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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

DIRECT CASE OF GTE

GTE Service Corporation, on behalf of
GTE California Incorporated

Ward W. Wueste, Jr., HQE03J43
John F. Raposa, HQE03J27
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(214) 718-6969

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5214

August 15, 1994

Their Attorneys

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SUMMARY

This Direct Case is submitted in response to the Commission's order designating investigation of issues arising out of GTECA's Video Channel Service Tariff in Cerritos, California.

GTE shows that it has carried its burden of demonstrating that the rates, rate structure, tariff terms and conditions are reasonable and in compliance with the Commission's orders and rules and that they supplant pre-existing privately negotiated contracts for video signal carriage. Further, GTE shows that it has Section 214 authority to continue its Cerritos operations because it was granted a permanent Section 214 authorization which survived expiration of the "good cause" cross-ownership waiver. Moreover, GTE establishes that the January 5, 1994 Stay Order of the Court of Appeals maintains the *status quo* of GTECA's Section 214 operating authority in Cerritos until the Court has ruled on GTECA's constitutional challenge to the video programming ban.

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DIRECT CASE OF GTE

GTE Service Corporation (Service Corp.), on behalf of its affiliated GTE Telephone Operating Companies (GTOCs) and GTE California Incorporated (GTECA), hereby submit this Direct Case in response to the issues designated for investigation in the Common Carrier Bureau's (Bureau's) Order, DA 94-784, released July 14, 1994 (July 14, 1994 Order).

BACKGROUND.

The facts of this case are set forth in detail in the Brief (February 14, 1994), Reply Brief (April 22, 1994) and Supplemental Brief (July 28, 1994) filed by GTECA in *GTE California Incorporated v. Federal Communications Commission*, No. 93-70924 (9th Cir.) (*Cerritos Appeal*).[1] GTECA incorporates those facts by reference and summarizes here only the significant matters pertinent to this Direct Case.

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

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[1] The Commission, the National Cable Television Association and the California Cable Television Association are parties to the *Cerritos Appeal* and have been served copies of these documents. Since the City of Cerritos and MCI Telecommunications Corp. are not parties to the *Cerritos Appeal*, GTECA is contemporaneously providing them with courtesy copies of these documents together with their service copy of this Direct Case.

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.[2] In approving GTECA's application, the Commission found that, despite its public interest benefits, GTECA's Cerritos project was inconsistent with the video programming ban of Section 533(b) and its implementing regulations in a number of respects.[3] Among the inconsistencies found by the Commission were:

- 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) (Com. Car. Bur. 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

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2 Section 214 of the Communications Act of 1934 (the Act), 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).

3 Section 613(b) of the Act, 47 U.S.C. § 533(b); 47 C.F.R. § 63.54(c).

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*).

- 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") 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 and also permitted private contractual relationships with Apollo and Service Corp. *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*). 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 its 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 and Order, FCC 93-533 (Dec. 6, 1993).

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 was and is required to convert its private contractual arrangements for video signal transport with Apollo to a tariffed common carrier service in compliance with the Communications Act and the Commission's Rules. Therefore, anticipating expiration of the waiver, on

April 22, 1994, GTECA filed Tariff Transmittal No. 873 which sought to provide video channel service to Apollo in Cerritos, California effective July 18, 1994. Pursuant to Special Permission No. 94-819, GTECA filed Transmittal No. 893 on July 12, 1994, which modified Transmittal No. 873.

In its July 14, 1994 Order, the Commission permitted GTECA's video channel service tariff for Apollo to take effect on July 18, 1994 as requested. Additionally, the Commission designated certain issues for investigation with respect to Transmittal Nos. 873 and 893 which establish video channel service in Cerritos for Apollo.[4] GTEC herein responds to these issues designated for investigation.

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[4] The Commission also excluded certain issues as only pertinent to Transmittal No. 874, GTECA's video channel service tariff for Service Corp. July 14, 1994 Order, at 8 (¶ 20) & n. 38. Therefore, these issues are irrelevant to this investigation of GTECA's provision of tariffed video channel service to Apollo.

