

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN THE MATTER OF:)	
)	GTA Docket 15-06
)	
Formal Complaint of Teleguam)	RECOMMENDATION OF THE
Holdings, LLC, Regarding PDS Dark)	ADMINISTRATIVE LAW JUDGE
Fiber Informal Complaint of October 23,)	
2015)	

INTRODUCTION

This matter comes before the Administrative Law Judge [“ALJ”] of the Guam Public Utilities Commission [“PUC”] upon the hearing of the Formal Complaint of Teleguam Holdings, LLC [“GTA”] regarding the refusal of Pacific Data Systems [“PDS”] to pay certain invoices for Dark Fiber Services [“DF Services” or DF-IOF].¹ In January 2015, GTA implemented certain changes to its network infrastructure. Prior to January 2015, GTA indicates that it had three central office/wire center facilities: Agana, Tumon, and Dededo. As a result of the network changes, GTA retired the Tumon and Dededo central offices.

The “Switch Collapse” project included an upgrade of the switch facilities in the Agana Office and a removal of the antiquated switching facilities in the Tumon and Dededo Offices.² Subsequently, in June 2015, GTA sent PDS a letter indicating that, as a result of the changes in the switching infrastructure, GTA now had “only one switch/central office/wire center--the Agana Central Office.”³ GTA stated that, because there was now only one central office/wire center, Dark Fiber “Inter-Office Facility Transport” [DF-IOF] had essentially been eliminated. Applying various provisions of the “Interconnection Agreement” [“ICA”] of the parties, GTA contended that it was no longer required to provide Dark Fiber IOF to PDS. Since GTA now had only one wire center, Dark Fiber Transport no longer existed as such service could only be provided when it connected a pair of GTA Unbundled Network Element [“UNE”] Wire Centers.⁴

GTA further indicated that, pursuant to Network Elements Attachment Section 1.10.2.2.1 of the ICA, GTA was authorized to charge PDS for what had previously been Dark Fiber-IOF, at the rate “for the commercial service that GTA, in its sole discretion, determined to be most analogous to the subject Dark Fiber Transport.”⁵ GTA stated that it would bill PDS for commercial services which would replace Dark Fiber Inter-Office Transport based upon “analogous” charges for OC 3 and OC 12. PDS immediately disputed these billing charges and questioned whether GTA had met the ICA and federal notice requirements for the network changes

¹ GTA Formal Complaint, GTA Docket 15-06, filed December 9, 2015.

² Testimony of Steven P. Redman.

³ PDS Exhibit 8, Letter from Andrew M. Gayle, Jr., Chief Operating Officer of GTA, to John Day, President of Pacific Data Systems, dated June 23, 2015.

⁴ Section 8.1 of the ICA dated August 11, 2014.

⁵ PDS Exhibit 8.

which it had identified.⁶ Prior to September 2015, the monthly billings which GTA submitted to PDS for Dark Fiber Inter-Office Facilities [“DF-IOF”] [17 routes] had been \$8,409.19 per month; GTA was now intending to charge PDS \$54,539.44 per month as commercial rates for “analogous service.”⁷

PDS thereafter refused to pay any invoices regarding the disputed services. After discussions between the parties and an exchange of emails did not lead to a resolution, GTA filed its Formal Complaint on December 9, 2015. The main relief sought by GTA was that PDS make “Interim Payments” to GTA for DF Services during the pendency of these proceedings until the billing dispute was resolved.⁸ The PDS’ Answer, filed on January 5, 2015, disputed that “Interim Payments” were due, and requested that the PUC address the “core issue in this dispute, namely GTA’s unilateral decision to discontinue ICA Dark Fiber services.”⁹

PDS contended that the discontinuance of DF Services, and the steep increase in rates billed, threatened its ability to provide competitive services to new and existing services on Guam.¹⁰ On January 20, 2016, the parties entered into a Stipulation which provided that, until this proceeding was resolved, PDS would make monthly payments [“Interim Payments”] to GTA for Dark Fiber Invoices in the same amount (\$8,409.19) as charged for those services in invoices issued by GTA prior to September 2015.¹¹

On February 2nd and 3rd 2016, the ALJ conducted a hearing of the matter on the merits and received testimony, evidence and argument from the parties. The parties stipulated to all of the Exhibits. On January 10, 2016, the parties submitted proposed Findings of Fact and Conclusions of Law. The ALJ now issues his Recommendation to the PUC pursuant to the Rules for Practice and Procedure before the Commission and Inter-Connection Implementation Rule 4(h).¹²

FINDINGS OF FACT

A. SWITCH COLLAPSE PROJECT

1. GTA first contemplated replacing its switch technology approximately 6 and ½ years ago.¹³
2. GTA’s switches in the Agana, Tumon, and Dededo wire centers were implemented in the 1980s. The technology was outdated. GTA believed that these switches were close to “end of life”; the maintenance vendor for the switches indicated that

⁶ PDS Exhibit 11, Email from John Day to Andrew M. Gayle dated July 2, 2015.

⁷ PDS Exhibit 18, Dark Fiber Inter-Office Transport (DF/IOF) Worksheet, GTA Docket 15-06, prepared January 29, 2016.

⁸ GTA Formal Complaint, GTA Docket 15-06, filed December 9, 2015, at p. 3.

⁹ PDS Answer to GTA Complaint of December 9, 2015, GTA Docket 15-06, filed January 5, 2016.

¹⁰ Id. at p. 3.

¹¹ Stipulation between Teleguam Holdings, LLC and Pacific Data Systems Inc., GTA Docket 15-06, filed January 20, 2016.

¹² The record in this Docket includes all documents filed of record, exhibits attached thereto, emails between the parties and/or the ALJ, testimony and exhibits introduced by the parties at the hearing, and argument presented by the parties at the hearing.

