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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
GTE Telephone Operating Companies	)	Transmittal Nos. 873, 874, 893
	)	
Revisions to Tariff F.C.C. No. 1	)	CC Docket No. 94-81

MOTION FOR STAY

GTE Service Corporation, on behalf of
GTE California Incorporated

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SUMMARY

The July 14, 1994 Order of the Common Carrier Bureau presents the Commission's most recent attempt to enforce an unconstitutional statute. In so doing, the Bureau's Order directly abridges GTECA's First Amendment free speech rights and those of its affiliate, Service Corp. Because the Commission concedes that it cannot invalidate the underlying statute, 47 U.S.C. § 533(b), the Commission must stay that portion of the July 14, 1994 Order which rejects GTOC Tariff Transmittal No. 874 until the United States Court of Appeals for the Ninth Circuit rules on GTECA's constitutional challenge. To do otherwise will require GTECA to discontinue the provision of video signal transport to Service Corp. and will cause both GTECA and Service Corp. irreparable harm. The public interest will be well-served by such a stay and no other party will be prejudiced by permitting the Court of Appeals to act before the Commission enforces the statute in this instance.

The question presented by this Motion is whether the *status quo* should be altered and irreparable injury done to GTECA -- or whether instead the *status quo* should be maintained and free speech rights preserved -- while the Court considers constitutionality of the video programming ban. Over the Commission's objections, the Court previously stayed the Commission's Remand Order, which threatened the same irreparable injury to GTECA as the Bureau's July 14, 1994 Order. The Court granted that stay motion in order to preserve the *status quo* while it considers the important constitutional issue presented by GTECA.

GTECA's First Amendment challenge to Section 533(b) has now been briefed and was argued on May 12, 1994. Supplemental briefs on a singular procedural issue

will be filed on July 28, 1994. However, notwithstanding GTECA's constitutional challenge, the Bureau rejected GTECA's tariff for provision of video signal transport to Service Corp. on the sole ground that it would violate Section 533(b) -- which, of course, GTECA has challenged as unconstitutional in the pending *Cerritos Appeal.* Without this tariff, GTECA must cease providing video signal transport to Service Corp. after September 12, 1994, thereby causing the 39 channels now leased by Service Corp. to "go dark" and causing the same type of irreparable injury that the Court of Appeals sought to avoid by issuing its January 5, 1994 Stay Order. GTECA submits this Motion for Stay of that portion of the July 14, 1994 Order which rejected Transmittal No. 874 in order to preserve the *status quo* until the substantial constitutional question presented in the *Cerritos Appeal* can be resolved by the Court.

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GTE Service Corporation (Service Corp.), on behalf of GTE California Incorporated, formerly General Telephone Company of California (GTECA), pursuant to Sections 1.43, 1.44(e), 1.45(d) and (e), and 1.102(b)(3) of the Commission's Rules,[1] respectfully moves the Commission to stay that portion of the July 14, 1994 Order of the Common Carrier Bureau (Bureau), DA 94-784 (July 14, 1994 Order), which rejects GTOC Tariff Transmittal No. 874 and requires GTECA to bring itself into compliance with the video programming ban[2] within 60 days. Contemporaneously with the submission of this Motion, GTECA has filed an Application for Review of the Bureau's July 14, 1994 Order pursuant to Section 1.115 of the Commission's Rules.[3] GTECA respectfully requests that the Commission expeditiously grant this stay motion notwithstanding any action it might take with respect to GTECA's Application for Review.

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[1] 47 C.F.R. §§ 1.43, 1.44(e), 1.45(d), (e), and 1.102(b)(3).

[2] 47 U.S.C. § 533(b); 47 C.F.R. § 63.54.

[3] 47 C.F.R. § 1.115.

I. STATEMENT OF FACTS.

The facts of this case are set forth in detail in the stay motion and briefs filed by the parties in *GTE California Incorporated v. Federal Communications Commission*, No. 93-70924 (9th Cir.) (*Cerritos Appeal*). GTECA incorporates those facts by reference and summarizes here only the significant matters pertinent to this motion.

