996, a report, after further verification of the Advisory Fees paid by GT&T to ATN from 1991 up to September, 1996. The amount of Advisory Fees actually paid to ATN during that period, by GT&T, comes to \$3,555,064,918. A copy of the above report is hereby marked as Exhibit C10.

12. Exhibit C7 Advisory Contract, referred to above is sought to be justified on the basis of para. 6.10 of Exhibit C4 Acquisition Agreement. Para 6.10 of the Acquisition Agreement reads -

"Management Services - where GT&T has engaged ATN or any of its subsidiaries to render any management services, GT&T shall pay fees in foreign currency in such amounts as the Board of Directors of GT&T shall approve and the repatriation of such fees to the United States of America shall not be subject to currency restrictions, withholding taxes, or any other taxation by the Government."

13. Para 5.10 of the Acquisition Agreement refers to management services and management services involve in line responsibilities which are different from advisory services. As may be seen from Section 1 of the Advisory Contract the responsibility of ATN under that contract to GT&T is mainly providing information, or advisory in nature. Besides, under Section 2 of the Advisory Contract, GT&T has to pay ATN, in addition to a monthly fee for the advisory services rendered to GT&T, in the amount of 6% of GT&T's total operating revenues, the following amounts -

- (1) To reimburse ATN, or any of its affiliates, for the salaries and expenses of any employee (including the usual overhead chargeable in such cases), and for any materials used by such employees, (i) in cases where such employees are supplied to GT&T as contemplated by section 1(c) hereof and (ii) in cases where it is necessary in carrying out ATN's obligations under this Agreement to send or maintain employees of ATN, either in Guyana or elsewhere, outside of the locations where they are habitually employed.
- (2) To reimburse ATN, or any of its affiliates, for the fees and expenses of all attorneys, accountants, or other professionals as may be engaged by ATN, or any of its affiliates, from time to time, to perform specific services for GT&T.

14. A copy of a document entitled "Options for Expansion" dated 8th January, 1996, submitted by GT&T to the Senior Legal Counsel of the PUC Mr Ashton Chase, is marked as Exhibit Cii. In this document GT&T gives quite different reasons, than the reasons stated in the Advisory Contract, for the payment of the Advisory Fees to ATN. These are -

- (i) ATN guarantees all of GT&T's debt. ATN is entitled to fees for such guarantees;

- (ii) ATN provides debt to GT&T at rates that are considerably better than GT&T could (or has been able to) secure elsewhere;
- (iii) The audiotext business was explored and developed by ATN;
- (iv) In addition to the above three items there is a general statement about ATN providing technical, managerial and some unspecified "other services" to GT&T.

15. But the following are important. In the Advisory Contract items (i) to (iii) mentioned in the previous paragraph are not stated as reasons for the paying of advisory fees by GT&T to ATN. Besides, for the provision of managerial and technical personnel by ATN, GT&T has to pay the cost separately. It is surprising that it is suggested that an additional payment is required to be made to the creditor as advisory fees in addition to the interest payable on the loan.

16. It could also be mentioned that if Mr Jeffrey J. Prosser, Mr Cornelius B. Prior or any other member of the Board of Directors of GT&T does any work for GT&T, ATN cannot charge any fees for that.

17. No evidence has been placed before us about any service provided by ATN to GT&T which would justify payment by GT&T of any fees to ATN. As pointed out by the PUC at page 39 of its decision dated 12th November, 1991, -

"The six per cent fee bears no relation to services actually rendered. It is due and payable even if no service is provided in any particular month."

18. The above decision has also pointed out, at page 40, -

"Pressed, on another occasion, to justify the six per cent advisory fees, Mr Kean (the then General Manager of GT&T) replied that the objective was to improve the cash flow of the Company but he did not go on to say which company. It certainly cannot be the cash flow of GT&T since quite the opposite is the case. It can therefore only be the cash flow of the recipient, that is ATN."

