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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
GTE Telephone Operating Companies )  
)  
Revisions to Tariff F.C.C. No. 1 )

Transmittal Nos. 873, 874, 893  
CC Docket No. 94-81

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COMMENTS OF GTE

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affiliated GTE Telephone Operating  
Companies and GTE California Incorporated

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## SUMMARY

GTECA's tariffs for Video Channel Services in Cerritos, California were filed in full compliance with Title II of the Act and Commission Rules. Briefs filed in response to the legal issues raised in the Bureau's July 14, 1994 Order by both cable interests and the local cable operator in Cerritos are legally flawed. In addition, allegations made by Apollo that the tariffs depart significantly from the business relationships established in supplanted GTECA-Apollo agreements are erroneous and conflict with the very language of the agreements themselves.

GTECA's Section 214 authority to provide video channel service in Cerritos survives the expiration of *Cerritos Order's* waiver on July 17, 1994. The Court of Appeals' issuance of a second stay of the Bureau's attempted rejection of Transmittal No. 874 lays to rest any question of whether the Commission may attempt to alter the *status quo* in Cerritos.

With respect to the video channel service tariff filed for Apollo, it is clear that GTECA may not provide video signal transport except pursuant to a properly filed tariff. As such, compliance with the Act and Commission Rules dictated the filing of a tariff which, in accordance with controlling law, properly supersedes any pre-existing contracts negotiated by GTECA for carriage of Apollo's video signals in Cerritos. The fact that certain tariff provisions differ from supplanted contractual terms does not provide a basis for rejection of GTECA's tariffs. GTECA's video channel service tariffs are reasonable, non-discriminatory, and are in compliance with all Commission Rules. In no way will the tariff impair the delivery of cable television programming services to

Cerritos residents. The Commission should promptly conclude this investigation and allow the tariffs to remain in effect as filed.

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**COMMENTS OF GTE**

GTE Service Corporation (Service Corp.), on behalf of its affiliated GTE Telephone Operating Companies (GTOCs) and GTE California Incorporated (GTECA), hereby submits these Comments in response to the legal briefs filed by Apollo CableVision, Inc. (Apollo), the National Cable Television Association (NCTA) and the California Cable Television Association (CCTA) in accordance with the investigation instituted by the Common Carrier Bureau's (Bureau's) Order, DA 94-784, released July 14, 1994 (July 14, 1994 Order).

**INTRODUCTION.**

It is indisputable as a matter of law that absent a waiver GTECA may not provide video signal transport except pursuant to the terms and conditions of a properly filed tariff. See 47 U.S.C. §§ 203(a), 533(b); 47 C.F.R. §§ 61.1(c), 63.54(c). Indeed, as the United States Supreme Court so recently affirmed, Section 203(a)'s tariffing requirement is fundamental to the purposes of the Communications Act (Act) and the Commission must enforce this mandate. *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2223, 2231 (1994) (*MCI v. AT&T*) ("The tariff-filing requirement is ... the heart of the common-carrier section of the Communications Act.").

The expiration of the five year waiver granted in the *Cerritos Order*<sup>1</sup> required GTECA to convert its existing contractual relationships with Apollo (and Service Corp.) into a tariffed common carrier arrangement in order to comply with the Commission's Rules and Title II of the Act. *In re Public Broadcasting Service*, 39 Rad.Reg. (P&F) 1516 (1977); *In re Midwestern Relay Co.*, 59 FCC 2d 477 (1976), *recon. denied*, 69 FCC 2d 409 (1978), *aff'd sub nom. American Broadcasting Co. v. Federal Communications Commission*, 643 F.2d 818 (D.C. Cir. (1980); *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). Anticipating expiration of the waiver, on April 22, 1994, GTECA filed Tariff Transmittal No. 873 which sought to provide video channel service to Apollo effective July 18, 1994. Pursuant to Special Permission No. 94-819, GTECA filed Transmittal No. 893 on July 12, 1994, which modified Transmittal No. 893. Separately, GTECA and its affiliate, Service Corp., also lawfully terminated existing agreements with Apollo in accordance with the termination clauses contained in those contracts.<sup>2</sup>

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<sup>1</sup> *In re General Telephone Company of California*, 4 FCC Rcd 5693 (1989).

