Brief, at 2 (April 22, 1994), GTECA Supplemental Brief, at 1-7 (July 28, 1994). While the Commission has rejected GTECA's reasoning (FCC Brief, at 13, 15; July 14, 1994 Order, at 5), this question is now squarely presented for resolution by the Court of Appeals. Since the Commission has been served with the pertinent pleadings, GTECA will not restate its arguments here. Suffice it to say that the Commission's predetermined judgment on this issue renders it incapable of being an impartial arbitrator. *Gibson v. Berryhill*, 411 U.S. 564, 575 n. 14 (1973); *Kelly v. Board of Education*, 159 F.Supp. 272 (E.D. Tenn. 1958).

C. **The Court's Stay Order Maintains the *Status Quo* Pending Appeal. Even Assuming, *Arguendo*, That GTECA's Section 214 Authority Could Have Terminated on July 17, 1994 (Which It Did Not), the Stay Order Maintains GTECA's Operating Authority Until GTECA's Constitutional Challenge To the Video Programming Ban Has Been Resolved.**

The can be no doubt that the Court of Appeals, in review of the *Remand Order*, has ample authority to preserve the *status quo* in this case pending its determination of the constitutionality of the video programming ban. *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4 (1942); *National Labor Relations Board v. Sav-On Drugs, Inc.*, 704 F.2d 1147, 1149 (9th Cir. 1983)(stays "commonly used" to maintain the *status quo* during an appeal). Indeed, it is well-settled that a court has jurisdiction to grant temporary relief in the form of a stay or a preliminary injunction so as to maintain the *status quo* in order to "preserve the court's power to render meaningful relief." *Republic of the Philippines v. Marcos*, 818 F.2d 1473, 1480 (9th Cir. 1987); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328 (1983); *accord Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806, 814 (3d Cir. 1989). This judicial power is both statutory and incidental to the jurisdiction of the courts of appeals to review administrative agency

actions. *Scripps-Howard*; *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597 (1966); 47 U.S.C. § 402(c); 5 U.S.C. § 705; Fed.R.App.P. 18.

Courts do not issue meaningless orders. The Commission must, therefore, interpret the Court's Stay Order in the context of what was requested and what was necessary to give it meaning. The *status quo* "is universally defined as the last uncontested status which preceded the pending controversy." *Mississippi Power and Light Co. v. United Gas Pipe Line Co.*, 609 F.Supp. 333, 343 (S.D. Miss. 1984). In the *Cerritos Appeal*, the "last uncontested status", due to the Stay, is that GTECA operates facilities pursuant to a proper Section 214 operating authority over which it engages in speech activities. The Stay requested by GTECA was granted by the Court of Appeals in order to maintain the *status quo* with respect to, and avoid a shut down of, those operations pending the Court's review of the constitutionality of the video programming ban. For that review to be meaningful, the Stay must operate to preserve GTECA's Section 214 operating authority pending the Court's final decision on the First Amendment issue. *Scripps-Howard*; *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958). The contrary view -- that GTECA's Section 214 authority nevertheless expired on July 17, 1994 -- would thus frustrate the Stay Order because it would not "preserve the *status quo* or the effectiveness of the judgment subsequently entered." *Mesabi Iron Co. v. Reserve Mining Co.*, 268 F.2d 782, 783 (8th Cir. 1959)(*per curiam*).

That the Stay Order preserves GTECA's Section 214 authority until a final decision on the merits also follows necessarily from the motion papers before the Court and the Stay Order itself. In its Stay Motion, GTECA specifically requested that

> "[i]f the Court grants a stay of the November 9 rescission Order [*Remand Order*], GTECA's *permanent* Section 214 authority granted in 1989 will come back into existence, pending judicial review."

Stay Motion, at 13 n. 13 (emphasis in original). In opposing the Stay Motion, the Commission made clear its contention that no irreparable injury could result because the *status quo* – that is, GTECA's Section 214 authority – was, in its view, to expire in "just a few months." FCC Opposition to Motion for A Stay Pending Judicial Review, at 11. Thus, when the Court granted GTECA's motion in order to preserve the *status quo* pending determination of the constitutional challenge, the Court was well aware of the Commission's view that GTECA's Section 214 authority would shortly expire. Nonetheless, the Court did not consider it necessary to accelerate the briefing schedule or take any other action to ensure that it would render its judgment prior to July 17, 1994. On the contrary, the Stay Order specifically directed that the previously established briefing schedule would remain in effect.

It would have been meaningless for the Court to retain the briefing schedule, which ensured that its decision could not be rendered before the purported July 17 "expiration" date of GTECA's Section 214 authority, had the Court thought that the case would become moot in six months. The only logical reading of the Stay Order, therefore, is that it preserves GTECA's Section 214 operating authority during the pendency of the appeal so that the Court may "render meaningful relief." *Philippines v. Marcos*, *supra*, 818 F.2d at 1480. Thus, the Stay Order's retention of the previously established briefing schedule logically must be read as a rejection of the Commission's position that the Section 214 authorization was to expire in July.