19. In Exhibit C3, letter dated 6th December, 1996, the General Manager of GT&T, relies on the following documents to support payment of the Advisory Fees under the Advisory Contract dated 28th January, 1991 -

- (i) Para. 6.10 of the Acquisition Agreement. This aspect has been dealt with before.
- (ii) A resolution of GT&T's Board of Directors at a meeting on 18th January, 1991. We have not been able to see any such resolution.
- (iii) Exhibit C5 letter written by the then Deputy Prime Minister W.H. Parris. This letter is dated 16th January 1991, twelve days before the Advisory Contract was entered into and does not specifically deal with the Advisory Contract.
- (iv) Exhibit C6 letter dated 28th January, 1991, from the then Solicitor General Julian Nurse. This document also does not specifically deal with the Advisory Contract.

- (v) The Order of the High Court dated 3rd August, 1995, entered on 11th August, 1995, in Civil Appeal No. 4370 13 of 1994, from the assessment of GT&T by the Commissioner of Inland Revenue for the Assessment Year 1994. This Order does not deal with the Advisory Fees paid by GT&T to ATN.

20. We are firmly of the view that the PUC has the power and jurisdiction to determine whether the payment of the Advisory Fees by GT&T to ATN was justified, to decide whether ATN was entitled to receive any Advisory Fees from GT&T and if so what should be the amount. Our jurisdiction and powers in this regard are not restricted either by the Advisory Contract entered into between GT&T and ATN or any of the other documents referred to in the preceding paragraph.

21. In this connection it may also be pointed out that even after the amendment of section 22 of the PUC Act by the Public Utilities Commission (Amendment) Act, 1994 (No. 14 of 1994), the new subsection (2a) inserted in that section by the aforesaid Amendment Act requires the PUC to take into account the provisions of any agreement only if it is an agreement between the Government and a public utility and that too only for the purposes of sections 26(2), 29 and 33 and the proviso to section 65(1) of the PUC Act, and not for the purposes of section 35(1) of that Act, which is the relevant provision for the present purposes.

22. It may be of interest to point out here that in his letter of 6th December, 1996, the General Manager of GT&T has not referred to any service rendered by ATN to GT&T to justify the payment of the Advisory Fees. On the other hand, he emphasises -

"The Advisory Fees were an important part of the collateral for Northern Telecom's acquisition loan to ATN".

The above statement has to be read in the context of the testimony referred to in para 18 above by the then General Manager of GT&T, in the proceedings before this Commission, consequent on the Tariff Notice filed by GT&T in April, 1991, to the effect that the purpose of the Advisory Fees was to improve the cash flow of ATN. We are of the view that the position taken by the present General Manager of GT&T, as regards the purpose of the Advisory Fees, is consistent with the position taken by the then General Manager of GT&T, Mr Kean, in the 1991 Tariff Proceedings. It is clear as this Commission held in its decision on 12th November, 1991, as regards the advisory fees -

"The six per cent fees bear no relation to service actually rendered. It is due and payable even if no service is provided in any particular month."

23. In the course of his submissions the learned counsel for GT&T, Mr Joseph Sanders, questioned the PUC's jurisdiction to deal with the present matter on the basis of para. 6.10 of the Acquisition Agreement, the consent of the Government Directors on the Board of GT&T as regards the level of Advisory Fees and the non-pendency of a rate issue. We have dealt with these matters in the preceding paragraphs of this decision. For the reasons stated in those discussions we reject the above arguments of the learned counsel.

24. The learned counsel for GT&T also argued -

"In its decision in 1991 November, the Commission did not make any order concerning the Advisory Fees: it made a finding. But as we know, as lawyers, a finding is not binding One appeals against the substantive part of the order and so we did not take up the matter of the finding."

This argument is answered by section 78(1) of the PUC Act which reads -

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This argument is answered by section 78(1) of the PUC Act which reads -

"An appeal shall lie to the Court of Appeal from any final decision or order of the Commission."

