

Cost attached to Amendment No. 3 as Exhibit "A" and by this reference incorporated herein).

(b) The annual rental payment is agreed to be the sum necessary to amortize the Owner's Recoverable Construction Cost and provide the Owner an annual rate of return of 18.9% on the Owner's Recoverable Construction Cost over the initial 15 year term of this Lease payable in monthly installments of \$95,265.00. The first rental payment is due on the date the Notice of Partial Completion is signed by the Owner, T.L. Robak, Inc. as Contractor, and the City of Cerritos and on the same day of each month thereafter for a total (including payment number one) of 180 months.

(c) Based upon the Owner's Recoverable Construction Cost specified in paragraph (a) above, the twelve (12) monthly payments total \$1,143,185.00 per year.

Any Attributable Owner's Recoverable Cost incurred after this Amendment No. 3 is signed, will be a separately identified entry on the Lessee's monthly bill, for which the Lessee is responsible for paying in addition to the monthly amount of \$95,265.00."

5. Exhibit "C" to the Initial Lease of January 22, 1987 is hereby amended as follows:

**"SCHEDULE OF ITEMS OF THE CATV
OPERATING FRANCHISE OWNED BY LESSEE**

Items of the operating system owned by the Lessee are limited to the following:

1. CATV and TVRO (Television Receive Only) earth station antennas;
2. Low Noise Amplifiers ("LNS");
3. Low Noise Blocking converters ("LNB");
4. Low Noise Converters ("LNC"); and
5. Coaxial cables up to the input of the decouplers/power dividers."

6. The Lease, as amended, shall in all respects, remain in full force and effect without modification or revision except to the extent and in the manner herein specifically provided.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 3 to the Lease Agreement as of the dates indicated below.

OWNER

GTE CALIFORNIA INCORPORATED

By J. Pullado
Dated: May 3, 1991 For B. Heiler

Attest:

Kenneth K. Okel
KENNETH K. OKEL
Assistant Secretary

LESSEE

Apollo CableVision, Inc.

By  _____

Dated: May 3, 1991

Attest:

Corporate Secretary

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8 Attorneys for Plaintiffs APOLLO
 9 CABLEVISION, INC.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 11 FOR THE COUNTY OF VENTURA

12
 13 APOLLO CABLEVISION, INC.,
 a California corporation,

CASE NO. CIV 142800

14 Plaintiff,

FIRST AMENDED AND
 SUPPLEMENTAL COMPLAINT

15 vs.

16 GTE CALIFORNIA INCORPORATED,
 17 a California corporation;
 18 GTE SERVICE CORPORATION,
 a California corporation;
 and DOES 1 to 50, inclusive,

19 Defendants.
 20

21 COMES NOW PLAINTIFF AND ALLEGES:

22 1. Plaintiff APOLLO CABLEVISION, INC. (hereinafter
 23 "Apollo") is, and at all times herein mentioned was, a
 24 corporation duly organized and existing under the laws of the
 25 State of California.

26 2. Defendant GTE CALIFORNIA INCORPORATED (hereinafter
 27 "GTE") is, and at all times herein mentioned was, a California
 28 corporation with its principal place of business and principal

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1 executive address in the City of Thousand Oaks, County of
2 Ventura, State of California.

3 3. From December 31, 1952 up until June 28, 1988,
4 defendant GTE had the name "General Telephone Company of
5 California." On June 28, 1988, defendant GTE changed its name
6 to its present usage GTE CALIFORNIA INCORPORATED.

7 4. Defendant GTE Service Corporation is an affiliate of
8 and at all times material it was controlled by defendant GTE
9 California Incorporated.

10 5. Plaintiff is ignorant of the true names and
11 capacities of defendants sued herein as Does 1 - 50, inclusive,
12 and therefore sues these defendants by such fictitious names.
13 Plaintiff will amend this complaint to allege their true names
14 and capacities when ascertained. Plaintiff is informed and
15 believes and thereon alleges that each of the fictitiously
16 named defendants is responsible in some manner for the
17 occurrences herein alleged.