On July 26, 1994, GTECA filed an Application for Review and a Motion for Stay of that portion of the July 14, 1994 Order which rejected Transmittal No. 874. Those pleadings are presently before the Commission. Therefore, the issues raised therein will not be addressed in this investigation.

FACTUAL ISSUE 1

Is GTECA's transfer of investment from unregulated to regulated accounts reasonable?

GTECA has been directed to brief whether its "transfer of investment from regulated to unregulated accounts [is] reasonable." July 14, 1994 Order, at 14. In accordance with the Commission's Rules and established precedent, such transfer is reasonable.

GTECA'S PROPOSED TRANSFER OF INVESTMENT FROM UNREGULATED TO REGULATED ACCOUNTS IS REASONABLE AND IN ACCORDANCE WITH THE COMMISSION'S RULES.

A. **Introduction.**

The conversion of GTECA's video channel service offering from a private contractual arrangement to a fully regulated tariff offering necessitates the transfer of the underlying assets from unregulated to regulated accounts. The investments in the Cerritos network are readily identifiable and can be recorded and transferred into regulated accounts in accordance with Parts 32 and 64 of the Commission's Rules. GTECA's request to transfer these assets should be granted so that all underlying accounts will reflect the regulatory status of GTECA's Cerritos video network.

B. **Transfer of Investments to Regulated Accounts.**

In the *Cerritos Order*, the Commission required GTECA to exclude costs associated with the construction, operation, or use of the Cerritos system from any regulated service rate base and to obtain prior authority from the Commission before reallocating any investment from nonregulated to regulated use. *Cerritos Order*, 4 FCC Rcd at 5693 (¶ 45.a). The expiration of the "good cause" waiver on July 17, 1994 required GTECA to file tariffs to reflect the regulated/common carrier status of the video channel service provided in Cerritos. Likewise, the assets associated with the tariffed

services should be transferred to regulated accounts in accordance with Commission Rules. On June 13, 1994, GTECA requested the necessary authority and a waiver of the Commission's Rules to effectuate this transfer. (Petition for Waiver.)

Pursuant to the Commission's joint cost rules, a waiver to reassign investments from non-regulated to a regulated use is conditioned upon a showing that the carrier's regulated activities require the use of the plant capacity allocated to non-regulated activities and that the carrier cannot obtain the needed capacity elsewhere at a lower cost. *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Recon. Order*), *further recon.*, 3 FCC Rcd 6705 (1988) (*Further Recon. Order*), *aff'd sub nom. Southwestern Bell Corp. v. Federal Communications Commission*, 896 F.2d 1378 (D.C. Cir. 1990); *see also In re Pacific Bell*, 9 FCC Rcd 492 (1994). GTECA has clearly met these standards. Absent a waiver, video channel services must only be provided pursuant to a regulated tariff. On July 18, 1994, GTECA's video channel service offering to Apollo became fully subject to Commission regulation and requires the use of the broadband network plant. In addition, the required capacity to provide video signal transport between Apollo and Cerritos residents, other than the existing coaxial network, does not exist, nor could it be obtained without investment in entirely new facilities. Such an investment would be redundant and would undoubtedly cost more than the value of the assets that GTECA is proposing to transfer.

In the July 14, 1994 Order (at 10 (¶ 24)), the Commission queried whether GTECA has made reasonable projections of relative regulated and nonregulated use of the Cerritos costs in accordance with Section 32.23 of the Commission's Rules. Additionally, the Commission queried whether the proposed transfer might result in

regulated customers bearing unregulated costs. Pursuant to the rules established in the *Joint Cost Order*, costs are directly assigned to either regulated or nonregulated activities whenever possible. Common costs are generally allocated between regulated and nonregulated operations on the basis of intended relative use. *Joint Cost Order*, at 1318 (¶ 169). GTECA's investment in coaxial cable and related video facilities in Cerritos is solely related to the provision of video channel transport service and is separate and distinct from GTECA's local exchange plant used to provide telephone service. The majority of investment and related costs in the coaxial network can be directly assigned. The only joint or common use of assets and resources are those associated with the installation and maintenance of the converter box equipment. These costs, which represent a small portion of the overall Cerritos investment, will be allocated in accordance with Part 64 of the Commission's Rules.