Once the extraordinary relief of a stay of an agency order is granted, it is incumbent upon both the judiciary and the agency to protect the appellant's right to

judicial review. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 242 (8th Cir. 1970); *accord Public Service Commission v. Federal Power Commission*, 284 F.2d 200, 206 (D.C. Cir. 1960) ("[T]he administrative agency cannot destroy the jurisdiction of this court by simply taking final action in the proceeding, ... Such a holding would create too ready a means by which administrative agencies could thwart the power of a reviewing court to pass upon the validity of orders ..."). The jurisdiction of the courts to maintain the *status quo* would be an idle ceremony if an appellant's situation could be irreparably changed before the courts' review of administrative agency decisions can be exercised. *Zenith Radio Corp. v. United States*, 518 F.Supp. 1347 (Ct. Internat'l Trade, 1981); 28 U.S.C. § 1651.

For the Commission to determine that GTECA's Section 214 authority expired notwithstanding the Court's Stay Order, the Commission must not only find that the Court engaged in a meaningless act in granting the Stay but that the Court is content to engage in an idle ceremony in considering GTECA's appeal. Neither determination can logically or reasonably be reached.

D. **Conclusion.**

For the reasons stated hereinabove, GTECA has lawful authority under Section 214 of the Act to provide video channel service to Apollo in accordance with Transmittal Nos. 873 and 893.

## LEGAL ISSUE 2

**Is it lawful for GTECA to supersede the Apollo contracts with the tariff filing in Transmittal No. 873?**

GTECA has been directed to brief whether it is "lawful for GTECA to supersede the Apollo contracts with the tariff filing in Transmittal No. 873." July 14, 1994 Order, at 13. Based upon unequivocal Commission and court precedent, and as unambiguously required by the Act and the Commission's Rules, the answer is yes.

**GTECA'S TRANSMITTAL NOS. 873 AND 893 LAWFULLY ABROGATE ANY PRE-EXISTING CONTRACTS PRIVATELY NEGOTIATED FOR GTECA'S CARRIAGE OF APOLLO'S VIDEO SIGNALS IN CERRITOS.**

A. **Introduction.**

Under the Communications Act and the Commission's Rules, absent a waiver, the provision of video signal transport is prohibited except pursuant to a tariffed carrier-user relationship. *See* 47 U.S.C. §§ 203, 533(b); 47 C.F.R. §§ 61.1(c), 63.54(c). Section 203's tariffing requirement is mandatory and the Commission may not forebear from enforcing this requirement. *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, __ U.S. __, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994). Thus, there can be no doubt that the carriage of video signals by a carrier for an end-user customer may only be made pursuant to tariff. *In re Public Broadcasting Service*, 39 Rad.Reg. (P&F) 1516 (1977); *In re Midwestern Relay Co.*, 59 FCC 2d 477 (1976); *In re United Video, Inc.*, 49 FCC 2d 878 (1974), *recon. denied*, 55 FCC 2d 516 (1975); *In re General Telephone Co. of California*, 13 FCC 2d 448 (1968); *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).

Because private contracts are statutorily impermissible for the carriage of video signals, the long standing rule first announced in *Armour Packing Co. v. United States*,

209 U.S. 56 (1908), mandates that GTECA's properly filed tariff (Transmittal Nos. 873, 893) establishes the only legal rate. "A tariff required by law to be filed is not a mere contract. It is the law." *Carter v. American Telephone and Telegraph Co.*, 365 F.2d 486, 486 (1966). All pre-existing agreements are superseded to the extent they are inconsistent with GTECA's tariff. In fact, Apollo's Lease Agreement with GTECA specifically contemplated this very result: that the Commission would assert its jurisdiction under Title II of the Act and that "the rates, terms and conditions" contained in Apollo's private contracts would be altered. Lease Agreement, ¶ 19. Moreover, despite Apollo's faulty assertion in its June 29, 1994 *ex parte* correspondence, *Armour Packing* is very much alive and has been repeatedly relied upon by the courts and the Commission. *E.g., Maislin Industries U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990); *United Video, supra*, 55 FCC 2d at 517-18. Consequently, Transmittal Nos. 873 and 893 lawfully abrogate the pre-existing GTECA-Apollo contracts which, prior to expiration of the five year "good cause" waiver on July 17, 1994, had regulated GTECA's provision of the video transport in Cerritos.