In 1985, the City of Cerritos, California, issued a Request for Proposals for the construction and operation of an underground, state-of-the-art cable communications system. Apollo CableVision, Inc. (Apollo) was awarded a 15-year cable television franchise, under a plan wherein GTECA, the local telephone common carrier in Cerritos, would construct and operate a system of coaxial cable and fiber optic cable and would lease half of the coaxial capacity to Apollo. The other half of the coaxial bandwidth would be leased to Service Corp. In early 1987, GTECA entered into Lease Agreements with Apollo and Service Corp., respectively, leasing each 39 channels for a period of fifteen years. The City of Cerritos selected Apollo's corporate parent, T.L. Robak, Inc., a firm experienced in the construction of underground network systems, to do the actual video network construction under contract with GTECA.

In February 1987, GTECA submitted an application to the Commission, requesting Section 214 authorization to build and operate the system.[4] The application explained that Service Corp. would use one-half of the coaxial bandwidth to conduct

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[4] Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, requires telephone common carriers to obtain authorization (214 authority) before construction, extension, acquisition, or operation of any "line." It is long established that the term "line" includes cable distribution facilities. *General Telephone Co. of California v. Federal Communications Commission*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

certain activities, including comparative technological and marketing tests of the delivery of voice, video, and data services over GTECA's existing copper wire telephone system and the separate coaxial and fiber systems. Service Corp.'s activities were also directed toward the development of new or interactive video services, of both commercial and public service type, and included both video-on-demand and near-video-on-demand services.

Despite its public interest benefits, however, the Commission found that GTECA's Cerritos project was inconsistent with the video programming ban of Section 533(b) and its implementing regulations in a number of respects.[5] Among the inconsistencies found by the Commission are:

- Near video on demand (as subsequently offered by Service Corp. as Center Screen℠) was regarded by the Commission as "video programming" within the meaning of Section 533(b), and therefore could not be provided by GTECA, either directly or through a third party, *i.e.*, Service Corp. GTECA's position that such programming was not "video programming" was rejected. *See In General Telephone Co. of California*, 3 FCC Rcd 2317, 2318-19 (¶ 15) (Common Carrier Bureau, 1988).

- GTECA's contract with Apollo's parent corporation, T.L. Robak, for the construction of the Cerritos facility constituted an "affiliation" within the meaning of the implementing regulations; thus, Apollo's involvement in the provision of cable television in Cerritos (as the holder of the municipal franchise) was inconsistent with GTECA's status as the local telephone common carrier. *See In re General Telephone Co. of California*, 4 FCC Rcd 5693, 5693 (¶ 5) (1989) (*Cerritos Order*).

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[5] The Commission's implementing regulations expand upon the statutory video programming ban by including within the definition of "affiliation" any "financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship." 47 C.F.R. § 63.54(c). In the instant case, Service Corp. is an "affiliate" of GTECA within the meaning of Section 533(b)(1) regardless of whether Service Corp. is also an "affiliate" under the Commission's implementing regulations. *See* Consolidated Reply to Petitions to Reject or Suspend Tariffs, June 1, 1994 (Consol. Reply), at 3, n. 4.

- Various services and experiments conducted by Service Corp. required the active cooperation of the cable operator; yet the relationship so entailed was deemed to constitute an "affiliation" within the meaning of the rules. *See Cerritos Order*, 4 FCC Rcd at 5700, n.56.

- Other services that were, or might be, offered by Service Corp. over the 39 channels not used by Apollo might be deemed to be "video programming" (depending on whether they meet the content-based definition of "video programming"[6]) and would thus be prohibited by Section 533(b).

In light of these inconsistencies and the substantial public benefits the Cerritos project would entail, the Commission determined that it was necessary and appropriate in the public interest to waive the Section 533(b) prohibitions against telephone company participation in providing video programming. The Commission issued a five-year, conditional "good cause" waiver pursuant to its authority under 47 U.S.C. § 533(b)(4) and 47 C.F.R. § 63.56. *Cerritos Order*. In addition, the Commission granted GTECA 214 authority to construct and operate the system.

