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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
GTE TELEPHONE OPERATING COMPANIES)	Transmittal Nos. 909, 910
Tariff F.C.C. No. 1)	
)	
Video Channel Service at)	CC Docket No. 94-81
Cerritos, California)	
To: Chief, Common Carrier Bureau		

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JUN 20 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**SUPPLEMENT TO PETITION
TO REJECT TARIFFS**

On May 17, 1994, Apollo CableVision, Inc. ("Apollo"), filed a Petition to Reject or Suspend Tariffs directed, among other things, to GTE Transmittal No. 874, the predecessor to the captioned tariffs. Apollo, by its attorneys, hereby supplements and renews its request to reject the captioned tariffs, in light of the finality of the Court's May 19, 1995 Order denying rehearing or rehearing en banc in GTE California, Inc. v. FCC, No. 93-70924 (9th Cir.).

The Relevant Procedural Background

The history of cable service in Cerritos, California, now spanning nearly a decade, has been often recited in pleadings directed to the April, 1994 tariff filings by GTE California Incorporated ("GTE") and will not be repeated here. The immediately relevant starting point for purposes of this supplement is

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the Common Carrier Bureau's July 14, 1994 Order in the captioned matter, DA 94-784 ("July 14 Order").

In that Order, the Bureau addressed, among other things, arguments by Apollo and others that expiration of GTE's Section 214 authority on the proposed effective date of the carrier's tariffs compelled their rejection.^{1/} More specifically, the Bureau rejected the carrier's arguments to the contrary, and "conclude[d] that GTECA's Section 214 authority will . . . expire on July 17 [1994]." (July 17 Order, ¶ 11.) With regard to GTE's service to Apollo, the Bureau granted an "interim Section 214 authorization" to maintain that service "while we consider this issue further in the context of our investigation of Transmittal No. 873." (July 17 Order, ¶ 12.) Concerning service to GTE Service Corp. under Transmittal No. 874, however, the Bureau granted "interim Section 214 authority for 60 days to provide service to Service Corp. under Transmittal 874 to give time to bring itself into compliance with the telephone/cable cross-ownership rule." (July 17 Order, ¶ 12; emphasis added.)

Rather than use the 60 days for the designated purpose, GTE chose instead to seek a stay of the July 17 Order by the U.S. Court of Appeals for the Ninth Circuit in GTE's still-pending appeal of the Commission's 1993 rescission of GTE's Section 214 certification and cross-ownership waiver for Cerritos. General Telephone Company of California, 8 F.C.C. Rcd. 8178 (1993); see also General

^{1/} See, e.g., letter dated June 29, 1994 from Edward P. Taptich, Esq. to A. Richard Metzger, Jr., p. 3; letter dated July 8, 1994 from Gail L. Polivy to A. Richard Metzger, Jr., pp. 3-4.

Telephone Company of California, 8 F.C.C. Rcd. 8753 (1993). And on September 7, 1994, the Ninth Circuit granted a stay pending its final action in GTE's earlier appeal. GTE California Incorporated v. FCC, No. 93-70924 (9th Cir., Order filed Sept. 7, 1994.)

The following day, GTE requested and was granted special permission to resubmit its earlier-rejected Transmittal No. 874. And on September 9, 1994, GTE refiled its tariff for service to GTE Service Corp. as Transmittal No. 909. On that same day, the Bureau suspended Transmittal No. 909 for one day and instituted an investigation, the specifics of which were never thereafter identified.^{2/} GTE service to its affiliate has been provided under Transmittal No. 909/910 since that time.

In an October 1994 decision, GTE California, Inc. v. FCC, No. 93-70924 (9th Cir., filed October 31, 1994), the Ninth Circuit upheld the Commission's November, 1993 rescission of GTE's Section 214 authority and cross-ownership waiver in Cerritos. Declining to reach the constitutional questions urged by GTE, and rejecting the carrier's procedural arguments, the Court held "that GTECA was not granted permanent section 214 authority to engage in video programming by the FCC." Slip op. at 13192. The Court further rejected GTE's characterization of the Bureau's July 14 Order as extending the cross-ownership waiver beyond July 17, 1994. Id. In the Court's view, all of GTE's authority to provide video programming through its affiliate GTE Service Corp. "was subject to the five-

^{2/} "We will designate specific issues for investigation in a future Order, and include those issues in the pending investigation of Transmittal 873." September 9, 1994 Order, ¶ 3.

year term of the waiver, and none survived expiration of the waiver on July 17, 1994." The Court reached no such conclusion with respect to GTE service to Apollo.^{3/}

Through a subsequent petition for rehearing and suggestion for rehearing en banc, GTE sought a reversal of the decision by the three-judge panel. In an Order filed May 19, 1995, however, the Ninth Circuit denied that petition. (See attached.) And Apollo has been advised by the Commission General Counsel's Office that the Court's mandate was received by the Commission in May of this year.