¹³ Testimony of Steven P. Redman.

the maintenance contract would expire at the end of 2016 and would no longer be supported thereafter.¹⁴

3. The benefits from upgrading the switch in the Agana Central Office included transformation of the network and power savings from moving to a digital platform.¹⁵
4. The project to implement the “switch collapse” (removal of Tumon and Dededo switches and location of only switch in Agana) was commenced by GTA on or about July 1, 2014.¹⁶ On that date GTA contracted with Genband to perform the switch collapse.¹⁷
5. On September 12, 2014, GTA notified PDS that the Tumon and Dededo End Offices/Wire Centers would be retired. In addition, the current Agana Office and Tandem would be upgraded and reflect a new end office and Tandem. PDS was further notified that unless, GTA received a valid service request [“ASR”], no trunks or PDS code would be loaded into the new Agana Tandem.¹⁸
6. Although the changes were initially designed to be effective on December 15, 2014, the deadline was extended and the changes were not actually implemented until on or about January 9, 2015, with completion on January 10, 2015.¹⁹
7. GTA also published notice on its website concerning the switch collapse, the retirement of the Tumon and Dededo end offices, and the upgrading of the current Agana end office and Tandem.²⁰ This notice has remained on GTA’s website to date.
8. PDS received a second notice on September 18, 2014, as an Interexchange Carrier, which notice was similar in content to the first notice that it received.²¹
9. The representatives of PDS attempted to schedule an “ICA implementation meeting” with GTA. PDS sought to discuss further the new GTA Switch Design/Topology to determine how the existing interconnection circuits and tandem trunks would be affected and the implementation timeline for these changes.²²
10. The September 2014 notices and correspondence from GTA to PDS did not provide notification to PDS regarding any effect on existing Dark Fiber Inter-Office Facilities Transport service being provided to PDS at any locations in the GTA network.

¹⁴ Id.

¹⁵ Id.

¹⁶ Testimony of Steven P. Redman; see also Testimony of Carl Leon Guerrero.

¹⁷ Id.

¹⁸ GTA Exhibit 6, Letter from Vickie Taitano, Carrier Services Group GTA, to John Day, President of PDS, dated September 12, 2014.

¹⁹ Testimony of Carl Leon Guerrero.

²⁰ GTA Exhibit 5, GTA Notice of Telecommunications Switch Collapse, dated September 19, 2014.

²¹ GTA Exhibit 8, Emails between Vicki Taitano and John Day.

²² PDS Exhibit 9, Emails between the parties from September 18, 2014 through October 27, 2014.

11. PDS, through its President, indicated that PDS would order the new EO circuits by the deadline. However, it felt that GTA had not notified PDS of its plan to replace its existing tandem switch with a completely new tandem switch within 90 days, as required by ICA Section 28.²³
12. On October 31, 2014, GTA, through its Legal Counsel, advised PDS that its 90 days' notice of the switch replacement scheduled by GTA was given to PDS in full compliance with the requirements of Section 28 of the ICA.²⁴
13. On November 14, 2014, and November 17, 2014, PDS placed Access Service Requests for installation of new trunks to the Agana End Office.²⁵
14. Although there were some delays, the switch collapse project was completed on or about January 10, 2015. The project did not materially affect the "interoperability" of GTA's facilities or network with PDS' facilities or network.²⁶
15. The switch collapse did not affect PDS interoperability with its customers, and businesses were not affected, with one exception. PDS did experience an interruption of service for a period of 15 to 30 minutes after midnight on January 6, 2015. PDS did not have to be present for the switch collapse, or undertake any actions with regard thereto.²⁷
16. PDS was able to accommodate the GTA changes.²⁸ After these changes were implemented, PDS was not aware that the upgrades had been completed as of January 12, 2015.²⁹
17. PDS is currently using Unbundled Network Elements ("UNE") Dark Fiber Transport obtained from GTA.³⁰
18. PDS is currently providing telecommunications services to its customers using UNE Dark Fiber Transport obtained from GTA.³¹
19. PDS is interconnected with GTA in such a way that PDS expects to receive access to UNE Dark Fiber Transport from GTA.³²
20. After the completion of the switch collapse project, there was only one wire center/tandem and end office, Agana. The Dededo and Tumon facilities were no longer wire centers or end offices.³³

²³ Id.

²⁴ PDS Exhibit 10, Email from Serge Quenga to John Day, dated October 31, 2014.

²⁵ GTA Exhibits 10 & 11, Access Service Requests from PDS to GTA to install trunks in the Agana End Office.

²⁶ Testimony of Carl Leon Guerrero.

²⁷ Testimony of Dave Duenas.

²⁸ Testimony of Pancho Madrid, PDS Manager for Services.

²⁹ GTA Exhibit 12, Email from Pancho Madrid to Vickie Taitano, indicating that, as of January 12, 2015, PDS was not aware that the upgrade had proceeded ahead and had been completed.

³⁰ PDS Response to GTA's Request for Admissions No. 2.

³¹ PDS Response to GTA's Request for Admissions No. 3.

³² PDS Response to GTA's Request for Admissions No. 4.

³³ Testimony of Carl Leon Guerrero.

B. REVISED BILLINGS

21. Over five months after GTA completed its network changes, on June 23, 2015, it advised PDS that billings would be revised, in accordance with GTA's General Exchange Tariff, "to reflect that GTA now has only one switch/central office/wire center-the Agana Central Office."³⁴
22. GTA COO Gayle advised PDS that "Inter-Office Transport", including Dark Fiber, DS3 and DS1, no longer existed in GTA's network, and that Dark Fiber IOF transport services were being discontinued as an Unbundled Network Element (UNE) across the GTA network due to the "Switch Collapse" implementation.³⁵
23. To justify its discontinuance of Dark Fiber IOF transport services, GTA relied upon §8.1 of the ICA, Dark Fiber, in the Network Elements Attachment. This Section provides: "...notwithstanding any other provision of this Agreement, GTA Tariff, or otherwise, GTA shall not be required to provide, and PDS shall not request or obtain, Dark Fiber Transport that does not connect a pair of GTA UNE Wire Centers...".
24. In the letter, GTA indicated that, pursuant to Network Elements Attachment Section 1.10.2.2.1, GTA was entitled to charge PDS the rate "for the commercial service that GTA, in its sole discretion, determines to be most analogous to the subject Dark Fiber Transport."³⁶ GTA's June 23 letter included a "Table of Analogous Rates," which matched GTA's estimation of PDS' capacity needs in each fiber ring with a circuit type under the General Exchange Tariff.³⁷
25. Previously, dark fiber interoffice transport charges to PDS had been based upon the length of the fiber, billed at a specific rate per mile.³⁸ However, the proposed charges for the analogous commercial services were based upon the capacity utilized by the carrier. GTA estimated PDS' capacity needs based upon the number of UNEs ordered by PDS in each of the five fiber rings.
26. GTA indicated that PDS could submit Access Service Requests in order to substitute services to replace Dark Fiber Transport. To indicate the new billing rates, GTA attached a certain pricing in its Tariff that GTA was currently charging for 4 different TDM circuit types. "Capacity" based charges for various Fiber Rings were priced based on certain existing commercial rates.³⁹ . Based upon the **estimated** capacity needs of PDS, GTA provided PDS with a calculation of the cost of dark fiber transport services under the General Exchange Tariff ("GET").