The Petition for Waiver requests permission to transfer the investments from nonregulated accounts to regulated accounts at an adjusted depreciated baseline cost. As demonstrated in Transmittal No. 873, unique sub-accounts within GTECA's standard chart of accounts will be established to record the transfer of these assets into regulation, allowing GTECA to directly assign the investment and related depreciation expense to the interstate jurisdiction. Only the usable portion of circuit equipment, coaxial cable, and conduit investment will be transferred above-the-line. GTECA will adjust the net book amounts to reflect a write-off of certain assets such that the resulting net book transferred to regulated accounts reflects the usable portion of facilities as well as the value of the network as measured by the charges set forth in the original lease agreements and in the tariff. Costs associated with subscriber decoder equipment, classified as "other terminal equipment" under Section 32.2362 of the

Commission's Rules, will continue to be accounted for on a "below-the-line" nonregulated basis.

The manner in which investments have been accounted for precludes the possibility that any regulated GTECA ratepayer will bear the costs of any unregulated services in Cerritos. The only nonregulated service provided by GTECA in Cerritos will be associated with the installation, maintenance and lease of the decoder equipment placed on subscriber premises. These activities can be separately identified and will be recorded to specific nonregulated accounts. Thus, the transfer of investment into regulated accounts is reasonable and will not result in other GTECA ratepayers paying for the investment in the Cerritos video channel services network.

C. **Account Data**

The July 14, 1994 Order (at 14 (¶ 35)) requires GTECA to submit the following information:

- The original cost and associated accumulated depreciation of the plant being transferred, by Part 32 account.
- The depreciated baseline cost of the transferred plant, as of the date of the transfer.
- The date the plant was placed in service.
- The net book value of the transferred plant, specified as depreciated cost minus deferred tax liabilities, as of the date of transfer.
- The estimated fair market value of the plant as of the date of the proposed transfer.
- The cost pools in GTE's Part 64 cost allocation manual to which the plant is to be transferred.

This data and information is provided in Attachment A to the Declaration of H. Ryan Gaddy and is consistent with data previously provided in GTE's tariff filings. Original cost amounts are those as of June, 1994 and have been adjusted slightly from the submission under Transmittal No. 873 as a result of a recent asset inventory.

These adjustments re-classify the account for certain costs and do not alter the total asset value that GTECA plans to transfer to regulated accounts.

D. **Conclusion.**

For the reasons stated hereinabove, GTECA respectfully requests that the Commission grant authority and a waiver to reallocate the subject investment from nonregulated to regulated use.

FACTUAL ISSUE 2

Are the rates and terms proposed in transmittal 873 reasonable?

GTECA has been directed to brief whether "the rates and terms proposed in transmittal 873 [are] reasonable." July 14, 1994 Order, at 14-15. As set forth hereinbelow, the rates and terms established in Transmittal Nos. 873 and 893 are reasonable.

THE TARIFF RATES, TERMS AND CONDITIONS SET FORTH IN TRANSMITTAL NOS. 873 AND 893 ARE REASONABLE.

A. **Introduction.**

As set forth below (Legal Issue 2), tariff provisions that may conflict with pre-existing contract terms do not affect the lawfulness of the tariff. Although many of the charges, terms and conditions appearing in the GTECA-Apollo agreements are directly incorporated into the video channel services tariff, others were terminated in accordance with contractual termination clauses and to enable GTECA to come into compliance with the Commission's Rules. True and correct copies of these contracts are attached as Attachments A through D to the Declaration of W. Scott Randolph. A comparison of the pertinent charges is provided in Attachment E to the Declaration of W. Scott Randolph and is discussed below.

