BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

IN THE MATTER OF: **Formal Complaint of Teleguam Holdings, LLC, Regarding PDS Dark Fiber Informal Complaint of October 23, 2015**	)	**GTA Docket 15-06** **ALJ ORDER RE: LIMITED REHEARING**

FACTUAL AND PROCEDURAL BACKGROUND

This is an Arbitration proceeding conducted pursuant to Rule 4(h) of the Commission's Implementation Rules In Connection with Interconnection Agreements between GTA and Competing Local Exchange Carriers and CMRS Operators (PUC Order, Docket 05-01, adopted August 13, 2007) (hereinafter the "Interconnection Implementation Rules"). It concerns a dispute between Teleguam Holdings LLC ["GTA"] and Pacific Data Systems Inc. ["PDS"] regarding the provision of Dark Fiber IOF [also referred to herein as "DF-IOF"] at colocation sites. The Administrative Law Judge ["ALJ"] hears this matter as an Arbitrator.

On May 19, 2016, the ALJ conducted a limited rehearing in this matter on certain issues. GTA had requested in its Petition for Rehearing that the Guam Public Utilities Commission reconsider and change and alter certain findings of fact and conclusions of law that it reached in its Order dated February 25, 2016. Before addressing those specific issues, the ALJ will provide the factual and procedural background of this case.

In 2006, GTA and PDS entered into an Interconnection Agreement (the "First ICA" or the "2006 ICA"). The First ICA was approved by the Guam Public Utilities Commission [PUC] in June 2006 following an arbitration proceeding between the parties to the ICA. In a June 22,

2006 Order (Docket 05-11), the PUC ordered that GTA shall provide dark fiber at each colocation site in accordance with the terms of the agreement negotiated by the parties ("Dark Fiber shall be ordered and implemented in accordance with the terms of the agreement"). In rendering this Order, the PUC relied on Exhibit A to the 2006 ICA, which refers to Dark Fiber IOF as a "requirement" for PDS colocation, and provides for "2 fiber strands per route for each of the 19 GTA facilities (PDS Supplemental Exhibit No. 1, Limited Rehearing). GTA never sought judicial review or challenged the 2006 PUC Order.

Exhibit A and the Pricing Attachment to the 2006 ICA were carried forward and became part of the parties' Second ICA. In GTA Docket 10-08, the PUC approved the Second ICA, which included the contractual obligation of GTA in Exhibit A and the Pricing Agreement to provide Dark Fiber to PDS (PUC Order Approving Interconnection Agreement, October 29, 2010). During the term of the Second ICA, GTA provided dark fiber to PDS in accordance with the PUC order and Exhibit A to the Second ICA. In 2014, the parties entered into another ICA (the "Third ICA" or the "2014 ICA"). Exhibit A, which was part of both the First ICA and the Second ICA, was carried forward and became Exhibit A to the Third ICA. The Pricing Attachment was also carried forward.

On August 28, 2014, the PUC approved the Third ICA, as negotiated between the parties. GTA did not seek judicial review of this Order/Arbitration Award. The PUC Order/Award was a final Arbitration Order in accordance with arbitration procedures under Rule 4(h) of the PUC Interconnection Implementation Rules. Pursuant to the Third ICA and Exhibit A, GTA agreed in §8.1 of the Network Elements Attachment to provide dark fiber IOF to PDS at all 19 of GTA's colocation facilities as stated in Exhibit A, and at the prices set forth in the Pricing Attachment.

The PUC Order Approving Interconnection Agreement, PDS Docket 14-01, dated August 28, 2014 (PDS Supplemental Exhibit 18, Rehearing on GTA Petition).

In its Arbitration Award, the PUC ordered the parties to carry out their duties and obligations as set forth in the Interconnection Agreement. Also, in the event that the parties revised, modified, or amended the ICA, the revisions, modifications or amendments were required to be submitted to the PUC for approval pursuant to 47 USC 252 (e) (1).

The Third ICA, which expires in August 2017, includes a Network Elements Attachment. Under §8.1 of the Network Elements Attachment, the parties agreed that "**...GTA shall provide PDS with access to unbundled Dark Fiber IOF in accordance with, and subject to, the rates, terms and conditions provided in the Pricing Attachment...**" (emphasis added). In the same provision (§8.1) it is subsequently provided that GTA "shall not be required to provide, and PDS shall not request or obtain, unbundled access to any dark fiber facility that does not meet the definition of Dark Fiber Transport. . . notwithstanding any other provision of this Agreement, . . . 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."

Despite these two differing provisions in §8.1of the Third ICA, GTA continued to provide dark fiber to PDS after the 2014 PUC Order was issued approving the Third ICA. It has continued to provide Dark Fiber to PDS up to the present time, taking the position that "in the meantime, until the lit service is established, in order to prevent any disruption to PDS and its customers, GTA continues to provide services to PDS that are "dark", meaning that GTA is not privy to PDS' traffic." (GTA Verified Petition for Rehearing, filed March 8, 2016, at p. 7).

In October 2015, over a year after the approval of the Third ICA, however, GTA filed a

formal complaint with the PUC because PDS refused to pay certain invoices based on its disagreements with GTA's changes to its network infrastructure and GTA's unilateral decision in June 2015 to no longer supply dark fiber because of its changes to its switching infrastructure.

On February 18, 2016, the Administrative Law Judge [ALJ] made his recommendations regarding the claims in GTA's complaintand issues raised by PDS. On the issue of supplying dark fiber, the ALJ discussed the history of the ICAs between GTA and PDS. Each of the three ICAs has incorporated the requirements for colocation and dark fiber in Exhibit A of the original ICA. Exhibit A indicates that GTA provides PDS with Dark Fiber Routes from 19 GTA facilities. Each of the three ICAs entered into the parties since 2006 contained the requirement in §8.1 that "...GTA shall provide PDS with access to unbundled Dark Fiber IOF in accordance with, and subject to, the rates, terms and conditions provided in the Pricing Attachment..." See PDS Supplemental Exhibits 9, 10, and 11, Limited Rehearing. Most of the DF-IOF circuits provided to PDS were installed in 2007; several were installed in 2007-2012.