³⁴ GTA Exhibit 3, Letter from Andrew M. Gayle, Jr., Chief Operating Officer, to John Day, President of Pacific Data Systems, dated June 23, 2015: Further Notice of GTA Switch Network Changes, Discontinuance of Inter-Office Transport.

³⁵ Id.

³⁶ PDS Exhibit 8, Letter from Andrew M. Gayle, Jr., Chief Operating Officer of GTA, to John Day, President of Pacific Data Systems, dated June 23, 2015.

³⁷ GTA Exhibits 2 and 3, Special Service Access, Rates and Charges, and Table of Analogous Rates.

³⁸ PDS Exhibit 18.

³⁹ Id.

27. GTA applied the new proposed rates to all Dark Fiber IOF routes in use by PDS at that time. This resulted in an increase in the monthly rate which GTA proposed to charge PDS from \$8,409.19 per month to \$54,539.44. On or about September 1, 2015 GTA sent PDS a billing that sought to charge PDS for dark fiber transport an "MRC" (monthly recurring charge) in the amount of \$54,539.44.⁴⁰ PDS submitted evidence indicating that, under the prior billings for Inter-Office Dark Fiber Transport, PDS had been billed for the MRC a total of \$8,409.19 per month.⁴¹

C. INTERCONNECTION AGREEMENT

28. The parties negotiated an Interconnection Agreement ("ICA") that governs, among other things, GTA's provision of UNEs, including UNE Dark Fiber Interoffice Facilities ("UNE Dark Fiber IOF"), to PDS.⁴²
29. GTA provides Dark Fiber Inter-Office Facilities (IOF) transport to PDS based on the Interconnection Agreement (ICA) between PDS and GTA that was approved by the PUC on Aug 28, 2014.⁴³ The current ICA is the third version of the original ICA.
30. The three PDS and GTA Interconnection Agreements have incorporated the requirements for collocation and dark fiber in Exhibit A of the ICA. Exhibit A has been in each of the PDS - GTA ICAs and was updated in the most recent ICA to include additional locations agreed to by the parties.⁴⁴
31. Exhibit A indicates that GTA provides PDS with Dark Fiber Routes from 19 GTA facilities, including the Agana Tandem, the Tumon/ Dededo Central Offices, and sixteen "remote" facilities.⁴⁵
32. Most of the PDS Dark Fiber IOF circuits provided to PDS were installed in 2007. Additional Dark Fiber IOF circuits were ordered by PDS and installed by GTA as recently as 2012.⁴⁶
33. The ICA defines UNE Dark Fiber IOF as: Consist[ing] of fiber strand(s) that are located within a fiber optic cable between either (a) accessible terminals in two or more GTA Central Offices or (b) an accessible terminal in a GTA Central Office and an accessible terminal in a PDS Central Office, but, in either case, that has not been activated through connection to multiplexing, aggregation or other electronics that "light it" and thereby render it capable of carrying Telecommunications Services. ICA § 2.27.
34. The ICA defines Dedicated Transport as: "A DS0, DS1, or DS3-capacity transmission facility between GTA switches (as identified in the LERG) or UNE Wire Centers that is dedicated to a particular end user or carrier. Dedicated Transport is sometimes referred to as dedicated interoffice facilities ('IOF')."

⁴⁰ PDS Exhibit 16, GTA September 2015 Billing for Inter Office Transport.

⁴¹ PDS Exhibit 15, Summary of ICA Dark Fiber IOF Routes and Charges.

⁴² Agreement by and between Pacific Data Systems and GTA Teleguam Holdings LLC dated August 11, 2014.

⁴³ PUC Order, PDS Docket 14-01, dated August 28, 2014.

⁴⁴ PDS Exhibit 5, Exhibit A to the ICA dated August 11, 2014, PDS Initial Collocation Requirements.

⁴⁵ Id.

⁴⁶ PDS Exhibit 18; Testimony of John Day.

Dedicated Transport does not include any facility that does not connect a pair of GTA UNE Wire Centers." ICA § 2.28.

35. Finally, the ICA defines Wire Center as: "A building or portion thereof which serves as the premises for one or more Central Office Switches and related facilities." ICA § 2.114.
36. ICA § 42 permits GTA to make technology upgrades: "Technology Upgrades - Notwithstanding any other provision of this agreement, GTA shall have the right to deploy, upgrade, migrate and maintain its network at its discretion. ... Nothing in this Agreement shall limit GTA's ability to modify its network through the incorporation of new equipment or software or otherwise."
37. Section 28 of the ICA governs notice of network changes. It states that in the event there is a change in the information necessary for the transmission and routing of services using that parties facilities or network, or any other change in its facilities or network that will materially affect the interoperability of its facilities or network with the other parties facilities or network, the party making the change shall publish notice of the change at least ninety (90) days in advance of such change, and shall use reasonable efforts, as commercially practicable, to publish such notice at least one hundred eighty (180) days in advance of the change; provided, however, that if an earlier publication of notice of a change is required by Applicable Law (including, but not limited to, 47 C.F.R. 51.325 through 51.335) notice shall be given at the time required by Applicable Law.