B. **Charges for the Lease of 39 Channels.**

The primary contract between Apollo and GTECA provided for the lease of 39 channels of bandwidth by Apollo (Lease Agreement). The video channel services tariff does not alter the basic underlying charges for Apollo's lease of its 39 channels on the system. The original calculation of the charges applicable to Apollo for its use of the Cerritos network are illustrated in Exhibit A of Amendment No. 3 to the Lease Agreement. A monthly payment of $95,265 was computed based on one-half of the

cost to construct and equip the network amortized over a 15-year term using an 18.9% cost-of-capital rate. The 18.9% rate represents a pre-tax factor that would enable GTECA to achieve the Commission's authorized rate of return for interstate services on the Cerritos investments. Thus, the factor incorporates both tax and return components. When adjusted to remove costs of decoder equipment (deregulated subscriber equipment), the monthly charge for the lease of the transport network alone equates to $81,764.

Pursuant to the terms of the Lease Agreement, Apollo prepaid its remaining principal amount in January of 1992. The unamortized amount of this prepayment as of July, 1994 was reflected in the tariff as a "single payment option" for the regulated portion of the 39 channels of bandwidth. Since Apollo has prepaid its monthly lease obligations for the use of both the coaxial network and the decoders, the single payment option for the use of 39 channels submitted under Transmittal No. 873 will have absolutely no financial impact on Apollo.

The use of the 18.9% cost-of-capital factor in the original rate calculation insured that GTECA would earn a reasonable return on its investment. Since GTECA was permitted to provide Apollo with video transport services on a below-the-line contract basis during the waiver period, as opposed to under a tariff, GTECA was not necessarily bound by existing Commission Rules regarding the calculation of rates for regulated service offerings. However, GTE's standard pricing methodology used to support new service rates under the price cap rules produces similar results when applied to the adjusted net book value of the Cerritos investments that GTECA proposes to transfer to regulated accounts. Exhibit B filed with Transmittal No. 873 displays a monthly cost for 39 channels, calculated using GTE's standard access

pricing model and incorporating the adjusted net book value of one-half of the Cerritos network investment (less decoder costs) and depreciation, tax, return, administration and maintenance expenses. Total annual expenses shown on Exhibit B equate to a monthly charge of $81,764, the same charge that was computed using an 18.9% pre-tax cost-of-capital factor in the Lease Agreement.

GTECA considers the video channel service as provided to Apollo to be an individual case basis (ICB) offering since the original video channel services network was built and designed to accommodate, in part, Apollo's unique service requirements. Since the Commission has exempted ICB offerings from price caps, GTECA has no plans to incorporate the video channel services offing in the calculation of its price cap indices. Existing price cap rules do not readily accommodate customer-negotiated ICB charges, particularly those that allow service prepayments. Similarly, costs and revenues associated with video channel service will be excluded from the calculation of any sharing and low end adjustments that GTECA may make for its price cap services.

C. **Power Charges.**

Under the pre-existing Lease Agreement, GTECA charged Apollo one-half of the invoice amount it received monthly for actual power expenses. GTECA has tariffed a monthly power charge of $2,625 which represents one-half of the 1993 average actual monthly power expense. The tariffed charge is, therefore, consistent with the amount Apollo has been paying under contract.

D. **Installation.**

The Installation Agreement between GTECA and Apollo, which covered the installation of drops, inside wire and decoders, expired in September of 1993. However, both parties agreed to continue this contract on an ongoing basis with each

party having the right to terminate the agreement by giving proper notice. GTECA gave proper notice and terminated the Installation Agreement contemporaneously with the expiration of the waiver and the effective date of the tariff.