<sup>2</sup> The only contract not terminated was the Apollo-GTECA Sublease. See Direct Case, at 16-18. As to Service Corp., on September 13, 1994 the Commission reinstated the tariff submitted in Transmittal No. 874. See Transmittal No. 909; Special Permission No. 94-1050; *In re GTE Telephone Operating Companies*, Order, DA 94-988, released September 9, 1994.

**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 SECTION 214 AUTHORITY TO CONTINUE ITS CERRITOS OPERATIONS AND THEREBY TO PROVIDE VIDEO CHANNEL SERVICE TO APOLLO AND SERVICE CORP. AFTER JULY 17, 1994.**

As set forth in GTE's Direct Case, GTECA's Section 214 authority to continue to provide video transport service in Cerritos survives the expiration of the separate five year waiver on July 17, 1994. Only NCTA and its California affiliate have argued otherwise. To the extent that there is any reservation as to the correctness of GTE's position, that doubt is laid to rest by the Court of Appeals' issuance of a second stay order on September 7, 1994 (September 7, 1994 Stay Order).

NCTA's tired assertion that GTECA's Section 214 authority lapsed with the expiration of the waiver is simply a rehash of the litigation position which it has espoused at the Ninth Circuit in the face of GTECA's constitutional challenge to the video programming ban. *See, e.g.*, July 27, 1994 correspondence from Bruce D. Sokler, NCTA counsel, to Ms. Cathy Catherson, Clerk of the Ninth Circuit. Most recently, NCTA raised this identical argument in response to GTECA's August 22, 1994 motion for a stay of that portion of the Bureau's July 14, 1994 Order which rejected Transmittal No. 874. NCTA Opp., at 1-6. Despite NCTA's incessant refrain that

GTECA lacks post-waiver Section 214 authority, the Court of Appeals has *once again* issued a stay in order to preserve the *status quo* in Cerritos.<sup>3</sup>

In its instant brief NCTA argues that "[i]t 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." Even if this is (truthfully) NCTA's "understanding," it is simply wrong -- and flies in the face of the *Cerritos Order*. Paragraph 52 of the *Cerritos Order* (4 FCC Rcd at 5700) makes clear that at the end of the five year period GTECA would be free to seek another *waiver* in order to continue operations; it says *nothing* about additional Section 214 authority, as NCTA claims.

In any event, in compliance with the Court's September 7, 1994 Stay Order, on September 13, 1994 the Commission reinstated the tariff submitted for GTECA's provision of video channel service to Service Corp. in Transmittal No. 874. See Transmittal No. 909; Special Permission No. 94-1050; *In re GTE Telephone Operating Companies*, Order, DA 94-988, released September 9, 1994. Thus, GTECA continues to provide video transport service to Service Corp. today. This *status quo* -- including GTECA's underlying Section 214 authority -- "remain[s] in effect pending further order of th[e] court." September 7, 1994 Stay Order. To find otherwise, the Commission must not only conclude that the Court has now entered *two* meaningless orders but that

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<sup>3</sup> Incomprehensibly, NCTA has gone so far as to assert that "GTE currently has no operating authority in Cerritos" despite the "interim" authority granted by the July 14, 1994 Order. NCTA Opp., at 6. Unsurprisingly, the Court afforded NCTA's hyperbole no weight whatsoever and swiftly granted GTECA's stay motion.

the Court is content to engage in an idle ceremony in considering GTECA's constitutional challenge.<sup>4</sup> See GTE's Direct Case, at 22-24. Such conclusions are neither logical nor reasonable.

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<sup>4</sup> *Zenith Radio Corp. v. United States*, 518 F.Supp. 1347 (Ct. Internat'l Trade, 1981).

## LEGAL ISSUE 2

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

**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. ANY ASSERTION TO THE CONTRARY IS SPURIOUS AND INCONSISTENT WITH OVERWHELMING COMMISSION AND COURT PRECEDENT.**

There can be no doubt that the rule first set down in *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), applies to GTOC Tariff Transmittal Nos. 873 and 893. Irrespective of whether the tariff provisions for Apollo's video channel service differ from those of the supplanted contracts, these tariff provisions nevertheless control and are lawful. *American Broadcasting*, 643 F.2d at 819; *United Video*, 49 FCC 2d at 878.

