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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

94-105

In the Matter of

Petition of the People of the State of
California and the Public Utilities
Commission of the State of California
to Retain Regulatory Authority Over
Intrastate Cellular Service Rates

PR File No. 94-SP3

OPPOSITION OF AIRTOUCH COMMUNICATIONS TO CPUC PETITION
TO RATE REGULATE CALIFORNIA CELLULAR SERVICE

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SUMMARY OF AIRTOUCH COMMUNICATIONS'
RESPONSE TO THE CPUC'S PETITION

For a number of important reasons the CPUC's Petition must be summarily dismissed or denied. First, the Petition contains significant procedural defects, not the least of which is a failure to describe the rules it proposes to establish. Second, the CPUC adopts new regulations, contrary to the specific mandate of Section 332(c)(3)(B) of the Communications Act of 1934. Third, despite its substantial burden of proof, the CPUC has provided no evidence that competition within the California wireless market is insufficient to protect subscribers from unjust and unreasonable rates. Fourth and last, despite regulating cellular rates for the past 10 years the CPUC is forced to acknowledge that its efforts have been ineffective and very costly since California cellular rates are generally higher than rates charged in unregulated states where carriers such as AirTouch, GTE and McCaw also offer service. This failure by the CPUC is costing consumers approximately \$250 million per year.

A. The Petition contains significant procedural defects and must be dismissed.

The CPUC has failed to describe in detail, much less attach, the rules it proposes to establish. This is because the CPUC has not yet figured out what type of regulation it will impose. The CPUC impermissibly requests that the Commission issue it an "open ticket" to impose any type of rate regulation it deems necessary, including cost-based/rate-of-return regulation. Such unlimited authority is not permitted either by Congress or the Commission's Rules.

The Petition also relies impermissibly on confidential information, thus precluding the parties' right to respond to the CPUC's claims. The Commission cannot legally rely on such information in making its determination. Without the confidential information, the CPUC's Petition is unintelligible and insufficient to support its claims. Finally, the CPUC has presented little or no evidence on the issues specifically identified by this Commission as pertinent to its determination. The bulk of the Petition is based on faulty analysis, incomplete facts and speculation.

B. The CPUC has adopted regulation beyond its authority which will undermine federal goals.

The CPUC has adopted a two-tiered regulatory structure which regulates existing cellular carriers--so called "dominant carriers"--with a significantly heavier hand than new entrants, thus ignoring the Congressional mandate for symmetrical regulation. In addition, cellular carriers are required to unbundle their wholesale rates and to interconnect with a "reseller switch." This action is plainly beyond the CPUC's authority under the Communications Act of 1934 as amended. Indeed, the CPUC has imposed new rate regulation, contrary to the specific mandate of Section 332(c)(3)(B) of the Act, which allows the CPUC only to enforce its "existing regulation" as of June 1, 1993 during the pendency of its Petition with the Commission for continued regulatory authority. Further, the CPUC's "reseller switch" order interferes with the Commission's plenary authority over the physical plant used to interconnect

interstate calls and undermines federal technical standards. This Commission must hold the CPUC's order invalid.

C. The CPUC has not met its burden of demonstrating that market conditions unique to California require rate regulation.

The Petition does not establish that competition within California wireless markets is insufficient to protect subscribers. To the contrary, California's wireless markets are more competitive than other states. Its favorable wireless demographics has attracted the first facilities' based ESMR competitor. Additionally, two powerful PCS competitors with existing infrastructures, Pacific Bell and Cox Enterprises, are poised to enter the market. Far from needing special protection, California's cellular markets will, if not impeded by regulation, lead the way to expanded competition.

