IN THE SUPREME COURT OF GUAM

PAUL CARLSON, JOHN BORLAS, and **JAY SHEDD;** Individuals, and **IT&E OVERSEAS, INC.;** and **GUAMCELL COMMUNICATIONS INC.,** Guam Corporations, and **KUENTOS,** a Guam Business**,**
Plaintiffs-Appellees

v.

GUAM TELEPHONE AUTHORITY; and **PETER ROY MARTINEZ, RALPH TAITANO, SCHOLASTICA RIVERA and EDWARD AGUON,** in their capacities as members of the Guam Telephone Authority Board of Directors, and **VINCE ARRIOLA,** in his capacity as the Guam Telephone Authority General Manager**,**
Defendants-Appellants

Supreme Court Case No. CVA01-015
Superior Court Case No. CV1949-00

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on March 15, 2002
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and JOHN A. MANGLONA, Designated Justice.

CARBULLIDO, J.:

[1] The Plaintiffs-Appellees, Paul Carlson, John Borlas, Jay Shedd, IT&E, Overseas Inc., GuamCell Communications, Inc., and Kuentos (hereinafter collectively referred to as "IT&E") filed a complaint for declaratory relief and a permanent injunction against Defendants-Appellants, Guam Telephone Authority, *et al.*[1] (hereinafter referred to as "GTA"), to enjoin GTA from operating its new internet service provider GuamTel.Net. After a hearing, the trial court granted a preliminary injunction on the ground that GTA did not have the statutory power to provide such service. Upon consent of the parties, the trial court entered final judgment for IT&E and issued a permanent injunction on the grounds set forth in its order granting the preliminary injunction. GTA appealed. We agree that GTA exceeded its statutory power in offering internet access service through GuamTel.Net and therefore affirm the trial court's judgment.

I.

[2] On December 2, 2000, GTA commenced operation of an internet service provider GuamTel.Net. On December 5, 2000, IT&E filed an *ex parte* motion for a temporary restraining order to enjoin GTA from further providing internet access service, and a complaint for declaratory relief and a permanent injunction on the ground that GTA's action in providing internet access service was *ultra vires*. On December 20, 2000, the lower court denied IT&E's *ex parte* motion and the case proceeded to the preliminary injunction stage. After a hearing on the matter, the court, on January 26, 2001, granted IT&E's motion for a preliminary injunction. GTA thereafter filed a Notice of Appeal of the preliminary injunction. This court ordered that the parties brief the issue

[1] The defendants named in this action were GTA, Peter Roy Martinez, Ralph Taitano, Scholastica Rivera, and Edward Aguon.

of the court's jurisdiction to hear the appeal of an interlocutory order. After reviewing the briefs, this court exercised its discretion under Title 7 GCA § 3108(b) and dismissed the appeal.

[3] On May 31, 2001, the parties stipulated to a judgment and a permanent injunction and the trial court entered judgment to that effect on June 28, 2001. This appeal followed.

II.

[4] This court has jurisdiction to hear appeals of final judgments entered by the Superior Court pursuant to Title 7 GCA §§ 3107 and 3108(a) (1994).

III.

[5] GTA argues that the trial court erred in two regards in entering judgment and granting an injunction in favor of IT&E. First, GTA contends that the party seeking an injunction has the burden to show that they are likely to win on the merits. GTA asserts that the trial court erroneously assumed that IT&E would win on the merits and impermissibly shifted the burden to GTA to show why the injunction should not issue. Second, GTA argues that the lower court erred in determining that GTA's enabling legislation does not allow it to provide internet access services.

A. Burden of Proof

[6] In its January 26, 2001 Decision and Order, the trial court announced the standard in determining whether a preliminary injunction should be granted, specifically noting that the burden is on the moving party to show probable success on the merits and the possibility of irreparable harm. *See* Appellant's Excerpts of Record, p. 14 (Decision and Order, Jan. 26, 2001). The court then stated: "in order to defeat Plaintiff's likelihood of success on the merits, GTA's actions in providing internet service . . . must fall within the definition of 'telephone services' or 'telecommunications services' . . . ." Appellant's Excerpts of Record, p. 15 (Decision and Order, Jan. 26, 2001). GTA argues that in making this statement, the trial court improperly assumed IT&E

would likely succeed on the merits and improperly shifted the burden to GTA to disprove the likelihood of success. We disagree.

[7] Upon reviewing the January 26, 2001 Decision and Order, the trial court's statement does not indicate that the court shifted the burden to GTA to disprove the likelihood of success on the merits; rather, it is more properly viewed as the court's statement of the issue that the court proceeded to analyze immediately after making the statement, which was whether internet access services fall within the terms "telephone services" or "telecommunications services." Our determination that the trial court did not improperly shift the burden to GTA is further supported by the trial court's pronouncement, after making the legal determination that GTA did not have the power to provide internet services, that "Plaintiffs are likely to succeed on the merits . . . ." Appellant's Excerpts of Record, pp. 16-17 (Decision and Order, Jan. 26, 2001). Moreover, after analyzing the remaining elements in granting an injunction, the trial court concluded that "a preliminary injunction . . . is appropriate because the *Plaintiff's have demonstrated* . . . a combination of probable success on the merits and the possibility of irreparable injury . . . ." Appellant's Excerpts of Record, p. 18 (Decision and Order, Jan. 26, 2001) (emphasis added).