Apollo's reliance on the so-called *Sierra-Mobile* doctrine[9] (which purportedly prohibits public utilities from unilaterally altering pre-existing contract rates through tariff filings) is entirely misplaced. *Sierra-Mobile* applies only when the underlying regulatory scheme permits private contracts to co-exist with tariffs. For example, *Sierra-Mobile* does apply to intercarrier agreements which are permissible under the Communications Act. *Bell Telephone Co. of Pennsylvania v. Federal Communications Commission*, 503 F.2d 1250, 1275 (3d Cir. 1974), *cert. denied* 422 U.S. 1026 (1975). In contrast, since

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[9] *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1955); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1955).

the carriage of video signals must occur only pursuant to tariff, *Sierra-Mobile* is inapposite and *Armour Packing* applies. *United Video*, 55 FCC 2d at 517-18.[10] Indeed, the instant case is identical to *United Video* in all pertinent respects. *See also Midwestern Relay*, 59 FCC 2d at 480 (relying upon *Bell Telephone* and *United Video* to reject the contention that *Sierra-Mobile* rather that *Amour Packing* may apply to carrier to user arrangements).

For these reasons, GTECA's Transmittal Nos. 873 and 893 may not be rejected even if terms may conflict with pre-existing contracts which, under *Armour Packing*, are unenforceable.

B. **The Pre-Existing GTECA-Apollo Contracts.**

Prior to July 17, 1994, GTECA had three private contracts in force with Apollo respecting the provision of video signal transport in Cerritos: (1) a fifteen year Lease Agreement for the provision of 39 channels of bandwidth, which was set to expire on May 2, 2004; (2) a five year Maintenance Agreement, which was set to expire on May 2, 1995; and (3) an Installation Agreement which was terminable at will by either party upon proper notice.[11]

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[10] Apollo's tired assertion that the video transport is one of private rather than common carriage (and thus not subject to *Armour Packing*) has been rejected once again by this Commission in the Bureau's July 14, 1994 Order. July 14, 1994 Order, at 12-13. This is consistent with the Commission's earlier finding that GTECA's provision of video signal transport to Apollo constitutes common carriage, a ruling which Apollo did not appeal. *In re General Telephone Co. of California*, 3 FCC Rcd 2317 (Com. Car. Bur. 1988).

[11] GTECA and Apollo have also entered into as Sub-Lease of building space which houses GTECA's headend and related equipment. This Sub-Lease is discussed *supra*. As discussed therein, if the Commission determines that continuation of the Sub-Lease is an impermissible affiliation and directs termination of the Sub-Lease, then the Sub-Lease (as well as the Lease Agreement and Maintenance Agreement) will be abrogated by regulatory authority. *Armour Packing*.

With the expiration of the *Cerritos Order*'s five year "good cause" waiver on July 17, 1994, the Lease Agreement and the Maintenance Agreement have been supplanted by tariff. The Installation Agreement was properly terminated by GTECA. Thus, only the Lease Agreement and the Maintenance Agreement have been abrogated by Transmittal Nos. 873 and 893 and Apollo is not harmed by the abrogation of these agreements. Moreover, such action, consistent with regulatory mandate, was contemplated by the parties when they entered into their private agreements. Specifically, paragraph 19 of the Lease Agreement provides that:

> "[Apollo] understands that the bandwidth capacity subject to this Agreement is provided on a non-common carrier basis, individually negotiated and tailored to meet the particular needs of [Apollo] and characterized by a long-term Lease with a customer expected to operate a stable business. Therefore, the service by [GTECA] under the Agreement is not subject to regulation by the ... Title II authority of the Federal Communications Commission (FCC). If the ... FCC claim[s] Title II jurisdiction over the service provided by [GTECA], [Apollo] shall be subject to the rates, terms and conditions such agency may impose."

The Commission has asserted Title II jurisdiction over GTECA's provision of service to Apollo. *Cerritos Order.* Thus, Paragraph 19 has been triggered and Apollo – by its own concordance – is subject to the rates, terms and conditions imposed by tariff filed in accordance with the Act and the Commission's Rules.[12]

C. **The *Armour Packing* Rule.**

Almost a century ago, the Supreme Court first held that a tariff filed in accordance with the provisions of the Act establishes the legal rate, even if it is

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[12] Even in the absence of such an express agreement, Apollo would be bound by the tariff rates, regulations and conditions. *Midwestern Relay*, 59 FCC 2d at 480; *Pinney and Boyle Co. v. Los Angeles Gas and Electric Corp.*, 168 Cal. 12, 18 (1914) (California law "conclusively presume[s] that the parties contracted in contemplation of the power of the proper board or tribunal to fix rates in every case where such power exists and may have been thereafter legally exercised.").

inconsistent with a previously negotiated agreement. *Armour Packing, supra.* Recognizing the important Congressional policy to establish uniform rate structures and prevent unjust discrimination in the area of interstate commerce, the Court stated:

> "if the rates are subject to secret alteration by special agreement then the [Interstate Commerce Act] will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart . . . [the Act] has provided for the establishing of one rate, to be filed as provided, subject to changes provided, and that rate to be while enforced the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish."