Under the terms of this agreement, Apollo performed all subscriber installation functions and charged GTECA for this activity. Beginning on the effective date of the tariff, GTECA has assumed responsibility for all installations. Tariffed charges now applicable to Apollo represent the costs GTECA expects to incur to install new drops and reconnect existing drops. Since Apollo utilizes 39 of the 78 channels on the network, installation charges assessed to Apollo reflect only one-half of the total installation cost.

E. **Maintenance.**

GTECA is responsible for maintenance of the Cerritos facilities but previously chose to subcontract these activities to Apollo. The Maintenance Agreement has been supplanted by the tariff upon expiration of the waiver reflecting the common carrier status of the video channel facilities. Performance of maintenance of a carrier's facilities is the responsibility of the common carrier. This function is an integral component of GTECA's common carrier service responsibility.[5] GTECA is now performing maintenance on the Cerritos network, including Apollo's 39 channels of bandwidth, at no additional charge to Apollo.

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5 In its July 14, 1994 *ex parte* correspondence, Apollo cited *In re Ohio Bell Telephone Co.*, 1 FCC Rcd 942 (Com. Car. Bur. 1986) and *In re Chesapeake and Potomac Telephone Co.*, 57 Rad.Reg. (P&F) 1003 (1985) for the proposition that "a telephone common carrier providing cable transmission service under tariff will include in its tariff the terms and conditions for maintenance of the cable distribution facilities." July 14, 1994 correspondence from Kevin S. DiLallo, Gardner, Carton & Douglas, to Mr. David Nall, Acting Chief, Tariff Division, at 4. GTECA agrees. For this very reason, GTECA's video channel service tariff for Apollo provides for GTECA's provision of maintenance of the network.

Apollo will certainly suffer no harm from GTECA's performance of system maintenance. Under the Maintenance Agreement, Apollo paid $18,638/month to GTECA for maintenance on its 39 channels. Under the tariff, Apollo is not charged for this maintenance *at all*. Rather, maintenance charges are subsumed under Apollo's pre-paid tariff rate and maintenance is provided by GTECA. Thus, Apollo will not incur an $18,638/month charge for maintenance.[6]

F. **Miscellaneous Conditions.**

GTECA has included tariff provisions that reflect certain conditions contained in the Lease Agreement. These include a requirement that Apollo utilize video channel service in compliance with contracts by and between Apollo and the City of Cerritos; a right of first refusal to Apollo for the use of additional channel capacity in excess of 39 channels, when and if available; and a condition that GTECA not compete with Apollo, or any permitted successor or assignee, in the provision of video programming in Cerritos during the term of the tariff.

G. **Conclusion.**

For the reasons stated hereinabove, GTECA respectfully urges the Commission to find that the rates, terms and conditions set forth in Transmittal Nos. 873 and 893 are lawful and reasonable.

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6 The Maintenance Agreement provides that Apollo is paid $37,276/month as GTECA's subcontractor to perform maintenance, but is charged back one-half of this amount ($18,638/month). Maintenance Agreement, Amendment No. 1, ¶ 3. According to Apollo (June 29, 1994 *ex parte* correspondence form Edward P. Taptich, Gardner, Carton & Douglas, to Mr. A. Richard Metzger, Acting Chief, Common Carrier Bureau, at 14), prior to the expiration of the waiver Apollo incurred substantial costs (nearly $30,000/month) to perform this maintenance. Based upon Apollo's own claims, Apollo's pre-tariff out-of-pocket maintenance expense was in excess of $11,000/month ($37,726 paid to Apollo by GTECA minus $18,638 charged back to Apollo minus $30,000 Apollo's cost to perform maintenance). Therefore, under the tariff, Apollo realizes a *net savings* in excess of $11,000/month.

FACTUAL ISSUE 3

Under Transmittal 873, will the relationship between GTECA and Apollo be exclusively a "carrier-user" relationship, apart from the effects of Robak's role in construction, as required by Section 63.54 of the Commission's Rules?