The ALJ opined that "[e]ven if GTA did not have an obligation to provide Dark Fiber to PDS over those routes [*i.e.*, to facilities that did not technically qualify as Dark Fiber under the ICA], it voluntarily agreed to do so in the ICA that the parties entered into on August 11, 2014." (*See* ALJ Feb. 18, 2016 Recommendation ¶44.)

Further, the ALJ concluded that pursuant to Exhibit A to the ICA, which has existed as an attachment to each of the three ICAs between the parties, GTA is obligated to provide Dark Fiber IOF services to PDS. Under §8.1 of the ICA Network Elements Attachment, GTA voluntarily agreed to do so under three ICAs and provided Dark Fiber IOF between 17 facilities that did not technically qualify as wire centers to be connected by Dark Fiber. Those facilities

did not connect a pair of wire centers. GTA is now obligated to continue to do so under the Third ICA. (*See* ALJ Feb. 18, 2016 Recommendation ¶¶ 92-93.)

On February 25, 2016, the PUC adopted the ALJ's findings of fact and conclusions of law. The PUC stated that Teleguam Holdings LLC [GTA] has a continuing contractual obligation to provide DF-IOF to PDS. Exhibit A to the Interconnection Agreement [ICA] indicates that there are 2 fiber strands per route for 19 routes. "This is a representation and Agreement by GTA that there will be Dark Fiber IOF Strands for 19 GTA facilities." The PUC also stated that, in the ICA pricing attachment, GTA agreed that it would provide DF-IOF service to PDS. DF-IOF strands are listed as a requirement for PDS colocation and the pricing attachment indicates that DF-IOF is a service that GTA provides; stating the nonrecurring and monthly recurring charges for DF-IOF. (*See* PUC Order, Feb. 25, 2016.)

On March 8, 2016, GTA filed a Petition for a Rehearing on issues contained in the PUC's February 25, 2016. GTA challenged Ordering Provision No. 7 which held that GTA has a contractual obligation to continue to provide Dark Fiber IOF Service to PDS. In its Rehearing Petition, GTA contends that Exhibit A to the ICA, which is relied upon by the ALJ's Recommendations, "only informs as to PDS initial Colocation requirements," and does not, in fact, obligate GTA to provide Dark Fiber IOF. The pricing attachment only concerns pricing and not "any promise to provide Dark Fiber IOF." According to GTA, §8.1 of the Network Element Attachment "unambiguously" states that GTA has no obligation to provide any Dark Fiber IOF to PDS, as "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."

Finally, GTA contended that the service which GTA now provides PDS is no longer

Dark Fiber IOF, but a "commercial, lit service." GTA sought to increase the monthly billing to PDS from $8,409.19 per month to $54,539.44 per month. Since PUC has already determined that rates for such commercial lit services are "just and reasonable" in the General Exchange Tariff, there is no further need for PUC review of the rates which GTA seeks to charge PDS and PDS is obligated to pay such rates. GTA also requested that PUC reconsider Ordering Provisions 8,9,10, and 11 of its February 25, 2016, Order.

PDS alleges that the ICA contractually obligates GTA to provide Dark Fiber IOF to PDS. Even if GTA was not obligated to provide dark fiber to PDS, it voluntarily agreed to do so in the ICA and is bound by the agreement. It further contends that the proposed pricing change is not effective because it was not approved by the PUC. On May 19, 2016, the ALJ heard testimony and received evidence regarding a limited rehearing of issues in this proceeding, as outlined in the ALJ's Report dated April 28, 2016.

DISCUSSION

1. GTA is mandated by the August 28, 2014, PUC Order/Arbitration Award to provide Dark Fiber IOF to PDS at 19 colocation centers. The Arbitration Award is final and binding upon GTA.

` Three PUC Orders/Arbitration Awards over a ten year period have required that GTA provide Dark Fiber IOF to PDS at 19 colocation centers. The PUC Order/Arbitration Award in PDS Docket 14-01, dated August 11, 2014, approved the Third ICA [the ICA currently in effect], which provides in §8.1 that "…GTA shall provide PDS with access to unbundled Dark Fiber IOF in accordance with, and subject to, the rates, terms and conditions provided in the Pricing Attachment." PUC Order Approving Interconnection Agreement, PDS Docket 14-01, dated August 28, 2014 (PDS Supplemental Exhibit 18, Rehearing on GTA Petition).

Exhibit A to the Third ICA provides that the 2 Fiber Strands per route is a "Colocation Requirement" at each of the 19 GTA Colocation facilities. The Pricing Attachment, which is specifically referenced in §8.1 of the Third ICA, establishes pricing for Dark Fiber IOF and references "Network Elements 8.1." In its Award, the PUC approved the entire Third ICA, including the agreement of GTA in §8.1 of the Network Elements Attachment, to provide PDS with access to unbundled Dark Fiber IOF.

Neither GTA's Petition for Rehearing nor its post hearing briefs have addressed the impact of the August 28, 2014 PUC Order/Arbitration Award, which requires GTA to provide Dark Fiber IOF to PDS. GTA's analysis focuses narrowly and almost exclusively upon its contention that the language of §8.1 of the Network Elements Attachment obviates any further duty to provide Dark Fiber IOF. However, GTA has not addressed its duty to comply with the August 28, 2014 Arbitration Award. GTA appears to believe that its unilateral network change in January 2015 simply allows it to act as if the language establishing its present obligation under §8.1 to provide Dark Fiber IOF no longer exists, and that it can unilaterally determine that it will not provide Dark Fiber IOF to PDS.

The August 28, 2014 PUC Order concerning the Third ICA is an Arbitration Award. The arbitration was commenced after PDS filed a demand for arbitration concerning its ICA with GTA. The PUC issued its Order after arbitration proceedings were conducted by the ALJ. The PUC proceedings involved detailed negotiations between the parties on provisions and language in the Third ICA. Issues on the implementation of the interconnection agreement between the Incumbent Local Exchange Carrier (ILEC), GTA, and competing local exchange carrier (CLEC), PDS, are conducted by the ALJ of the PUC under the Commission's Implementation Rules In

Connection with Interconnection Agreements between GTA and Competing Local Exchange Carriers and CMRS Operators (PUC Order, Docket 05-01, adopted August 13, 2007).