18 6. In 1985, the City of Cerritos, California issued
19 Requests for Proposals to build a cable television system for
20 that city. At that time, most of the municipalities in the Los
21 Angeles basin already had cable television networks, virtually
22 all of which were built above ground. The City of Cerritos,
23 however, sought an underground network with sophisticated
24 interactive communications capabilities and additional unique
25 and expensive requirements. These requirements made the
26 anticipated costs of installing a cable network in Cerritos
27 much greater than the cost of installing a traditional above
28 ground network. As a result, most cable system construction

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1 companies were not willing to take on the risk of building the
2 Cerritos system. For several years prior to the issuance of
3 the 1985 Request for Proposals, the City of Cerritos had tried
4 unsuccessfully to find a supplier to meets its requirements for
5 a state-of-the-art system.

6 7. Both GTE and Apollo responded to the 1985 Requests for
7 Proposals by submitting separate proposals to the City of
8 Cerritos. These proposals were not accepted. Thereafter, at
9 the suggestion of the City of Cerritos, Apollo and GTE entered
10 into discussions to determine whether they could work out an
11 arrangement which would accommodate their various interests and
12 abilities and meet the requirements of the City of Cerritos.
13 Apollo had experience, ability and interest in constructing and
14 operating a cable television service system in Cerritos, but it
15 did not have sufficient financial resources to finance the
16 initial construction of the expensive system required by
17 Cerritos, and it did not have the technical ability or the
18 desire to provide interactive capabilities. GTE, through its
19 affiliate, GTE Service Corporation, had been doing research on
20 alternative communications technologies, including interactive
21 technologies, and desired a site where it could test these
22 technologies. GTE had financial resources sufficient to
23 finance the expected construction costs of the system, but GTE
24 did not have the know-how to cost effectively construct and
25 operate a cable television system. Furthermore, applicable FCC
26 rules prohibited telephone companies, such as GTE, from owning
27 and operating cable television services.

28 8. In these discussions, GTE assured Apollo that it

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1 wanted to use the proposed Cerritos cable system for a
 2 relatively short period of time (i.e., 5 years or less) for
 3 purposes of testing new communications technologies and not for
 4 purposes of competing with Apollo's video programming. Based
 5 on these discussions, the parties entered into contractual
 6 arrangements whereby GTE was to finance and Apollo to design
 7 and construct an underground network of coaxial cable and fiber
 8 optic conduit in Cerritos so that GTE would own a sophisticated
 9 network through which it could test its new communications
 10 technology and Apollo would be able to operate a cable
 11 television system, which would include access to the full cable
 12 television capacity of the system after GTE, or GTE Service
 13 Corporation, concluded its tests.

14 9. On January 22, 1987, Apollo and GTE entered into a
 15 series of agreements which gave effect to these goals,
 16 including a Construction Agreement, a Design Agreement, and a
 17 Lease Agreement. In the Design Agreement and the Construction
 18 Agreement, GTE agreed to provide the financing for the design
 19 and construction of the system by paying Apollo's parent, T.L.
 20 Robak, Inc., to design and construct the system for both fiber
 21 optic and coaxial cable transmission. In the Lease Agreement,
 22 GTE agreed to lease the coaxial cable facilities of the System
 23 back to Apollo for the purpose of providing cable television
 24 services in Cerritos. GTE leased to Apollo 275 MHz of the
 25 bandwidth capacity of the coaxial cable facility, approximately
 26 half of the capacity of the cable, reserving the remaining
 27 capacity for GTE Service Corporation to engage in testing of
 28 new communications technologies. The parties considered

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1 themselves joint venture partners, not potential competitors,
2 and contemplated that the remaining bandwidth capacity would
3 become available when GTE concluded its testing period, at
4 which time Apollo would be allowed to take on the full capacity
5 of the coaxial cable.

6 10. The Lease Agreement was subsequently amended on May
7 26, 1988, June 19, 1989, and May 3, 1991. The second amendment
8 to the Lease Agreement ("Amendment No. 2") was precipitated by
9 GTE Service Corporation's desire to have different decoders or
10 converter boxes installed at customer locations throughout the
11 Cerritos cable television system. Converter boxes convert or
12 decode the information transmitted on the coaxial cable to a
13 form that can be used by individual subscribers. Although the
14 converter boxes that Apollo had installed were suitable for the
15 video programming Apollo was providing, GTE Service Corporation
16 desired more expensive and sophisticated converter boxes that
17 would permit the transmission of certain experimental
18 programming GTE Service Corporation was attempting to develop.