It is a sign of desperation that in its brief Apollo asserts on the one hand that *Armour Packing* is no longer good law and but then argues on the other hand that *Sierra-Mobile* should be applied because no legitimate distinction exists between *Armour Packing* and *Sierra-Mobile* any longer. Compare Apollo Br., at 17 ("... *Armour* ... is generally recognized to have been rendered obsolete ...") with Apollo Br., at 13 ("... no meaningful distinction exists between carrier-carrier agreements [which are subject to *Sierra-Mobile*] ... and carrier-customer agreements [which are subject to *Armour*] ..."). Apollo's leaps of logic do not withstand scrutiny.

First, Apollo contends that "[GTECA's] fundamental premise ... -- that carriers may establish the terms of service to customers only by filed tariffs, and not by unfiled contracts -- is no longer valid." Apollo Br., at 12, purportedly relying upon *MCI Telecommunications Corp. v. Federal Communications Commission*, 917 F.2d 30 (D.C.

Cir. 1990) and *Sea-Land Service, Inc. v. Interstate Commerce Commission*, 738 F.2d 1311 (D.C. Cir. 1984). This very contention, however, was recently and unequivocally laid to rest by the Supreme Court in *MCI v. AT&T*, *supra*. There, the Court stated without any doubt that:

"[T]his Court has repeatedly stressed that rate filing was Congress' chosen means of preventing unreasonableness and discrimination in charges: '[T]here is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.' ... 'The duty to file rates with the Commission, [§ 203], and the obligation to charge only those rates, [§ 203(c)], have always been considered essential to preventing price discrimination and stabilizing rates.' ... As the *Maislin* [497 U.S. 116 (1990)] Court concluded, compliance with these provisions 'is 'utterly central' to the administration of the Act.'"

*Id.*, 114 S.Ct. at 2231 (citations omitted; emphasis added). Of particular application to this case, the Court approvingly cited *Armour Packing* for the proposition that "elimination of [the tariff] filing requirement '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.'" *MCI v. AT&T*, 114 S.Ct. at 2231, *quoting Armour Packing*, 209 U.S. at 81.

Well prior to *MCI v. AT&T*, the Commission has long recognized that it has no authority to permit GTECA to provide video signal transport service to customers except pursuant to a properly filed tariff.

"... Section 203 specifically requires the use of tariffs and states that no carrier shall charge a different compensation than the charges specified in the schedule then in effect. We have previously interpreted this provision to require that a carrier's charges to a customer must be determined by a lawful tariff notwithstanding any conflicting contract provision ..."

\* \* \*

"[T]he Communications Act does not permit carriers to set rates for common carrier services with customer-users by contract. Section 203(c) specifically requires that the tariff govern the rates a carrier may charge, 'unless otherwise provided by or under authority of this chapter.' While

the Court in *Bell [Telephone Co. v. Federal Communications Commission, 503 F.2d 1250, 1275 (3d Cir. 1974), cert. denied 422 U.S. 1026 (1975)]* found this authority for carrier-to-carrier contracts in Section 201(b) and 211(a), these provisions clearly do not apply to carrier-customer contracts. The Third Circuit was careful to point out that its finding only applied to carrier-carrier situations and implied that carrier-customer situations may warrant a different result. ... Therefore, with respect to common carrier services provided to customer-users, we believe that the rule of *Armour* should be controlling."

*Midwestern Relay Co.*, 69 FCC 2d at 412, 415 (emphasis added).

"Like the [*Bell Telephone Co.*] 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."

*United Video*, 55 FCC 2d at 517-18 (emphasis added). Thus, twenty years ago, the Commission foreshadowed the Supreme Court's own conclusion that unflinching adherence to Section 203(a)'s tariffing requirement (at least with respect to video signal transport) is mandatory.

Apollo's second contention, that the distinction between *Armour Packing* and *Sierra-Mobile* is no longer operative, is similarly untenable. Apollo rests this contention upon the fallacious premise that, since it is not a *per se* violation of the Act to incorporate individually negotiated rates into a filed tariff as long as those rates are made generally available, "no meaningful distinction exists between carrier-carrier agreements (which have traditionally been filed, and as to which the *Sierra-Mobile* doctrine has been applied), and carrier-customer agreements where the terms of such agreements are embodied in filed tariffs." Apollo Br., at 12-13. Even assuming, *arguendo*, that it *may* be true that such a tariff is not *per se* unlawful, Apollo's argument presents a factual scenario which is not presently before the Commission.