[8] Upon review of the Decision and Order in its entirety, it is evident that the trial court applied the correct standard when considering whether to grant the injunction. *See Textile Unlimited, Inc. v. A. BMH Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001) (explaining that the moving party carries the burden to demonstrate a likelihood of success on the merits and irreparable injury). The court then made a finding that IT&E met its burden to prove the elements supporting injunctive relief. We therefore reject GTA's argument that the trial court improperly placed the burden on GTA to show why an injunction should not issue and find that the trial court did not err in this regard.

B. Statutory Authority

[9] The central issue in this case is whether GTA has the statutory authority to provide internet access service. Because GTA is a creature of statute, GTA may only act within its powers as

specifically granted by the legislature. *See Ada v. Guam Telephone Authority*, 1999 Guam 10, ¶ 11. As creatures of legislation, the powers of administrative agencies and their executive officers are "dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common law powers but only such as have been conferred upon them by law expressly or by implication." *Id*. (citations omitted). Thus, GTA may only provide internet access service if such service is within its powers as granted by the legislature. GTA's powers are set forth in Title 12 GCA § 7104.

[10] Relevant to the instant case, GTA has the power "to install, maintain, sell and supply to individuals, firms, corporations and governments, including the government of Guam, *telephone services*." Title 12 GCA § 7104(a) (1993) (emphasis added).[2] The determinative

[2] Title 12 GCA 7104 provides in full:

> The Authority shall have and exercise each and all of the following powers:
>
> (a) To install, maintain, sell and supply to individuals, firms, corporations and governments, including the government of Guam, telephone services;
>
> (b) Acquire, subject to the laws of the territory of Guam, by grant, purchase, gift, devise or lease, or by the exercise of the right of eminent domain in accordance with the provisions and subject to the limitations of 21 GCA Chapter 15, and hold and use any real or personal property necessary or convenient or useful for the carrying on of any of its powers pursuant to the provisions of this Article. The provisions of 5 GCA Chapter 5 (Procurement Law) shall be applicable to the Authority except when requirements of federal law or federal loans with respect to the expenditure of federal funds are inconsistent with the provisions of Title VII-A of this Code and under such conditions federal law or federal requirements shall control;
>
> (c) Establish its internal organization and management and adopt regulations for the administration of its operations;
>
> (d) Establish and modify from time to time, with approval of the Public Utility Commission, reasonable rates and charges for the telephone service, at least adequate to cover the full cost of such service, including the cost of debt service and collect money from customers using such service, all subject to any contractual obligations of the Board to the holders of any bonds, pursuant to any such contractual obligation; and refund charges collected in error.
>
> (e) Enter into contracts and execute all instruments necessary or convenient in the exercise of its powers, adopt a seal, and sue or be sued in its own corporate name;
>
> (f) Construct works along or across any street or public highway or watercourse, or over any of the lands which are the property of the Territory; and with respect to federal lands, the Authority shall have the same powers with respect to the construction of such works as possessed by the government of Guam. The Authority shall restore any such street or highway to its former state as near as may be, and shall not use it in a manner to impair unnecessarily its usefulness;
>
> (g) At any time or from time to time, incur indebtedness pursuant to Article 2 of this Chapter;
>
> (h) Enter into contracts with government of the Territory, with the United States or with a reputable institution for loans or grants;
>
> (i) Employ, retain or contract for the services of qualified managers, specialists or experts,

issue is whether internet access service falls within the definition of "telephone services" as set forth in section 7104(a).

[11] The trial court's finding that GTA exceeded its statutory authority in providing internet access service was based on its finding that under GTA's enabling act, and the *Ada v. GTA* decision, 1999 Guam 10, GTA has the power to provide "telephone service" and, or, "telecommunications service." Relying on terms used in the Telecommunications Act of 1996, the trial court found that because internet access service is a subset of "information services," it did not fall within the categories of either "telephone service" or "telecommunications service," and, therefore, GTA acted outside its statutory powers.

[12] GTA argues that the trial court erred in finding that it lacked statutory authority to operate GuamTel.Net. GTA submits two points of error to support this argument. First, GTA asserts that the lower court erroneously relied on cases that interpret the Federal Telecommunications Act of 1996 in concluding that there is a distinction between "telecommunication services" and "information services." The trial court found this distinction important, finding that the former includes permissible action under GTA's enabling act and the latter includes internet access services and which is not within GTA's enabling act powers. Second, GTA argues that if the legislature intended to limit GTA's powers to "telecommunication services" only and not "information

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> as individuals or as organizations, to advise and assist its Board of Directors and employees;
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> (j) Adopt such rules and regulations as may be necessary for the exercise of the powers and performance of the duties conferred or imposed upon the Authority or the Board by this Article;
>
> (k) Control, operate, improve, equip, maintain, repair, renew, replace, reconstruct, alter and insure the telephone system subject to compliance with any applicable regulations of the territory of Guam;
>
> (l) Do any and all other things necessary to the full and convenient exercise of the above powers.
>
> Nothing contained in this Section or elsewhere in this Article shall be construed directly or by implication to be in any way in derogation or limitation of powers conferred upon or existing in the Authority or the Board by virtue of any provisions of the Organic Act of Guam or statutes of the Territory or any other provisions of this Chapter.

Title 12 GCA § 7104 (1993) (as amended).

services," it could have done so between 1973 and the present, especially in light of the *Ada* decision. Because the legislature has not limited GTA's authority, it can be implied that the legislature intended, and in fact acquiesced in the *Ada* court's determination, that GTA's enabling statute be read broadly to grant GTA the power to provide internet access services.