In the proceedings between GTA and PDS concerning the Third ICA, arbitration proceedings were conducted by the PUC ALJ, as Arbitrator, pursuant to Rule 4 (h), which addresses "formal" arbitration proceedings. Rule 4(h) (6) gives the Arbitrator "broad discretion in conducting the dispute resolution proceeding, and "authority to award remedies or relief deemed necessary by the arbitrator to resolve a dispute." After submission by the ALJ of his Report, the PUC issued its Order. The Order indicated that the parties had reached a final resolution concerning all language or textual issues in the Third ICA. The Order approved the Interconnection Agreement between GTA and PDS pursuant to 47 USC 252[e][4], which included §8.1, Exhibit A, and the Pricing Attachment.

The Order required GTA to comply with all of its duties under the ICA, including its duty under §8.1 to provide Dark Fiber IOF to PDS in accordance with Exhibit A and Pricing Attachment. But further, the Order required GTA to submit any revision, modification, or amendment to the ICA to the PUC "for approval." Rule 4(h)(10) of the Interconnection Implementation Rules provides that "[T]he Commission shall issue a final order accepting or rejecting, in whole or in part, the recommendation of the arbitrator within ten (10) days after the recommendation has been filed." (emphasis added).

By issuing its Order/Award in accordance with Rule 4(h)(10), the PUC Order became "final." The Order also left open certain issues concerning pricing of UNEs. GTA did not seek judicial review of the order. GTA knew that §8.1 required it to provide Dark Fiber IOF to PDS at all of the 19 colocation facilities. However, it never raised the argument, based on the

additional language in §8.1, that it did not have a duty to provide Dark Fiber Transport "that does not connect a pair of GTA UNE Wire Centers." As of August 2014, GTA only had three wire centers. Dark fiber to 17 of the 19 GTA facilities did not connect a pair of wire centers. By as early as 2006 all of the remote wire centers had been turned off.

Arbitration awards generally have the same preclusive effect as court orders, only to the extent the parties agree that the issues could be decided in arbitration. *Charley Enterprises Inc. v. Dicky's Barbeque Restaurants Inc*., 807 F.3d 553, 566 at f.n. 16 (4th Cir. 2015). Arbitration awards have the same *res judicata* and *collateral estoppel* effect as court judgments. *Western Maryland Wireless Connection v. Zini*, 601 F. Supp. 2d 634, 640 (D. Md. 2009). A final and binding arbitration award normally has the same effects on the parties as a judgment of the court. *United Government Security Officers of America* v. *Special Operations Group Inc*., 435 F. Supp. 2d 790, 793 (E.D. Va. 2006).

For the entire history of the ICA between GTA and PDS, nearly all of the Dark Fiber was provided to facilities that were not connecting a pair of wire centers. GTA agreed in the Third ICA that it would continue to provide dark fiber IOF to PDS despite the fact that the remote service centers had not been wire centers since prior to the implementation of the first ICA in 2006. GTA's network change in January 2015 removed two wire centers, leaving only one. The change only affected two routes that were previously between two wire centers: Agana to Tumon and Tamuning to Tumon. Both prior to and after the 2015 Network changes, GTA provided Dark Fiber IOF service to PDS for 17 routes that were clearly not between two wire centers.

GTA is bound by the Arbitration Award to continue to provide Dark Fiber IOF to PDS in accordance with the Third ICA for the full three year term.

2. In the Third ICA, GTA did contractually obligate itself under §8.1 of the Network Elements Attachment to provide Dark Fiber IOF to PDS at 19 facilities for a three year term.

In its Petition, GTA has argued that ICA Exhibit A and Pricing Attachment were not "promises to provide Dark Fiber IOF." GTA now seems to argue that, in fact, it never contractually agreed to provide Dark Fiber IOF to PDS. It argues that Exhibit A only concerns "colocation at GTA facilities" and lacks any promise by GTA to provide Dark Fiber IOF. It contends that the Pricing Attachment contains no commitment to provide Dark Fiber IOF, but "rather states what cost will be assessed if PDS applies for Dark Fiber IOF and GTA is able to provide it."

The nature of the actual relationship of the parties over their 10 year history with the ICA does not support GTA's position. GTA has undeniably provided Dark Fiber IOF to PDS at the colocation facilities. Each of the ICAs have included the promise by GTA in §8.1 that it "shall provide PDS with access to unbundled Dark Fiber IOF in accordance with, and subject to, the rates, terms and conditions provided in the Pricing Attachment…" . This is an express promise by GTA in §8.1 to provide Dark Fiber IOF to PDS.

In §8.1, GTA agreed to provide Dark Fiber IOF in accordance with the Pricing Attachment. The ICA Pricing Attachment indicates that a "Service" which GTA provides to PDS is Dark Fiber IOF. The Pricing Attachment states the non-recurring and monthly recurring charges for Dark Fiber IOF. GTA also agreed to a per mile charge for the Dark Fiber IOF. In Exhibit A, Dark Fiber IOF Strands are listed as one of the "Requirements" for PDS Colocation. Under the column of Exhibit A referring to "Dark Fiber IOF Strands", it is indicated that there are "2 Fiber Strands Per Route" for 19 routes. Exhibit A indicates that there will be 2 Dark Fiber

IOF Strands per route for each of the 19 GTA Facilities. §8.1, the Pricing Attachment, and Exhibit constitute a representation and Agreement by GTA that there will be Dark Fiber IOF Strands for the 19 GTA Facilities.

GTA's contention that there is no relationship between colocation and dark fiber is not correct. As PDS points out, it would make no sense for it to collocate at those facilities without access to dark fiber. From the First ICA through the third ICA, GTA agreed that PDS could collocate at each of the 19 facilities and that GTA would provide Dark Fiber for colocation. §6 of the ICA requires GTA to render monthly bills "for interconnection and facilities provided hereunder at the rates set forth in the Pricing Attachment." §8.1 includes a specific requirement that GTA provide Dark Fiber IOF and that the rates be in accordance with those in the Pricing Attachment.

GTA has previously indicated that there is a definite connection between Dark Fiber IOF and the colocation facilities. In its letter to PDS dated February 14, 2007, GTA stated: "GTA will strive to install PDS's orders for Dark Fiber IOF facilities in parallel with the PDS orders for colocation facilities in each of the GTA Central Offices such that Dark Fiber IOF facilities will be ready for PDS use concurrent with the colocation availability." (PDS Supplemental Exhibit No. 5, Limited Rehearing).