*Armour Packing*, 209 U.S. at 81.[13]

*Armour Packing*'s reasoning has been upheld by courts throughout this century, including as recently as 1990 by the Supreme Court. "Congress has not diverged from this interpretation and we decline to revisit it ourselves. ... [T]his Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes." *Maislin Industries, supra*, 497 U.S. at 130-31.

Pursuant to *Armour Packing*, it is indisputable that where

> "a conflict exists between published tariff rates and rates enumerated in pre-existing agreements, we think it well established that the tariff rates must prevail. Were we to permit enforcement of the inconsistent contractual rates, we would significantly undercut the clear policy of the Act to secure equal rates for all, as well as condone one discriminatory situation such as the Act was intended to remedy."

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[13] Two years prior to *Armour Packing*, the Court had explained:

> "[i]t cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination."

*New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U.S. 361, 391 (1906).

*Farley Terminal Co., Inc. v. Atchison, T. & S. F. Ry. Co.*, 522 F.2d 1095, 1098 (9th Cir. 1975). The *Farley* court went on to hold that a tariff rate, or charge, duly established in accordance with the underlying regulatory scheme, is the legal rate; it has the force of statute and it is binding on carrier and customer alike. *Id.*, 522 F.2d at 1098. "And a contract valid when made is nevertheless rendered void by subsequently established tariff rates which are inconsistent, at least to the extent of the inconsistency." *Id.*, 522 F.2d at 1099; *see also Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619, 621 (7th Cir. 1979) ("it has long been held that properly published tariffs are incorporated into any agreement between the shipper and carrier"); *Illinois Cent. Gulf R. Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978) (filed tariffs have the force of law and establish the liability of a recipient of services covered by the tariff, even if the recipient was a party to the contract under which the services were to be provided at a different price).

Although these particular cases arose under the Interstate Commerce Act, the underlying principle of *Armour Packing* applies with equal force to cases involving services regulated by the Communications Act, since the Communications Act had its genesis in the Interstate Commerce Act. *American Tel. & Tel. Co. v. Federal Communications Commission*, 978 F.2d 727, 736, n. 12 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 3020 (1993) ("Due to this shared lineage, an interpretation of one of the modern statutes is often thought instructive in judicial construction of the other."); *MCI Telecommunications Corp. v. Federal Communications Commission*, 917 F.2d 30, 38 (D.C. Cir. 1990) (The Communications Act was based upon the Interstate Commerce Act and must be read in conjunction therewith); *American Broadcasting Co., Inc. v. Federal Communications Commission*, 643 F.2d 818, 820-821 (D.C. Cir. 1980) ("To

understand the purposes of the Communications Act, we must look to the legislative history of the Interstate Commerce Act of 1887, for the Communications Act borrowed its language and purpose from the Interstate Commerce Act.").

Because of the similar provisions and common ancestry of the two Acts, both the courts and the Commission have repeatedly applied *Armour Packing* in cases construing actions regulated by the Communications Act. *See, e.g., Marco Supply Co. v. AT&T Communications*, 875 F.2d 434, 436 (4th Cir. 1989) (where the general principle that "a regulated carrier *must* charge the tariff established with the appropriate regulatory agency, even if it has quoted or charged a lower rate to its customer" was applied to contracts entered into between carriers whose rates are regulated by the Commission)(emphasis in original); *American Broadcasting, supra*, 643 F.2d at 825-26 (applying *Armour Packing* and holding that although the filed tariff conflicted with a previous contract, this did not affect its lawfulness); *Public Broadcasting Service, supra*, 39 Rad.Reg. at 1530 ("our firm policy with respect to carrier to user agreements is to consider the rate practices and regulations set forth by tariff to be effective notwithstanding any conflicting agreement between the carrier and its customer"); *Midwestern Relay, supra*, 59 FCC 2d at 480 (rejected customer's contention that private contracts were not superseded by tariff even though the contracts contained no provision permitting the carrier to alter the terms of service by tariff); *United Video, supra*, 49 FCC 2d at 880 ("with respect to common carrier service offerings to non-carrier customers, the effective rates, practices, and regulations are those which appear in the carrier's tariff on file with the Commission and such tariff, the Commission's Rules, and the Act itself, are applicable as a matter of law, notwithstanding any conflicting provision appearing in an agreement executed by the

carrier with its customer"), *recon. denied*, 55 FCC 2d at 517-18 ("*Armour Packing* is analogous to the situation before us herein given the fact that the Communications Act, except to the extent it may permit intercarrier contracts, is essentially patterned upon the Interstate Commerce Act. Accordingly, we conclude that the [private] contract is unenforceable to the extent it contains provisions inconsistent with [the carrier's] effective tariff."); *Cruces Cable Co., Inc. v. American Television Relay, Inc.*, 35 FCC 2d 707, 708 (1972) ("it is well established that a carrier may unilaterally terminate a contract rate by publishing a tariff for a rate higher than that provided for in the contract").