The Cerritos project is the only one of its kind currently in operation in the nation and, as the Commission has consistently recognized, offers "substantial public interest benefits" from its experimental technical and market trials. *In re General Telephone Co. of California*, 8 FCC Rcd 8178, 8181 (¶ 15) (1993) (*Remand Order*). Especially notable are two innovative services provided by Service Corp. over the 39 channels not leased by Apollo. One of these, Center Screen℠, is a near-video-on-demand service that enables cable subscribers to choose programs (including popular first-run movies) at intervals of 15-30 minutes. *Remand Order*, 8 FCC Rcd at 8179, n.6. The other,

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[6] *See* 47 U.S.C. § 522(19); *Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54 - 63.55*, 7 FCC Rcd 5781, 5820-22 & n. 195 (1992).

Main Street™, is an information service that allows subscribers to participate in a variety of interactive video services, including educational offerings. The City of Cerritos has expressly recognized these services as "beneficial" and has officially stated that it is "pleased to be a part of and to benefit from" GTE's innovative offerings.[7]

Two cable television industry associations, however, petitioned for review of the *Cerritos Order* in the United States Court of Appeals for the District of Columbia Circuit. *National Cable Television Association v. Federal Communications Commission*, 914 F.2d 285 (D.C. Cir. 1990). That Court expressly upheld the Commission's finding that the Cerritos project produced substantial public interest benefits (*id.*, at 289), but held that the Commission had failed to explain why one aspect of the project – the involvement of T.L. Robak – was "essential," and accordingly remanded the case to the Commission for reconsideration. *Id.*

In the *Remand Order*, the Commission concluded that its original grant of the good cause waiver was erroneous, solely on the ground that Robak's involvement was not "essential" within the meaning of the D.C. Circuit's decision. As a result, the Commission rescinded both its five-year waiver and GTECA's 214 authority. In so doing, the Commission did not "mandate a specific remedy at this time", but "simply direct[ed] GTECA to take steps necessary to achieve compliance with [Section 533(b) and the implementing regulations] within 120 days from the date this decision is released." *Remand Order*, 8 FCC Rcd at 8182 (¶ 17). The 120-day deadline was subsequently extended by the Commission to 150 days. *See* Memorandum Opinion

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[7] Comments of the City of Cerritos ¶¶ 16, 18 (July 14, 1992) (Attachment D to GTECA's *Cerritos Appeal* Stay Motion).

and Order, FCC 93-533 (Dec. 6, 1993). As explained in the declaration of Virginia K. Sheffield submitted by GTECA in the *Cerritos Appeal* (Attachment C to GTECA's Stay Motion), any and all modes of compliance with this decision would have caused serious and permanent disruption of the Cerritos project, including the end of Center Screen℠.

GTECA sought review of the *Remand Order* in its *Cerritos Appeal.* In light of the irreparable injury to GTECA, the public interest, and the serious First Amendment issue raised by GTECA's challenge to Section 533(b) and the Commission's implementing regulations, the Court stayed the Commission's *Remand Order. Cerritos Appeal,* January 5, 1994 Stay Order.

GTECA's five-year waiver, however, was not extended by the Court's stay order and lapsed at midnight on July 17, 1994. With the expiration of the waiver, GTECA is required to convert its video transport agreement with Service Corp. from a private contractual arrangement to a tariffed common carrier service in compliance with the Communications Act and the Commissions Rules. *See, e.g.,* 47 U.S.C. § 203; *In the Matter of Commission Order Dated April 6, 1966 Requiring Common Carriers to File Tariffs with Commission for Local Distribution Channels Furnished for Use in CATV Systems,* 4 FCC 2d 257 (1966); *In re General Telephone Co. of California,* 13 FCC 2d 448 (1968). Therefore, anticipating expiration of the waiver, on April 22, 1994, GTECA filed Tariff Transmittal No. 874 which sought to provide video channel service to Service Corp. in Cerritos, California effective July 18, 1994.