*First*, the video channel service tariff submitted for Apollo *does* alter the pre-existing GTECA-Apollo contractual relationship in order to bring that relationship into compliance with the Act and the Commission's Rules. Thus, the supplanted contracts cannot be embodied in their entirety (as assumed in Apollo's premise) in the filed tariff. *Second*, despite GTECA's repeated attempts, Apollo consistently refused to discuss the attributes of the tariff prior to filing. Thus, there are no "negotiated" rates in the tariff because Apollo refused to negotiate. *Third*, even if Apollo had negotiated in good faith, the parties would still have been bound by (for example) Section 61.38's pricing rules and Section 63.54's "carrier-user" limitation. Thus, the parties could not have lawfully agreed upon a tariff rate or other tariff conditions inconsistent with the Act and the Commission's Rules, as Apollo had repeatedly insisted. Consequently, the necessary premise underlying Apollo's second contention fails completely.

Notwithstanding Apollo's contentions, both the Commission and the courts have properly recognized and reiterated the continued viability of *Armour Packing* and that a clear distinction exists between carrier-to-carrier contracts (to which *Sierra-Mobile* applies) and carrier-to-customer contracts (to which *Armour Packing* applies). *United Video*, 55 FCC 2d at 517-18 (*see* quotation above); *see also* *Midwestern Relay Co.*, 59 FCC 2d at 477 ("[T]he Court's holding in *Bell Telephone* ... was limited to contracts between common carriers and did not encompass contracts between carriers and customers.").

Like the Supreme Court in *MCI v. AT&T*, the Commission has repeatedly rejected Apollo's claim that private agreements may establish the terms and conditions of carriage in the face of Section 203, notwithstanding any pre-existing contractual relationship between a carrier and its customer. *E.g.*, *United Video*, 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 ... 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"). Thus, there can be utterly no doubt that (except in the circumstances of a limited waiver), GTECA may not lawfully establish video signal carriage terms and rates for its customers (including Apollo) other than by tariff.

Finally, there is simply no requirement that GTECA show "substantial cause" to support its video channel service tariff. Apollo's "substantial cause" argument (Apollo Br., at 19-21) is adequately disposed of in GTECA's Direct Case (at 37-38). The Commission has never applied the substantial cause test to contractual relationships, only to long term service tariffs. Moreover, as the Commission made clear in *Midwestern Relay Co.*, even if the terms of Apollo's pre-existing contracts had been subsumed into long term service tariffs (which, of course, they were not), *Armour Packing* would still apply.

"Petitioners finally contend that this case can be distinguished from *United Video* because Midwestern's tariff revision conflicts with its current effective tariff. In *United Video* the relevant contract provisions were never made a part of United's effective tariff and the issue of a tariff revision conflicting with the carrier's effective tariff never arose. In this

case, however, the relevant contract provisions (i.e., the specific rate and the five year contract period) are also a part of Midwestern's existing effective tariff. Therefore, Petitioners argue, Midwestern's tariff revision is unlawful because it causes an increase in Midwestern's rates before the end of the five year period stated in its existing effective tariff. However, Petitioners have not shown why this requires rejection of this tariff revision. As stated above, we must reject a revision when it clearly conflicts with the Act or our Rules or orders. The fact that a tariff revision would conflict with an existing tariff does not, in itself, meet that test. In fact, any tariff revision normally conflicts with an existing tariff when it seeks to change an existing provision. Accordingly, we find that Petitioners have not distinguished this case from *United Video* on any relevant grounds. Therefore, our *Order*, to the extent it relied on *United Video* to deny Petitioners' request for rejection of Midwestern's tariff revision, is consistent with our findings here."

*Midwestern Relay Co.*, 69 FCC 2d at 414 (emphasis added).

Contrary to Apollo's contentions, equity requires that GTECA be permitted to bring its relationship with Apollo into compliance with the Act and the Commission's Rules; indeed, equity demands that Apollo's claims be rejected. The law is exceedingly clear (1) that GTECA may continue to provide service to Apollo only pursuant to a filed tariff, (2) that as of the effective date of the tariff the only permissible continuing relationship between GTECA and Apollo is that of a carrier-user, and (3) that the schedule of charges for GTECA's video channels must comply with the Commission's pricing rules. Transmittal Nos. 873 and 893 are in full conformance with these requirements. Moreover, while GTECA is certainly not required to show "substantial cause" for its tariff, what more substantial cause could there be than to bring the parties into compliance with the Act and the Commission's Rules? GTECA's video channel service tariff for Apollo supplants the pre-existing GTECA-Apollo contracts to

accomplish this very result.<sup>5</sup> The alternative -- which Apollo, of course, favors -- is to require GTECA to provide service in an unlawful manner.