[13] IT&E counters both arguments. First, IT&E contends that because GTA only recently commenced operation of GuamTel.Net, and the propriety of GTA's actions has been subject to the current litigation, the legislature has not acquiesced in GTA's actions in providing internet access services. As to the merits of the lower court's finding that GTA's enabling statute did not allow it to provide internet access services, IT&E contends that in *Ada v. GTA*, this court found that GTA's enabling statute, which allows them to provide "telephone service," should be read to give GTA broad authority to provide "telecommunications services." Because federal courts have consistently and unambiguously held that internet access services fall into the category of "information services" and not "telecommunications services," the lower court correctly determined that GTA exceeded its enabling act powers by providing internet access services through GuamTel.Net.

1. Standard of Review

[14] The parties further disagree as to the proper standard of review in the instant case. IT&E argues that the trial court's characterization of the nature of internet access services is reviewed under the clearly erroneous standard. Specifically, IT&E argues that whether internet access services is "information services" as opposed to "telecommunications services" is a question of fact reviewed for clear error. GTA, on the other hand, argues that because the trial court's reliance on the distinction between "information services" and "telecommunications services" was made pursuant to its ultimate determination of the definition of the term "telephone services" in GTA's enabling act, the trial court's findings are reviewed *de novo.*

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[15] First, we note that the final judgment issued in the instant case was based on the trial court's findings in its order granting a preliminary injunction. The lower court's final judgment supported its issuance of a permanent injunction in the instant case. While the grant of a permanent injunction is reviewed for an abuse of discretion, we "review any determination underlying the grant by the standard that applies to that determination . . . ." *Dare v. California*, 191 F.3d 1167, 1170 (9th Cir. 1999) (citations omitted).[3]

[16] Here, the determination underlying the grant of injunctive relief involved an interpretation of GTA's powers. We agree with GTA that the standard of review that applies to the lower court's interpretation of GTA's statutory powers is *de novo*. The issue before both the trial court and this court is whether GTA has the statutory authority to provide internet access services. GTA's statute allows it to provide "telephone services." Whether internet access services are telephone services within the meaning of the statute requires statutory interpretation, and is therefore properly considered a question of law reviewed *de novo*. *See Ada*, 1999 Guam 10 at ¶ 10 (issues of statutory interpretation are reviewed *de novo)*; *see also Minnesota Microwave, Inc. Pub. Servs. Comm'n*, 190 N.W.2d 661, 664 (Minn. 1971) (rejecting the argument that the agency's conclusion was one of fact and determining that "whether appellant is supplying 'telephone service' [as set forth in the statute] is a question of law to be determined on the basis of the operative facts determined by the commission."). Furthermore, whether the trial court correctly relied on the two terms "telecommunications services" and "information services" in interpreting GTA's enabling act calls for a review of the trial court's method of statutory interpretation and is similarly a question of law reviewed *de novo*.

[3] Similarly, a lower court's grant of a preliminary injunction is generally reviewed for an abuse of discretion. However, "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, the court may undertake plenary review of [the] issues rather than limit its review in a case of this kind to abuse of discretion." *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (internal quotations and citation omitted).

[17] We are also cognizant of the rule that while "an agency's interpretation of a statute is a question of law reviewed *de novo*," if a statute is silent or ambiguous, courts should defer to the agency's reasonable interpretation of the statute. *See Ada*, 1999 Guam 10, at ¶ 10; *Blas v. Guam Customs & Quarantine Agency*, 2000 Guam 12, ¶ 12; *see also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534, U.S. 327, -- , 122 S. Ct. 782, 786 (2002) ("If the statute were thought ambiguous, however, the FCC's reading must be accepted nonetheless, provided it is a reasonable interpretation"). This rule of deference stems from the principle announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). *See Ada*, 1999 Guam 10, at ¶ 10 (citing *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782). Deference is given to the agency interpretation so long as that interpretation neither contravenes clear legislative intent nor frustrates the policy that legislature sought to implement. *Id*.; *Blas*, 2000 Guam 12, at ¶ 12.

[18] IT&E contends that GTA's present argument is not an agency interpretation and is thus not to be accorded any deference. While there is authority to the contrary, *see AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) (implying that an agency's litigation argument, as *amicus curiae*, regarding the proper interpretation of a statute, is to be given deference under *Chevron*), we find it unnecessary to consider IT&E's argument. Even assuming GTA's interpretation is an agency interpretation which should be accorded deference if reasonable, we decline to defer to GTA's interpretation in the instant case. Deference is generally given to an agency interpretation when the agency has specialized knowledge in the area. *See Westmark Asset Mgmt. Corp. v. Joseph*, 37 P.3d 516, 521 (Colo. Ct. App. 2001) ("As a general rule, we defer to an administrative agency's interpretation of a statute it administers involving a subject matter that calls for the technical expertise the agency possesses."); *Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031, 1041, 78 Cal. Rptr. 2d 1, 6 (Cal. 1998); *Gen. Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). However, deference should not be accorded and "the *de novo* standard is applied[,] where it is clear from the lack of agency precedent that the case is one of first

impression for the agency and the agency lacks special expertise or experience in determining the question presented." *Kitten v. State Dep't of Workforce Dev*., 634 N.W.2d 583, 590 (Wis. Ct. App. 2001); *Lynch v. Lyng*, 872 F.2d 718, 724 (6th Cir. 1989) ("[T]he amount of weight accorded an agency interpretation diminishes further when the interpretation does not require special knowledge within the agency's field of technical expertise."); *see also Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996). Where technical knowledge is not necessary in interpreting a statute, courts accord the agency interpretation less weight. *Minn. Microwave*, 190 N.W.2d at 665.