D. REMOTE SWITCHING CENTERS

38. GTA had 16 remote switching centers (RSCs) prior to privatization of GTA (in 2004). However, GTA turned off the switching capability of at least 13 of these centers by 2005.⁴⁷ According to GTA, thereafter the RSCs were no longer wire centers.⁴⁸
39. By definition, a "Wire Center" is a premise that has "one or more Central Office Switches and related facilities." ICA § 2.114. After the switching capability was removed from the Remote Switching Centers, the RSCs were no longer wire centers. GTA described this process as the "dumbing down" of the RSCs.⁴⁹
40. GTA did not give notice to PDS under Section 28 of the ICA that these Remote Switching Centers had been turned off or "dumbed down."⁵⁰

E. CONTINUING PROVISION BY GTA OF DARK FIBER IOF TO PDS

41. GTA indicates that it turned off the RSCs in 2005. Its position is that the RSCs were no longer "wire centers" or central offices. The dark fiber routes between GTA's three wire centers and the "remotes" were no longer technically Dark Fiber IOF. Dark Fiber IOF consists of fiber strands between two or more GTA Central Offices.⁵¹

⁴⁷ Testimony of Carl Leon Guerrero.

⁴⁸ Id.

⁴⁹ Testimony of Vicki Taitano.

⁵⁰ Testimony of John Day.

⁵¹ ICA § 2.27.

42. GTA continued to provide Dark Fiber IOF service under the ICA between these RSCs and other wire centers after the RSCs were no longer wire centers, as if the dark fiber service was in fact between two wire centers. GTA continued to agree with PDS in each subsequent ICA that GTA would provide dark fiber IOF between wire centers and remotes, and even between remotes.⁵²
43. GTA witness Vicki Taitano testified that prior to the switch collapse, Dark Fiber IOF should not have existed for the remote facilities as these were not truly interoffice facilities. This would have been true for all facilities except Agana.⁵³ When asked why GTA continued to provide Dark Fiber service to PDS after the RSCs were “dumbed down”, Ms. Taitano responded that there was “miscommunication within GTA.”⁵⁴
44. Under three ICA Agreements, GTA agreed to provide Dark Fiber IOF to PDS for facilities that did not technically qualify as Dark Fiber under the ICA. Even if GTA did not have an obligation to provide Dark Fiber to PDS over those routes, it voluntarily agreed to do so in the ICA that the parties entered into on August 11, 2014.
45. As late as November 2014, GTA provided survey documentation to PDS indicating that it could provide additional Dark Fiber strands to PDS. This was two months after it had indicated to PDS that the Dededo and Tumon wire centers were being retired.⁵⁵
46. After GTA changed its network structure from three wire centers to one in January 2015, it still continued, under the ICA, to provide PDS with the same dark fiber IOF services that it had provided prior to the network change.
47. GTA’s network change only affected two of PDS’ 17 routes, specifically the Agana to Tumon and Tumon to Dededo routes. Those were the only routes between two wire centers. The other 15 routes were not affected by GTA’s network change. The retirement of the Tumon and Dededo switches did not affect the dark fiber routes between collocation sites. GTA agreed to provide the dark fiber strands between the collocation sites indicated in Exhibit A to the ICA.⁵⁶

CONCLUSIONS OF LAW

A. JURISDICTION

48. GTA initially filed this matter as a dispute under the ICA. Pursuant to the Implementation Rules governing Interconnection Agreements between GTA and Competing Local Exchange Carriers and CMRS Operators (“IIR”), the PUC has jurisdiction to resolve disputed issues arising under the ICA.⁵⁷

⁵² PDS Exhibit 18.

⁵³ Testimony of Vicki Taitano.

⁵⁴ Id.

⁵⁵ PDS Exhibit 13; Testimony of John Day.

⁵⁶ Testimony of David Blessing; PDS Exhibit 5.

⁵⁷ IIR 4.

B. GTA PROVIDED ADEQUATE NOTICE OF NETWORK CHANGES

49. Under Section 28 of the ICA, GTA and PDS agreed that a Notice of Network Changes which “materially affects the interoperability of GTA’s facilities or network with PDS’ facilities or network” would be given in accordance with the provisions therein.⁵⁸
50. PDS argued that the notice which GTA was required to give of its system changes is governed by federal regulation under 47 CFR §51.325 through 51.335. These regulations contain detailed requirements concerning public notice, content of notice for network changes, methods for providing notice, and other matters pertaining hereto.⁵⁹
51. However, the provision negotiated by the parties, ICA Section 28 Notice of Network Changes, indicates that the parties did not agree to a wholesale incorporation of the federal regulation requirements into the ICA notice provision.
52. The CFR provisions only apply, according to the proviso in Section 28, where “**an earlier publication of notice of a change is required by Applicable Law (including but not limited to, 47 CFR 51.325 through 51.335)...**” (emphasis added).
53. The language indicates that the parties only intended to incorporate the notice requirements of 47 CFR where an earlier publication of notice was required therein.
54. The provisions of 47 CFR 51.325 through 51.335 only apply for a network change that: (1) will affect a competing service provider’s performance or ability to provide services; and (2) will affect the incumbent LEC’s interoperability with other service providers. There has been no showing in the instant case that the network changes implemented by GTA will affect PDS’ performance or ability to provide services, or that it will affect GTA’s interoperability with other service providers.⁶⁰
55. In addition, the CFRs do not expressly require more than 90 days’ notice. There is a “Short Term Notice” provided for in 47 §51.333 which conceivably authorizes an incumbent LEC to provide **less than 6 months’** notice of planned network changes. That notice provision does not necessarily require notice of more than 90 days.
56. The primary reason the Federal CFR notice requirements do not apply here is that Federal Law provides an exemption from such notice requirements where the parties have voluntarily entered into a negotiated interconnection agreement.
57. 47 U.S.C. §252 provides as follows in pertinent part: “Upon receiving a request for interconnection services for network elements pursuant to Section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in Subsections (b) and (c) of Section 251 of this title.”⁶¹(emphasis added)

⁵⁸ Section 28 of the ICA.