The ALJ cannot accept GTA's assertion that it never entered into a contractual obligation to provide Dark Fiber IOF to PDS. §8.1 of Network Elements Attachment, as well as Exhibit A and the Pricing Attachment, are concrete evidence that GTA contractually obligated itself in the Third ICA to provide Dark Fiber IOF to PDS for a three year term. In its Post Hearing Reply Brief, GTA states that the core issue is "do the terms of the ICA mandate that GTA provide

continued access to Dark Fiber IOF over the life of the Interconnection Agreement? The simple answer is "Yes." §8.1 requires that "GTA shall provide PDS with access to unbundled Dark Fiber IOF."

3. §8.1 of the Network Elements Attachments does not "unambiguously" require that GTA's obligation to provide Dark Fiber IOF services to PDS be abrogated and deleted from §8.1 of the Third ICA.

Throughout the hearing on GTA's Petition, and in the briefing pertinent thereto, GTA's principal argument has been that Section 8.1 of the Network Elements Attachment to the ICA "unambiguously" establishes that, as a matter of law, GTA has no duty to provide, and PDS has no right to Dark Fiber that does not connect two GTA Wire Centers.

However, GTA's briefing has never mentioned, let alone addressed, the first sentence of §8.1, which provides that "…GTA shall provide PDS with access to unbundled Dark Fiber IOF in accordance with, and subject to, the rates, terms and conditions provided in the Pricing Attachment." The first sentence of §8.1 imposes an undeniable obligation on GTA to provide Dark Fiber IOF, at the rates contained in the Pricing Attachment, to PDS for the full term of the ICA. By agreeing to provide Dark Fiber IOF to PDS, GTA was agreeing to provide such service for a three year term, beginning on the Effective Date. Section 2 of the Third ICA.

The duty of GTA to provide Dark Fiber IOF to PDS is unconditional. In the first sentence of §8.1 GTA's duty is not conditioned upon whether Dark Fiber connects a pair of wire centers or not. GTA shall provide Dark Fiber. A reasonable inference is that GTA was required to continue to provide PDS with Dark Fiber at the 19 colocation facilities.

Although GTA agreed in §8.1 to provide PDS with Dark Fiber IOF for a three year term, there is another provision in §8.1 which provides that "For the avoidance of any doubt,

notwithstanding any other provision of this Agreement, a 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." (This second provision will be referred to as the "avoidance of doubt" clause).

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. 18 GCA §87102. The meaning of the two clauses in §8.1 of the Third ICA must be examined as of the time of contracting in August 2014 in order to glean the intent of the parties. At the time of contracting, the parties clearly intended that the two aforementioned clauses **both** be a part of §8.1, one that obligated GTA to provide Dark Fiber IOF to PDS for a three year term, in accordance with the Pricing Attachment, and another which said that notwithstanding any other provision, GTA was not required to provide Dark Fiber to PDS that did not connect two wire centers.

GTA's analysis does not address the "plain meaning" of the first sentence of §8.1 of the Third ICA. It also did not consider the intent of the parties at the "time of contracting." When the parties entered the contract, PDS relied upon the language in §8.1 that GTA would provide it with Dark Fiber IOF for a three year term. It had no expectation that, nearly 10 months after the parties entered into a contract for a three year term, GTA would rely upon a separate provision in §8.1 to deprive PDS of its right to the provision of Dark Fiber IOF. GTA's argument that the "avoidance of doubt" clause supersedes or trumps its obligation to provide Dark Fiber IOF to PDS in §8.1 does not conform to the requirements of 18 GCA §87107, which provide as follows: **Effect to be Given Every Part**.

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practical, each clause helping to interpret the other." (emphasis added).

In a case relied upon by GTA, *Wasson v. Nathaniel Berg, M.D*, 2007 of Guam 16 ¶34, the Supreme Court of Guam recognized that "…contract terms should not be read in isolation but in the context of the whole, *Pacificare*, 2004 Guam 17 ¶73…" "The parties' agreement in this case must be viewed as whole, with each provision interpreted in light of each other, so as to give effect to every part, if reasonably practicable. See 18 GCA §87107." *Government of Guam and Edna T. Paulino v. Pacificare Health Insurance Company of Micronesia Inc.*, 2004 Guam 17 ¶73, In *Bank of Guam v. Flores*, 2004 for Guam 25, the Supreme Court of Guam addresses issues of contract interpretation at ¶10:

> "Interpretation of a contract to determine what is intended by its various provisions is properly done by considering the contract as a whole and not by considering a particular part of the contract in isolation. *Stewart Title Co. v. Herbert*, 96 Cal. Rptr. 631, 634-35 (Ct. App. 1970). **A particular term cannot be considered "ambiguous" in some detached or abstract sense, but rather must be considered in the context of both the instrument containing it as well as the circumstances of the entire case.** *Avemco Ins. Co. v. Davenport*, 140 F.3d 839, 843 (9th Cir. 1998). Thus, to determine whether the term is ambiguous on its face, we must review the Extension Agreement and the circumstances under which it was made in order to consider the meaning and function of the term "mutual benefit." *Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 718 P.2d 920, 927 n.7 (Cal. 1986)." (emphasis added).

In *Torres v. Torres*, 2005 Guam 22 ¶13, the Supreme Court of Guam held: "…we have recognized that an ambiguity exists when a document "on its face, it is capable of two different reasonable interpretations." *Bank of Guam v. Flores*, 2004 Guam 15 ¶14 (quoting E.M. Chen & Assocs., v. Lu Island Dev., Inc., Civ. No. 93-00017A, 1993 WL 469348, at *3 (D. Guam App. Div. Oct. 21, 1993))." In a recent case, *Ramiro et al. v. Charles B. White Jr, as Administrator for Estate of Ernesto Castro Sales*, 2016 Guam 4, the Supreme Court of Guam considered

inconsistencies in certain documents whereby the Decedent expressed his intent to designate individuals as beneficiaries for his accounts. The Court held that **"When a contract is 'capable of two different reasonable interpretations' 'on its face,' it is ambiguous."** Id. at ¶ 19. The Court can consider "extrinsic evidence" if it determines that the Instrument at issue is ambiguous. Upon a finding that the Decedent's intent was "ambiguous" as to whether he intended to update some or all of the subaccounts, the Court did consider extrinsic evidence. Id. at ¶ 22.