[19] First, the record in this case indicates that GTA did not consider whether it possessed the statutory authority to operate as an internet service provider prior to commencing operation of GuamTel.Net. *See* Supplemental Excerpts of Record, p. 62 (Hearing on Mot. for Prelim. Inj., Jan. 8, 2001)); Appellant's Excerpts of Record, p. 23 (Stipulated Judgment and Permanent Injunction, May 31, 2001). It is evident that GTA only had occasion to review its enabling act powers as a result of the instant litigation; therefore, GTA's interpretation of its enabling act powers is not longstanding. *Minn. Microwave.*, 190 N.W.2d at 665 (finding that an agency's interpretation is not longstanding if the agency had no occasion to consider the question prior to the institution of litigation). Furthermore, the statute in question is not technical in nature, and there is nothing that indicates that GTA is better able to determine the scope of the term "telephone services" in its enabling act. *See id.* at 664-65 (determining that the statute regulating telephone companies did not contain language that was "exceedingly technical in nature, such that only specialized agencies may be thought able to understand it . . . . thus, [there is] no good reason for deferring to administrative expertise for its interpretation."); *Lynch*, 872 F.2d at 724 ("There is nothing about the Secretary's expertise in administering the food stamp program that would make him better able to divine congressional intent as to effective dates."). Accordingly, we find that GTA's interpretation of the term "telephone services" in 12 GCA § 7104(a) should not be accorded deference in the instant case.

2. Analysis.

[20] As stated earlier, the determinative issue is whether internet access service falls within the definition of "telephone services" as set forth in section 7104(a). The trial court correctly deduced that there is no definition of "telephone services" in GTA's enabling act.

[21] Where a statute contains an undefined term, it is useful to reference other courts' interpretation of that term. *See Van Bennett Food Co. v. City of Reading*, 486 A.2d 1025, 1026 (Pa. 1985). There are no cases in this jurisdiction that specifically address the scope of GTA's power to provide "telephone services" as set forth in section 7104(a). The only case which is arguably useful in answering the question is *Ada v. GTA*, 1999 Guam 10.

[22] In *Ada*, GTA submitted a bid to acquire a Federal Communications Commission ("FCC") license to provide and operate Personal Communications Services ("PCS") in both Guam and the CNMI. *Ada*, 1999 Guam 10, at ¶¶ 1-2. Senator Tom Ada filed a suit against GTA, requesting, among other things, a declaratory judgment that GTA did not have the authority to operate PCS in the CNMI and an injunction to enjoin GTA from taking further action towards the operation of PCS in the CNMI. *Id*. at ¶¶ 2-3. The trial court ultimately entered judgment on the pleadings in favor of GTA pursuant to Guam Rules of Civil Procedure 12(c). *Id*. at ¶¶ 5- 8. This court affirmed. *See id*. at ¶¶ 1, 19.

[23] The issue announced by the *Ada* court was "whether GTA had the authority to engage in the bidding process for acquisition of the PCS licenses from the FCC." *Id*. at ¶ 11. The court ultimately held that such action was within GTA's powers. Specifically, the court referenced GTA's enabling act, and found that:

> [A] plain reading of . . . [12 GCA § 7104(a)] provides that GTA has the authority to "install, sell and supply to individuals, firms, corporations and governments, including the government of Guam, telephone services." PCS is a wireless telecommunications service that combines features of cellular telephones with advanced digital technologies. It is not unexpected that a broad grant of authority would be necessary in order for GTA to adapt to and acquire new telecommunications technologies and fulfill its purpose of providing and enhancing these services to its customers.

Id. at ¶ 13 (internal citation omitted).

[24] The parties have differing interpretations of *Ada*. IT&E posits the interpretation pronounced by the trial court. The trial court used *Ada* in conjunction with the GTA enabling statute, determining that GTA may only provide "telephone services" as mandated in section 7104 or "telecommunications services" as determined in *Ada*. Relying on cases which interpret the Federal Telecommunications Act of 1996, the court held that because internet services was an "information service," it did not qualify as either a "telecommunications service" or "telephone service," and therefore, GTA did not have the authority to provide internet access services. In contrast, GTA focuses on *Ada*'s language that GTA's enabling act should be read as giving GTA a broad grant of authority. GTA argues that this broad grant of authority includes the authority to provide internet access services.

[25] It is important to note that both the trial court and IT&E view *Ada* to be a determination by this court that pursuant to GTA's enabling act, GTA may only provide "telecommunications services" as defined by the Federal Telecommunications Act of 1996. We find that both the trial court and IT&E misinterpreted *Ada*. The *Ada* court was confronted with the issue of GTA's power to acquire PCS licenses. Although the *Ada* court properly recognized that PCS service has been characterized as a "telecommunications service" by the FCC, the *Ada* court did not specifically consider whether the term "telephone services" in GTA's enabling statute is interpreted as "telecommunications services" as used by the FCC. In fact, the *Ada* court acknowledged that the parties in that case did not dispute that GTA had the statutory authority to procure PCS licenses. *Id*. at ¶ 14. Thus, it is not at all clear that the *Ada* court used the FCC term "telecommunications" with the explicit purpose of defining the scope of GTA's powers under section 7104(a). Rather, the *Ada* holding is more properly interpreted as a finding that PCS, which is characterized as a "telecommunications service" by the FCC, falls within the definition of "telephone services" under GTA's enabling act. Because the issue in *Ada* was whether GTA could procure PCS licenses, and not internet access services, *Ada* is not on point.