19 11. As originally provided under the Lease Agreement and
20 the Construction Agreement, GTE owned the coaxial cable and
21 fiber optic system located under public streets and easements
22 in Cerritos, but Apollo owned the "drops," which connected
23 individual houses, offices, and other buildings to the system,
24 as well as the internal wiring in the customer's home or
25 business, including the converter boxes. Neither the Lease
26 Agreement nor any other agreement gave GTE the right to use
27 Apollo's property to transmit signals to Apollo's customers.
28 This ownership structure gave Apollo practical protection

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1 against competition from GTE. GTE could not compete with
2 Apollo in providing video programming without making a
3 considerable investment to install new drops and converter
4 boxes to the individual customers.

5 12. In Amendment No. 2 Apollo agreed to cooperate with
6 the desire of GTE and GTE Service Corporation to replace the
7 existing converter boxes and to allow GTE to become the owner
8 of the system all the way to the customer, including the
9 converter boxes. In return, GTE gave Apollo, among other
10 things, express assurances that GTE would not use its newly
11 acquired ownership rights to destroy or infringe on Apollo's
12 essential business objective and economic expectations of
13 providing video programming to customers in Cerritos. In
14 recital paragraph F, GTE expressly disclaimed any intent to use
15 the decoders for the purpose of providing Video Programming and
16 further agreed that the approach undertaken by the agreement
17 was not intended to change Apollo's control over or essential
18 economic expectations of providing video programming in
19 Cerritos.

20 13. Consistent with these purposes, in paragraph 7(a) of
21 Amendment No. 2, GTE explicitly agreed not to compete with
22 Apollo for up to 22 years, as follows:

23 GTEC agrees not to compete with Apollo, or any
24 permitted successor or assignee, in the provision of
25 Video Programming in the City during the term of the
lease (including any extensions thereof not in
excess of seven (7) years beyond the initial term).

26 14. In paragraph 8 of Amendment No. 2 GTE agreed to
27 several provisions which, if observed by GTE, would have had
28 the effect of assuring Apollo that it would be able to become

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1 and remain the sole provider of a full 78 channel cable
 2 television service in Cerritos. First, the parties restated
 3 and strengthened Apollo's right of first refusal to any excess
 4 bandwidth capacity by setting the price at which Apollo would
 5 be entitled to lease the excess bandwidth, which price was set
 6 at the then reasonable market rent for the additional
 7 bandwidth. Paragraph 8 of Amendment No. 2 provides that
 8 paragraph 21 of the Lease Agreement shall be amended to
 9 provide:

(a) Owner [GTE] agrees that if bandwidth capacity in
 the Coaxial facilities in excess of 275 MHz should
 become available, Lessee, 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.

14 GTE further agreed that if bandwidth capacity became available
 15 in GTE's Fiber Network Facilities, Apollo would similarly have
 16 a right of first refusal for any use of that facility for video
 17 programming at the then reasonable market rent for such
 18 bandwidth.

19 15. On November 16, 1989, Apollo, GTE, and GTE Service
 20 Corporation entered into further agreements regarding the
 21 exchange of converter boxes. In the "Enhanced Capability
 22 Decoder (Converter Box) Agreement" GTE Service Corporation
 23 agreed to pay Apollo certain specified costs associated with
 24 the installation of the converter boxes and also undertook
 25 other obligations. In particular, in paragraph 2(d) of the
 26 Agreement, GTE Service Corporation agreed not to compete with
 27 Apollo in the provision of video programming in Cerritos, using
 28 language virtually identical to GTE's non-compete agreement in

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paragraph 7(a) of Amendment No. 2 as quoted above.

16. Prior to November 16, 1989, neither GTE nor GTE SC had offered experimental programming which competed with the programming Apollo offered on its cable television system. At that time, two of the new communications technologies that GTE Service Corporation desired to test in Cerritos were Video On Demand ("VOD") and Near Video On Demand ("NVOD"), both of which compete with the cable television services Apollo offered. GTE Service Corporation claimed that Apollo would be benefited by GTE SC's offering of VOD and NVOD services through increased penetration, i.e., the portion of Cerritos residents choosing to subscribe to Apollo's basic service, but Apollo feared that the VOD and NVOD service might induce Apollo's subscribers to decline or discontinue special movie services, such as Home Box Office and Showtime.