In the present case, the issue of "ambiguity" must be considered in the context of both the instrument containing it as well as the circumstances of the entire proceeding. §8.1 established a contractual obligation on the part of GTA to provide Dark Fiber IOF at 19 colocation centers for three years. GTA agreed to comply with its obligation, and such obligation was affirmed by an Arbitration Award. The "avoidance of doubt" clause was included in §8.1 even though GTA was already providing Dark Fiber to 17 facilities where such fiber did not connect a pair of wire centers. GTA's interpretation of the "avoidance of doubt" clause would mean that if, subsequent to the signing of the contract, there are dark fiber routes that no longer connect two wire centers, such clause authorized GTA to unilaterally delete and remove the first sentence from §8.1.

In PDS' understanding, the intent of §8.1 is that GTA made a three year commitment to provide Dark Fiber IOF to PDS. PDS does not concur with an interpretation of the contract that GTA could, one year after execution of the contract, unilaterally delete the first sentence of §8.1 and refuse to continue to provide Dark Fiber IOF. Ambiguity further arises because GTA does not consider the first sentence of §8.1 in its interpretation. When the history of the ICA

negotiations and the understanding of the parties concerning Dark Fiber is considered, the ambiguity is compounded.

When the parties executed the Third ICA in August 2014, GTA had already been providing Dark Fiber IOF to PDS at 17 facilities that were not wire centers. GTA had been providing Dark Fiber IOF to facilities that were not wire centers since the beginning of the ICA in 2006. The January 2015 change in network infrastructure implemented by GTA only affected two of PDS' 19 routes, specifically the Agana to Tumon and Tumon to Dededo routes. Notwithstanding that 17 of the routes were not between wire centers when GTA executed the Third ICA in August 2014, it agreed to provide Dark Fiber IOF to PDS for a three year term. There is an issue as to whether the "avoidance of doubt" clause was intended by the parties to apply at all to GTA's contractual obligation to provide Dark Fiber IOF, or whether the first sentence of §8.1 could be unilaterally stricken out of the contract by a party.

The "avoidance of doubt" clause does not apply to any of the 19 facilities to which GTA voluntarily undertook to provide Dark Fiber in the first sentence of §8.1. The "avoidance of doubt" clause provides that GTA "shall not be required" to provide Dark Fiber to routes that do not connect a pair of wire centers. However, GTA voluntarily agreed to provide Dark Fiber to the 19 facilities; it did so voluntarily in the first sentence of §8.1. All of the clauses of §8.1 must be interpreted as a whole; all such clauses must be construed together in a consistent manner, so that their legality and enforceability can be maintained.

In the present case, there is ambiguity as to how to construe the different provisions in §8.1 together. GTA contends that it is automatically, without approval from the PUC, and based upon its change in the network infrastructure, entitled to read its obligation to provide Dark Fiber

IOF out of the contract. In other words, its unilateral elimination of wire centers eliminates its obligation to provide Dark Fiber under §8.1. This contention appears particularly problematic in light of the fact that 17 of the facilities for which it provided Dark Fiber when the Third ICA was executed did not connect a pair of GTA UNE Wire Centers. Since the inception of the ICA in 2006, for over ten years, GTA has continued to provide dark fiber to PDS which did not connect two wire centers. When GTA executed the Third ICA in August 2014, it had the full power to agree to provide Dark Fiber to PDS which did not connect two wire centers.

GTA believes that the "avoidance of doubt" clause allows it to discontinue compliance with its obligation to provide Dark Fiber. Said clause is not automatic or self effectuating. §8.1, Exhibit A to the ICA, and the Pricing attachment have long been interpreted as requiring GTA to provide Dark Fiber. When the Third ICA was executed, there was no intent by the parties that the "avoidance of doubt" clause would automatically eliminates the first sentence of §8.1, Exhibit A and the Pricing attachment from the Third ICA. Otherwise the parties would not have included the obligation of GTA to provide Dark Fiber in the first sentence of §8.1.

A more reasonable way to interpret §8.1, so that all of its provisions are given effect, is that the first sentence obligates GTA to continue to provide Dark Fiber IOF, at the existing colocation facilities, to PDS for the remaining term of the three year ICA. Under the "avoidance of doubt" clause, other than the Dark Fiber that it already agreed to provide, GTA would not be required to provide any additional Dark Fiber which does not connect a pair of wire centers.

The "avoidance of doubt" clause also applies **"**notwithstanding **any other provision of this agreement…"** The parties intended as of the date of contracting that both of the aforementioned clauses be adopted at the same time. The "avoidance of doubt" clause was not

intended to apply to the express promise by GTA in §8.1 that GTA agreed to provide PDS with access to unbundled Dark Fiber IOF. Such clause only applies to subsequent requests for Dark Fiber by PDS after the execution of the Third ICA. It applies to provisions of sections of the ICA other than the first sentence of §8.1, which was adopted simultaneously with the "avoidance of doubt" clause. That interpretation best harmonizes the conflicting provisions of §8.1 in a integrated contract. This interpretation preserves the integrity of all clauses of §8.1.

GTA's position is that the change in its network infrastructure eliminating all wire centers except for one meant that there was no longer any Dark Fiber IOF service. However, upon executing the Third ICA, GTA had already agreed to provide Dark Fiber to 17 facilities that were not wire centers. In reality, GTA's change in network infrastructure has no relationship to GTA's contractual obligation to provide Dark Fiber. During the contract negotiations in August 2014, GTA had the option of not agreeing to provide Dark Fiber IOF to PDS for a three year term at the time the Third ICA was executed. However it voluntarily agreed to do so.

Furthermore, GTA was never "required" to provide Dark Fiber to PDS that did not connect a pair of GTA UNE Wire Centers. For over 10 years, GTA voluntarily agreed to provide Dark Fiber to facilities that did not connect a pair of wire centers. In §8.1 of the ICA, GTA voluntarily agreed to provide Dark Fiber IOF to PDS at 19 facilities over the course of the three ICAs and specifically agreed to do so in the Third ICA. GTA and PDS have previously agreed 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). (ALJ Feb. 18, 2016 Recommendation ¶96).