⁵⁹ PDS Exhibit 2, containing provisions 47 CFR §51.325 through 51.335.

⁶⁰ 47 CFR 51.325(a)(1) and (2).

⁶¹ 47 U.S.C. §252(a)(1).

58. 47 U.S.C. §251(c)(5) relates to “Notice of Changes.”⁶²
59. The CFR provisions referenced by PDS were designed “to implement Sections 251 and 252 of the Communications Act of 1934, as amended, 47 U.S.C. 251 and 252”.⁶³
60. The CFR Sections referenced by PDS are not applicable. 47 U.S.C. §252 provides that the notice requirements of Section 251(c) of the act may be supplanted by an interconnection agreement.
61. As set forth in MCI Telecommunications Corporation v. U.S. West Communications, 204 F.3d 1262, 1266 (9th Cir.2000), “The reward for reaching an independent agreement is exemption from the substantive requirements of Subsections 251(b) and 251(c).”
62. The clause in Section 252 (a) (1) indicating that the parties may negotiate and enter into a binding agreement “without regard to the standards set forth in Subsections (b) and (c) of Section 251 of this title” means that the parties may make agreements that go beyond or contradict the specific statutory requirements that an incumbent must follow. McLeodusa Telecommunications Services Inc. v. Arizona Corporation Commission, 655 F.Supp.2d.1003, 1015 (D. Arizona 2009).
63. By negotiating an interconnection agreement which contains specific notice requirements, GTA and PDS intended that Section 28 of the ICA replace any notice obligations otherwise covered by Sections 51.325 to 51.335 of the Code of Federal Regulations. GTA and PDS agreed by contract to replace the regulatory provisions that derive from 47 U.S.C. §251 (c), including Sections 51.325 to 51.335 of the FCC’s rules, with ICA Section 28.
64. The fact that Section 28 of the ICA only incorporated the requirements in 47 CFR 51.325 through 51.335 for “earlier publication of notice of a change” suggests that only that matter, and not the substantive notice requirements of the federal regulation, were incorporated into Section 28 of the ICA.
65. There is a “maxim of interpretation”: *Expressio unius est exclusio alterius.*” When interpreting a law or statute, “the expression of one thing is the exclusion of the other...”⁶⁴
66. The application of this maxim to the instant case indicates that, because the cited provisions of 47 CFR only apply if “an earlier publication of notice of a change is required”, by implication other matters regarding notice in the CFRs do not apply, such as public notice requirements, content of notice, methods of providing notice or other aspects of the federal CFR regulations.
67. Therefore, the federal CFR regulations set forth by PDS in PDS Exhibit 2 do not otherwise apply to the required notice under Section 28 of the ICA.

⁶² 47 U.S.C. §251(c)(5).

⁶³ 47 CFR §51.1, Basis and purpose.

⁶⁴ Duhaime’s Law Dictionary, citing *Rodoro v. Royal Bank of Canada*, 2000 OJ 272.

68. The September 12, 2014, and September 18, 2014, Notices from GTA to PDS were sufficient to inform PDS of the retirement of the Tumon and Dededo End Offices, and that the Agana End Office and Tandem would be upgraded.
69. On September 19, 2014, GPA published its Notice of Telecommunications Switch Collapse on its website. These notices all complied with the requirement in Section 28 of the ICA that "the party making the change shall publish Notice of the change at least (90 days) in advance of such change....".
70. While the rule refers to "reasonable efforts, as commercially practicable" to give 180 days notice in advance of the change, PDS did have 90 days notice of the basic changes that were being made. The initial Notices perhaps could have been more explicit about the fact that GTA was replacing its existing Tandem Switch in the Agana Office with a completely new Tandem Switch. However, GTA and PDS did meet on or about October 23, 2014, at which time PDS was expressly notified that GTA would replace its existing Tandem Switch with a new Tandem Switch.⁶⁵ Given the circumstances, PDS had reasonable notice of retirement of the Tumon and Dededo Wire Centers as well as the replacement of the Tandem Switch.
71. The 180 day notice is not an express requirement under ICA §28, but is conditioned on use of "reasonable efforts, as commercially practicable." GTA did not give notice in July of 2014 of the proposed network changes when it contracted with Genband because GTA was not certain that the switch collapse project would be successful. It issued notices to the public and carriers when it gained confidence that the project would succeed.⁶⁶
72. GTA gave proper notice of the network changes. PDS implies that defective notice from GTA invalidated the network changes implemented. This conclusion is not supported by the ICA. GTA is entitled to make network changes "[N]otwithstanding any other provision of this agreement...". ICA § 42.

C. GTA WAS PERMITTED TO MAKE NETWORK UPGRADES UNDER THE ICA

73. The ICA allows GTA broad discretion to "deploy, upgrade, migrate and maintain its network." ICA § 42. Further, the ICA specifically notes that "Nothing in this Agreement shall limit GTA's ability to modify its network through the incorporation of new equipment or software or otherwise." ICA § 42.

D. THE REMOTE SWITCHING CENTERS (RSCs) ARE NOT "WIRE CENTERS"

74. PDS raises a factual dispute as to whether GTA in fact turned off or "dumbed down" its Remote Switching Centers. It also believes that GTA is bound by the PUC Order of June 22, 2006 in Docket 05-11, which approved the first ICA, and "determined" there were 19 wire centers as of that date.
75. According to testimony from GTA's witnesses, prior to the privatization of Guam Telephone Authority in 2004/2005, a majority of the remote switching centers no longer had switching capacities, and the remainder of remote switching centers lost

⁶⁵ PDS Exhibit 9.