[26] Accordingly, because we hold that *Ada* does not dispose of the issue before us, we reject IT&E's argument that because the *Ada* court referred to GTA's enabling act powers as the power to provide "telecommunications services," the Federal Telecommunications Act of 1996 and cases interpreting its terms are highly relevant. Moreover, having acknowledged that *Ada* is inapposite, we further decline to rely on FCC terminology in the instant case. We find it unnecessary to rely on FCC terminology, specifically the terms "telecommunications services" and "information services," arising out of Federal Telecommunications Act of 1996, in resolving the issue before us.

[27] The Telecommunications Act of 1996 and its predecessor, the Communications Act of 1934, are regulatory in nature. Both the regulatory purposes of the 1996 Act and the importance of the terms used in the Act in relation to defining the FCC's jurisdiction are important factors in determining whether this court should rely on the federal law in determining whether GTA may provide internet access services. Thus, we provide the following brief overview of both the 1934 and 1996 Acts.

[28] The Federal Communications Commission was created by the Communications Act of 1934. *See* John C. Roberts, *The Sources of Statutory Meaning: An Archeological Case Study of the 1996 Telecommunication Act*, 53 SMU L. REV. 143, 145-46 (2000). The FCC was given jurisdiction to regulate telephone and radio. *Id*. at 146; *see Computer & Communications Indus. Ass'n v. F.C.C.*, 693 F.2d 198, 207 (D.C. Cir. 1982). The 1934 Act was written broadly, and did not offer much specific guidance to the FCC regarding its regulatory powers. Roberts, *supra*, at 146. During most of the 20th Century, the telephone system was run by the Bell Company, which had a virtual monopoly over telephone services in the United States. "Transmission of voice telephone messages was considered by all to be a classic 'natural monopoly' and was regulated as such by the FCC, state commissions, and the Justice Department (through consent decrees)." *Id*. at 152. The Bell system was regulated in a similar manner as railroads, consisting of "filed rates (tariffs), requirements of open access by customers and non-discrimination between them, and public utility style cost-of-

service ratemaking." *Id*.

[29] The FCC's regulation of the Bell system was generally static until the emergence of the potential for the transmission of complex *non-voice information* over the traditional Bell telephone system in the mid-1960's. *Id*. With the advent of a different type of technology, the FCC was confronted with the issue of whether these data processing services would be subject to regulation, thus prompting a series of three FCC cases commonly known as the Computer Inquiries. *See id*. The first three Computer Inquiries were endeavors by the FCC to interpret its vague regulatory powers in the 1934 Act in light of new, developing technologies in the communications industry. *See id*. at 152-54; *see also Computer & Communications*, 693 F.2d at 207.

[30] Finally, Congress offered some guidance to both the FCC and the industry by amending the 1934 Act with the Telecommunications Act of 1996. The purpose of the 1996 Act was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *United States TeleCom Assoc. v. F.C.C.*, 290 F.3d 415, 417 (D.C. Cir. 2002) (internal quotations and citations omitted). The 1996 Act differed greatly from the 1934 Act in that the 1996 Act comprehensively delineated the scope of the FCC's regulatory authority. Roberts, *supra*, at 147-48. The 1996 Act introduced terms of art to be used to describe which services would be subject to regulation and which would be exempt. *See id*. The terms *coined* by Congress in the 1996 Act, and relied upon by both the trial court and GTA, included "telecommunication services" and "information services." Under the 1996 Act, common-carriers offering "telecommunications services" are subject to regulation regarding, for instance, rates and access, while those providing "information services" are generally exempt from such regulation. *See FTC v. Verity Int'l, Ltd.*, 124 F. Supp. 2d 193, 202 (S.D.N.Y. 2000) ("While basic communications services long have been covered by filed tariffs, enhanced and information services have not."); *AT&T Corp.*, 216 F.3d at 877 (determining that because internet service providers

provide information services, they are therefore not subject to regulation as telecommunications carriers); *FTC v. GTE.Net v. Cox Communications, Inc.* 185 F. Supp. 2d 1141, 1145 (S.D. Cal. 2002) ("The FCA places wire services into three categories with distinct regulatory implications: cable services, telecommunications services, and information services. Traditionally, the FCA requires carriers of 'telecommunications services' to be treated as 'common carriers' subject to the obligations of §§ 201(a) and 202(a)" governing nondiscrimination, interconnection, and reasonableness of charges.) (internal citation omitted). "Telecommunications" is defined under the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (2000). "Information services" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20) (2000).

[31] The FCC has determined that the terms "telecommunications services" and "information services" are mutually distinct categories that parallel the prior distinction made between "basic" and "enhanced" services established in the Second Computer Inquiry ("*Computer II*"). Federal-State Board on Universal Service, H.R. REP NO. 96-45 (1998), *reprinted in* 13 F.C.C.R. 11501, ¶ 13; Roberts, *supra*, at 154 (noting that in *Computer II*, the FCC created the distinction between "basic" and "enhanced" services, the former subject to regulation and the latter exempt); *see also Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 856 (E.D. Va. 1999). The courts and the FCC have both determined that internet service providers ("ISPs") are end-users of telecommunications, and are themselves providers of "information services," and thus not subject to common carrier regulation under the 1996 Act. *See AT&T Corp.*, 216 F.3d at 877-78; *see also Am. Online*, 49 F. Supp. at 856; Deployment of Wireline Service Offering Advanced Telecomm.