In its July 14, 1994 Order, the Bureau rejected GTECA's tariff for Service Corp. -- which would otherwise have automatically gone into effect on July 18 under 47 U.S.C. § 204, as did the tariff for Apollo (Transmittal No. 893) -- solely on the ground

that Service Corp.'s participation in the Cerritos project as an affiliate of GTECA violates Section 533(b). The Bureau stated:

> "Transmittal 874 by its terms expressly provides transmission service to an affiliate of GTECA for the delivery of video programming. ... The involvement of Service Corp., an affiliate of GTECA, with the provision of video programming violates Sections 63.54 and 63.55 of the Commission's Rules, 47 C.F.R. § 63.54, 63.55, and Section [613(b)] of the Communications Act, 47 U.S.C. § [533(b)]. As previously indicated, after July 17, 1994, GTECA's waiver of Sections 63.54 and 63.55 of the Commission's Rules will expire by its terms. We therefore conclude that Transmittal 874 is patently unlawful on its face and must be rejected."

July 14, 1994 Order, at 6-7 (¶ 16).[8]

The Bureau rejected GTECA's reliance on *Chesapeake & Potomac Telephone Co. v. United States*, 830 F.Supp. 909 (E.D. Va. 1993), *appeal pending sub. nom. Bell Atlantic v. United States*, No. 93-2340 (4th Cir.) (*C&P*) for the proposition that the statutory video programming ban and the Commission's implementing regulations are unconstitutional. The Bureau stated:

> "The Commission found in the *Remand Order*, however, that the *C&P* case did not limit the Commission's ability to rescind the waiver in this case. Moreover, the Commission has previously stated that the cross-ownership rule is consistent with the First Amendment to the Constitution."

July 14, 1994 Order, at 7 (¶ 17). Nonetheless, the Bureau granted "authority for 60 days to provide service to Service Corp. under Transmittal 874 to give GTE time to bring itself into compliance with the [video programming ban]." July 14, 1994 Order, at 5 (¶ 12).

Without an effective tariff, GTECA cannot by law provide access to its cable system -- video transport service -- to Service Corp. The 39 channels offered by

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[8] In fact, Transmittal No. 874 makes no mention of the type of video content which Service Corp. might transmit to its subscribers. *See* Consol. Reply, at 3, n. 5.

Service Corp. over the Cerritos cable television system operated by GTECA -- including Center Screen℠ and Main Street™ -- must, therefore, shut down at midnight on September 12, 1994. The irreparable injury to GTECA and Service Corp., and the harm to the public interest will be acute. A stay is necessary to prevent GTECA from being forced to shut down half of the cable system before the Court of Appeals can reach a final judgment in the *Cerritos Appeal*. The question posed by this Motion is whether to preserve the *status quo*, for the benefit of GTECA and the public and to the injury of no one, while the Court resolves GTECA's constitutional challenge to Section 533(b).

Contemporaneously with the submission of this Motion, GTECA has filed an Application for Review of the Bureau's July 14, 1994 Order. If the Commission fails to grant this Motion or overturn the Bureau's rejection of Transmittal No. 874 by August 19, 1994, GTECA will file a petition for review with the Court of Appeals and seek a stay from that Court.

II. LEGAL STANDARDS GOVERNING A STAY.

The four-factor test for granting a stay is well established.[9] The Commission must consider (1) the irreparable injury to the movant in the absence of a stay, (2) the

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[9] *See, e.g., Wisconsin Gas Co. v. Federal Energy Regulatory Commission*, 758 F.2d 669 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Denver Rockets v. All-Pro Management, Inc.*, 1971 Trade Cas. ¶ 73,535, at 90,211 & n.1 (9th Cir. 1971); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Implementation of Sections of the Cable Television Consumer protection and Competition Act of 1992: Rate Regulation*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd (1993).

harm, if any, to others if a stay is granted, (3) the public interest, and (4) the movant's likelihood of success on the merits. The strength of the showings required on each factor is interrelated. In particular, if the balance of equities strongly favors the movant, a lesser showing of likelihood of success on the merits will suffice, *i.e.*, a stay should be granted if there is a "serious question" and a "fair chance of success on the merits," even if the Court views the movant's odds of success as less than 50-50.[10]

As shown below, each of these factors overwhelmingly favors the grant of a stay. Indeed, a stay is plainly warranted here because the Bureau's July 14, 1994 Order violates the spirit if not the letter of the stay issued by the Court on January 5, 1994. More specifically, the Court's January 5 Stay Order was based on the determination that the balance of equities decisively tipped in favor of maintaining the *status quo* while the Court considered the indisputably serious constitutional issue presented in *Cerritos Appeal*. Simply stated, the Court held that *the Commission should not enforce Section 533(b) so as to deny continued video programming to the people of Cerritos during the pendency of GTECA's constitutional challenge*. Yet that is precisely what the Bureau has done in its July 14, 1994 Order.