Consequently, in accordance with overwhelming and consistent precedent, Transmittal Nos. 873 and 893 properly and lawfully supersede the pre-existing GTECA-Apollo agreements.

**APOLLO'S FACTUAL ALLEGATIONS UNDERLYING ITS LEGAL BRIEF ARE ERRONEOUS. APOLLO'S LEGAL ANALYSIS IS THEREFORE FATALLY FLAWED FOR THIS REASON ALONE.**

While purporting to address Legal Issue 2, Apollo's brief raises numerous factual allegations, very many of which are erroneous. Because these groundless factual allegations underpin Apollo's already defective legal analysis, that analysis is fatally flawed for this reason alone.

In its July 14, 1994 Order, the Bureau requested comment on the extent to which the terms and conditions of Transmittal Nos. 873 and 893 differ from those set forth in the supplanted GTECA-Apollo contracts. As GTECA demonstrated in its Direct Case, and as set forth more fully below, the fact that certain provisions of the tariff differ from the supplanted contractual terms does not provide a basis for rejecting the tariff. Rather, the test is whether the tariff terms and conditions are reasonable, non-discriminatory, and are in compliance with Commission Rules and Title II of the Act. They are.

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<sup>5</sup> GTECA's video channel service tariff voids the pre-existing contracts. *Farley Terminal Co., Inc. v. Atchison, T. & S. F. Ry. Co.*, 522 F.2d 1095, 1099 (9th Cir. 1975) ("[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.").

The law is well-settled that even if Transmittal Nos. 873 and 893 modify the terms and conditions of the supplanted pre-existing contracts -- even significantly -- this in no way alters the lawfulness of GTECA's tariff. *American Broadcasting*, 643 F.2d at 819 (Commission's application of *Armour Packing* affirmed even though the tariff substantially increased the customer's rates and omitted a material term of the pre-existing contract); *United Video*, 49 FCC 2d at 878 (the Commission properly applied *Armour Packing* even where the tariff allegedly "constituted a major revision in the [carrier-customer] rate structure.>").

In the instant case, the tariff regulations for video channel services filed under Transmittal Nos. 873 and 893 were designed to replicate, as close as possible, the pre-existing contractual arrangements between GTECA and Apollo. However, in accordance with law, some of the pre-existing relationships between GTECA and Apollo could not be maintained after expiration of the waiver. Such an occurrence had already been contemplated by the parties. Paragraph 19 of the Lease Agreement specifically provides that if Commission asserted Title II jurisdiction (which it has), Apollo is fully subject to the tariff rates, terms and conditions imposed by the Commission's Rules.<sup>6</sup> Thus, Apollo suffers no harm by the occasion of an event -- the assertion of the Commission's Title II jurisdiction and the expiration of the waiver -- for which the parties had already planned.

While some of the operational characteristics of the Cerritos video network have been necessarily altered, *e.g.*, maintenance and installation responsibilities, the application of the terms and conditions of the tariff do not place any improper financial

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<sup>6</sup> See GTE's Direct Case, at 26-28.

or operational constraints on Apollo. Indeed, under the tariff, Apollo will be able to provide cable television services to Cerritos subscribers as it has for the past five years.

Turning to each of the erroneous allegations raised by Apollo:

**The Supplanted Agreements Never Guaranteed Apollo Unlimited Use and Operation of GTECA's Cerritos Video Network Nor Accession to Channels Which Service Corp. Continues to Lease and Utilize.**

Allegation: Apollo asserts that use of the 39 channels not leased to Apollo were only "temporarily reserved" for Service Corp. and that "[Service Corp.] would terminate its use of the system at the conclusion of the [five year waiver] period" at which time "Apollo would accede to use of [Service Corp.'s] bandwidth through rights of first refusal." Apollo Br., at 3. Nothing could be farther from the truth, legally or factually.