GTECA has been directed to brief whether, under Transmittal Nos. 873 and 893, "the relationship between GTECA and Apollo be exclusively a "carrier-user" relationship, apart from the effects of Robak's role in construction, as required by Section 63.54 of the Commission's Rules." July 14, 1994 Order, at 15. GTECA believes that the proposed relationship will be limited to that permitted by Section 63.54 of the Commission's Rules.

GTECA SHOULD BE PERMITTED TO MAINTAIN THE CURRENT SUB-LEASE AND DECODER ARRANGEMENTS WITH APOLLO.

A. Introduction.

GTECA's sublease of headend facilities space from Apollo and GTECA's provision of cable converter (decoder) equipment on a common carrier basis reflect permissible "carrier-user" relationships between Apollo and GTECA. The termination or alteration of these existing relationships could result in disruption or rearrangement of service configurations for local subscribers in Cerritos. GTECA should be permitted to maintain these arrangements with Apollo.

B. Continuation of the Sub-Lease May Be a Permissible Relationship.

GTECA and Apollo have a pre-existing private agreement for the sublease of certain building space in Cerritos which GTECA utilizes to house its headend and related equipment. The effective date of the Sublease is September 1, 1988 and it runs

for a term co-extensive with Apollo's underlying lease, *i.e.*, until January 14, 1997. Sublease, ¶1; Apollo Lease, ¶ 4(a) and Lease Summary, ¶ (k).[7]

In its July 14, 1994 Order, the Bureau indicated that GTECA's proposed continuation of the Sublease after the waiver expiration on July 17, 1994 appears to violate Section 63.54 of the Commission's Rules which prohibits, *inter alia*, "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); July 14, 1994 Order, at 15 & n. 74. For this proposition, the Bureau cited *CCI Cablevision v. Northwestern Indiana Telephone Co.*, 3 FCC Rcd 3096, 3097 (1988), *aff'd sub nom. Northwestern Indiana Telephone Co. v. Federal Communications Commission*, 872 F.2d 465 (D.C. Cir. 1989), *cert denied* 493 U.S. 1035 (1990) (*NITCO II*).

NITCO II has its genesis in *Comark Cable Fund III d/b/a CCI Cablevision v. Northwestern Indiana Telephone Co.*, 100 FCC 2d 1244, *recon. denied*, 103 FCC 2d 600 (1985), *remanded sub nom. Northwestern Indiana Telephone Co. v. Federal Communications Commission*, 824 F.2d 1205 (D.C. Cir. 1987) (*NITCO I*), wherein the Commission found that a prohibited affiliation existed between the subject telephone company (NITCO) and Northwest Indiana CATV, Inc. (Northwest). Specifically, the Commission found seven direct and indirect relationships between NITCO and Northwest, "each of which was ... prohibited by Section 63.54", including the lease of office space by NITCO's owner (Robert Mussman) to Northwest. *NITCO I*, 103 FCC 2d at 602. On remand, that Commission clarified that each of the relationships constituted

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7 Apollo also has an option to renew its Lease for a five-year extension. Apollo Lease, Addendum, ¶1.

an "indicia" of affiliation, and that "taken together" six of the previously identified relationships (including the office lease), in addition to five newly identified relationships, constituted an affiliation prohibited by Section 63.54. *NITCO II*, 3 FCC Rcd at 3096-97.

In light of *NITCO II*, GTECA's submits that the Sublease constitutes only an "indicia" of affiliation -- not a prohibited affiliation itself. As set forth in Transmittal No. 873, GTECA is converting its private contractual arrangements with Apollo to a tariffed common carrier service. Excepting the Sublease, all other contractual relationships with Apollo -- *e.g.*, the Lease Agreement, the Maintenance Agreement and the Installation Agreement -- have been supplanted by tariff or terminated in accordance with their terms. Thus, the Sublease exists as a bare "indicia" of affiliation and the Commission need not order its termination.[8]

C. The Provision of Decoders to Apollo (Or Any Other Programmer) Is a Permissible Relationship.

Currently, GTECA provides 39 channels of capacity on the converter (decoder) boxes to Apollo. GTECA plans to continue to provide this capacity to Apollo on a de-regulated basis. The decoders are the property of GTECA and are an absolute requirement for GTECA to provide video bandwidth to Apollo.

