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1 Apollo's lawsuit founded upon state law alleges that a contractual right had
2 accrued in its favor against GTECA to lease the excess bandwidth capacity of the
3 Cerritos cable system at a reasonable market rent, and that this right accrued "on
4 or about October 18, 1993 ..." (Complaint, paragraph 8) It is true that GTECA has
5 alleged in its answer that enforcement of the contractual rights alleged by Apollo
6 "... would require the violation of the Communication's Act and the FCC's rules."
7 (Answer of GTECA, 13 Affirmative Defense.) As explained in Apollo's Motion to
8 Dismiss GTECA's action in District Court (Exhibit 1 filed herewith), and in
9 Apollo's memorandum of points and authorities in support of its application to
10 remand this case (Exhibit 2 filed herewith), this federal matter raised as a
11 defense does not convert Apollo's case into one founded upon federal law.

12 The contract upon which Apollo brings suit, the lease agreement, as amended,
13 has been in existence since June of 1989. (Exhibit B to GTECA's Motion, Exhibit
14 5, paragraph 8, filed herewith.) Apollo's state law cause of action accrued in
15 October of 1993. (See Exhibit 2 to the Declaration of Patrick G. Rogan filed with
16 GTECA's Motion.) Apollo brought suit against GTECA in state court on April 7,
17 1994. GTECA first filed tariffs with respect to the Cerritos Cable System on
18 April 22, 1994. By order dated July 14, 1994, the FCC rejected GTECA's tariff
19 filing for the excess bandwidth here at issue.²

20 Apollo's lawsuit did not and could not have challenged the lawfulness of any
21 tariff filed with the FCC if for no other reason than that there was no tariff
22 filing in existence when the lawsuit was filed. It may be that all future cable
23 service provided by the City of Cerritos will be pursuant to an FCC tariff. But
24 that is by no means certain. (See Application for review with the FCC filed by
25 Apollo on August 1, 1994, filed herewith as Exhibit 6) Whether the provision of
26 cable service to Cerritos will be governed by a tariff or not, Apollo's lawsuit
27 against GTECA does not challenge the lawfulness of any tariff or of any FCC order,

28
² See n.1, supra.

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1 whether now existing or to be made in the future. Apollo in this lawsuit simply
2 seeks a declaration of its rights under private contract.³

3 III. APOLLO'S LAWSUIT SEEKS ONLY A DETERMINATION OF WHETHER, IN OCTOBER,
4 1993, IT VALIDLY EXERCISED ITS RIGHT OF FIRST REFUSAL TO
5 PURCHASE THE EXCESS BANDWIDTH, AND WHAT THE "THEN REASONABLE MARKET
6 RENT" WAS FOR SUCH BANDWIDTH

7 Apollo does not ask the state court to impinge upon the FCC's jurisdiction
8 to determine the terms of the tariffs it authorizes. Apollo seeks a determination
9 of Apollo's contractual rights before any tariffs were before the FCC. A state
10 court determination of Apollo's rights prior to the filing of GTECA's tariffs is
11 important to the FCC's determination of the lawfulness of the proposed tariffs.
12 The validity of the terms of the tariffs under investigation depends on the
13 contractual rights held by the parties when the tariffs were filed.

14 GTECA's proposed tariffs covering the entire 550 MHz of bandwidth capacity
15 are pending investigation. See Exhibits A and M to GTECA's Motion. Transmittal
16 no. 873 (as modified by no. 893), which governs the 275 MHz of bandwidth leased
17 to Apollo, unilaterally modifies GTECA's contracts with Apollo. Whether
18

19 ³ As part of the predicates for its arguments, GTECA
20 misleadingly characterizes pivotal FCC actions in 1988-1989
21 with respect to the GTECA/Apollo contract relationship (GTECA
22 Memorandum, page 1). First, the FCC did not broadly "assert[]
23 Title II jurisdiction" over the parties' agreements; while the
24 agency ruled statutory certification was required under 47
25 U.S.C. § 214 to implement the Cerritos project, for example,
26 it did not favor then-protestants' specific urgings that
27 tariffs were required for the provision of the proposed
28 service under 47 U.S.C. § 203. Second, the FCC's grant of
certificate authority was not, as GTECA suggests, mutually
exclusive with "the parties' private contract"; carrier-
customer agreements are regular and familiar elements in FCC-
regulated telecommunications activities. Third, the FCC's
grant of certificate authority in 1989 did not "impose" any
"rates, terms and conditions" on GTECA or Apollo inconsistent
with the parties' agreements; the decision to file tariffs in
1994, and to include proposed provisions inconsistent with the
parties' agreements, were discretionary choices by GTECA, not
ones "imposed" by the FCC.

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1 Transmittal no. 873 modifies Apollo's contracts in violation of the Sierra-Mobile
2 doctrine or does so without "substantial cause" may be affected by whether Apollo
3 owns the rights to the entire bandwidth covered by the proposed tariffs. (See
4 Exhibit A to GTECA's Motion, ¶¶ 25, 26, 30.) United States Gas Co. v. Mobile Gas
5 Corp., 350 U.S. 332, 339 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348
6 (1956); RCA American, 86 FCC2d 1197 (1981); Showtime Networks, Inc. v. FCC, 932
7 F.2d 1 (D.C. Cir., 1991)(substantial cause test applied to tariffed cabled
8 services).