17. On November 16, 1989, GTE Service Corporation and Apollo also entered into a Service Agreement under which Apollo agreed to permit GTE Service Corporation to provide VOD and NVOD services in Cerritos and to perform certain services in connection with that programming. The agreement further provided that if the provision of VOD and NVOD directly resulted in a decrease in Apollo's net revenues per subscriber, GTE Service Corporation would pay Apollo compensation in accordance with a set formula.

18. GTE Service Corporation's provision of VOD and NVOD services did in fact compete with programming offered by Apollo and directly resulted in a decrease in Apollo's net revenue per subscriber. GTE Service Corporation eventually agreed to pay

1 Apollo to compensate Apollo for lost revenues caused by
2 competition from GTE's VOD and NVOD services.

3 **FIRST CLAIM FOR RELIEF**

4 19. Plaintiffs reallege and incorporate herein by this
5 reference, each and every allegation contained in paragraphs 1
6 through 18 of this complaint, as though the same were fully set
7 forth herein.

8 20. There is and was implied in each of the contracts
9 between plaintiff and defendants, a covenant by each party not
10 to do anything which would deprive the other parties thereto of
11 the benefits of the contract. This covenant of good faith and
12 fair dealing imposed upon GTE and upon GTE Service Corporation
13 a duty to refrain from doing anything which would render
14 performance of the contracts impossible and a duty to do
15 everything that the contract presupposed that they would do to
16 accomplish their purpose.

17 21. Defendants have breached this covenant of good faith
18 and fair dealing by (1) failing and refusing to rent the excess
19 capacity on the coaxial cable that became available in or about
20 July 1994 at the reasonable market rent for such excess
21 capacity and (2) providing video programming to customers in
22 Cerritos in direct competition with Apollo.

23 On or about July 29, 1993 plaintiff was notified in
24 writing by GTE that an additional 275 MHz of bandwidth capacity
25 in the coaxial facilities would become available in 1994, no
26 later than July. GTE, however, failed and refused to comply
27 with its obligation to give Apollo the opportunity to use such
28 increased capacity at the then reasonable market rent.

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1 Instead, GTE offered Apollo the right to use this increased
 2 capacity only upon payment of a rental rate of \$95,265.00 per
 3 month. \$95,265.00 per month is not the reasonable market rent
 4 for such bandwidth capacity. Defendants have used this demand
 5 for an unreasonable rent to deprive plaintiff of the benefits
 6 of the contract and enable defendants to further breach its
 7 obligations by competing with plaintiff in the provision of
 8 video programming in Cerritos.

9 In July 1994 defendants broke off negotiations with Apollo
 10 and undertook to provide video programming to customers in the
 11 City of Cerritos in direct competition with Apollo, utilizing
 12 the 275 MHz of bandwidth in the coaxial cable that they refused
 13 to rent to Apollo at the reasonable market rent. Defendants
 14 voluntarily filed tariffs with the Federal Communications
 15 Commission, which tariffs sought to materially alter the
 16 contractual arrangement between Apollo and defendants and which
 17 sought to deprive Apollo of its right to acquire the excess
 18 bandwidth which came available in July of 1994.

19 22. At the same time GTE Service Corporation terminated
 20 its Service Agreement with Apollo. Despite this termination
 21 and written notice that any provision of video programming
 22 services in Cerritos after termination of said agreement would
 23 breach defendants' non-compete agreements, GTE Service
 24 Corporation continued to provide and is providing video
 25 programming in Cerritos in direct competition with Apollo.
 26 Moreover, defendants proposed in their tariff applications that
 27 GTE Service Corporation operate a video channel service
 28 including cable television and enhanced video service on the

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remaining one-half (1/2) of the bandwidth capacity not allocated to Apollo and in direct competition with Apollo in providing cable TV service to customers in the City of Cerritos. The actions of defendants in unilaterally and voluntarily filing tariffs containing provisions contrary to their contracts with Apollo and in repudiating their contractual obligations not to compete with Apollo in the provision of video programming in the City of Cerritos breached the covenant of good faith and fair dealing implied in each of the contracts entered into by and between plaintiff and defendants.