In his Report on GTA Petition for Rehearing, dated April 26, 2016, the ALJ recommended that a limited rehearing be granted so that additional discussion and argument could be presented by the parties concerning the import of §8.1. Although the ALJ stated his belief that GTA had contractually obligated itself to provide dark fiber IOF services to PDS, he indicated: "§8.1 raises the possibility that, even though GTA had a contractual obligation to provide dark fiber IOF, and other provisions of the ICA establish such an obligation, GTA would still not be obligated to continue to provide dark fiber IOF after the number of wire centers was reduced to one and such dark fiber transport that did not connect a pair of wire centers."

For the reasons set forth herein, the ALJ does not believe that the above possible interpretation of §8.1 is the appropriate interpretation. Since the parties adopted both the first sentence of §8.1and the "avoidance of doubt" clause at the same time, the most reasonable interpretation of §8.1, so that all of its provisions are given effect, is that the first sentence obligates GTA to continue to provide Dark Fiber IOF, at the existing colocation facilities, to PDS for the remaining term of the three year ICA. Under the "avoidance of doubt" clause, other than the Dark Fiber that it already agreed to provide, GTA would not be required to provide any additional Dark Fiber which does not connect a pair of wire centers.

4. The history of the ICA negotiations between the parties and implementation of the three ICAs, as well as the circumstances of the entire proceeding, must be addressed to to consider the issues herein. It is relevant to consider the parties' course of dealings.

Where a term or provision in a contract is determined to be ambiguous as a matter of law, extrinsic evidence of the parties' course of dealings should be accepted to determine the intent of

the parties. *Craftworld Interiors, Inc. v. King Enterprises, Inc.*, 2001 Guam 17, 2000 WL 716471 (Guam Terr. June 2, 2000). In *DP Aviation v. Smiths Industries Aerospace and Defense Systems, Ltd.*, 268 F.3d 829 (9th Cir. 2001), the court stated:

> The *Restatement (Second) of Contracts*, §§212, 214(c) (1981), . . . permits the district court to determine the intent of contracting parties from extrinsic evidence including the relations of the parties, their prior negotiations, and their course of dealing. . . [meaning] ... the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

DP Aviation v. Smiths Industries Aerospace and Defense Systems, Ltd., 268 F.3d at 838.

A course of dealing in the context of a sales contract or commercial relationship is defined as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *See* 13 GCA §1205(1). Likewise, under 13 GCA §1205(2), a contract term may be supplemented or explained by evidence of usage of trade, defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify expectation that it will be observed with respect to the transaction in question." In *C9Ventures v. SVC-West, L.P*, 202 Cal.App.4th 1483, 136 Cal.Rptrs.3d 550 (2012), involving the interpretation of an oral commercial sales contract, the court held that an inference of the parties' common knowledge or understanding of the terms of their agreement may be based upon substantial evidence of the prior course of dealing between the parties.

In *General Industrial Development Trading, Inc. v. CompUSA, Inc.*, 72 Fed.App'x. 604 (9th Cir. 2003), a provision in a contract between a manufacturer and a retail computer company, which was determined to be ambiguous, was modified by the parties' subsequent course of conduct where the retailer made two large payments to a middle man after the agreement was

signed, and the manufacturer was notified of the payments but did not object.

In proceedings before the Commission, the ALJ has discretion concerning the evidence considered: "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." Rule 30 of the Commission's Rules for Practice and Procedure. The ALJ and the Commission, having intimate knowledge of the course of dealings between the parties over the ten year history of the ICA, are in the best position to understand those dealings and to consider such dealings in interpreting the ICA.

Course of conduct evidence is relevant to understand the parties' intent in the Third ICA. The parties' course of conduct over the past 10 years provides strong evidence that the parties' interpreted the Third ICA as obligating GTA to provide the Dark Fiber IOF services, notwithstanding GTA's changes in its network switching infrastructure. GTA had turned off certain switching centers in the past, but continued to provide the Dark Fiber services.

Although GTA now argues that Exhibit A to each of the ICAs never actually obligated GTA to supply Dark Fiber IOF to each of the 19 locations stated, and that GTA made no promises under Exhibit A, GTA's ten year course of conduct of supplying the Dark Fiber services to PDS and its acquiescence with PDS's and the PUC's interpretation of Exhibit A obviates this recent claim. GTA should be precluded from abandoning its long-term interpretation of the terms of the ICA at this time, including its decision not to seek judicial review of the PUC's order approving the Third ICA and its decision to continue to supply Dark

Fiber IOF immediately after the Third ICA was approved.

In the present case, GTA should not be able to repudiate its obligation to provide Dark Fiber, change course in the middle of the Third ICA term, and assert rights and claims it never previously claimed. For ten years, GTA represented to PDS that it was obligated to supply Dark Fiber IOF services. This interpretation of the parties' agreement was accepted by the PUC when it approved each ICA, and was reasonably relied upon by PDS. GTA changed its position on its Dark Fiber obligations during the middle of the Third ICA and would essentially take away existing dark fiber routes from PDS. GTA had made changes to its infrastructure in the past, but never used those changes as a reason to reverse course on its Dark Fiber obligations. Finally, GTA's change of position will have a detrimental impact on PDS and its customers. Testimony of John Day, President of PDS, Limited Rehearing.

5. GTA's Waiver Argument, and provisions §§1.4 and 48 of the ICA, do not justify non-compliance by GTA with its obligation under §8.1 of the Network Elements Attachment to provide PDS with unbundled access to Dark Fiber IOF.

GTA asserts that, under §1.4 of the Third ICA, "the Principal Document" may not be waived or modified except with an express and deliberate written document that is signed by the Parties. The "Principal Document" appears to refer to the Third ICA. §1.4 is of questionable applicability to the instant dispute. There is no attempt by anyone to "waive" the Third ICA, or to suggest that GTA has waived the Third ICA.

The issue for resolution in this proceeding involves two clauses within §8.1 of the Network Elements Attachment which were adopted by the parties at the same time. One provides that GTA has an absolute obligation to provide Dark Fiber IOF to PDS, the other states that GTA "shall not be required" to provide dark fiber that does not connect two wire centers.

There is no issue of "waiver" here. For reasons previously stated, the "avoidance of doubt" clause has no applicability to GTA's duty under §8.1 to provide Dark Fiber IOF to PDS for a three year term. The parties never intended that the "avoidance of doubt" clause would affect GTA's duty to continue to provide Dark Fiber to the 19 colocation facilities. Under §1.4, PDS has not waived its right to enforce the GTA obligation to provide dark fiber to PDS under the first sentence of §8.1.