9 Transmittal no. 909, related to the disputed excess bandwidth, governs the
10 relationship between GTECA and its affiliate GTE Service Corp., the current user
11 of the bandwidth. Transmittal no. 909 would be rendered moot if the State Court
12 found that in October, 1993, Apollo validly exercised its right to and therefore
13 owned the right to use the 275 MHz of bandwidth covered by 909, before any
14 transmittal was ever filed by GTECA. (Exhibit M to GTECA's Motion.)
15 Determination of preexisting contractual rights is within the province of the
16 State Court.

17 **IV. STATE COURTS HAVE JURISDICTION TO ADJUDICATE CONTRACT DISPUTES BETWEEN**
18 **LICENSEES AND THIRD PARTIES. THE FCC DOES NOT HAVE JURISDICTION TO**
19 **DETERMINE THE VALIDITY OF CONTRACTS BETWEEN LICENSEES AND THIRD PARTIES**

20 GTECA brief relies upon FCC v. ITT World Communications, Inc., 466
21 U.S. 463, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984), in arguing that Apollo's lawsuit
22 is really a lawsuit against "action that is the outcome of the agency's order,"
23 and hence prohibited by 28 U.S.C. § 2342. Apollo submits that FCC v. ITT is
24 inapposite to our case. In that case ITT brought suit in District Court against
25 the FCC seeking declaratory relief and an injunction based upon allegations that
26 certain FCC actions were in excess of the agency's authority. On the issue
27 relevant to our case, the Supreme Court held that the plaintiff ITT could not seek
28 further review of an FCC order by filing an action in the District Court.

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1 "In substance, the complaint filed in the District Court raised the
2 same issues and sought to enforce the same restrictions upon agency
3 conduct as did the petition for rule making that was denied by the
4 FCC ... The appropriate procedure for obtaining judicial review of
5 the agency's disposition of these issues was appeal to the Court of
6 Appeals as provided by statute." 466 U.S. at 468.

7 In our case, Apollo does not seek review of any FCC rule or decision.

8 Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir.
9 1984), heavily relied upon by GTECA in our case, is similarly distinguishable in
10 that the plaintiff in that action sought a writ of mandamus from the Court of
11 Appeals to compel the FCC to take action on a matter that had been pending in
12 excess of five years. That case can hardly be said to stand for the proposition
13 that an action on a contract between two private parties lies within the exclusive
14 jurisdiction of the FCC when one of those parties claims that his performance
15 under the contract is excused by later action involving the FCC.

16 Apollo submits that our action is more closely analogous to Regents of
17 Georgia v. Carroll, 338 U.S. 586, 70 S.Ct. 370, 94 L.Ed. 363 (1950), than the line
18 of authority cited by GTECA. That case came before the Court on a writ of
19 certiorari to the Court of Appeals of the State of Georgia. The state court had
20 awarded damages to the plaintiff for breach of a contract that the FCC had ordered
21 the defendant to repudiate. The issue before the court was whether the order of
22 the FCC precluded any state action for breach of contract. It was argued by the
23 defendant, and by the FCC as amicus curiae, that to allow the state court action
24 to stand would interfere with the FCC's regulatory power. (338 U.S. at 593; See
25 Syllabus of Brief of the FCC at 94 L.Ed. 367.) In affirming the state court
26 contract action and dismissing the arguments of the defendants that primary
27 jurisdiction lay with the FCC, the court held:

28 "Under the present statute, the Commission could make a choice only
within the scope of its licensing power, i.e., to grant or deny the
license on the basis of the situation of the applicant. It could
insist that the applicant change its situation before it granted a
license, but it could not act as a bankruptcy court to change that
situation for the applicant. The public interest, after all, is in

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1 the effective use of the available channels, and only to that extent
2 in what particular applicant receives a license. The Commission has
3 said frequently that controversies as to rights between licensees and
4 others are outside the ambit of its powers. We do not read the
Communications Act to give authority to the Commission to determine
the validity of contracts between licensees and others." 338 U.S. at
602.

5 See Illinois Citizen's Committee for Broadcasting v. FCC 467 F.2d 1397, 1400
6 (1972), a state court could impose damages on a licensee for breach of contract
7 notwithstanding the FCC's decision that the licensee repudiate the contract before
8 a license was granted; Cable Vision Inc. v. KUTV Inc., 211 F.Supp. 47, 56-58
9 (1962), vacated on other grounds, 335 F.2d 348, 349 (1964), cert. denied, 379 U.S.
10 989 (1964), state courts have jurisdiction to adjudicate contract disputes between
11 licensees and third parties even though the dispute may involve the effect of the
12 Federal Communications Act.

