

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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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

To: Chief, Common Carrier Bureau

**BRIEF OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION
AND THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The California Cable Television Association ("CCTA") and the National Cable Television Association, Inc. ("NCTA"), by their attorneys, hereby submit their brief in response to the Bureau's July 14, 1994 Order in the above-captioned proceeding. Order, DA 94-784, rel. July 14, 1994 ("Order"). The Order sought briefing on whether the stay of the FCC's Remand Order¹ issued by the United States Court of Appeals for the Ninth Circuit continues, until judicial review is complete, the Section 214 authorization previously granted to the General Telephone Company of California ("GTECA") permitting it to provide cable service in Cerritos, California or whether the Section 214 authorization terminates on July 18, 1994. Order at ¶ 34. As demonstrated below, the Ninth Circuit's stay order had no effect on the Commission's time-limited Section 214 grant and, as a result, that authorization expired on July 17, 1994.² The Court's stay order

¹ General Telephone Company of California, 8 FCC Rcd. 8178 (1993) ("Remand Order").

² As discussed below, GTECA is currently providing service in Cerritos pursuant to a new Section 214 authorization granted sua sponte by the Common Carrier Bureau to avoid a lapse in authority to provide service during the course of the FCC's investigation of GTECA's tariff. Order at ¶¶ 2, 12, 53.

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-- which merely held in abeyance effectuation of the Remand Order's mandate that the waiver and Section 214 authorization be immediately rescinded -- returned GTECA to its original position of having authority to operate only until July 18, 1994.

BACKGROUND

In 1989, the Commission authorized GTECA, over the objections of CCTA and NCTA, to operate video transmission facilities in a manner that violated Sections 63.54-63.55 of the Commission's Rules (47 C.F.R. §§ 63.54 - 63.55), the regulations that prohibit the provision by telephone companies of video programming directly to subscribers, either directly or indirectly through an affiliate. GTECA had filed two interrelated applications for authority to construct and maintain broadband coaxial cable facilities and broadband fiber optic facilities in Cerritos, California. General Telephone Co. of California, 4 FCC Rcd. 5693 (1989) ("Waiver Order"). The Commission's regulations define the concept of "affiliate" broadly to bar any relationship between a "carrier" and its "customer," except the carrier-user relationship. The Commission found that GTECA's relationship with its "customer," Apollo Cablevision, when viewed in conjunction with Apollo's parent T.L. Robak, violated the cross-ownership rules because GTECA was involved simultaneously with its customer in a carrier-user relationship, and with T. L. Robak in a non-carrier-user relationship; i.e., a construction customer-construction contractor relationship. General Telephone Co. of California, 3 FCC Rcd. 2317, 2319-20 (Com. Car. Bur. 1988); Waiver Order, 4 FCC Rcd. at 5693.

Instead of rejecting GTECA's proposal, the Commission chose to waive the cross-ownership prohibition on grounds that, in spite of the rule, "other good cause" existed that justified an exception in that particular case. The Commission held that the "totality of the circumstances" merited the special treatment, noting

particularly GTECA's intention to undertake technical and marketing experimentation. Waiver Order, 4 FCC Rcd. at 5700, 5701.

Of particular importance to the legal question raised in this proceeding is the fact that the Commission viewed the entire package as one interrelated matter. The Commission stated that it was only because of the grant of the waiver that the FCC could also grant the Section 214 applications. Id. at 5700 ("The grant of a waiver for good cause permits us to grant the Section 214 coaxial cable and fiber optic applications for [GTECA's] Cerritos project"). The Commission expressly indicated that at the end of five years the waiver would expire, but that GTECA could then seek another waiver. Id. at 5700. Both the Section 214 applications and the waiver are treated in one unitary ordering clause in the Commission's opinion. Id. at 5701.

NCTA appealed the Commission's ruling to the United States Court of Appeals for the District of Columbia Circuit. NCTA told the court, as it had told the Commission, that irrespective of the merits of the experimentation, the benefits alleged to flow from the project could be realized without a waiver. The court remanded the case to the Commission to provide the agency with an opportunity to explain why the benefits of the project could not be achieved without a waiver. National Cable Television Association, Inc. v. FCC, 914 F. 2d 285 (D.C. Cir. (1990)). The D.C. Circuit's opinion contains no suggestion that the Section 214 authority existed separate and apart from the waiver.