The CPUC has identified four "findings" regarding market conditions that allegedly warrant continued regulatory intervention: (1) the duopoly market structure; (2) insufficient competitive pressure from ESMR and PCS service providers; (3) relatively high prices for cellular service; and (4) cellular carriers' earnings above those in competitive markets. These "findings" are based on flawed analysis and unsupported assertions rather than evidence. However, even if true, they simply identify factors resulting from the industry's traditional duopoly structure, which have been observed in all cellular markets nationwide. The "findings" do not in any way suggest that California has a special need for state regulation. In any event, the CPUC's analysis supporting the "findings" is

unsound to the point of demonstrating bias. The substantial errors of fact and economics cannot be relied upon to support any showing at all, let alone a demonstrated need for continued regulation in California.

D. The CPUC is responsible for higher rates in California and thus should not be permitted to continue or augment its rate regulation.

Even the CPUC admits that its own regulation "resembles a regulatory 'crazy quilt' more than a progressive environment for consumer protection and innovation."¹ Yet, in concluding that cellular rates in California are too high, the CPUC assumes, without support, that California's past regulation of cellular service has not raised prices and reduced consumer choice. The evidence is to the contrary. State regulation of cellular service has led to higher prices. Consumers of cellular service in California have paid \$250 million more per year as a result of the CPUC's regulation. The CPUC's request for continued and augmented regulation over rates will cost consumers \$500 million more during the proposed 18-month period. The CPUC has repeatedly rejected innovative pricing proposals commonly available elsewhere, such as packaging of CPE and service, customer specific contracts and discount offerings. The CPUC's regulation, the heaviest in the nation, has denied consumers the benefits of unfettered price competition. Congress' and this Commission's binding determinations that the marketplace--not state regulators--should establish the rates for cellular

1 I.93-12-007 (mimeo) at 14-15.

service must be allowed to provide the people of California with the benefits of true competition.

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TO RATE REGULATE CALIFORNIA CELLULAR SERVICE

Pursuant to Section 20.13 of the Commission's Rules and its Second Report and Order, 9 FCC Rcd 1411 (1994), AirTouch Communications¹ opposes the Petition to Retain State Regulatory Authority Over Intrastate Cellular Service Rates ("Petition") filed on August 8, 1994² by the California Public Utilities Commission ("CPUC"). The Petition is both procedurally defective and insufficient on the merits. The Petition's

1 AirTouch Communications ("AirTouch") is one of the world's largest independent wireless companies. Formerly known as PacTel Corporation, AirTouch has substantial cellular telephone operations and ownership interests throughout California.

2 The Petition was filed as a result of a three-two split among the CPUC's Commissioners. Two Commissioners voted not to file the Petition and not to continue regulation of cellular rates any longer. See D.94-08-022. AirTouch has applied for rehearing and suspension of that decision. AirTouch's application is submitted herewith as Appendix A.

significant procedural defects warrant immediate dismissal. Even if the merits of the Petition were considered, the CPUC has not met its burden of proof.

I. INTRODUCTION.

On the merits, the Petition fails to make the necessary showing to justify continued state regulation. State regulation of mobile service rates and entry is preempted by federal law unless a state can prove that its "market conditions" for cellular service "fail to protect subscribers adequately" from unjust, unreasonable or discriminatory rates.³

That case cannot be made in California. California's favorable mobile services demographics have already attracted more new entry than any other state, and California's subscribers are uniquely positioned to enjoy the benefits of the full and open competition envisioned by the federal regulatory plan. Thus, it comes as no surprise that the CPUC's Petition falls short. Indeed, the CPUC is reduced to flagging "market conditions" which are common to all cellular markets nationwide and which have long been recognized by Congress and this Commission as the natural consequences of the historical cellular duopoly. Such "findings" prove nothing unique about California's markets, and cannot support a special variance for California from the clear federal policy to permit the

³ See Section 332(c)(3) of the Communications Act of 1934, as amended.

development of mobile services markets unimpeded by state rate regulation.

In stretching to make a case, the CPUC has resorted to inadequate and, at times, erroneous analysis. The Petition is based on a number of central and basic economic mistakes. For example, the Petition uses static, historical duopoly market share data to predict the competitiveness of the current and future barrier-free wireless market. The Petition also ignores inconvenient facts such as the indisputable evidence that cellular rates are higher in regulated states such as California than in unregulated markets nationwide.