D. **The *Sierra-Mobile* Doctrine.**

In contrast to the *Armour Packing* rule, the so-called *Sierra-Mobile* doctrine, construing cases arising under the Federal Power Act, 16 U.S.C. § 791(a) *et seq.*, and the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, emerged under vastly different circumstances. This line of cases had its beginnings in two companion cases, *Federal Power Commission v. Sierra Pacific Power Co.*, *supra*, and *United Gas Pipe Co. v. Mobile Gas Service Corp.*, *supra*. There, "[the Court] ruled that, except in rare cases, the Federal Power Commission has no power under the Federal Power Act or the Natural Gas Act, to accept for filing rates that contravene existing contracts." *Sam Rayburn Dam Electric Cooperative v. Federal Power Commission*, 515 F.2d 998, 1002 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976). In *Mobile*, the Court noted that this result promoted the purposes of the Natural Gas Act.[14] "By preserving the integrity

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[14] Although *Mobile* pertains to the Natural Gas Act, its reasoning and holding apply equally to the Federal Power Act. *See Richmond Power & Light v. Federal Power Commission*, 481 F.2d 490, 492-98 (D.C. Cir.) *cert. denied*, 414 U.S. 1068 (1973).

of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *Id.*, 350 U.S. at 344. However, the *Mobile* court itself recognized that the policy underlying the Natural Gas Act with regard to the provisions permitting private contracts was in striking contrast from that of the Interstate Commerce Act, the predecessor of the Communications Act. In particular, the Court stated:

> "[B]y requiring contracts to be filed with the [Federal Power] Commission, the [Natural Gas] Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts."

*Mobile*, 350 U.S. at 338-39.

Thus, while at first blush *Armour Packing* and *Sierra-Mobile* might appear inconsistent, they simply apply in different circumstances. Specifically, under the energy statutes, uniform rates are not prescribed and private carrier-customer contracts are permissible. *American Broadcasting*, *supra*, 643 F.2d at 825; *Bell Telephone*, *supra*, 503 F.2d at 1275. However, under the Communications Act, this is certainly not the case with respect to the provision of video signal transport, where carriage is prohibited except pursuant to tariff. 47 U.S.C. §§ 203, 533(b); 47 C.F.R. §§ 61.1(c), 63.54(c); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, *supra*, 114 S.Ct. 2223; *Public Broadcasting Service*, *supra*; *Midwestern Relay*, *supra*; *United Video*, *supra*; *General Telephone Co. of California*, *supra*, 13 FCC 2d 448 (1968); *Commission Order Dated April 6, 1966, Requiring Common Carriers to File Tariffs with Commission For Local Distribution Channels Furnished for Use in CATV Systems*, *supra*.

### E. Because The Communications Act Does Not Permit Private Contractual Carriage of Video Signals Absent a Waiver, *Armour Packing* Requires that GTECA's Tariff the Lease and Maintenance Agreements.

Whether *Armour Packing* or *Sierra-Mobile* applies depends upon whether the pre-existing contracts at issue are lawfully permitted under the applicable regulatory scheme. Simply stated, where private contract rates are prohibited, *Armour Packing* applies. Contrarily, where privately negotiated contracts may lawfully co-exist with the filed tariff rate, *Sierra-Mobile* applies.

This distinction was most recently recognized by the D. C. Circuit in *American Broadcasting*, wherein the court concluded that "the Communications Act of 1934 does not permit communications common carriers to alter by contract the rates they announce in their filed tariffs, ..." *Id.*, 643 F.2d at 819. Because the Act does not permit the filing of a private contract between the carrier and its customers, the court applied *Armour Packing*. *Id.*, 643 F.2d at 825-26. In contrast, the Third Circuit in *Bell Telephone*, *supra*, correctly applied *Sierra-Mobile* to an attempted unilateral modification of an existing contract governing the business relations between two carriers. The *Bell Telephone* court held that since the Communications Act permits contracts *between carriers*, the unilateral modification of these lawful intercarrier contracts is not allowed through a subsequent tariff filing. *Id.*, 503 F.2d at 1278.

In both *United Video* and *Midwestern Relay*, the Commission has applied the distinction recognized in *American Broadcasting* and *Bell Telephone*, noting that the Third Circuit's reasoning was clearly limited to contracts between carriers and does not apply to contracts between carriers and customers.

> "The Court indicated that Sections 201(b) and 211(a) of the Communications Act would permit carrier-to-carrier contracts as a legitimate method of ordering business relations. In its opinion the Court indicated that no similar authority existed under the Communications Act for contracts between carriers and customer-users as evidenced by its statement that '[w]hile *communications carriers may be ... prohibited from contracting with customer-users*, we find no such directive barring contractual relations between independent carriers.' Like the Court, we also find no provision of the Communications Act which can be

> reasonably interpreted to permit a carrier to provide service to customer-users pursuant to contracts. Indeed, Section 203(c) of the Communications Act mandates that carriers provide service to their customer-users pursuant to tariffs. Nor has Liberty attempted to show that the Communications Act authorizes a carrier to provide service to its customer-users pursuant to contracts. It follows that the rate specified in the United-Liberty contract is unenforceable and United's subsequent tariff filing changing such rate was therefore appropriate."