13 The FCC has also explicitly adopted a position of not assuming jurisdiction
14 in contractual controversies involving its licensees, "recognizing that such
15 matters are better left to local courts for resolution." (See Exhibit 7 filed
16 herewith. See also Stanmark, Inc., 18 Pike & Fisher R.R. 996, 1002, ¶ 17 (1959),
17 where the FCC held that it could not adjudicate a private contractual dispute
18 regarding breach of an agreement to transfer a broadcast license; Transcontinental
19 Television Corp., 21 Pike & Fisher R.R. 945, 956, ¶ 17 (1961), where the FCC held
20 that when the issues resolve into a controversy involving private rights, the
21 local civil court is the appropriate forum for such matters.

22 GTECA's argument assumes that Apollo's action is somehow an attack upon an
23 FCC order or decision. Apollo submits that its lawsuit is nothing more than what
24 it purports to be, that is, an action founded upon breach of contract. GTECA may
25 defend this lawsuit by claiming that an FCC order or determination gives it
26 grounds to evade its contractual obligations. This does not mean, as the GTECA
27 appears to assert, that Apollo will of necessity argue that any FCC ruling relied
28 upon by GTECA is invalid. Apollo recognizes that the forum to decide questions

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1 as to the validity of FCC orders is the FCC itself, and if necessary, appeal to
2 the Circuit Court.

3 V. THE STANDARDS TO BE APPLIED IN THIS CASE ARE WITHIN THE CONVENTIONAL
4 COMPETENCE OF STATE COURT SUCH THAT PRIMARY JURISDICTION DOES NOT APPLY

5 GTECA misconstrues the nature of Apollo's suit in arguing that this case
6 falls within the primary jurisdiction of the FCC. This case is more analogous to
7 Nader v. Allegheny Airlines, Inc. 426 U.S. 290, 48 L.Ed.2d 643 (1978) than the
8 authority relied on by GTECA. GTECA relies on cases which recognize the primary
9 jurisdiction of a public agency when the plaintiff challenged a tariff or other
10 public regulatory scheme.⁴

11 Plaintiff in Nader brought an action for fraudulent misrepresentation
12 against the defendant airline for failure to disclose its overbooking practices.
13 A tariff in effect had no provision regarding disclosure practices. The Court
14 found that because the plaintiff did not challenge the tariff the case did not
15 fall within the primary jurisdiction of the FCC. 426 U.S. at 304-305.

16 Similarly, Apollo does not ask this court to interpret or determine the
17 reasonableness or lawfulness of GTECA's proposed tariffs. Apollo does not ask the
18 court to set the reasonable market rate for the excess bandwidth as a term of a
19 tariff. Apollo only asks this court to determine whether it validly exercised its
20 right of first refusal, and what the then reasonable market rate was for the
21 bandwidth. State Courts certainly can determine whether a party to a lease had
22 validly exercised its right of first refusal. Furthermore, valuation of the right
23 to use the disputed bandwidth capacity for purchase, is within the wisdom and

24 ⁴ E.g. Far East Conf. v. United States, 342 U.S. 570, 96
25 L.Ed. 576 (1954); U.S. v. Western Pacific Railroad Co.,
26 352 U.S. 59 1 L.Ed.2d 126 (1956); Carter v. American Tel.
27 and Tel. Co., 365 F.2d 486 (5th Cir 1966), Cert. Denied
28 385 U.S. 1008 (1967); Rilling v. Burlington Northern R.
Co., 909 F.2d 399 (9th Cir 1990); Texas and Pac. Railway
Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350
(1907); Industrial Commun. Sys., Inc. v. Pac. Tel. and Tel.
Co., 505 F.2d 152 (9th Cir 1974).

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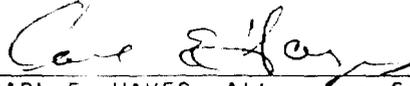
competency of the State Court.

Moreover, GTECA's argument that Apollo has failed to exhaust its administrative remedies is unavailing. The exhaustion principle applies where a claim is cognizable in the first instance by an administrative agency alone. U.S. v. Western Pacific Railroad Co., 352 U.S. 59, 64, 1 L.Ed.2d 126 (1956), (emphasis added). An administrative procedure must be available which addresses the plaintiff's dispute. See, Rojo v. Kliger, 53 Cal.3d 65, 82-88 (1990). The FCC acknowledges it "has neither the authority nor the machinery to adjudicate alleged claims arising out of private contractual agreements between parties." Transcontinental Television Corp., 21 Pike & Fisher at 956, ¶ 17. The FCC has made it clear that private contract disputes are best left to the local courts. Stanmark, 18 Pike & Fisher R.R. at 1002, ¶ 17. Indeed, the Communications Act itself provides that it shall not abridge or alter the remedies existing in common law or by statute. 47 U.S.C. § 414.

VI. CONCLUSION

For each and all of the foregoing reasons, Apollo Cablevision, Inc. respectfully requests that GTECA's Motion for Judgment on the Pleadings be denied, and that this case proceed to trial forthwith.

Respectfully submitted,


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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 December 8, 1994, I served PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE TO STAY 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.
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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 December 8, 1994, at San Luis Obispo, California.

Martha Greenlee
MARTHA J. GREENLEE

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Motion of GTE California Incorporated for Declaratory Ruling" have been mailed by first class United States mail, postage prepaid, on the 8th day of February, 1995 to all parties on the attached list.



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