Capability, 15 F.C.C.R. 385, ¶ 34 (Dec. 23, 1999), *vacated on other grounds by Worldcom Inc. v. Federal Communications Comm'n*, 246 F.3d 690 (D. C. Cir. 2001); Roberts, *supra*, at 176.

[32] As shown above, the 1996 Act, like its predecessor, deals with federal regulation of a rapidly developing telecommunications industry. Many cases which arise under the Act center around the issue of whether a certain type of service is subject to regulation under the Act. *See AT&T Corp.*, 216 F.3d at 873-74 (identifying the issue as whether the open access requirement under the 1996 Act applies to providers of cable broadband transmission facilities); *Ass'n of Communications Enters. v. F.C.C.*, 253 F.3d 29, 30-31 (D.C. Cir. 2001) (identifying the issue as whether the resale requirement under the 1996 Act applies to an ILEC's offering of advanced services). Regulation under the 1996 Act is entirely "depend[ent] on application of the statutory categories established in the definitions section" of the Act. Roberts, *supra*, at 172 (quoting Federal-State Joint Board on Universal Service, H.R. REP NO. 96-45 (1998), *reprinted in* 13 F.C.C.R. 11501, ¶ 21).

[33] Thus, the terms "telecommunications services" and "information services," relied upon by both the trial court and IT&E in defining the term "telephone services" in GTA's enabling act, are terms of art specific to the 1996 Act. *See id.* at 174 ("[I]t is hard to see how terms like 'information service' and 'telecommunications carrier' could have a commonly understood meaning outside the world of the FCC."). The terms are clearly relevant in identifying the FCC's regulatory jurisdiction and the scope of the FCC's authority. Because the terms used in the 1996 Act were coined in a specific federal regulatory context, the relevance of those terms in deciding the issue in this case is not readily apparent. The 1996 Act is regulatory in nature and defines jurisdiction, whereas GTA's statute confers powers to provide services. Accordingly, we do not find the distinctions made in the 1996 Act to be determinative in the instant context. Furthermore, because *Ada v. GTA* does not answer the question before us, we must conduct an independent analysis of the scope of the term "telephone services" in 12 GCA § 7104(a).

[34] Undefined terms in a statute are generally ascribed their common ordinary meaning. *See United States v. New Mexico*, 536 F.2d 1324, 1327-28 (10th Cir. 1976); *Ass'n of Communications Enters.*, 253 F.3d at 31 (referring to the dictionary definition of an undefined term in the statute). Several courts have been presented with the task of defining the term "telephone service" in their statutes. These courts describe the term "telephone service" as implicating the terms "telephone" and "telephony." *See Minn. Microwave*, 190 N.W.2d at 665; *Application of Radio-Fone*, 193 N.W.2d 442, 447-48 (Neb. 1972) *rev'd* on other grounds by *A.T.S. Mobile Tel. Inc. v. Gen. Communications. Co.*, 282 N.W.2d 16 (Neb. 1979); *Commercial Communications, Inc. v. Pub. Utils. Comm'n*, 327 P.2d 513, 518-19, 50 Cal. 2d 512, 522-23 (1958). As one court plainly articulated: "[I]t appears to be basic that what a telephone company actually provides and maintains is the facilities for the transmission of telephone messages, or for communication by telephone." *Commercial Communications, Inc.*, 327 P.2d at 519, 50 Cal. 2d at 522-23.

[35] The word "telephony" is defined as "the use or operation of an apparatus for transmission of sounds between widely removed points with or without connecting wires." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 1211 (10th ed. 1997). "Telephonic" is defined as "of, pertaining to, or happening by means of a telephone system" and "telephone" is defined as "an apparatus, system, or process for transmission of sound or speech to a distant point, esp[ecially] by an electrical device." THE WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE, 681 (1997). Thus, telephonic communication is characterized as the transmission of speech over distances. Courts have further characterized "telephone service" as the providing of facilities for two-way communication. *See Minn. Microwave, Inc.*, 190 N.W.2d at 665-66.

[36] Thus, GTA's enabling act gives it the power to provide telephone service as defined above. Furthermore, we find that the term "telephone services" reasonably includes ancillary services "designed to supplement or to work in conjunction with existing telephone services." *Minn. Microwave, Inc.*, 190 N.W.2d at 666 (interpreting a statute which allowed for regulation of

"telephone service"). As GTA emphasizes, section 7104(a) was drafted in the plural, and not the singular, thus indicating the legislature's intent that GTA have the authority to provide more than one type of service related to telephonic communication. *See Stamford Ridgeway Assocs. v. Bd. of Representatives*, 572 A.2d 951, 963 (Conn. 1990); *State v. Fenter*, 569 P.2d 67, 69 (Wash. 1977).

[37] Additionally, terms should be defined in accordance with the legislature's reasonable contemplation. *See New Mexico*, 536 F.2d at 1328. As set forth in *Ada v. GTA*, the nature of the telephone industry leads to the conclusion that the legislature reasonably contemplated that the term "telephone services" in GTA's enabling statute be interpreted to take into account technological developments in the telephonic communications industry. *See Ada*, 1999 Guam 10 at ¶ 13 ("It is not unexpected that a broad grant of authority would be necessary in order for GTA to adapt to and acquire new telecommunications technologies and fulfill its purpose of providing and enhancing these services to its customers."); *see also Minn. Microwave,* 190 N.W.2d at 666 ("It is not disputed that the grant of jurisdiction made to the commission in 1915 can properly take account of and regulate changes on telephone service brought about by mere changes in the state of the art of telephony."); *Digital Paging Sys., Inc. v. Pub. Serv. Comm'n*, 360 N.Y.2d 931, 934-35 (N.Y. App. Div. 1974) (accepting the commission's conclusion that "the statutory definitions of 'telephone line' and 'telephone corporation' were legislatively drafted in broad enough terms to include technological advances in the telephonic communications industry" and that paging services were a type of telephonic communication); *Radio-Fone*, 193 N.W.2d at 447 (determining that the holder of a government issued certificate to provide "telephone service" authorizes the holder to use "new and improved devices and methods for telephonic communication" including non-wire mobile phone service). Thus, the term "telephone services" in section 7104(a) should be defined with the view that the legislature expected GTA to provide telephonic services which integrate technological advancements in telephonic communication, and not telephone services as conducted in 1973, the year section 7104(a) was enacted.