The provision of decoders to Apollo, as well as any other programmer, is exclusively a "carrier-user" relationship within the meaning of Section 63.54(c) of the Commission's Rules. Both Apollo and local subscribers may lease decoders from GTECA or may obtain their own decoder equipment, provided it is compatible with

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[8] In the event that the Commission finds that continuation of the Sublease constitutes a prohibited affiliation, GTECA respectfully requests that the Commission permit GTECA no less than 180 days to relocate its facilities in order to minimize any disruption in service to the residents of Cerritos.

GTECA's network. In addition, other programmer-users of the Cerritos network may also obtain capacity on the converters under the same terms as it is provided to Apollo. This approach is also consistent with the treatment of subscriber equipment under the Commission's video dialtone framework which contemplates exchange carrier provision of subscriber equipment, as well as other detariffed or nonregulated services, to its programmer-customers. *See Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58*, 7 FCC Rcd 5781, 5797-98 (1992), *pets. for recon. pending, appeal pending sub nom. Mankato Citizens Telephone Co. v. Federal Communications Commission*, No. 92-1404 (D.C. Cir.). Since decoders will be provided to all customers on a non-discriminatory basis, GTECA's continued provision of decoders to Apollo does not violate Section 63.54(c).

In contrast, to terminate GTECA's continued provision of decoders to Apollo would require GTECA to either sell the equipment to Apollo or another programmer or to remove the decoders from subscribers' premises. Such action could result in a disruption of video services for the residents of Cerritos.

D. **Conclusion.**

For the reasons stated hereinabove, GTECA respectfully urges the Commission to find that continuation of the Sublease and the provision of decoders does not constitute a prohibited affiliation within the meaning of Section 63.54(c) of the Commission's Rules.

LEGAL ISSUE 1

Does the Court of Appeals' stay of the *Remand Order* continue the Section 214 authorization in effect until judicial review is complete, or does the authorization terminate on July 18, 1994?

GTECA has been directed to brief whether "the Court of Appeals' stay of the *Remand Order* continue[s] the Section 214 authorization in effect until judicial review is complete, or does the authorization terminate on July 18, 1994." July 14, 1994 Order, at 13. Based both upon the *Cerritos Order* and the Court of Appeals' January 5, 1994 Stay Order, GTECA may provide video channel service to Apollo as set forth in Transmittal Nos. 873 and 893 in accordance with existing Section 214 operating authority.

GTECA CURRENTLY HAS SECTION 214 AUTHORITY TO CONTINUE ITS CERRITOS OPERATIONS AND THEREBY TO PROVIDE VIDEO CHANNEL SERVICE TO APOLLO AND SERVICE CORP.

A. **Introduction.**

As set forth in GTECA's February 14, 1994 Brief, April 22, 1994 Reply Brief, and July 28, 1994 Supplemental (letter) Brief in the *Cerritos Appeal*, GTECA's Section 214 authority did not terminate on July 17, 1994. *Cerritos Order*, 4 FCC Rcd at 5701. In addition, even assuming, *arguendo*, that GTECA's Section 214 authority could have terminated on July 17, 1994 (which it did not), such purported termination was stayed by the Court's January 5, 1994 Order (Stay Order), which Stay Order was based upon GTECA's December 17, 1993 Motion for a Stay Pending Judicial Review (Stay Motion).

B. **GTECA Received Permanent Section 214 Authority For Its Cerritos Operations Which Survives After July 17, 1994.**

GTECA has set forth the reasons why the *Cerritos Order*'s grant of Section 214 authority was not limited to a five year period (as was the waiver which expired on July 17, 1994). *Cerritos Appeal*, GTECA Brief, at 4 (February 14, 1994), GTECA Reply