It may, therefore, be seen that an appeal lies not only from a final order of the PUC, but from its decisions or findings as well. It, therefore, follows that it is wrong to say that a finding of this Commission, which is not incorporated as an order, is not binding on GT&T.

25. The learned Counsel for GT&T also referred to the proposals made by GT&T in the document titled "Options for Expansion" (Exhibit C11). As regards Advisory Fees the proposal contained in this document is for ATN to agree to reduce to three per cent through January, 1998, the Advisory Fee on all revenues except those derived from cellular (which would be deregulated with grant of a second license) and international long distance. This document is relevant only for one purpose, namely that even GT&T and ATN are convinced that the Advisory Fees of six per cent of gross revenues is not justified.

26. To a specific query, by the Chairman of the PUC, whether he has anything to say on the merits, other than what the General Manager has said in his letter of 6th December, 1996, the learned counsel for GT&T categorically stated that he has nothing more to say. We may also quote the following from the transcript of the proceedings of the PUC at the public hearing on 12th December, 1996, referring to the decision of the PUC on 12th November, 1991,

"Chairman: Was there a finding to the effect that there was little justification for the payment of Advisory Fees?"

Mr Sanders: That indeed was the finding. The previous Commission said it in its findings and in its analysis - that there was little justification or it could find no satisfactory justification, but they made no order. They made no order that is my point".

As we have stated earlier, the PUC is of the view that the argument that a finding or decision in any proceedings before it is not binding on a public utility, which is a party to the proceedings, unless recorded as an order, is quite untenable and the PUC rejects it. This view of ours is consistent with the decision of Boilers J. in Khan V. Shaffieullah, (1963) BGLR 112.

27. Miss Lily Ferdinand, Legal Counsel for the Guyana Consumers' Association opposed the payment of Advisory Fees to ATN by GT&T. Miss Eileen Cox, representing the Consumers' Advisory Bureau of Guyana, did not find any need to add anything further.

28. In the light of the above discussions and findings, the PUC hereby orders -

O R D E R

- (1) After the date of this Order GT&T shall not pay to ATN any Advisory Fees, whether under the Advisory Contract referred to above (Exhibit C7) or otherwise, nor shall ATN receive any such Advisory Fees from GT&T without the prior approval of the PUC;

- (2) The entire amount of Advisory Fees paid by GT&T to ATN from January, 1991, upto and including the date of this Order was paid without any justification and shall be recovered by GT&T from ATN, and shall be refunded by ATN to GT&T, in three equal monthly instalments payable on or before the 31st January, 28th February and 31st March of 1997, with interest at the rate of 12% per annum from the date of this Order, on the unpaid portion of the amount so recoverable by GT&T. The principal amount so recoverable by GT&T from ATN has been determined as \$3,555,064,918.00 from January, 1991, up to September, 1996.
- (3) Notwithstanding what is ordered in Order No. (2) above, the two shareholders of GT&T, namely, the Government and ATN, may enter into any other arrangement, with the approval of the PUC, as to the method of repayment by ATN of the sums directed to be recovered by GT&T from ATN under that Order.
- (4) Any arrangement as is referred to in Order No. (3) shall be entered into on or before 31st January, 1997, or within such further time as may be allowed by the PUC for good and sufficient reason, on application made therefor before the expiry of the said date; and the arrangement and compliance with the arrangement, shall be promptly reported to the PUC;

(5) GT&T shall pay \$10,000.00 as costs to the Guyana Consumers's Association within thirty days of this Order.

DATED AT GEORGETOWN, GUYANA

THIS 22nd DAY OF January 1997

P.J. Menon

P.J. MENON, A.A. - CHAIRMAN

Hugh K. George

HUGH GEORGE - MEMBER

J. F. Willem

JOHN WILLEMS, A.A. - MEMBER

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