[38] Thus, in accordance with a plain reading of section 7104(a), the issue in the instant case is whether internet access service either (1) falls within the definition of "telephone service," or (2) supplements such telephone service, both taking into account technological developments in the telephonic communication industry. This requires a discussion of the nature of internet access services.

[39] "An [Internet Service Provider] . . . is an entity that provides its customers with the ability to obtain a variety of on-line information through the Internet." Deployment of Wireline Services, 15 F.C.C.R. 385, at ¶ 34. Specifically, an ISP

> is an entity whose function is to allow dial-in users to access the Internet. . . . To serve its customers, an ISP sets up a center which has modems, routers, World Wide Web servers, authentication servers, and mail servers. From this dial-up center, customers' traffic is routed to the Internet backbone over dedicated facilities or to other on-line services.

Jamie N. Nafziger, *Time to Pay Up: Internet Service Providers' Universal Service Obligations Under the Telecommunications Act of 1996*, 16 J. MARSHALL J. COMPUTER & INFO. L. 37, 62 (1997); *see also* Supplemental Excerpts of Record, p. 6 (Definitions admitted as Exhibit 7). To access a dial-up connection, a user needs a telephone line, a modem, and a computer. Nafziger, *supra*. at 56. GuamTel.Net was designed to provide internet access using digital subscriber line ("DSL")[4] service. Supplemental Excerpts of Record, pp. 63-66, 98-99 (Transcript of Proceedings). The ISP provides *access* to the internet. The internet, in turn, has been described as:

> a network of networks. It allows people to communicate with each other through various interconnected communications networks. These networks use twisted pair copper wire, coax cable, fiber optic cable, satellites, and wireless technologies to

[4] DSL technology is a relatively new data transfer technology that can turn a single pair of copper telephone wires ("a copper pair") into a high-speed, multi-channel, data delivery system. A basic DSL system consists of two high-speed modems located at each end of a conventional telephone line--one at the telephone company's end, and one at the customer's end. This technology allows customers to gain high-speed access to large sources of data, including the internet, without the need for expensive additional wiring.

Bell Atlantic Network Services, Inc. v. Coval Communications Group, Inc., 262 F.3d 1258, 1262 (Fed. Cir. 2001) (describing DSL technology in detail).

> transmit information from one computer to another at speeds of billions of bits per second.

Nafziger, *supra*, at 55; *see also* Supplemental Excerpts of Record, p. 6 (Definitions admitted as Exhibit 7).

[40] In addition to providing internet-access, most ISPs offer "user e-mail accounts and a Web portal site, a default home page gateway offering Internet search capabilities and proprietary content devoted to chat groups, interactive gaming, shopping, finance, news, and other topics." *AT&T*, 216 F.3d at 874; *see also* Supplemental Excerpts of Record, p. 6 (Definitions admitted as Exhibit 7). Furthermore, in distinguishing internet access from cable services, the Ninth Circuit made the following observation:

> Internet access is not one-way and general, but interactive and individual . . . . Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange . . . . [C]ommunication with a Web site involves a series of connections involving two- way information exchange and storage, even when a user views seemingly static content.

AT&T, 216 F.3d at 886-87.

[41] Referencing both the dictionary definitions and judicial interpretations, it is evident that a telephone service is a system for two-way communication of speech. We find that internet access service does not fall within this definition. Internet access service is more appropriately considered a system for two-way communication of data. *See* Nafziger, *supra*, at 55-56 (explaining that the internet allows people to transmit *information* from one computer to another at fast speeds); *AT&T*, 216 F.3d at 886-87 (recognizing that the internet allows for two-way information exchange); *cf. W. Telepage, Inc. v. Tacoma Dep't of Fin.*, 998 P.2d 884, 990 (Wash. 2000) (characterizing paging services as "the transmission or communication of data because the service transmits numeric and alpha-numeric information to customers by microwave"). ISPs offer access to the internet. Internet access allows the user to transmit data in several ways, including web searches and electronic mail. We recognize that internet access can be used to communicate with others in a manner similar to

that of traditional telephone services, such as a new technology called IP telephony or Voice over IP (VoIP) which allows two people to talk using internet lines.[5] *See* Roberts, *supra*, at 156-57. However, the question before us is not whether IP telephony is a telephone service; but rather, whether internet access service is a telephone service.[6] The access ISPs provide can be used to make voice or telephonic calls *if* the individual either procures IP telephony software or connects with companies that offer gateways which transmit the call. The fact that the special software or gateway companies exist and can be utilized does not render internet access service a "telephone service." To use internet access for voice transmission, the subscriber must take an additional, completely voluntary step. Because ISPs offer internet access and its concomitant data transmission capability, without necessarily providing the technology necessary to place an IP telephony call, ISPs do not provide a "telephone service." The access provided by the ISP and the platform for placing a voice call are too independent to render the former the equivalent of the latter.

