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October 4, 1994

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Ms. Kathleen M.H. Wallman, Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: GTE Transmittal No. 909  
Cerritos, California  
CC Docket No. 94-81

Dear Ms. Wallman:

In its July 14, 1994 Order in CC Docket No. 94-81 (DA 94-784), the Common Carrier Bureau suspended GTE's Transmittal No. 873 for one day, and initiated an investigation of various legal and factual issues. The same Order rejected GTE's Transmittal No. 874 (resubmitted September 9, 1994, as Transmittal No. 909), on the grounds of its inconsistency with the prohibitions against telephone-cable cross-ownership in Section 553(b) of the Communications Act, 47 U.S.C. § 613(b), and Sections 63.54 and 63.55 of the Commission's Rules, 47 C.F.R. §§ 63.54, 63.55.

In earlier opposing Transmittal No. 874, Apollo CableVision, Inc. and others had raised various objections independent of the cross-ownership issue. Among other things, Apollo described a variety of potential anticompetitive effects which would result from GTE Telephone's installing its affiliate, GTE Service, as a competitor to Apollo on one half of the Cerritos cable system GTE Telephone owns, and now operationally controls.<sup>1</sup> Because the rejection of Transmittal No. 874 was based on cross-ownership concerns, however, the Bureau's

<sup>1</sup> See, e.g., Apollo's "Petition to Reject or Suspend Tariffs," filed May 17, 1994, pp. 20-26; letter to Mr. A. Richard Metzger, Jr., Acting Chief, FCC Common Carrier Bureau, from Edward P. Taptich, Esq. dated June 29, 1994, pp. 10-13 (for your convenience a copy of the pertinent portion of the letter is attached hereto).

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July 14 Order did not "reach any of the other issues raised with respect to that filing." (Order, ¶ 20, and fn. 38.)

In a September 9, 1994 Order in the referenced docket (DA 94-988), the Bureau announced that in light of the Ninth Circuit's September 7, 1994 stay of the Transmittal No. 874 rejection, it was accepting Transmittal No. 909 (the renumbered Transmittal No. 874), suspending that tariff for one day, and initiating an investigation. Referencing the Transmittal No. 873 hearing issues, and certain of the parties' earlier arguments not addressed in the July 14 Order, the Bureau stated (at ¶ 3) that specific issues for the investigation of Transmittal No. 909 would be specified "in a future order".

The purpose of this letter is to urge that the forthcoming investigation order on Transmittal No. 909 specifically include a consideration of the anticompetitive effects of installing GTE Service as a competitor of Apollo on the 78-channel Cerritos cable system. More particularly, Apollo urges that, the Bureau include the following issues in its forthcoming investigation order:

Are the initial Commission conditions imposed on GTE Telephone's use of the Cerritos system adequate to the potential anticompetitive effects on Apollo of GTE Service's becoming a competitor of Apollo on the Cerritos facilities? Do the provisions of Transmittal No. 909 adequately reflect necessary anticompetitive protections?

In its May 17, 1994, rejection petition (pp. 24-25 and Attachment 3), Apollo identified various specific facilities elements commonly required by Apollo and GTE Service, and as to which GTE Telephone could arbitrarily favor its affiliate.<sup>2</sup> In subsequent filings, Apollo further pointed out that, since the time of GTE's take-over of system operations in June and July, problems in the conduct of Apollo's business have arisen as a direct result of GTE Telephone's withdrawing from Apollo -- and then conveying to GTE Service -- certain operational controls.<sup>3</sup> And with respect to Apollo's proprietary customer information required under Transmittal No. 873, Apollo has pointed out GTE Telephone's direct rejection of Apollo's request that such information be kept confidential from GTE Service<sup>4</sup>.

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<sup>2</sup> The carrier never challenged Apollo's facts, offering only a general assertion it "will not favor any one customer over another." GTE Consolidated Reply, filed June 1, 1994, p. 28.

<sup>3</sup> While the carrier has contested certain of Apollo's assertions in these respects, its responses are partial and unsupported. See Apollo's September 30, 1994 Reply Comments herein, pp. 22-24.

<sup>4</sup> See Apollo's September 30 Reply Comments, p. 28. As recently as on June 29, 1994 meeting with Apollo, GTE's Mr. R.D. Wright stated that GTE Telephone and GTE Service were "one company", and that no information given GTE Telephone by Apollo would be withheld from GTE Service.

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GTE Telephone has acknowledged that "[t]he Cerritos project is the only one of its kind currently in operation." (GTE Motion for Stay herein, filed July 26, 1994, p.4.) Nowhere is a carrier affiliate competing on the same cable system with a third party operator over facilities owned and controlled by that carrier.

The parties never envisioned such a circumstance in agreeing jointly to conduct the Cerritos experiment, indeed, they specifically provided otherwise by contract. In 1989, GTE Telephone agreed "not to compete with Apollo, or any permitted successor or assignee, in the provision of Video Programming" in Cerritos during the term of Apollo's lease. (See Apollo Brief, Attachment 10, ¶7(a).) In the same year, GTE Service also agreed "not to compete with Apollo, or any permitted successor or assignee, in the provision of Video Programming" in Cerritos during the term of Apollo's lease with the carrier. (See Apollo Brief, Attachment 14, ¶2(d).) Transmittal No. 909, however, assumes otherwise.

Section 18.1 of GTE Telephone's proposed tariff describes its offering to be one of facilities for the provision "of broadband video and information services including, but not limited to cable television and enhanced video services, in the city of Cerritos, CA." Within that framework, the carrier has repeatedly emphasized that Apollo will be able freely to provide its commercial cable services. By simply adding GTE Service to the Transmittal No. 873 tariff, Transmittal No. 909 extends the same entitlements to GTE Service. Any such activities by GTE Service, however, would directly contradict that entity's noncompetitive agreement with Apollo. While GTE Telephone (in pleadings, ironically, filed on its behalf by GTE Service) has simply declared that Apollo's claims regarding any agreements with GTE Service are "irrelevant" to the Bureau's investigation<sup>5</sup>, it is GTE Telephone's tariff filing and content which seek to assist GTE's competitive ambitions by negating Apollo's contract rights vis-à-vis GTE Service. At a minimum, such a blatantly anticompetitive use of the Commission's tariff process is least deserving of examination.

Just as the parties did not earlier contemplate what Transmittal No. 909 proposes, neither did the Bureau or the Commission in granting GTE Telephone Section 214 authority for its Cerritos experimentation. Consequently, the conditions included in the Commission's 1989 action, 4 F.C.C. Rcd. 5693, were not designed to protect against the potential for anticompetitive abuses in that regard.

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<sup>5</sup> See, e.g., "Comments of GTE" filed September 15, 1994, p. 31.

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**In light of the foregoing, therefore, Apollo requests that the forthcoming investigation order include the earlier-suggested specification of issues.**

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Edward P. Taptich". The signature is fluid and cursive, with a prominent initial "E" and a long, sweeping underline.

**Edward P. Taptich**

**Counsel for Apollo CableVision, Inc.**

**cc: David Nall, FCC  
Daniel L. Brenner, Esq.  
Randy R. Klaus  
John B. Richards  
Jeffrey Sinsheimer**