*United Video*, 55 FCC 2d at 517-18 (citations omitted; emphasis by the Commission); *Midwestern Relay* ("[T]he Court's holding in *Bell Telephone* [] was limited to contracts between common carriers and did not encompass contracts between carriers and customers").

*MCI Telecommunications Corp. v. Federal Communications Commission*, 665 F.2d 1300 (D.C. Cir. 1981) did not break any new ground and is consistent with *American Broadcasting*, *Bell Telephone*, *United Video* and *Midwestern Relay*. In *MCI*, the D.C. Circuit refused to allow an across the board tariff rate increase in violation of an intercarrier Docket Settlement Agreement authorized and supervised by the Commission. Again, *Sierra-Mobile* was applied to preserve the pre-existing agreement among the various carriers, an agreement permitted under the Communications Act, in contrast to private carrier-user contracts.[15]

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[15] The distinction governing the appropriate application of *Armour Packing* versus *Sierra-Mobile* remains valid in light of *Sea-Land Service, Inc. v. Interstate Commerce Commission*, 738 F.2d 1311 (D.C. Cir. 1984). *Sea-Land* announced that, due to intervening changes in interstate *commerce* policy, current law no longer considers contract rates to be *per se* violations of the common carrier duty of non-discrimination. *Id.*, 738 F.2d at 1316. However, even assuming, *arguendo*, that *Sea-Land* may apply generally to the Communications Act, it certainly cannot apply in those specific instances, such as the provision of video signal transport by a carrier for a customer, in which private arrangements are forbidden. *See Maislin Industries, supra*, 497 U.S. 116, wherein the Supreme Court rejected the Interstate Commerce Commission's "deregulatory" interpretation of that statute and required the carrier to charge only the tariff rate because the private contract had not been filed with the ICC. Since the carrier had failed to comply with the statute, the customer was bound by the tariff rate notwithstanding the contract. *Id.*, 497 U.S. at 124. In the instant case, GTECA cannot comply with the Communications Act and the Commission's Rules by providing video signal carriage by private contract (absent a waiver) and, therefore, GTECA's customers must be bound by the tariff rate (as was the shipper in *Maislin Industries*). This is so, even if it works a "harsh result" on GTECA's customers. *American Tel. & Tel., supra*, 978 F.2d at 736, n. 12.

In the instant case, GTECA filed Transmittal Nos. 873 and 893 to comply with the Act and the Commission's Rules with respect video transport upon expiration of the Cerritos waiver. It is indisputable that, upon expiration of the waiver, GTECA's provision of video signal carriage is prohibited except pursuant to tariff. 47 U.S.C. §§ 203, 533(b); 47 C.F.R. §§ 61.1(c), 63.54(c); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S.Ct. 2223; *Public Broadcasting Service, supra*; *Midwestern Relay, supra*; *United Video, supra*; *General Telephone Co. of California, supra*, 13 FCC 2d 448 (1968); *Commission Order Dated April 6, 1966, Requiring Common Carriers to File Tariffs with Commission For Local Distribution Channels Furnished for Use in CATV Systems, supra.* Because Congress and the Commission have mandated that video signal transport may be provided only pursuant to tariff and never by contract (absent a waiver), *Sierra-Mobile* is inapplicable and *Armour Packing* controls. As such, any inconsistent terms privately negotiated must yield to those terms properly filed under a tariff. Thus, the Commission must properly apply its "firm policy with respect to carrier to user agreements is [that] the rate practices and regulations set forth by tariff [are] effective notwithstanding any conflicting agreement between the carrier and its customer." *Public Broadcasting Service, supra*, 39 Rad.Reg. at 1530.[16]

Finally, it is irrelevant to the Commission's analysis that GTECA's tariff for Apollo may alter the pre-existing private contractually relationship. Simply stated, the fact that GTECA's filed tariff may conflict with pre-existing contract provisions does not affect its lawfulness. If the inconsistent rates in the private contracts were to remain in force, it

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[16] Apollo has never suggested, not could it, that the pre-existing agreements constitute contracts between carriers. Although GTECA is a carrier, Apollo is not. 47 U.S.C. § 541(c). *Bell Telephone* is therefore inapplicable.

"would significantly undercut the clear policy of the Act to secure equal rates for all, as well as condone one discriminatory situation such as the Act was intended to remedy." *Farley Terminal Co., Inc., supra*, 522 F.2d at 1098. Indeed, the Commission has properly applied *Armour Packing* even where the filed tariff allegedly "constitute[s] a major revision in the [carrier-customer] rate structure." *United Video*, 49 FCC 2d at 878.