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[10] *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984); *Benda v. Grand Lodge of International Association of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. denied*, 441 U.S. 937 (1979); *Policy and Rules Concerning Local Exchange Carrier Validation and Billing Information for joint Use Calling cards*, 8 FCC Rcd 6393 (1993); *Amendment of Part 90 of the Commission's Rules Governing Eligibility for the Specialized Mobile Radio Services in the 800 MHz Land Mobile Band*, 7 FCC Rcd 6879 (1992).

III. GTECA (AND OTHERS) WILL SUFFER IRREPARABLE INJURY IF THE COMMISSION DOES NOT STAY REJECTION OF TRANSMITTAL NO. 874.

This is an extremely clear case of irreparable injury. It is indisputable that Section 203 of the Communications Act and the Commission's video transport tariffing rules do not allow GTECA to operate its Cerritos cable television system without tariffs and that GTECA must therefore shut down the 39 channels provided to Service Corp. at midnight on September 12, 1994.

The effect of rejection of Transmittal No. 874 on the grounds of noncompliance with Section 533(b) is that GTECA and its affiliate, Service Corp., must silence themselves as speakers and radically alter the *status quo* on the basis of a statutory provision which violates the First Amendment. GTECA's and Service Corp.'s constitutional rights to freedom of speech are at stake. *C&P*; *U S West, Inc. v. United States*, No. C 93-1523 R, Order Granting Plaintiffs' Motion for Summary Judgment (W.D. Wash. June 15, 1994) (both holding the video programming ban facially unconstitutional); and *BellSouth Corp. v. Federal Communications Commission*, No. CV 93-B-2661-S, Order Pending (N.D. Ala.) (same). Each day that GTECA and Service Corp. are barred from engaging in the provision of video speech to their intended audience is a violation of their constitutional rights and, derivatively, of the rights of the people of Cerritos. *E.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (opinion of Brennan, J.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993) ("'any loss of First Amendment freedoms, even briefly, can constitute irreparable injury'").

The Commission itself recognized in the *Remand Order* (8 FCC Rcd at 8182 (¶ 16)) that "immediate implementation of this decision would disrupt service to the

residents of Cerritos and thereby harm the public." The rejection of Transmittal No. 874 has precisely the same effect. As was more fully detailed in the Declaration of Virginia K. Sheffield in GTECA's stay motion in the *Cerritos Appeal*, *any* alteration to the *status quo* in this matter will result in irreparable injury, not only to GTECA and Service Corp., but to the citizens of Cerritos as well, who will lose access to 39 channels on their cable system. Without a tariff, and in accordance with the specific directive of the July 14, 1994 Order, GTECA *must* cease video signal transport for Service Corp. on September 12, 1994. GTECA and Service Corp. -- active, innovative leaders in development of telecommunications and video services to customers -- will be silenced.

These consequences are serious as well as irreparable. The unrecoverable financial loss alone would be sufficient to support issuance of a stay, for GTECA will lose a substantial portion of its investment. *See Cerritos Appeal*, GTECA Motion for Stay, Sheffield Decl., at ¶ 13. But more importantly, GTECA's and Service Corp.'s First Amendment rights are at stake.