⁶⁶ Testimony of Steven P. Redman.

switching capacities just after privatization.⁶⁷ GTA also produced NECA Tariff F.C.C. No. 4, which indicated for the public record and for all interexchange carriers, that only one wire center--Agana--currently exists.⁶⁸

76. The RSCs are no longer "wire centers", as they do not have switching capacity. The wire center is defined as "a building or portion thereof which serves as the premises for one or more Central Office Switches and related facilities."⁶⁹ GTA met its burden of proof in establishing that the RSCs are no longer premises that have a Central Office Switch.
77. PDS also contends that GTA would have been obligated to give notice to PDS pursuant to Section 28 of the ICA of the turning off or dumbing down of the RSCs. Since GTA provided neither notice to PDS nor public notice, PDS allegedly cannot be affected by this network change.
78. However, the remote switching capability was removed from GTA's remote offices prior to the removal of GTA's Rural Exemption in late 2005. Under the Communications Act's Rural Exemption in section 251(f)(1), rural telephone companies are not obligated to comply with Section 251(c) [notice requirements] until the exemption is eliminated. The notice of network change provision appears in section 251(c) (5). 47 U.S.C. § 251(c) (5). GTA was covered by the rural exemption in section 251(f) (1) until October 27, 2005.⁷⁰ Thus, at the time GTA's remote switches were modified it appears that GTA was not subject to the notice of network change provision under section 251(c) and the FCC's rules implementing that provision in 47 C.F.R. §§51.325 through 333.
79. GTA did submit a fiber cable map in November 2014 that included various Remote Switching Centers.⁷¹ However, GTA witness Vicki Taitano testified that the "remotes" had not had switching capacity since 2005; she stated that PDS knew that GTA only had switches in Agana, Dededo, and Tumon prior to the January 2015 network changes.⁷²
80. GTA's position that the RSCs are no longer wire centers should be sustained.

E. AS A RESULT OF GTA'S NETWORK CHANGES, THERE IS NOW ONLY ONE CENTRAL OFFICE/WIRE CENTER: AGANA

81. Prior to the switch collapse, GTA had three central offices: Agana, Tumon, and Dededo. Accordingly, only Agana, Tumon and Dededo were considered "Wire Centers" under the ICA. The switch collapse resulted in there being only one Wire Center (Agana).⁷³
82. PDS contends that GTA is bound by the PUC Order of June 22, 2006, in Docket 05-11, which referenced that there were "19 wire centers" as of that date.⁷⁴

⁶⁷ Testimonies of Carl Leon Guerrero and Vicki Taitano.

⁶⁸ GTA Exhibit 16, Tariff F.C.C. No. 4, Wire Center Report.

⁶⁹ §2.114 of the ICA. The RSCs do not contain Central Office Switches and are not wire centers.

⁷⁰ PUC Order, Docket 05-11, dated October 27, 2005, at ¶ 1.

⁷¹ PDS Exhibit 14, GTA Fiber Field Survey.

⁷² Testimony of Vicki Taitano.

⁷³ Testimonies of Carl Leon Guerrero and Vicki Taitano.

⁷⁴ PDS Exhibit 25, PUC Decision, Docket 05-11, dated June 22, 2006.

83. The PUC Order incorporated the Report of the Georgetown Consulting Group, the PUC Consultant.⁷⁵ The Georgetown Report analyzed floor space, entrance facilities and Dark Fiber; however, there was no analysis whether any of the locations were in fact wire centers or central offices under the definitions in the FCC's rules or the ICA. The description in the GCG Report of 19 locations as "central offices" or "wire centers" was at most "*dicta*."
84. The Georgetown Report contained no analysis or findings that any of the 19 locations were in fact wire centers. The statement concerning the 19 locations was conclusory and did not establish whether such locations were in fact wire centers or central offices. Similarly, since the PUC in Docket 05-11 incorporated the GCG Report, there was no analysis in the Order or finding which established that there were 19 central offices or wire centers.
85. PDS further contends that the ALJ already determined in PDS Docket 14-01 that GTA presently has 19 wire centers. The ALJ does not concur. What the ALJ held in that Docket is as follows: "The ALJ concurs with PDS' interpretation of "existing wire centers"; for purposes of this arbitration, the applicable definition is the network's "existing wire centers" as of August 28, 2014."⁷⁶ (emphasis added). The ALJ limited his determination to the arbitration, and specifically, the number of wire centers that were in existence **as of August 28, 2014**. The ALJ did not state a specific number of wire centers in existence as of that date. The holding there has no applicability to the instant issue, which concerns the number of wire centers in existence after GTA made its network changes in January 2015. The ruling herein will have no effect on the prior Order in PDS Docket 14-01.
86. GTA's position that there is only one wire center at present, Agana, should be sustained.

F. GTA HAS A CONTINUING CONTRACTUAL OBLIGATION UNDER THE ICA TO PROVIDE DARK FIBER IOF TO PDS

87. Based upon the network changes it has made, GTA concludes Dark Fiber IOF no longer exists and that it has the unilateral right to refuse to provide such service to PDS henceforth. It alleges that Dark Fiber IOF no longer exists under the ICA.
88. GTA's position that it is no longer required to provide Dark Fiber IOF to PDS is not supported by the ICA. During the history of the three ICAs between GTA and PDS since 2006, GTA has essentially agreed to provide Dark Fiber inter-office facility transport to PDS despite the fact that the RSCs were longer wire centers and that the vast majority of fiber routes provided by GTA were not between wire centers.
89. Exhibit A to the ICA, PDS Initial Colocation Requirements, has existed as an Attachment to the three ICAs negotiated by GTA and PDS. It indicates that there are Dark Fiber IOF Strands from 19 different facilities. The Dark Fiber Inter-Office Transport (DF/IOF) is further explicated by PDS Exhibit 18. With the exception of two circuit routes, Agana to Tumon, and Tamuning to Tumon, 17 of the routes for

⁷⁵ PDS Exhibit 24, GCG Report regarding Colocation Arbitration, dated May 31, 2006, referencing Dark Fiber "availability in the nineteen (19) offices..." and "19 wire centers..."

⁷⁶ ALJ Order on Issues Involving Telric Study, PDS Docket 14-01, dated August 17, 2015, at p. 5.

which GTA has provided Dark Fiber IOF over the history of the ICAs were not between two wire centers.