Even if the CPUC had made a more adequate showing, the history of cellular regulation in California demonstrates that continued regulation by the CPUC would only impede both competition and technological innovation. The CPUC said it best itself: "[t]he current [CPUC] cellular regulatory framework resembles a regulatory 'crazy quilt' more than a progressive environment for consumer protection and innovation."⁴

The CPUC has regulated cellular with a significantly heavier hand than any other state in the nation, and that regulation has been costly to consumer welfare: on the order of \$250 million per year. The CPUC now seeks to continue and even augment its regulation, with a projected additional cost of \$500 million to consumers over the next 18 months.

4 California Public Utilities Commission Order Instituting Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications, dated December 17, 1993 (hereinafter, "I.93-12-007") at 14-15.

There have been no corresponding consumer benefits. While giving lip service to reliance on market forces the CPUC has imposed a series of specific regulations which have inflated retail prices, deterred price competition, and reduced incentives for innovation. In addition, the CPUC has flatly prohibited many pro-consumer forms of competition, including marketing practices routinely employed in other industries and in other cellular markets outside of California to consumers' benefit. Far from opening the California markets to increased competition, the net effect of the CPUC's regulation has been reduced avenues for competition and higher prices for consumers.

That the Petition can assert that the presence of regulation in California has "probably prevented rates from being even higher and certainly has not contributed to higher rates,"⁵ suggests that the CPUC is incapable or unwilling to evaluate fairly its own performance. Both the instant Petition and the regulatory patterns observed in California make clear that the CPUC has failed to understand or to deal effectively with the Commission's historical duopoly market structure for cellular. The CPUC has failed to understand the nature of competition in a duopoly market, and now makes similar erroneous assumptions about competition in the new and open wireless marketplace. That fundamental lack of understanding has led the CPUC repeatedly to select forms of regulation that constrict rather than open competition in a concentrated market and to then complain bitterly about the all too predictable results.

5 Petition at 46.

It would serve neither consumers nor the industry to let the CPUC's regime continue.

The Petition has four deficiencies, any one of which is sufficient to require immediate dismissal or denial:

(1) The Petition does not include the required specification on the nature and scope of existing state regulation, nor does it append the required copy of the regulations. This failure is not a mere omission. The CPUC is attempting to pass off radically expanded new rate regulation as "existing" regulation. The lack of the required detail precludes the Commission from conducting its statutorily mandated evaluation.

(2) The Petition relies heavily on confidential data which cannot be seen, reviewed or addressed by any responding party, including the party whose data ostensibly has been used. Consistent with its rules, the Administrative Procedure Act ("APA") and fundamental due process, the FCC cannot rely on such data. As redacted, the Petition is unintelligible and incapable of supporting the CPUC's requested relief.

(3) The CPUC's Petition fails to include evidence on each of the critical issues relevant to measuring market competition. Rather than evidence, the CPUC has supported its conclusions with supposition.

(4) The CPUC has improperly adopted an entirely new form of rate regulation before the Commission has acted on the Petition. Even if the Commission does not dismiss the CPUC's Petition, it should declare the CPUC's regulatory scheme has been invalid during the pendency of its Petition. The CPUC's

attempt to package new regulation as "existing" regulation is a transparent attempt to circumvent interim and potentially permanent federal preemption of the new regulation. This kind of gamesmanship should not be tolerated.

Because the procedural defects moot the need for the Commission to consider the merits, we discuss them first.