23. Plaintiff has performed all conditions, covenants, and promises required by it on its part to be performed in accordance with the terms and conditions of each of the contracts.

24. As a result of defendants' breach of the contracts, plaintiff has incurred damages and will incur damages in the future in an amount not presently ascertained, but substantially in excess of the minimal jurisdictional limits of this court.

SECOND CLAIM FOR RELIEF

25. Plaintiffs reallege and incorporate herein by this reference, each and every allegation contained in paragraphs 1 through 24 of this complaint, as though the same were fully set forth herein.

26. On March 4, 1987, the City of Cerritos, California, enacted an ordinance granting Apollo a non-exclusive contract for the construction, operation and maintenance of a cable

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1 communication system for the City of Cerritos. Plaintiff had
2 and has a reasonable expectancy of economic gain from operating
3 a full 78 channel cable television system and providing cable
4 television services to the residences and businesses within the
5 City of Cerritos, California, without competition from
6 defendants.

7 27. Defendants GTE and GTE Service Corporation have
8 engaged in conduct with the purpose, intent, and actual effect
9 of interfering with plaintiff's relationship with its present
10 and future customers in the City of Cerritos in that defendants
11 have prevented plaintiff from offering a full 78 channel cable
12 television service and defendants are presently competing with
13 plaintiff in the provision of video programming and intend to
14 compete with plaintiff in the future.

15 28. Defendants knew of the relationship existing between
16 plaintiff and its present and future customers in the City of
17 Cerritos and defendants knew that its actions as herein
18 described would interfere with the plaintiff's reasonable
19 expectancy of economic gain from these relationships.

20 29. As a proximate result of defendants' conduct,
21 plaintiff has suffered damages and will suffer damages in the
22 future in an amount presently unascertained but exceeding the
23 minimum jurisdictional limit of this court.

24 30. The acts of defendants, as herein described, were
25 willful and oppressive and malicious. Plaintiff is therefore
26 entitled to punitive damages.

27 **THIRD CLAIM FOR RELIEF**

28 31. Plaintiffs reallege and incorporate herein by this

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1 reference, each and every allegation contained in paragraphs 1
2 through 30 of this complaint, as though the same were fully set
3 forth herein.

4 32. On or about June 29, 1993, plaintiff was notified in
5 writing by GTE that an additional 275 MHz of broadcast capacity
6 would become available in 1994, no later than July. GTE
7 offered plaintiff the right of first refusal to use this
8 capacity upon its availability at a rental rate of \$95,265.00
9 per month.

10 33. On or about October 18, 1993, plaintiff communicated
11 to GTE its formal acceptance of GTE's offer to lease all of the
12 excess bandwidth capacity of the coaxial facilities pursuant to
13 the terms of the lease agreement as amended. The written
14 acceptance communicated plaintiff's position that the
15 \$95,265.00 per month rental figure specified in the offer from
16 GTE did not represent "the then reasonable market rent for such
17 bandwidth", and accordingly conditioned the acceptance of the
18 offer upon the parties agreement to a reasonable market rent.

19 34. An actual controversy has arisen and now exists
20 between plaintiff and defendants concerning their respective
21 rights and duties in that plaintiff contends that bandwidth
22 capacity in the coaxial facilities in excess of 275 MHz has
23 become available and plaintiff is entitled to use that increase
24 in capacity at a reasonable market rent, and plaintiff further
25 contends that the sum of \$95,265.00 per month is a figure
26 substantially and materially in excess of the reasonable market
27 rent for the excess bandwidth, whereas defendants dispute these
28 contentions and contend that plaintiff does not have a valid

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1 enforceable contractual right to use the excess bandwidth
2 because plaintiff has refused to agree to lease the excess
3 bandwidth at a monthly rental of \$95,265.00, which defendants
4 contend is the reasonable market rent for the excess bandwidth.

5 35. Plaintiff desires a judicial determination of its
6 rights and duties and a declaration that it has a valid
7 enforceable contractual right to lease the excess bandwidth at
8 a reasonable market rent.