The Bureau's attempt to enforce the video programming ban is also inconsistent with the Commission's representations as to a GTECA affiliate, Contel of Virginia, Inc. d/b/a GTE Virginia (GTE-VA). While the July 14, 1994 Order rejects Transmittal No. 874 solely on the basis of GTECA's affiliation with Service Corp., the Commission has publicly stated that it will not enforce the ban against another GTECA affiliate, GTE-VA. *C&P*, Government Defendants' Memorandum in Opposition to Motions to Intervene, Sept. 20, 1993, at 16; Reporter's Transcript, Sept. 30, 1993, at 57:17-22. These inconsistent positions make it clear how needless is the Bureau's insistence upon enforcing the video programming ban in Cerritos -- which clearly abridges GTECA's and Service Corp.'s First Amendment rights -- while at the same time forebearing

enforcement in Virginia, when in both cases the appellate courts are considering a constitutional challenge to the statute.

IV. NO INJURY TO ANY OTHER INTERESTED PARTY WILL RESULT FROM THE COMMISSION'S GRANT OF A STAY.

The harms wrought by the July 14, 1994 Order are truly quite needless. The *status quo* has existed for several years in Cerritos and is to be disrupted now (if the July 14, 1994 Order takes effect) *only* because GTECA is being forced into compliance with video programming ban given expiration of the waiver granted in the *Cerritos Order*. No genuine, substantive harm to the public interest underlies the Bureau's decision to disrupt the *status quo*.

GTECA fully accepts that, if the courts ultimately uphold (and Congress does not repeal) the video programming ban, GTECA will have to come into compliance notwithstanding the absence of any concrete harm to the public interest. However, on the distinct question of whether the *status quo* should be maintained *pending* judicial review, the strong irreparable injury, including the silencing of GTECA and its affiliate, coupled with the absence of harm from maintaining the *status quo*, is decisive. The Court of Appeals has already received briefs and heard arguments addressing the constitutionality of Section 533(b). It is inconceivable that any person would be injured by the relatively brief extension of GTECA's provision of video signal transport to Service Corp. required for the Court to resolve the *Cerritos Appeal* on its merits. Indeed, the Court issued the January 5, 1994 Stay Order specifically to preserve the *status quo* while it decides GTECA's constitutional challenge. That the Bureau has attempted to circumvent the Court's Stay Order is nearly incomprehensible.

V. THE PUBLIC INTEREST STRONGLY FAVORS A STAY.

The public interest would be well served by a stay. The Commission itself -- joined by the Antitrust Division of the Department of Justice and the National Telecommunications and Information Administration of the Department of Commerce -- is already formally on record in opining that the video programming ban disserves the public interest and should be repealed *in its entirety*. *C&P*, 830 F. Supp. at 914 & n.8 (citing authorities). Moreover, the Commission has found that the Cerritos project produces "substantial public interest benefits." *Remand Order*, 8 FCC Rcd at 8182 (¶ 15).

The citizens of Cerritos plainly will benefit from a stay.[11] If a stay is granted, they will receive continued service from those who have served them well all along, unless and until Section 533(b) is upheld. On the other hand, if a stay of the July 14, 1994

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[11] *See* Comments of the City of Cerritos, at ¶ 15 (July 14, 1992) (Attachment D to GTECA's *Cerritos Appeal* Stay Motion) ("Many of the services currently benefiting the residents of Cerritos would presumably be unavailable if the waiver were to be withdrawn or revoked at this late date."); Reply Comments of the City of Cerritos, at ¶ 12 (July 24, 1992) ("The innovations and advancements presented by the Cerritos system represent precisely the type of benefits the City sought to obtain for its residents in contracting with Apollo/General for a state-of-the-art telecommunications system."); Comments by the City of Cerritos in Support of Motion for Stay, at ¶ 6 (Dec. 3, 1993) (Attachment E to GTECA's *Cerritos Appeal* Stay Motion) ("The City fears that neither it nor Apollo will be able to find an `unaffiliated' programmer to provide any near video on demand service to replace Center Screen℠ within the compliance limits set by the Commission."); *id.*, at ¶ 10 ("If a stay is granted, the City's residents will receive continued service from those who have served them throughout the course of this protracted proceeding, until a court rules otherwise. On the other hand, if a stay is denied, the citizens of Cerritos will suffer an abrupt and disorderly discontinuation of valuable service.") (footnote and internal quotation marks omitted).

Order is denied, the citizens of Cerritos will suffer a discontinuation of valuable services before any judicial determination has been made.