II. THE CPUC'S PETITION IS DEFECTIVE ON ITS FACE AND SHOULD BE SUMMARILY DISMISSED.

A. The CPUC has failed to describe in detail, much less attach, the rules it proposes to establish.

This Commission requires that all petitions filed under Section 332(c)(3) "must identify and provide a detailed description of the specific existing or proposed rules that it would establish if we were to grant its petition."⁶ Despite this mandate, the CPUC's Petition contains only a partial and superficial reference to its existing or proposed regulations,⁷ concluding with a vague request "to retain its existing regulatory authority . . . over the rates for cellular service within California."⁸ This Commission cannot evaluate, nor can the interested parties comment upon, a petition that does not describe in detail the petitioning state's proposed regulatory scheme. Consideration of a petition that provides so little supporting evidence would only ensure that any decision this

6 Second Report and Order at 1504-05: See also Section 20.13(a)(2) and (b)(1) of the Commission's Rules.

7 Petition at 81-83.

8 Petition at 1.

Commission might make was wholly arbitrary. For example, the CPUC notes that it has "adopted a program of wholesale rate unbundling based upon prices capped at existing rate levels",⁹ but fails to disclose which elements are to be unbundled, what prices the cellular carriers are currently charging, and how those rates might be changed during the "interim period" that the CPUC intends to regulate.¹⁰

Even the sketchy description of the CPUC's proposed regulatory scheme contained in its Petition is of no use to the parties or this Commission, since the CPUC notes that it intends to open a "subsequent phase of [its] investigation" to consider changes in that regulatory scheme.¹¹ In other words, the CPUC not only fails to provide a "detailed description" of its proposed regulations, but also admits that what little description it does give has no binding effect since it intends to change those regulations in later proceedings.

The CPUC's conclusory Petition not only violates this Commission's express requirements, but defies Congressional intent. Congress did not grant petitioning states unlimited

9 Petition at 81.

10 As discussed in more detail below (pp. 16-18), the reason the CPUC could not provide a description of the elements of service it has ordered unbundled, or the rates charged for those unbundled services, is because these services have never been unbundled and have never been previously tariffed. The CPUC's claim that the rates will be "capped at existing rate levels" (Petition at 81) is misleading because it fails to note that there are no existing rate levels because those services have never been offered or tariffed.

11 Petition at 81.

power to regulate rates, as the CPUC has requested.¹² Rather, Congress gave this Commission authority to grant the states limited power to "exercise under State law such authority over rates, for such period of time, as the Commission deems necessary."¹³ This Commission can hardly be in a position to determine whether the authority requested by the CPUC is "necessary" if the CPUC refuses to describe exactly what rate regulations it intends to enforce.

B. The CPUC's reliance on confidential information is contrary to this Commission's rules.

The CPUC has improperly relied on confidential data that is omitted from the public portions of its Petition.¹⁴ The Commission required that interested parties be given fair notice of and an opportunity to comment on the CPUC's Petition.¹⁵ This requirement cannot be met where the parties have not been

12 Petition at 1.

13 47 U.S.C. § 332(c)(3)(B).

14 On September 13, 1994, the CPUC informally submitted to the Commission modifications to its redacted Petition filed on August 9, 1994. AirTouch did not receive access to this information until two business days prior to the deadline for filing responses to the Petition. The submission contains approximately 75 pages of newly revealed data. There is no justification for the CPUC waiting until the eve of the responding parties' filing deadline to disclose such information. The CPUC provides no valid explanation for its failure to disclose this information with its redacted Petition.

The CPUC's eleventh hour submission has completely violated the carriers' due process rights and the public's right to respond that is afforded both by Congress and this Commission's Rules. The new informal submission should be stricken from the record and should not be considered by this Commission.

15 Second Report and Order at 1504. See also Section 20.13(a)(5) and (6)(1) of the Commission's Rules.

supplied with the evidence supporting the CPUC's Petition. As the Second Circuit has observed in construing the analogous notice and comment requirements of the Administrative Procedure Act, "[i]t is clear that '[i]t is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or on data that, [in] critical degree is known only to the agency.'"¹⁶ This Commission cannot, consistent with its own rules, the APA, and due process of law, rely upon the non-public portions of the evidence submitted by the CPUC. In the absence of this supporting evidence, the CPUC's Petition lacks adequate evidentiary support and must be dismissed.¹⁷

C. The Petition contains insufficient evidence on the crucial issues.

The CPUC has the burden of producing substantial evidence to support its claims regarding market competition.¹⁸ Rather

16 National Black Media Coalition v. F.C.C., 791 F.2d 1016, 1023 (2d Cir. 1986) (emphasis in original, internal quotation marks and brackets omitted).