9 36. A judicial declaration is necessary and appropriate
10 at this time under the circumstances in order that plaintiff
11 may ascertain its rights under the lease agreement as amended.

12 WHEREFORE, plaintiff prays judgment as follows:

13 1. For a declaration that bandwidth capacity in the
14 coaxial facilities in excess of 275 MHz has become available
15 and plaintiff is entitled to use that increase in capacity at
16 a reasonable market rent;

17 2. For damages according to proof;

18 3. For exemplary and punitive damages in an amount
19 sufficient to deter defendants from engaging in similar
20 tortious, malicious and oppressive conduct in the future;

21 4. For reasonable attorneys fees;

22 5. For costs of suit herein incurred; and,

23 6. For such other and further relief as justice may
24 require.

25 SMITH, HELENIUS & HAYES

26
27 By: _____
28 CARL E. HAYES,
Attorneys for Plaintiff
APOLLO CABLEVISION, INC.

PROOF OF SERVICE

I am employed in the County of San Luis Obispo, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1880 Santa Barbara Street, San Luis Obispo, California, 93401.

On January 19, 1995, I served NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AN AMENDED AND SUPPLEMENTAL COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Douglas H. Deems, Esq.
PILLSBURY MADISON & SUTRO
Attorneys at Law
725 South Figueroa Street
Los Angeles, CA 90017

(By Mail) I deposited such envelope in the mail at San Luis Obispo, California. The envelope was mailed with postage thereon fully prepaid.

(By Mail) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Luis Obispo, California, in the ordinary course of business.

(By Overnight Delivery) I deposited such envelope in the Federal Express depository at San Luis Obispo, California. The envelope was sent with delivery charges thereon fully prepaid.

(By Personal Service) I caused such envelope to be hand delivered to the offices of the addressee(s) shown above and indicated by an asterisk (*).

(By Facsimile) I caused each document to be delivered by electronic facsimile to the offices listed above.

(State) I declare, under penalty of perjury, under the laws of the State of California, that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on January 19, 1995, at San Luis Obispo, California.

Martha Greenlee
MARTHA J. GREENLEE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

APOLLO CABLEVISION, INC.,
a California corporation,

Plaintiff,

vs.

GTE CALIFORNIA INCORPORATED,
a California corporation;
and DOES 1 to 30, inclusive,

Defendants.

CASE NO. CIV 142800
(Complaint filed 4/7/94)

PLAINTIFF'S
SUPPLEMENTAL BRIEF IN
OPPOSITION TO DEFENDANT'S
MOTION FOR JUDGMENT ON
THE PLEADINGS

DATE: January 24, 1995
TIME: 3:30 p.m.
DEPT: 31

I.

INTRODUCTION

This brief is supplemental to plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Judgment on the Pleadings which was filed on December 8, 1994. Concurrently with the filing of this brief, plaintiff is serving and filing a motion for leave to file an amended and supplemental complaint in this action. That motion is noticed

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1 for hearing on February 9, 1995.

2 While plaintiff believes that defendant's motion for
3 judgment on the pleadings or in the alternative for a stay
4 should be denied for the reasons set forth in plaintiff's
5 original opposition to defendant's motion, plaintiff submits
6 that the motion should be denied for the additional reason that
7 the amended pleading to be filed by plaintiff seeks recovery of
8 money damages for breach of contract and for tortious
9 interference with prospective economic advantage, and not
10 merely declaratory relief.

11 As explained in plaintiff's original opposition
12 memorandum, federal cases have consistently held that state
13 courts could impose damages on an FCC licensee for breach of
14 contract, even in situations where the licensee allegedly
15 breached the contract under FCC compulsion.