Facts: Contemporaneous with GTECA's 15-year lease of 39 channels to Apollo, GTECA also entered into a 15-year lease with Service Corp. for Service Corp.'s half of the bandwidth. Apollo was always well aware that GTECA had entered into coordinate fifteen year agreements with it and Service Corp. The Service Corp. Lease Agreement was executed shortly after the Common Carrier Bureau's Memorandum Opinion Order and Authorization granted GTECA Section 214 authority and a waiver of 47 C.F.R. §§ 63.54 and 63.55. *In re General Telephone Co. of California*, 3 FCC Rcd 2317 (Com. Car. Bur., 1988) (*CCB Order*). The *CCB Order*, unlike the Commission's subsequent *Cerritos Order*, imposed no temporal limitation upon its grant of a waiver. *Nowhere* was it ever suggested that the lease of Service Corp.'s channels was limited to five years -- nor would this have made any sense. The *Cerritos Order's* provision for a limited five year waiver did not occur until more than a year after GTECA entered into the coordinate leases with Apollo and Service Corp. At the time the coordinate leases

were executed, all parties believed that GTECA could provide service indefinitely (or at least for 15 years), under the terms of the Bureau's unlimited waiver.

The language of the right of first refusal upon which Apollo relies confirms this result. That provision reads in its entirety:

"Owner [GTECA] agrees that if bandwidth capacity in excess of 275 MHz should become available, Lessee [Apollo], or its successor, is hereby granted a right of first refusal to the use of any such increase in capacity at the then reasonable market rent for such bandwidth."

Bandwidth Lease, Amendment No. 2, ¶ 8 (emphasis added). This provision, entered into on June 26, 1989 -- after the adoption of the *Cerritos Order* -- again makes absolutely no mention of a five year period for Service Corp.'s operation of its 39 channels. Instead, this provision maintains the permissive "if" and "should" language as to *whether* Service Corp.'s channels *might* subsequently become available. If Apollo's factual assertions were true, then surely the parties would at least have referred to "when" Service Corp.'s channels were to become available, and perhaps even established a date certain after the expiration of the waiver. They did not do so. Moreover, the *Cerritos Order* itself expressly permitted GTECA to seek an extension of the waiver (4 FCC Rcd at 5700 (¶ 52)), so that even the five year limitation was clearly not set in stone, as Apollo would apparently now have the Commission believe.

Even if Apollo were not totally mistaken with respect to the facts, under its Lease Agreement Apollo still only has a "right of first refusal" with respect to Service Corp.'s 39 channels. By law, Apollo's contractual right of first refusal simply permits Apollo to acquire Service Corp.'s channels *before they are sold to someone else*. This right of first refusal does not give Apollo the ability to force either GTECA or Service Corp. to

make those channels available to Apollo -- either at the expiration of the waiver or at any other time.

Apollo's right of first refusal is *not* an "option contract" and does not give Apollo the "power to compel the owner of the property to sell." *Nelson v. Reisner*, 51 Cal.2d 161, 166 (1958).

"[A]greements whereby a party is given the 'first opportunity' or the 'first right' or the 'first privilege' or the 'first refusal' to purchase property or to renew a lease have been upheld in this state. [Citations omitted.] These cases have construed such options to mean that the optionee does not have an absolute right to purchase property or renew a lease but that he has an option to purchase or renew only in the event that the optionor desires to sell or re-lease the property. In *Nelson*, the Supreme Court, in upholding the validity of such agreements, regarded the right to purchase or renew as a right of preemption rather than an option to purchase. The distinction there recognized was that an option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership, while a preemption does not give the preemptor the power to compel an unwilling owner to sell, but merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the preemption, at the stipulated price. Upon the receipt of the offer the preemptor elects whether he will buy and if he decides not to buy, then the owner may sell to anyone."

*Swartz v. Shapiro*, 229 Cal.App.2d 238, 255-56 (1964) (emphasis added); *see also Rollins v. Stokes*, 123 Cal.App.3d 701, 710 (1981) ("a preemptive right gives the holder the first right to buy *when and if the owner later wants to sell*. If the holder does not buy, the owner of the property may sell to anyone. Conversely, an option gives the holder a power to compel a sale regardless of whether the owner then wants to sell.") (emphasis added).