The real import of §1.4 of the ICA in this proceeding is that it establishes that there can be no amendment or modification of the Third ICA unless approved by the PUC. GTA's waiver argument is really a suggestion that the "avoidance of doubt" clause automatically amends §8.1, and modifies it, by removing or deleting the first sentence of §8.1 from the Third ICA. However, if GTA wishes to delete the first sentence §8.1 of the ICA, it must negotiate the same with PDS and obtain the approval of the PUC. The "avoidance of doubt" clause does not give GTA the right to refuse compliance of its duty to provide Dark Fiber under the first sentence of §8.1.

The "avoidance of doubt" clause has no applicability to GTA's duty to provide Dark Fiber IOF to PDS under the first sentence of §8.1. GTA has not addressed the "plain meaning" of its duty to provide Dark Fiber IOF under the first sentence of §8.1.

GTA has also based its waiver argument upon §48 of the Third ICA, which provides that a failure or delay of a party to rely upon a remedy in the agreement or exercise an option provided under the agreement, is not construed as a waiver of such rights, remedies or options. The same argument applies as to §1.4-- the parties never intended that the "avoidance of doubt" clause was a "remedy" or "option" applicable to GTA's duty under the first sentence of §8.1 to

provide Dark Fiber IOF to PDS. GTA cannot unilaterally discontinue provision of Dark Fiber IOF. That would breach its duty under the first sentence of §8.1.

GTA has an obligation to provide Dark Fiber IOF to PDS for the remainder of the term of the Third ICA to provide Dark Fiber which does not connect pairs of wire centers. In the first sentence of §8.1, GTA made an unequivocal promise to provide Dark Fiber IOF to PDS for the full three year term of the Third ICA.

The ALJ has not suggested that the "course of conduct" argument compels GTA to "waive" the provisions of §8.1. However, the "course of conduct" argument is relevant to the contract interpretation of the first sentence of §8.1. Through three ICA Agreements, GTA had provided Dark Fiber IOF to 19 locations, 17 of which were never connected by dark fiber going back to 2006. GTA argues that §8.1 "trumps" anything contrary in any part of Exhibit A and the Pricing Attachment. There was never an intention on the part of parties that the "avoidance of doubt" clause would "trump" GTA's obligation to provide Dark Fiber in the first sentence of §8.1. These provisions were adopted at the same time, and the parties intended that they would both exist together as integral and lawful provisions in the Third ICA.

6. At the present time it is not necessary or appropriate for the PUC to decide whether Dark Fiber is a "telecommunications service" pursuant to 12 G.C.A. § 12203(h)(2). Resolution of such issue is not necessary to the decision in this matter. The record on the issue has not been fully developed in this case, and the legal authorities are less than conclusive as to whether Dark Fiber should be characterized as a telecommunications service.

12 G.C.A. § 12203(h)(2) provides that a Guam Telecommunications Company may only cancel, discontinue or abandon the provision of a telecommunications service if the PUC finds that such cancellation, discontinuance or abandonment will not deprive customers of any necessary or essential telecommunications service or access thereto. During the rehearing and in

briefing, PDS has raised the contention that Dark Fiber is a Telecommunications Service. GTA's attempt to cancel or discontinue provision of Dark Fiber Service is invalid because the PUC has not approved such attempt.

GTA argues that dark fiber is not a "Telecommunications Service" under Guam law and that GTA is not required to obtain approval from the PUC before ceasing to provide dark fiber to PDS. GTA has characterized "Dark Fiber" as "a piece of glass incapable of transmitting anything until electronics are attached to it." The FCC Form 499 for carrier reporting of revenues for Universal Service Fund purposes classifies dark fiber revenues as "revenues other than U.S. telecommunications revenues." PDS points out that The FCC has characterized provision of dark fiber as a "service" and at one time characterized it as a "wire communication." However, the Federal Communications Commission has not directly ruled that dark fiber is a "telecommunications" service.

The primary issues in this arbitration concerning §8.1 of the ICA can be decided upon contract interpretation and the duties of the parties under the Third ICA. Therefore, at present, there is no need for the ALJ to resolve the issue of whether Dark Fiber is a Telecommunications Service. In addition to the absence of need for resolution at present, the state of the law is not conclusive.

The FCC has not completely resolved whether dark fiber is a telecommunications service. *See, e.g., In the Matter of Requests for Review of Decisions of the Universal Serv. Adm'r by Lower Merion Sch. Dist. Ardmore, Pennsylvania Bethel Sch. Dist. Spanaway, Washington Tuslaw Local Sch. Dist. Massillon, Ohio Indep. Sch. Dist. of Boise City Boise, Idaho Sch. & Libraries Universal Serv. Support Mechanism*, 26 F.C.C. Rcd. 15444, 15447 (n.4) (citing

Eligible Services List of the Schools and Libraries Support Mechanism for funding year 2004) (2011).

The FCC has noted that "Commission precedent refutes the contention that leasing dark fiber is not a “service.” *In the Matter of Sch. & Libraries Universal Serv. Support Mechanism A Nat'l Broadband Plan for Our Future*, 25 F.C.C. Rcd. 18762, 18769 (2010). In a 1993 order, the FCC found that dark fiber was a "wire communication," and that Four Bell Operating Companies could not discontinue providing dark fiber service since they had not met their burden of proof of showing that the public convenience and necessity would not be adversely affected by discontinuance of their dark fiber service *In the Matter of Sw. Bell Tel. Co. Us W. Commc'ns Bell Atl. Tel. Companies Bellsouth Tel. Companies Applications for Auth. Pursuant to Section 214 of the Commc'ns Act of 1934 to Cease Providing Dark Fiber Serv.*, 8 F.C.C. Rcd. 2589 (1993).

That decision was later vacated because the D.C. Circuit remanded it on the issue of whether the dark fiber services constituted common carrier offerings, finding that the FCC had shown that the petitioners were common carriers with respect to some forms of telecommunications services but had not specifically addressed whether the petitioners provided dark fiber services on a common carrier basis. ("We find that the Commission has not sufficiently supported its conclusion that petitioners' dark fiber service was ever offered on a common carrier basis and accordingly remand to the Commission for reconsideration of its orders.") *Sw. Bell Tel. Co. v. F.C.C.*, 19 F.3d 1475, 1477 (D.C. Cir. 1994).