90. Having admitted that none of the RSCs were wire centers, GTA nevertheless agreed over the history of the ICAs to provide Dark Fiber IOF to 17 locations that were not between two wire centers. GTA's argument that it is now authorized to discontinue Dark Fibers IOS service since there is only one wire center is not logical in light of the aforementioned history.
91. The network changes made by GTA in January 2015, at most, affect two Dark Fiber routes which were previously between two wire centers: Agana to Tumon and Tamuning to Tumon. It is only those routes that are changed or altered by GTA's retirement of the Tamuning and Tumon wire centers. Both prior to and after the January 2015 network changes implemented by GTA, it provided Dark Fiber IOF service to PDS for 17 routes that were clearly not between two wire centers.
92. GTA now argues that it is not required to provide Dark Fiber Transport that does not connect a pair of GTA UNE Wire Centers pursuant to §8.1 of the ICA Network Elements Attachment. GTA may be correct that it is not "required" to do so; however throughout the history of the ICA agreements, GTA has voluntarily provided Dark Fiber IOF between 17 facilities that technically did not qualify under §8.1 as connecting a pair of GTA UNE Wire Centers.
93. Although GTA may not have been required to provide Dark Fiber IOF, it agreed to do so over the course of three ICAs. Parties to an ICA can agree to their own arrangements and rates. GTA may agree to undertake obligations that it was not necessarily required to undertake under the ICA. GTA could have, but never suggested in prior ICA negotiations, that it was not obligated to provide Dark Fiber IOF to routes that connected the RSCs (since the RSCs were not "wire centers"). That GTA has now changed the configuration of its network does not provide a justification to discontinue Dark Fiber IOF.
94. 47 CFR§51.319(d)(2)(iv) provides that incumbent LECs are **required** to provide Dark Fiber Transport between any "pair of incumbent LEC wire centers." However, neither this provision nor those in the ICA preclude a party from agreeing to provide such service where the dark fiber is not between two wire centers. Notwithstanding this provision, GTA agreed to provide Dark Fiber IOF service between facilities that were not wire centers in the current ICA.
95. Since GTA disabled the RSCs, the consequence was that GTA was not be obligated to provide dark fiber to PDS over routes where a RSC was an endpoint. Assuming that GTA did not have an obligation to provide dark fiber to PDS over these routes, GTA voluntarily agreed to do so in the ICA that the parties entered into on August 11, 2014, and which was approved by the PUC on August 28, 2014.
96. The parties agree that they may voluntarily enter into an ICA which obligates them to do either less or more than the law and regulations would otherwise require. See 47 U.S.C. § 252(a)(1) (voluntary negotiations); 47 CFR § 51.3; MCI Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262, 1266 (9th Cir. 2000)
97. GTA continues to have a contractual obligation under the ICA to provide Dark Fiber IOF to the facilities indicated in Exhibit A. In interpreting a contract, it is

fundamental to ascertain and give effect to the intention of the parties at the time the contract was made.⁷⁷

G. THE NEW BILLING OR PRICING RATES/CHARGES WHICH GTA HAS SOUGHT TO IMPOSE UPON PDS HAVE NOT BEEN PROPERLY ADOPTED; THE CURRENT INTERIM BILLING RATES SHOULD REMAIN IN EFFECT UNTIL CHANGED IN ACCORDANCE WITH LAW

98. GTA states that, subsequent to its network changes, it has continued to provide PDS with “Dark Fiber Transport” services. The issue concerns the propriety of the billing rates/changes which GTA has sought to implement as a result of its network changes. GTA relies upon Section 1.10.2.2.1 of the Network Elements Attachment, which provides as follows in pertinent part: “In the case of Dark Fiber Transport (there being no analogous service under GTA’s access tariffs), the monthly recurring charges that GTA may charge, and that PDS shall be obligated to pay, for each circuit shall be the charges for the commercial service that GTA, in its sole discretion, determines to be the most analogous to the subject Dark Fiber Transport and, unless otherwise agreed in writing by the parties, GTA may, without further notice, disconnect the subject dark fiber facility within thirty (30) days of the date on which the dispute is resolved in GTA’s favor.” (emphasis added).
99. However, the TRRO Certification and Related Provisions set forth at §1.10 et seq. of the Network Elements Attachment are inapplicable to the dispute in this case and did not provide a basis for GTA to charge the rates which it seeks to implement. This provision applies to the applicable procedure which PDS must follow before PDS requests unbundled access to Dark Fiber Transport. GTA does not invoke this provision pursuant to any request which PDS made for Dark Fiber Transport. There was no recent request from PDS for Dark Fiber Transport. PDS took no action which required it to undertake the TRRO Certification required by §1.10.
100. As for the “analogous” commercial rates which GTA seeks to charge PDS for Dark Fiber Transport⁷⁸, Section 1.10.2.2.1 also has no applicability to this matter. GTA requests that the PUC adopt this procedure as an “impliedly” appropriate dispute resolution procedure for Dark Fiber Transport. However, this provision does not state applicable law regarding the establishment of billing changes by a Telecommunications Company. It is not a general principle of rate making for billing changes that a telecommunications party has “sole discretion” to determine what applicable rates are.
101. In accordance with the Guam Telecommunications Act of 2004, 12 GCA §12201 *et seq.*, the Guam Public Utilities Commission has the authority and jurisdiction to determine what are just and reasonable rates and charges for any telecommunication service.⁷⁹ All rates and charges for telecommunication services are required to be “just and reasonable...”⁸⁰ It is the Commission that has the power to determine what are just and reasonable rates and charges.⁸¹

⁷⁷ McLeodusa Telecommunications Services, Inc. v Arizona Corporation Commission, 655 F.Supp.2d 1003(D. Arizona 2009).

⁷⁸ See September billing from GTA to PDS set forth in PDS Exhibit 16.

⁷⁹ 12 GCA §12204 (c) (2).

⁸⁰ 12 GCA §12205 (c).

⁸¹ 12 GCA §12205 (c) (1).