16 Defendant GTE has tried to mischaracterize the plaintiff's
17 existing lawsuit as one seeking to encroach upon the FCC rate
18 setting function. Plaintiff has denied that that is the
19 objective of this lawsuit or that this lawsuit could have
20 any such effect. The proposed amendment to the complaint
21 makes it clear that the gravamen of plaintiff's action is
22 one for breach of contract and interference with economic
23 relationships by GTE and its subsidiary. No relief is sought
24 against the FCC and no relief is sought which would have the
25 effect of imposing any conditions upon the FCC. Under the
26 authority of Regents of Georgia v. Carroll, 338 U.S. 586, 70
27 S.Ct. 370, 94 L.Ed. 363 (1950) and Illinois Citizen's Committee
28 for Broadcasting v. FCC, 467 F.2d 1397, 1400 (7th Cir. 1972),

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SAN LUIS OBISPO, CALIFORNIA 93401

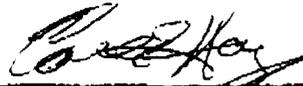
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a state court has jurisdiction to hear and determine these state law claims. Those cases make it clear that even in the situation where the FCC orders a licensee to repudiate a contract, state courts still have jurisdiction to award damages for that repudiation if its constitutes a breach of contract. In the language of the Supreme Court the FCC has not been given authority "to determine the validity of contracts between licensees and others." 338 U.S. at 602.

Accordingly, even if it were true, as is asserted by GTE in its defense, that it was somehow compelled by the FCC and federal law to take the action that it has taken, which assertion plaintiff vigorously denies, this would constitute no grounds to divest the state court of jurisdiction to hear and determine the plaintiff's claims. This is all the more true in respect to plaintiff's damage claims. Defendant GTE has never suggested that the FCC is the proper forum to hear damage claims against GTE and it is not suggested that there is any forum to determine these claims other than state court.

Respectfully submitted,
SMITH, HELENIUS & HAYES

By 
CARL E. HAYES,
Attorneys for Plaintiff
APOLLO CABLEVISION, INC.

PROOF OF SERVICE

I am employed in the County of San Luis Obispo, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1880 Santa Barbara Street, San Luis Obispo, California, 93401.

On January 19, 1995, I served PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Douglas H. Deems, Esq.
PILLSBURY MADISON & SUTRO
Attorneys at Law
725 South Figueroa Street
Los Angeles, CA 90017

(By Mail) I deposited such envelope in the mail at San Luis Obispo, California. The envelope was mailed with postage thereon fully prepaid.

(By Mail) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Luis Obispo, California, in the ordinary course of business.

(By Overnight Delivery) I deposited such envelope in the Federal Express depository at San Luis Obispo, California. The envelope was sent with delivery charges thereon fully prepaid.

(By Personal Service) I caused such envelope to be hand delivered to the offices of the addressee(s) shown above and indicated by an asterisk (*).

(By Facsimile) I caused each document to be delivered by electronic facsimile to the offices listed above.

(State) I declare, under penalty of perjury, under the laws of the State of California, that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on January 19, 1995, at San Luis Obispo, California.

Martha Greenlee

MARTHA J. GREENLEE

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Attorneys for Defendant, APOLLO CABLEVISION, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

APOLLO CABLEVISION, INC., a
California Corporation,

CASE NO. CIV 142800

Plaintiff,

PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION FOR JUDGMENT ON THE
PLEADINGS OR IN THE
ALTERNATIVE TO STAY

vs.

GTE CALIFORNIA INCORPORATED, a
California Corporation, and DOES
1 to 50, inclusive,

DATE: December 15, 1994
TIME: 3:30 p.m.
DEPT: 31

Defendants.

I. INTRODUCTION

On or about January 22, 1987, Apollo Cablevision, Inc. ("Apollo") and GTE California, Inc. ("GTECA") entered into a lease agreement wherein GTECA agreed to lease and Apollo agreed to rent 275 MHz of bandwidth capacity of an underground electrical signal transmission facility to be constructed in the City of Cerritos, California, for the purpose of transmitting cable television signals to plaintiff's customers in the City of Cerritos via co-axial cable. The lease agreement as amended granted the plaintiff a right of first refusal to the use of any bandwidth capacity in excess of 275 MHz, should it become available, at the then reasonable market rent for such bandwidth. In or about June of 1993, Apollo was notified that an additional 275 MHz of bandwidth capacity would be available in 1994, and offered Apollo the right to lease this capacity at a rental rate of \$95,265.00 per month. On or about October 18, 1993, Apollo communicated its

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1 formal acceptance of GTECA's offer but disputed that \$95,265.00 per month
2 represented "the then reasonable market rent" for such bandwidth.