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[5] IP telephony has been described by the FCC as follows:

> "IP telephony" services enable real-time voice transmission using Internet protocols. . . . The services can be provided in two basic ways: through software and hardware at customer premises, or through "gateways" that enable applications originating and/or terminating on the PSTN. Gateways are computers that transform the circuit-switched voice signal into IP packets, and vice versa, and perform associated signaling, control, and address translation functions. The voice communications can be transmitted along with other data on the "public" Internet, or can be routed through intranets or other private data networks for improved performance. . . . Companies such as IDT and Qwest employ gateways to offer users the ability to call from their computer to ordinary telephones connected to the public switched network, or from one telephone to another. To use the latter category of services, a user first picks up an ordinary telephone handset connected to the public switched network, then dials the phone number of a local gateway. Upon receiving a second dialtone, the user dials the phone number of the party he or she wishes to call. The call is routed from the gateway over an IP network, then terminated through another gateway to the ordinary telephone at the receiving end.

Federal-State Joint Bd., H.R. REP NO. 96-45 (1998); *reprinted in* 13 F.C.C.R. 11501, ¶ 84 (internal footnotes omitted).

[6] GTA argues that it has the statutory authority to provide internet access service, not IP telephony service.

[42] Internet access service is more properly regarded as a data-transmission service. As such, it is not a "telephone service" under 12 GCA § 7104(a) as defined previously. The issue, therefore, is whether internet access service is a supplement to telephone service.

[43] Certain types of data transmission services have been characterized as supplementing telephone service, such as one-way paging systems. *See Minn. Microwave,* 190 N.W.2d at 666-67. The nexus between these types of services and ordinary telephone service is readily apparent. By contrast, internet access and internet use is not logically or inherently seen as supplementing ordinary telephone service. While it cannot be doubted that internet access allows for communication which conveniently substitutes or replaces telephonic communication (such as electronic mail), this is distinct from a service which supplements or works in conjunction with telephone service. Internet access service allows for a type of transmission of data and information that is by-and-large unrelated to ordinary telephone service, and therefore does not supplement such service.

[44] Thus, as internet access service is neither a telephonic communication service, nor is it readily viewed as supplementing telephonic communication, internet access service does not fall under the definition of "telephone services" under 12 GCA § 7104(a).

[45] Finally, we reject GTA's argument that the legislature's failure to limit GTA's power to exclude internet services should be viewed as legislative approval of GTA's providing of such services. GTA argues that the legislature's inaction indicates that the legislature intended, and in fact acquiesced in the *Ada* court's determination, that GTA's enabling statute be read broadly to grant GTA the power to provide internet services. We disagree. Considering that the issue in the instant case was being litigated in the courts only three days after GTA commenced providing internet access services, the legislature in this instance had virtually no time to act one way or the other. It would be a different situation altogether if the legislature's inaction with regard to GTA's offering of internet access service was over the course of many years. *See Hudson v. Arthur*

Treachers, 343 S.E.2d 97, 99 (Va. Ct. App. 1986); *see also Hughes Props., Inc. v. State*, 680 P.2d 970, 972 (Nev. 1984). However, we cannot say that the legislature's failure to act between the time GuamTel.Net was started a year and a half ago, and now, indicates acquiescence on its part in GTA's decision to provide internet access services.

[46] Accordingly, we hold that GTA does not have the statutory authority to provide internet access services and GTA therefore exceeded its statutory authority in attempting to do so through its operation of GuamTel.Net.[7] In light of our holding, we decline to address IT&E's argument that GTA is prohibited from providing internet access service on the ground that such service is not a governmental function and therefore not a public use.

C. Attorney's Fees

[47] IT&E requests attorney's fees in the instant case pursuant to Title 5 GCA § 7112. Section 7112 directs a court to award reasonable costs and attorney's fees in favor of a taxpayer who brings suit under Chapter 7 of Title 5 of the Guam Code Annotated. Title 5 GCA § 7112 (2001).

[48] We note that IT&E requested attorney's fees in the lower court, and that the lower court did not rule on the issue in entering final judgment. *See* Appellant's Excerpts of Record, pp. 5, 6 (Complaint for Declaratory Judgment and Injunctive Relief, Dec. 5, 2001) (requesting attorney's fees pursuant to 5 GCA § 7112); Appellant's Excerpts of Record, p. 24 (Stipulated Judgment and Permanent Injunction, May 31, 2001) (allowing IT&E to make a motion for attorney's fees). We decline to address IT&E's request for attorney's fees. That issue is more properly determined by the lower court in the first instance.

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[7] We recognize the societal benefits which flow from increased availability of internet access. However, our duty is to interpret statutes in light of their terms and legislative intent. Policy arguments favoring GTA's participation in the ISP business are more properly directed to the legislature. Courts are not in the business of judicial legislation. *Bank of Guam v. Reidy*, 2001 Guam 14, ¶ 22.

IV.

[49] In sum, we find that the lower court did not shift the burden to GTA to prove that it was not likely to win on the merits of a claim for an injunction. Under an analysis of 12 GCA § 7104(a), we find that internet access services are neither a telephone service, nor a supplement to telephone service. Accordingly, GTA does not have the statutory authority to provide internet access services and the judgment of the trial court is **AFFIRMED.** We **REMAND** to the trial court to determine whether IT&E is entitled to attorney's fees in this matter under Title 5 GCA § 7112.