Apollo maintains, citing a letter dated June 29, 1993, that a contract was formed in which GTECA committed itself to transfer Service Corp.'s channels to Apollo. Apollo Br., at 3-4. The short answer is that, although GTECA did *offer* the channels to Apollo, Apollo did not effectively *accept* the offer -- because GTECA's offer was to sell only at a

particular price and Apollo rejected this material term of the offer. Instead, Apollo purported to "accept" GTECA's offer, but *qualified* its "acceptance" on a different -- albeit unspecified -- price. October 18, 1993 correspondence from Ronald Wyse, Apollo counsel, to Marceil Morrell, GTECA counsel, at 1 ("... this acceptance is conditioned upon the parties' mutual agreement to a different sum not later than November 30, 1993."). This deviation from a material term of GTECA's offer constituted a counteroffer on Apollo's part. As such, it revoked GTECA's offer. *Landberg v. Landberg*, 24 Cal.App.3d 742, 750 (1972) ("a valid acceptance must be absolute and unqualified (Civ. Code § 1585), and [a] qualified acceptance constitutes a rejection terminating the offer; it is a new proposal or counteroffer which must be accepted by the former offeror now turned offeree before a binding contract results."); *T.M. Cobb Co., Inc. v. Superior Court*, 36 Cal.3d 273, 282 (1984) ("mutual consent of the parties is essential for a contract to exist (Civ. Code §§ 1550, 1565), and '[consent] is not mutual, unless the parties all agree upon the same thing in the same sense.'").

Even if GTECA's offer had not been revoked by Apollo's counteroffer, the condition subsequent stated in Apollo's "acceptance" -- "the parties' mutual agreement to a different sum" -- never occurred. Thus, Apollo's acceptance was withdrawn by its own terms on November 30, 1993. For its part, GTECA rejected Apollo's counteroffer. November 1, 1993 correspondence from Marceil Morrell to Ronald Wyse, at 1 ("In light of Apollo's rejection of this material term, I am certain that you will not be surprised that we cannot view your letter as either Apollo's formal acceptance of GTECA's offer or as a valid, enforceable exercise of Apollo's contractual right of first refusal.").

Despite the revocation of GTECA's offer, GTECA's rejection of Apollo's counteroffer and the withdrawal of Apollo's purported "acceptance" by its own terms, in

February, 1994, Apollo alleged (as it does here) that it had "formally accepted" GTECA's offer, but still "disagreed" with a material term of that offer -- the price. In light of this assertion, GTECA again advised Apollo that Mr. Wyse's October 18, 1993 letter constituted only a counteroffer which was never accepted by GTECA. GTECA also advised Apollo that if the terms of its June 29, 1993 offer had not expired or been revoked, then they were withdrawn effective immediately. February 11, 1994 correspondence from Richard Cahill, GTE Telephone Operations General Counsel, to Thomas Robak, Apollo President, at 2.

Notwithstanding Apollo's current averments to the Commission, Apollo subsequently conceded that no contract was -- or could have been -- formed. February 28, 1994 correspondence from Ronald Wyse to Richard Cahill, at 1 ("Apollo has consistently denied that the June 29, 1993 letter from R.A. Cecil complied with the requirements of paragraph 21 of the lease agreement between Apollo and GTECA ... In our opinion, no offer has yet been received from any GTE entity that complies with the requirements of paragraph 21 of the lease ...") (emphasis added). In this, GTECA completely agreed: "[W]e are in full accord that there has been no offer and acceptance with respect to any [Service Corp.] channels. In particular, we concur that there has been no meeting of the minds as to a material term, *i.e.*, the price at which such channels might be purchased should they become available." March 2, 1994 correspondence from John Raposa, GTECA counsel, to Ronald Wyse, at 1.

Despite Apollo's bald claim to Service Corp.'s channels, Apollo is not entitled to dispossess Service Corp. of its valuable right to this bandwidth, either as a matter of law or fact. As the language of the (supplanted) contracts makes clear, the parties *never* agreed to wrench Service Corp.'s channels away upon expiration of the waiver.

At best, even now, Apollo has only a right of first refusal.<sup>7</sup> That right is triggered if, and only if, Service Corp. decides to make its channels available. Service Corp. has not advised GTECA of its intention to sell these channels to anyone else, so Apollo's right of first refusal is not triggered. Since Apollo concedes that no contract was -- or could have been -- formed, Service Corp. retains full rights to its 39 channels in accordance with Transmittal No. 909.

**GTECA's Rightful Assumption of Common Carrier Obligations Under the Tariff Does Not Materially Impact Apollo's Business Operations.**

Allegation: Apollo repeatedly claims that its relationship with GTECA is based upon "a series of interrelated contracts" and that "all of the parties' agreements were interdependent and were executed in reliance on the existence and content of the others." Apollo Br., at 2, 5.