The FCC on remand held that the record was insufficient to determine whether the dark fiber offerings constituted common carriage and thus vacated the remanded orders. *In the Matter*

of Local Exch. Carriers Individual Case Basis Ds3 Serv. Offerings Bell Atl. Tel. Companies Revisions to Tariff F.C.C. No. 1 Bellsouth Tel. Companies Revisions to Tariff F.C.C. No. 4 Sw. Bell Tel. Co. Revisions to Tariff F.C.C. No. 68 Us W. Commc'ns Revisions to Tariff F.C.C. No. 1 Sw. Bell Tel. Co. Us W. Commc'ns Bell Atl. Tel. Companies, 23 F.C.C. Rcd. 569, 569 (2008).

The issue of whether GTA offers Dark Fiber on a "common carrier basis" has not been addressed in these proceedings. Furthermore, there was no factual record developed in this proceeding on the issue. A few briefs were submitted. There is an insufficient record for the ALJ to make a determination on this issue.

At least one court has used the FCC determination that leasing dark fiber is a "wire communication" to find that leasing dark fiber is a "telecommunications service." *Glob. Naps, Inc. v. New England Tel. & Tel. Co.*, 156 F. Supp. 2d 72, 78 (D. Mass. 2001) ("Applying this standard, I agree with the DTE that the FCC does treat the leasing of dark fiber as the provision of telecommunications service."). However, the GTA Post Hearing brief has raised doubts as to whether the Glob Naps, Inc. decision correctly cites past precedent of the FCC.

In summary, the FCC has not settled this issue. The legal authorities are inconclusive. The ALJ will leave it to another day to determine whether Dark Fiber is a "telecommunications" service, if and when the issue is fully developed in a PUC proceeding.

7. The New Billing/Pricing Rates which GTA attempted to impose upon PDS have not been properly determined; they are merely "estimates." Furthermore, GTA cannot unilaterally impose such rates upon PDS, but by law must have prior approval from the PUC.

GTA takes the position that the Dark Fiber IOF billing rates which are charged to PDS are no longer valid, and that GTA may unilaterally impose new commercial rates for "lit" services upon PDS. Since September 1, 2015, GTA has sought to increase PDS's monthly

billing for dark fiber transport services from $8,409.19 per month to $54,539.44 per month. Recommendation of the ALJ, February 18, 2016, at ¶27. However, GTA has not provided reasons or analysis to justify a change or alteration in the Ordering provisions of the PUC Order regarding pricing, issued on February 25, 2016. The ALJ Recommendations contained in ¶¶98-106 should be retained.

GTA admitted at the hearing on the request for reconsideration that the new billings to PDS are not accurate and were only "estimates." Testimony of Vicki Taitano, GTA Telecom Carriers Manager, Rehearing on GTA Petition. She admitted that GTA could not produce a "hard bill." GTA admittedly does not know what PDS "capacity" is and what volume it may produce in each ring. GTA is unable to produce "hard numbers" unless it examines PDS' equipment and cabinets at the colocation facilities.

An underlying problem with GTA's new billing is that GTA does not know what services it should bill PDS for, whether that be OCS3, OCS12, or other service. Ms. Taitano testified that it is not clear what service should apply to PDS because GTA does not know what PDS' capacity is. The bills on commercial "lit" services which GTA has provided to PDS are nothing more than a "guess or estimate." GTA has merely argued that the rates for commercial lit services in the General Exchange Tariff should automatically apply, as PUC has already determined that such rates are "just and reasonable."

GTA has not yet properly determined what commercial services PDS should be billed for under the General Exchange Tariff. It is not simply a matter of applying commercial rates for "lit" services under the GET. The PUC may have determined rates for "lit" services under the GET, but it has in no manner approved or determined what particular services or rates should be

applicable to PDS in this regard.

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 telecommunications service. Furthermore, 12 GCA §12205(c)(2) provides in part: "it is the intent of this section to provide the Commission authority to establish frameworks governing the rates, charges, classifications, terms and conditions of telecommunications services offered by dominant and non-dominant telecommunications companies." Since GTA has not developed proper or appropriate rates to charge PDS, PUC has not had an adequate opportunity to address such charges which GTA seeks to impose in a rate proceeding. GTA could file a rate proceeding in accordance with 12 GCA Chapter 12 and the PUC Rules of Practice and Procedure.

However, the most appropriate course for GTA to pursue to change the rates it charges PDS would be to seek an amendment of the Interconnection Agreement with PDS in an arbitration proceeding. As previously indicated, there is a final Arbitration Award which requires GTA to provide Dark Fiber IOF to PDS at 19 facilities. The abrogation or deletion of Dark Fiber IOF services from the Third ICA, §8.1, would require, at the very least, an amendment to the Third ICA and a new Arbitration Award.

§1.4 of the ICA provides that the Agreement between the parties cannot be waived or modified except by an express written document signed by the parties. §1.4 further provides: "No waiver, amendment, modification or supplement shall become effective until and unless it is formerly filed with and approved by the Commission." (emphasis added). GTA contends that it is unilaterally authorized to discontinue Dark Fiber IOF services to PDS notwithstanding the first

sentence of §8.1 obligating it to provide Dark Fiber IOF to 19 facilities. GTA cannot unilaterally delete the first sentence of §8.1 unless an amendment is filed with, and approved by the Commission.

Furthermore, if a party believes that a provision of the ICA has become invalid or unenforceable, it is required to promptly renegotiate that provision with the other party "and amend in writing this Agreement in order to make such mutually acceptable revisions to this Agreement as may be required in order to conform the Agreement to Applicable Law." §4.5 of the Third ICA.

CONCLUSION

For the reasons set forth herein, GTA's request that PUC change or revise Ordering Provisions 7, 9, 10 and 11, of its February 25, 2016, Order, and numerous findings of fact and conclusions of law of the ALJ Recommendation dated February 18, 2016, should be denied. All other relief requested in the GTA Petition for Rehearing should be denied.

SO ORDERED this 26th day of July, 2016.

_____
Frederick J. Horecky
Administrative Law Judge/
Arbitrator
Guam Public Utilities Commission