GTE's Transmittal No. 909
Must Now Be Summarily Rejected

It is well established that a carrier may not file a tariff to provide service over facilities for which the carrier does not hold an authorization pursuant to Section 214 of the Act. E.g., American Telephone & Telegraph, 91 F.C.C.2d 1, 14 (1982) (rejecting BPSS tariffs and requiring AT&T to "obtain appropriate certification under Section 214 . . . before offering BPSS" (id. at 4)); MCI Telecommunications Corp., 60 F.C.C.2d 25, 45-46 (1976) ("MCI [is] offering a service for which prior agency approval had not been obtained, and thus rejection of the tariff was an appropriate and necessary remedy").

^{3/} Slip op. at 13192:

We express no opinion on whether GTECA had or has permanent section 214 authority to carry Apollo's signals, as no issues relating to that question are properly before us.

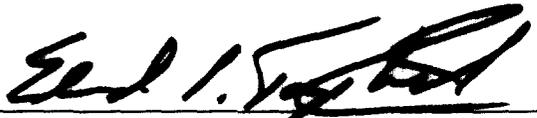
In this case, GTE has no Section 214 authority to provide service to GTE Service Corp. First, the Ninth Circuit's October 1994 decision specifically held that GTE's initial FCC authority to engage (through GTE Service Corp.) in video programming in Cerritos expired on July 17, 1994. Slip op. at 13192. Second, its mandate to the Commission having issued, the Court's earlier stays -- the only legal bases for GTE's serving its affiliate in Cerritos after September 15, 1994^{4/} -- are now extinguished. Third, GTE has not applied for any new Section 214 authority, and the Commission has granted GTE none on its own motion.

At this moment, therefore, there is no Section 214 authority underlying Transmittal No. 909 -- indeed, there has been none extant for three weeks. In light of that fact, the tariffs are patently unlawful on their face, and must be rejected.^{5/}

Respectfully submitted

APOLLO CABLEVISION, INC.

By:


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June 20, 1995

^{4/} The Bureau granted GTE only 60 days of interim Section 214 authority in its July 17 Order (¶ 54).

^{5/} In a June 12, 1995 letter to the Common Carrier Bureau Chief, counsel for Apollo suggested certain specific areas of inquiry, should the Bureau decide to rejuvenate its investigation of Transmittal No. 909/910. Letter dated June 12, 1995 from Edward P. Taptich, Esq. to Kathleen M. H. Wallman. Grant of the relief herein would, of course, moot such matters.

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NOT FOR PUBLICATION

May 23 2 43 PM '95 UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 19 1995

OFFICE OF
 GTE CALIFORNIA, INC.;)
)
 Petitioner,)
)
 PACIFIC BELL; NEVADA BELL;)
 NATIONAL CABLE TELEVISION)
 ASSOCIATION, INC. ("NCTA");)
 PACIFIC TELESIS GROUP,)
)
 Interveners,)
)
 v.)
)
 FEDERAL COMMUNICATIONS)
 COMMISSION; UNITED STATES OF)
 AMERICA,)
)
 Respondents,)
)
 CALIFORNIA CABLE TELEVISION)
 ASSOCIATION; NATIONAL CABLE)
 TELEVISION ASSOCIATION, INC.,)
)
 Respondent-Intervenor.)

CAROL A. CATTELL, CLERK
U.S. COURT OF APPEALS

No. 93-70924

FCC No. 93-488

ORDER

Litigation Division
Office of General Counsel
5-23-95

Before: FERGUSON, NOONAN, and T.G. NELSON, Circuit Judges.

Judges Ferguson and T.G. Nelson vote to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Noonan votes to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The motion of Apollo Cablevision, Inc. for leave to intervene
is DENIED.

CERTIFICATE OF SERVICE

I, Roberta Schrock, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 20th day of June, 1995, caused a copy of the foregoing document to be served on the following by first-class U.S. mail, postage prepaid:

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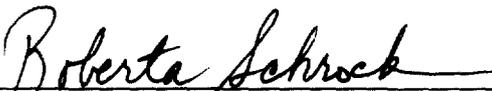
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