Accordingly, because the Act and the Commission's Rules forbid the provision of video signal transport by private contract, GTECA's Transmittal Nos. 873 and 893 lawfully abrogate pre-existing GTECA-Apollo contracts.[17]

## F. The Substantial Cause Test Does Not Apply to GTECA's Transmittal Nos. 873 and 893.

Contrary to Apollo's allegation, GTECA need not make a showing of "substantial cause" in order to file its tariff. The "substantial cause" test is used by the Commission in a limited role "as an aid in ascertaining whether newly-filed modifications to [the carrier's] long-term service tariffs are within the zone of reasonableness," and not "as an additional hurdle that [the carrier's] otherwise reasonable new tariff ha[s] to overcome." *Showtime Networks, Inc. v. Federal Communications Commission*, 932 F.2d 1, 6 (D.C. Cir. 1991). The Commission has never applied the substantial cause

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[17] The same result is true under California law. *Law v. Railroad Commission*, 184 Cal. 737, 739-40 (1921)("If the service contracted for was devoted to the public use, the contract for the service was subject to the exercise of the police power and, the state having elected to confer upon the commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this power results in the practical annulment of his private contract fixing compensation for a public service.")(citation omitted); *Limoneira v. Railroad Commission*, 174 Cal. 232, 237 (1917)("But it cannot now be questioned that this contract, made in the year 1903, was subject to the power of the state to practically annul it in so far as the prescribed rate was concerned in the regulation of the public use."); *Sutter Butte Canal Co. v. Railroad Commission*, 202 Cal. 179, 187-88 (1927) ("[I]t is clear that it is well within the regulatory power of the Commission to disregard altogether the contracts.").

test to a long-term carrier-customer relationship as presented by the GTECA-Apollo contracts. July 14, 1994 Order, at 12.

Because GTECA is not modifying an existing long term service tariff, the Commission need not indulge in the question whether any purported "modification" is reasonable. The fact that Transmittal Nos. 873 and 893 may work significant changes to the pre-existing private contracts is simply irrelevant. *American Broadcasting*, 643 F.2d at 819; *United Video*, 49 FCC 2d at 878. To ask the Commission to find the tariff unlawful for this reason alone flies in the face of *Armour Packing* and consistent court and Commission precedent.[18]

In sum, GTECA filed its tariff in order to come into compliance with the Act and the Commission's Rules pertaining to video signal transport. Because private contracts for video signal carriage are impermissible, *Armour Packing* and its progeny require that GTECA's tariff supersede the Lease Agreement and the Maintenance Agreement.

G. **Conclusion.**

For the reasons stated hereinabove, GTECA respectfully requests that the Commission adhere to establish precedent and find it lawful for GTECA to supersede its pre-existing Apollo contracts with the tariff filing in Transmittal Nos. 873 and 893. *Armour Packing*; *Marco Supply Co.*; *American Broadcasting*; *Public Broadcasting Service*; *Midwestern Relay*; *United Video*; *Cruces Cable Co.*

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[18] Since GTECA's tariff for Apollo is not based on GTECA's "business needs and objectives," but instead was filed in compliance with clear federal mandate, *RCA American Communications, Inc.*, 86 FCC 2d 1197, 1201 (1981), *aff'd RCA American Communications, Inc. v. Federal Communications Commission*, 731 F.2d 996 (D.C. Cir. 1984) is inapposite.

**CONCLUSION.**

Accordingly, Transmittal Nos. 873 and 893 are properly justified as supported by this Direct Case.

Respectfully submitted,

GTE Service Corporation, on behalf of
GTE California Incorporated

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August 15, 1994

Their Attorneys

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AUG 15 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DECLARATION OF H. RYAN GADDY

I, H. Ryan Gaddy, state as follows:

1. I am of legal age and a resident of Denton County, Texas. I am an employee of GTE North Incorporated and a member of the headquarters staff of GTE Telephone Operations. My title is Manager - Regulatory Accounting. My business address is P.O. Box 152092, Irving, TX 75015-2092.

2. Attached hereto as Attachment "A" is a true and correct compilation of the information requested by the Commission in Paragraph 35 of the Bureau's July 14, 1994 Order as reflected in the files and records of GTE Telephone Operations.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief and that this declaration is executed this 12th day of August, 1994, at Irving, Texas.

H Ryan Gaddy

H. Ryan Gaddy

JFR0612A

ATTACHMENT A

# Cerritos Investment
# FCC Order - July 14, 1994

Attachment A

Issue 1:

(A) The original cost and the associated accumulated depreciation of the plant being transferred, by Part 32 account.
Response: The schedule below reflects amounts as of June 1994. The Original Costs (A) have been updated to reflect adjustments made this year as a result of an inventory.