In 1993, the Commission found that the waiver was not justified under the court's governing legal standard. It rescinded the Section 214 authorization and waiver, providing GTECA with a 120 day transition period, which was subsequently extended, to permit the company to disengage and come into compliance with the FCC's regulations. Remand Order, 8 FCC Rcd. at 8182. It is important to note what the legal effect of the Remand Order was: It cut short the

five-year period during which the GTECA could provide service in Cerritos pursuant to the previously-issued waiver and Section 214 authorization (which would have expired in any event on July 17, 1994) and immediately rescinded the "temporary conditional rule waiver and associated Section 214 authority." It was that decision for which GTECA sought judicial review and which the Ninth Circuit stayed.

Despite the fact that the FCC had acted pursuant to a remand order from the D.C. Circuit, GTECA filed a petition for review of the FCC remand decision with the United States Court of Appeals for the Ninth Circuit. In its petition to review the Remand Order, GTECA raised a First Amendment challenge to the cable-telco cross-ownership prohibition, but did not challenge the initial grant of the waiver, the conditions contained therein, or the rescission of the waiver which was the legal result of the Remand Order.

GTECA has not sought new Section 214 authority from the Commission, as it is entitled to do, and as was contemplated by the 1989 Waiver Order. Indeed, rather than comply with the Remand Order, GTECA unsuccessfully sought a stay of the Commission's ruling. Following rejection by the Commission of GTECA's stay request, the company was successful in obtaining a stay of the Remand Order from the United States Court of Appeals for the Ninth Circuit. See Order, Case No. 70924 (9th Cir., filed January 5, 1994). The Ninth Circuit heard oral argument on the merits of the GTECA case on May 12, 1994. The court has not yet ruled on GTECA's First Amendment claim.

Consistent with the unitary nature of the waiver and Section 214 authority, the Commission's merits brief in the Ninth Circuit recognized that all authorizations and waivers granted in this case in 1989 expired in July 1994. As the Commission advised the Court, "even if GTE prevails in this proceeding, the waiver granted by the Commission will remain in effect but only until July 17 of

this year. Once the waiver expires by its own terms the company must file a new application with the FCC under Section 214 if it wishes to provide cable service in Cerritos after that time. Therefore, this case becomes moot very soon." See Brief of the United States and Federal Communications Commission in Case No. 93-70924 (9th Cir.) at 19-20 (emphasis added). In a subsequent letter filing with the Court, the Commission, in describing the history of this case, stated that it had "limited the grant of GTECA's Section 214 certificate to the five-year term of an accompanying telephone company/cable television cross-ownership waiver that was a condition precedent to the issuance of the Section 214 authorization."³ It also observed that it "found the Section 214 certificate could not be issued for the project absent a waiver" and that "[b]ecause the waiver was a necessary condition precedent to the conclusion that the 'public convenience and necessity' standard of Section 214 was satisfied, this express limitation necessarily applied to the Section 214 authority as well."⁴

With the waiver and Section 214 certificate set to expire July 17, 1994, GTECA filed separate tariffs under which it proposed to offer 39 coaxial channels each to Apollo Cablevision and its affiliate GTE Service Corp. ("Service Corp."). In the instant Order, the Commission rejected the Service Corp. tariff (Transmittal No. 874) on the grounds that Service Corp.'s direct provision of programming violated the telephone company/cable television cross-ownership rules, but, sua sponte, it provided new and temporary Section 214 authority so that GTECA could disengage its current operations. At the same time, it set the tariff proposing transmission service to Apollo (Transmittal

³ Letter to Ms. Cathy Catterson, Clerk, United States Court of Appeals for the Ninth Circuit from William E. Kennard, FCC General Counsel and Douglas Letter, Appellate Litigation Counsel, Department of Justice, in Case No. 93-70924, July 27, 1994 at 2-3 ("FCC Response").

⁴ Id. at 3, 4.

No. 873) for investigation to examine legal, economic and structural issues. Order at ¶ 35.