Despite its rescission of GTECA's waiver, the *Remand Order* (8 FCC Rcd at 8182 (¶ 15)) reaffirmed the public interest analysis of the original *Cerritos Order*, which in turn noted (4 FCC Rcd at 5699 (¶ 48)) that "it is necessary to give GTE a greater degree of influence over the cable system, than our non-affiliation rule now provides," and that "[a]pplication of our non-affiliation rules would inhibit flexibility in the testing process." Especially in light of the serious First Amendment issue presented by *any* effort to exclude a telephone company from providing video programming, there is no good reason to take away that flexibility while GTECA tests the law through its appeal of the *Remand Order*. The public interest could not be more clear.

While the Commission itself cannot declare the video programming ban unconstitutional,[12] the Commission can properly stay that portion of the July 14, 1994 Order which rejects GTOC Tariff Transmittal No. 874 until the Court of Appeals rules on GTECA's constitutional challenge. The public interest demands no less.

VI. GTECA HAS THE REQUISITE LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CONSTITUTIONAL CHALLENGE TO THE VIDEO PROGRAMMING BAN.

The sole basis offered by the Bureau for rejecting GTOC Tariff Transmittal No. 874 is the video programming ban. July 14, 1994 Order, at 6-7 (¶ 16). However, the video programming ban is unconstitutional. Two courts have already held the ban unconstitutional, both on its face and as applied, and a third has publicly announced its

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[12] *Cerritos Appeal*, Respondent's [FCC's] Brief, April 8, 1994, at 17.

intention to do so. *C&P*; *U S West*; *BellSouth*. GTECA has urged a similar constitutional challenge in its *Cerritos Appeal*. In light of the seriousness of the question now pending before the Court of Appeals, it is most difficult to see why the Bureau insists upon enforcing the video programming ban in California (while at the same time the Commission forebears enforcement in Virginia).

The premise that a telephone company may constitutionally be barred from participation in video programming, simply *because* it is a telephone company, flies in the face of established First Amendment doctrine. As the court explained in *C&P*: "Section 533(b) directly abridges [telephone companies'] right to express ideas by means of a particular, and significant, mode of communication" and therefore must be subjected to heightened constitutional scrutiny. *Id.*, 830 F. Supp. at 918. The bans means do not fit its ends well enough to survive such scrutiny, because the ban actually *disserves* the purpose of promoting competition "by limiting the number of outlets through which [video] programming can be distributed" (*id.*, at 927), and it is not narrowly tailored to prevent telephone company cross-subsidization and monopolization because "effective alternatives exist that would allow telephone companies to enter the cable television market, yet prevent the evils allegedly targeted by § 533(b)" (*id.*, at 931). *See also U S West*. Indeed, such "effective alternatives" -- separate accounting to preclude any possibility of cross-subsidization by ratepayers -- already exist for the Cerritos project. *Cerritos Order*, 4 FCC Rcd at 5700 (¶ 54).

GTECA respectfully submits that it is far more likely than not that, upon judicial review, Section 533(b) (and with it Section 63.54(c) of the Commission's Rules) will be held invalid. A stay should be granted to preserve the *status quo* pending that review. It would be grossly unfair to GTECA, Service Corp. and to the people of Cerritos for

Service Corp.'s offerings to be discontinued, only to find out later that the statute on which the Bureau's July 14, 1994 is based is unconstitutional.

VII. CONCLUSION.

For the reasons stated hereinabove, GTECA respectfully moves the Commission to stay that portion of the July 14, 1994 Order which rejects GTOC Tariff Transmittal No. 874 and requires GTECA to bring itself into compliance with the video programming ban within 60 days. The tariff submitted in Transmittal No. 874 for GTECA's provision of video channel service to Service Corp. in Cerritos, California should be permitted to take effect pending final judicial determination of the constitutionality of the video programming ban.

Respectfully submitted,

GTE Service Corporation, on behalf of
GTE California Incorporated

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Motion for Stay" have been mailed by first class United States mail, postage prepaid, on the 26th day of July, 1994 to all parties on the attached list.

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