3 On April 7, 1994, Apollo brought this action in the Superior Court for the
4 State of California seeking a declaration of its contractual right to lease the
5 additional 275 MHz of bandwidth capacity. GTECA responded to the complaint by:
6 (1) Filing related tariffs with the Federal Communications Commission ("FCC")
7 seeking to convert its contractual relationship with Apollo into a tariffed
8 arrangement (Exhibits F & G to GTECA's Motion for Judgment on the Pleadings filed
9 October 4, 1994 ("GTECA Motion")); (2) Filing an action in District Court seeking
10 a declaration that its contracts with Plaintiff had been rendered void by the
11 tariff filings; and (3) Removing this state court action to the District Court on
12 the asserted grounds that Plaintiff's State Court claims were in reality Federal
13 claims arising under the Federal Communication's Act.

14 Plaintiff Apollo responded to GTECA's actions by: (1) Filing a petition to
15 reject or suspend the tariffs (see Exhibit "H" to GTECA's Motion); (2) Filing a
16 Motion to Dismiss GTECA's Complaint for Declaratory Relief for Lack of Federal
17 Subject Matter Jurisdiction (Exhibit 1 filed herewith); and (3) Filing a Motion
18 to Remand this Action from Federal Court to State Court for Lack of Federal
19 Subject Matter Jurisdiction. (Exhibit 2 filed herewith.)

20 While Apollo's Motion for Remand was pending, the FCC intervened in the
21 removed action and filed a Motion to Dismiss, or in the Alternative to Stay.
22 (Exhibit 3 filed herewith.) The FCC's motion to dismiss raised substantially the
23 same arguments presented by GTECA in its Motion for Judgment on the Pleadings.
24 (Id. at 6-11.)

25 The rulings that followed were: (1) The FCC rejected one of GTECA's
26 proposed tariffs (Transmittal No. 874)' as "patently unlawful" and began an

27
28 ¹ On September 7, 1994, the 9th Circuit stayed the FCC order
which rejected Transmittal no. 874. A substantially similar
Transmittal no. 909, which applies to the disputed

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1 investigation of the other (Transmittal No. 873, as amended by No. 893) (Exhibit
2 "A" to GTECA's Motion); (2) The District Court dismissed GTECA's Complaint for
3 Declaratory Relief because it raised a federal question only as a defense and
4 therefore lacked federal subject matter jurisdiction (Exhibit 4 filed herewith);
5 (3) The District Court granted Apollo's Motion to Remand for Lack of Federal
6 Subject Matter Jurisdiction because Apollo's Complaint raised only state law
7 claims (Exhibit "N" to GTECA's Motion); and 4) The District Court denied the FCC's
8 Motion to Dismiss, ordering this action back to state court. Id. Now GTECA seeks
9 dismissal of Apollo's action pursuant to CCP § 438 (c)(1)(B)(i) using
10 substantially the same arguments the FCC raised in its Motion to Dismiss, to wit:
11 1) Apollo's Complaint attempts to circumvent the jurisdiction of the FCC or the
12 Court of Appeals by improperly seeking review of or relief from an FCC order in
13 state court; or 2) that the FCC has primary jurisdiction because it is uniquely
14 capable of determining the issues in this case.

15 II. APOLLO'S LAWSUIT DOES NOT CHALLENGE THE LAWFULNESS OF ANY TARIFF
16 FILED WITH THE FCC OR CHALLENGE ANY ORDER OF THE FCC

17 GTECA's position in its motion is founded upon a misconception as to the
18 nature of Apollo's lawsuit. GTECA suggests in its Memorandum of Points and Auth-
19 orities in Support of its Motion for Judgment on the Pleadings that Apollo's
20 action challenges the lawfulness of the tariffs filed by GTECA with the FCC.

21 "Apollo seeks a determination of rates and thereby
22 challenges the validity and lawfulness of GTECA's tariffs
23 -- the very subject of the ongoing proceedings at the
24 FCC." (GTECA Memorandum 11:6-8.)

25 Apollo's lawsuit neither challenges nor seeks any ruling whatsoever
26 regarding the tariff's filed by GTECA.

27 bandwidth, took effect September 12, 1994, subject to
28 investigation by the FCC because "Transmittal 909 raises
substantial questions of lawfulness which warrant
investigation." See Exhibit M to GTECA's Motion, paragraph
3.