(B) The depreciated baseline cost of the transferred plant, as of the date of transfer.
Response: See Below

(C) The date the plant was placed in service.
Response: See Below

(D) The net book value of the transferred plant, specified as depreciated cost minus deferred tax liabilities, as of the date of transfer.
Response: See Below

(E) The estimated fair market value of the plant as of the date of the proposed transfer.
Response: See Below

(F) The cost pools in GTE's Part 64 cost allocation manual to which the plant is to be transferred.
Response: Because the value of the investment necessary to provide Apollo service has been separately identified, the cost pool to which the plant is to be transferred is "Directly Assigned Regulated."

| Account | Description | (A) Original Cost | (A) Accumulated Depreciation | (B) Depreciated Baseline | (D) Deferred Taxes | (D) Net Book Value | (E) Estimated Fair Market Value |
|---|---|---|---|---|---|---|---|
| N232 to 2232.27 | TPIS-Circuit Equipment-Video | 1,358,459 | 344,220 | 1,014,239 | 290,861 | 723,378 | 650,571 |
| N422 to 2422.17 | TPIS-Underground Coaxial Cable | 3,531,794 | 1,100,983 | 2,430,811 | 122,182 | 2,308,629 | 2,076,269 |
| N441 to 2441.10 | TPIS-Conduit Systems | 5,120,994 | 1,459,419 | 3,661,575 | 88,305 | 3,573,270 | 3,213,625 |
| Total | | 10,011,247 | 2,904,622 | 7,106,625 | 501,348 | 6,605,277 | 5,940,465 |

| Account | Description | (C) Date Placed In Service 1988 | 1989 | 1990 | 1991 | 1992-93 | Total |
|---|---|---|---|---|---|---|---|
| N232 to 2232.27 | TPIS-Circuit Equipment-Video | | | 739,000 | 619,000 | | 1,358,000 |
| N422 to 2422.17 | TPIS-Underground Coaxial Cable | 353,000 | 3,179,000 | | | | 3,532,000 |
| N441 to 2441.10 | TPIS-Conduit Systems | | 512,000 | 4,609,000 | | | 5,121,000 |
| Total | | 353,000 | 3,691,000 | 5,348,000 | 619,000 | 0 | 10,011,000 |

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

# DECLARATION OF W. SCOTT RANDOLPH

I, W. Scott Randolph, state as follows:

1. I am of legal age and a resident of Denton County, Texas. I am an employee of GTE North Incorporated and a member of the headquarters staff of GTE Telephone Operations. My title is Manager - Regulatory Matters. My business address is P.O. Box 152092, Irving, TX 75015-2092.

2. Attached hereto as Attachment "A" is a true and correct copy of the Lease Agreement between GTECA and Apollo, together with Amendments, as reflected in the files and records of GTE Telephone Operations.

3. Attached hereto as Attachment "B" is a true and correct copy of the Maintenance Agreement between GTECA and Apollo, together with an Amendment, as reflected in the files and records of GTE Telephone Operations.

4. Attached hereto as Attachment "C" is a true and correct copy of the CATV Installation Agreement between GTECA and Apollo, together with the letter agreement extending its term and GTECA's notice to terminate, as reflected in the files and records of GTE Telephone Operations.

5. Attached hereto as Attachment "D" is a true and correct copy of the Sublease between GTECA and Apollo as reflected in the files and records of GTE Telephone Operations.

6. Attached hereto as Attachment "E" is a true and correct comparison of GTECA's charges to Apollo under the pre-existing contracts and under the tariff.

7. The monthly power charge set forth in Transmittal Nos. 873 and 893 represents one-half of the 1993 average actual monthly power expense charged to Apollo under the terms of the pre-existing Lease Agreement.

8. Tariffed charges applicable to Apollo for installation 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.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief and that this declaration is executed this 12th day of August, 1994, at Irving, Texas.

W. Scott Randolph

JFR0812A

ATTACHMENT A

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# LEASE AGREEMENT

This Lease Agreement is entered into as of the 22nd day of January, 1987, between General Telephone Company of California ("Owner") and Apollo Cablevision, Inc. ("Lessee").

## Recitals

This Lease Agreement is entered into with reference to the following agreed facts:

A. Owner and T. L. Robak, Inc., Lessee's parent corporation, have entered into negotiations for the construction of an underground electrical signal transmission facility (the "System") to be constructed in the City of Cerritos, California. A portion of the System (the "Coaxial Facilities") has been designed to transmit cable television ("CATV") signals to Lessee's customers in the City of Cerritos via coaxial cable.

B. The purpose of this Lease Agreement is to set forth the terms and conditions under which Owner will lease to Lessee the bandwidth required by it to provide CATV service to Lessee's customers in the City of Cerritos.

NOW THEREFORE, the parties hereto do hereby agree as follows:

1. <u>The Coaxial Facilities Capacity.</u> The Owner agrees to lease and the Lessee agrees to rent from the Owner 275 MHz of bandwidth capacity for the use of Lessee in providing CATV service in the City of Cerritos. A description of where the Coaxial Facilities are installed to provide said capacity is shown on