Facts: Contrary to Apollo's claims, the very language of each of the contracts in question provides that these agreements stand alone and that each contains the *entire* understanding of the parties. As such, Apollo's Lease Agreement provides, in pertinent part, that:

15. Complete Agreement. This Agreement and the exhibits attached hereto contain the entire understanding of the parties, and such understanding may not be modified or terminated except in a writing signed by the parties."

Lease Agreement, ¶ 15 (emphasis added). Each of the three amendments to this contract also confirm that, but for the specifically amended items, all other provisions in the Lease Agreement-- including this Paragraph 15 integration clause -- remain in full force and effect. See Amendment No. 1, ¶ 3; Amendment No. 2, ¶ 9; Amendment

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<sup>7</sup> See Transmittal No. 893, Section 18.4(A)(1).

No. 3, ¶ 6. Precisely the same integration (or, merger) language appears in the Maintenance Agreement and is confirmed in its May 3, 1991 Amendment.

Maintenance Agreement, ¶ 12; Amendment No. 1, ¶ 4.<sup>8</sup>

Pursuant to the express terms of these agreements, each constitutes the final, entire and complete understanding between the parties. Thus, any evidence of the parties' understandings and intentions outside of these agreements, such as the purported effect of *other* antecedent or contemporaneous agreements – in Apollo's language, "a series of interrelated contracts" – is wholly irrelevant. Cal. Civil Code § 1625; Cal. Code Civ. Proc. § 1856(a); *Hanarahan-Wilcox Corp. v. Jenison Machinery Co.*, 23 Cal.App. 642, 646 (1937) (in light of an integration clause, any evidence that the parties did not intend the agreement to be their complete agreement must be excluded); *Salyer Grain & Milling Co. v. Henson*, 13 Cal.App.3d 493, 501 (1979) (same). Consequently, based upon the agreements themselves, there is no basis for Apollo's contention that the contracts were somehow "interrelated" or "interdependent."

Allegation: Apollo claims that the supplanted agreements extend to Apollo the sole responsibility for the operation of the GTECA's video network including repair, maintenance and any contact with subscribers. Apollo Br., at 2, 3 and 7.

Facts: GTECA has always been the sole titleholder to its Cerritos video network. Lease Agreement, ¶ 6. As owner of the network, GTECA has always been ultimately responsible for maintenance responsibilities. The Maintenance Agreement clearly

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<sup>8</sup> Even though not relevant to this investigation, the agreements between Apollo and Service Corp. are also stand alone as they each contain an integration clause. *E.g.*, Service Agreement, ¶ 14; Amendment No. 1 to Service Agreement, ¶ 10; Amendment No. 2 to Service Agreement, ¶ 6; Enhanced Capability Decoder Agreement (Converter Box) Agreement, ¶ 6.

states that "...repair, replacement and maintenance of the System is the responsibility of the Owner." Maintenance Agreement, Amendment No. 1, ¶ 2. Prior to expiration of the waiver, GTECA simply contracted maintenance work to Apollo and paid Apollo for its services. As Apollo admits, the term of the Maintenance Agreement was for five years and would have expired in May, 1996. There were never any agreements or assurances given to Apollo that it could or would continue to maintain GTECA's network beyond that date.

Abrogation of the Maintenance Agreement on July 18, 1994 was required to bring GTECA and Apollo into compliance with the Act and the Commission's Rules. GTECA had no choice but to supplant the Maintenance Agreement upon the expiration of the waiver. *E.g.*, 47 C.F.R. § 63.54(c). Therefore, this agreement has been voided by operation of law. In accordance with GTECA's pre-existing responsibilities, GTECA assumed responsibility for maintenance of the network as set forth in the tariff. Network maintenance will be performed under the tariff by GTECA as it is for all other common carrier services that GTECA provides.

Allegation: Apollo contends that its agreement to the monthly lease charge was based, in part, upon purportedly offsetting revenues it was to receive under the Maintenance Agreement and that its prepayment assumed that offset. Apollo Br., at 5.

Facts: Nowhere in the Lease Agreement is there any reference to the Maintenance Agreement nor is there any indication that the monthly lease amounts were contingent upon any expected revenues Apollo was to receive under the Maintenance Agreement. Upon completion of the coaxial network in Cerritos, GTECA appropriately allocated costs to both Service Corp. and Apollo and computed the lease