102. Furthermore, 12 GCA §12205 (c)(2) provides in part: “It is the intent of this section to provide the Commission authority to establish appropriate frameworks governing the rates, charges, classifications, terms and conditions of telecommunications services offered by dominant and non-dominant telecommunications companies.”⁸²
103. The PUC has not had a full or adequate opportunity to address the rates/charges which GTA seeks to impose herein in a rate proceeding. This proceeding is not a rate case. It is not a proper proceeding in which applicable rates or charges for Dark Fiber Transport should be determined. GTA has various options it could pursue. One is the filing of a rate proceeding in accordance with 12 GCA Chapter 12 and the PUC Rules of Practice and Procedure to establish the rates or tariffs for such Dark Fiber Transport.
104. Another option is for GTA to pursue new rates or tariffs in arbitration proceedings to amend its Interconnection Agreement with PDS or to implement a new ICA, after the current ICA expires, upon the approval of the PUC. However, it is not appropriate for GTA to impose such new rates without a full review by the PUC. In past proceedings, GTA has generally sought PUC approval before implementing new tariffs. In pursuing either option, GTA would face the issue of its obligation under the current ICA to continue to provide DF-IOF Services to PDS, which could be a difficult hurdle to overcome.
105. There are numerous concerns about the fairness or equity of the rates which GTA seeks to impose upon PDS for Dark Fiber Transport. The charges for the Dark Fiber Transport which GTA now seeks to impose are more than six times the current charges (from \$8,409.19 to \$54,539.44 per month). A party that seeks to increase rates six fold has a heavy burden to justify such rates. The rates proposed by GTA are also based upon an “estimate” of the capacity utilized by PDS and not its actual capacity usage.
106. The prior rates for DF/IOF are based upon a per mile UNE rate,⁸³ whereas the new proposed rate by GTA for DF/IOF is based upon “capacity” charges.⁸⁴ Whether utilization of capacity based charges is “just and reasonable” is an issue that should be fully vetted and addressed in a rate or tariff proceeding. Also, GTA chose to apply “analogous” commercial rates to Dark Fiber Transport. It is not clear that Dark Fiber Transport rates should be based upon rates for other commercial services. In general, a rate for a service should be based upon the cost of providing that particular service. GTA indicated that Dark Fiber services continues to be provided to PDS on the same fiber strands. There was no indication that GTA was now incurring greater cost to provide such services than prior to the network changes.⁸⁵
107. PDS suggested that the 18 month transmission period provided by the FCC in its Triennial Review Remand Order (“TRRO”) released on February 4, 2005, could be afforded for the transition from the ICA rates to Non-ICA commercial rates for Dark Fiber Transport services. “TRRO” was a process that the Federal

⁸² 12 GCA §12205 (c) (2)

⁸³ PDS Exhibit 18.

⁸⁴ GTA Exhibit 2, Special Service Access Rates and Charges.

⁸⁵ Rebuttal Testimony of Carl Leon Guerrero.

Communications Commission [FCC] enacted to allow carriers who lost access to UNE dark fiber transport an 18 month transition period to seek alternative facilities or arrangements, such as by installing their own fiber. The FCC specified a longer transition if CLECs and ILECs needed necessary time for “completing any change of law processes.”⁸⁶

108. The ALJ does not recommend that the TRRO process be applied here. The default transition time lines should not be applied to one CLEC, PDS, eleven years after the FCC TRRO took effect. The transition mechanism was not designed to replace or supersede transport facilities that PDS and GTA agreed to in their ICA. Furthermore, the TRRO applied exclusively to the “embedded” customer base.⁸⁷ The TRRO was released in 2005, but PDS’ Dark Fiber lines were installed after the TRRO, in 2007. PDS’ UNE Dark Fiber IOF was not a part of any “embedded base” when the TRRO was released in 2005.
109. Finally, the 18 month transition period provided by the TRRO is not necessary in the instant case. Dark Fiber IOF pricing, the current “Interim Rates”, should remain in effect until the present ICA terminates on or about August 11, 2017, unless otherwise changed in accordance with the law. Upon the termination of the current ICA, the parties can negotiate such service/pricing arrangements as they desire concerning Dark Fiber Transport in negotiation/arbitration proceedings.

CONCLUSION

The ALJ recommends that the PUC rule as follows: (1) the Findings of Fact and Conclusions of Law in the ALJ Recommendation are adopted; (2) GTA was authorized under ICA §42 to make the network upgrades it undertook in January 2015; (3) GTA provided adequate notice under ICA §28 to PDS and the public of the proposed network changes; (4) the Federal CFR notice requirements are not applicable; (5) the Remote Switching Centers (RSCs) are not “wire centers”; (6) GTA retired the Tamuning and Tumon end offices/wire centers in January 2015; at present there is only one central office/wire center, the Agana Central Office; (7) GTA has a contractual obligation under the ICA and Exhibit A thereof to provide Dark Fiber IOF to PDS at the rates agreed upon under the ICA; (8) GTA, both before and after the network changes, provided Dark Fiber IOF to seventeen routes involving Remote Switching Centers, even though such routes were not between a pair of wire centers; (9) the “analogous” commercial “rates” which GTA sought to impose upon PDS for Dark Fiber Transport are not valid and effective, as they have not been reviewed or approved by the PUC pursuant to the Guam Telecommunications Act of 2004; (10) GTA should be required to bill PDS for Dark Fiber Transport at the current agreed upon the “Interim Rates” presently in effect under the ICA dated August 11, 2014; (11) The Interim Rates will remain in effect until the expiration of the current ICA in August 2017 or unless otherwise altered by the PUC; (12) any new requests by PDS for Dark Fiber Transport should be billed at the existing rates under the ICA for as long as the current ICA is in effect.

⁸⁶ PDS Exhibit 19, “TRRO” Order on remand, ¶143.

⁸⁷ Id. at ¶142.

RELIEF

The ALJ recommends that the PUC include the above rulings in its Order. In addition, the PUC should order the following relief:

1. GTA and PDS shall equally share the regulatory fees and expenses incurred in the Docket, including without limitation, consulting and counsel fees and expenses, and the fees and expenses for conducting the hearing/arbitration process. Each party prevailed on some issues in this proceeding, and neither acted in "bad faith".
2. Each party shall bare its own attorney's fees.
3. The ALJ will prepare a Proposed Order for the consideration of the Commissioners.

SO ORDERED this 18th day of February, 2016.

Frederick J. Horecky
Administrative Law Judge
Guam Public Utilities Commission