The Commission's Order in this proceeding (at ¶ 11) confirms again that GTECA's Section 214 authority expired this month:

We reject GTECA's argument that its Section 214 authority does not expire on July 17. GTECA explicitly concedes that the waiver of the telephone-cable cross ownership rule granted to GTECA in 1989 expires, by its terms, on July 17. Moreover, the Section 214 authority granted to GTECA was expressly conditioned on the issuance of the waiver. Because of the Commission's rules barring GTECA from operating its Cerritos system in the absence of a waiver, we conclude that GTECA's Section 214 authority will also expire on July 17.

NCTA and CCTA have participated in every stage of the proceedings before the Commission since the original GTECA applications were filed in 1988. It has been our understanding since the Commission's 1989 Order that GTECA received operating authority for only five years, and that no matter what else occurred subsequently, GTECA would have to seek new authority from the FCC pursuant to Section 214 to operate after July 18, 1994. GTECA has not done so. Nevertheless, in the instant Order (at ¶ 12), the Commission has raised the question of whether the Court's stay of the Remand Order had the effect of extending the time-limited Section 214 authorization:

We also have significant doubts about GTECA's claim that the Ninth Circuit's stay of the Remand Order in effect continues GTECA's Section 214 authority to operate the Cerritos facilities during the pendency of that review proceeding. We are, however, unable to determine the legal status of the Section 214 authority based on the current record. . . . GTECA is directed . . . and other parties . . . are invited, to submit briefs to the Commission addressing this issue further.

As we demonstrate below, GTECA's original Section 214 authorization expired on July 17, 1994 and the Ninth Circuit's stay of the Remand Order did not have the effect of extending that authorization.

DISCUSSION

All authority granted GTECA in 1989 has expired by its own terms. The Commission has exclusive jurisdiction, in the course of awarding a Section 214 certificate to a carrier, to "attach to the issuance of the certificate such terms and conditions as in its the judgment the public convenience and necessity may require." 47 U.S.C. § 214. The Commission did just that in 1989 when, as part of its grant of the Cerritos waiver and associated Section 214 certificate, it limited the project to a term of five years. Waiver Order, 4 FCC Rcd. at 5701.

The Ninth Circuit's stay order had no legal impact on the time-limited waiver and associated Section 214 authorization previously granted to GTECA. As GTE conceded in its Motion to Stay the tariffing 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 Commission's Rules.⁵

The Commission too has acknowledged that the Court stay of the Remand Order has no effect on the waiver granted to GTECA. In describing to the Ninth Circuit the facts surrounding GTECA's recent tariff filing, the Commission observed in its July 27, 1994 letter to the Court that GTECA "recognize[d] that the original cross-ownership waiver it had received would expire on July 17, 1994, irrespective of the action taken in the Remand Order (or the stay). . . ." ⁶ Because the waiver was a condition precedent to the grant of GTECA's Section 214 authorization, and because (as even GTECA concedes) the

⁵ Motion for Stay, filed by GTE Service Corporation, CC Docket No. 94-81, July 26, 1994 at 6 (emphasis added).

⁶ FCC Response at 5.

waiver was not extended by the Court's stay, the stay also had no legal effect on the Section 214 authorization which expired -- as did the waiver -- on July 17, 1994.

Moreover, the only relevant legal consequence of the Remand Order was to shorten GTECA's original five years of operating authority by immediately rescinding that authority. In the absence of that order -- or its being stayed -- the five-year waiver period would continue to run. The Court's stay order -- which merely held in abeyance effectuation of the Remand Order's mandate that the waiver and Section 214 authorization be immediately rescinded -- returned GTECA to its original position of having authority to operate only until July 18, 1994. The stay order, therefore, did not have the effect of continuing the Commission's time-limited Section 214 grant.

CONCLUSION

For the reasons stated above, the Court's stay order had no effect on GTECA's 214 authorization which expired on July 17, 1994 and is no longer in effect.

Respectfully submitted,

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August 15, 1994

CERTIFICATE OF SERVICE

I, Charnene Davis, do hereby certify that on this 15th day of August, 1994, copies of the foregoing "**Brief of the California Cable Television Association and the National Cable Television Association, Inc.**" were delivered by first-class, postage pre-paid mail to the following parties:

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