17 The CPUC's submission of confidential information in support of its Petition not only violates this Commission's rules, but is a possible violation of California state law. The California Public Utilities Code, Section 583, provides that "[n]o information furnished to the [CPUC] by a public utility, [except matters required to be open to the public], shall be open to public inspection or made public except on order of the [CPUC]." The CPUC's own General Order No. 66-C provides that "[r]ecords or information of a confidential nature furnished to, or obtained by the Commission" shall not be made public except upon order of the CPUC. The CPUC has made no order releasing to the public the confidential information appended to its Petition; its release of that material to this Commission, with the possibility that it will be released to the public in this proceeding, may thus violate the CPUC's statutory duties under California state law. It should be noted that the cellular carriers are constrained from requesting the information due to its competitively sensitive nature.

18 Second Report and Order at 1504-1505.

than evidence, the CPUC primarily presented speculation. To collect evidence supporting its Petition, the CPUC instituted an "investigation" to examine the fundamental questions of whether current market conditions for mobile telephone services adequately protect customers from unjust rates and whether continued regulation is necessary to protect consumers.¹⁹

However, one month prior to instituting its "investigation," the CPUC revealed to this Commission that it had already prejudged the issue:

"It has long been the position of the CPUC and consumer groups, based on a factual record developed before the CPUC, that adequate competition does not exist in California in order to ensure just, reasonable and nondiscriminatory rates."²⁰

The CPUC's bias led it to conduct a truncated proceeding designed to assemble a set of papers to "support" the CPUC's foregone conclusion. To that end, despite the fundamental nature of the issues raised in the Order Instituting the Investigation²¹ and the dispute among the parties on those issues,²² the CPUC restricted the parties' ability to submit

19 D.94-08-022 (mimeo) at 2.

20 "Comments of the People of the State of California and the Public Utilities Commission of the State of California" (Docket No. 93-252), dated November 4, 1993, at 6.

21 The OII announced an ambitious goal of establishing a new regulatory framework and identified over 50 substantive issues for comment. CPUC I.93-12-007. Appendix A.

22 See, e.g. Opening and Reply Comments of AirTouch and Its Affiliates in I.93-12-007, submitted herewith as Appendices B and C.

evidence²³ and denied repeated requests for hearings.²⁴ Instead, the CPUC ordered the carriers to submit certain types of information that the CPUC believed would meet its preconceptions.²⁵ Based on the limited record, the CPUC summarily concluded that the cellular market is not competitive and adopted its dominant/non-dominant regulatory framework imposing disparate regulation on cellular service providers.²⁶ The imposition of a regulatory framework based solely on the radically conflicting comments of the parties was beyond the CPUC's authority.²⁷ The CPUC relied upon "evidence" untested by cross-examination, made findings unsupported by the evidence,

23 The CPUC restricted the submission of evidence to opening and reply comments of 80 and 40 pages, respectively. I.93-12-007 (mimeo) at 36 (Ordering ¶ 5).

24 See, e.g., AirTouch Reply Comments in I.93-12-007 at 35; Nextel Opening Comments in I.93-12-007, dated February 25, 1994, at 20; Fresno/Contel Opening Comments in I.93-12-007, dated February 25, 1994, at 3-6; CCAC Opening Comments in I.93-12-007 at 72-73; US WEST Opening Comments in I.93-12-007, dated February 25, 1994, at 24, 58-59; LACTC Opening Comments in I.93-12-007, dated February 25, 1994, at 47. D.94-08-022 (mimeo) at 1.

25 The CPUC also requested voluminous capacity utilization data on all of AirTouch's cell sites over a five-year period. In connection with just the Los Angeles market, this request required sorting through 62,000 hourly data files and validation of equipped radio channels for over 2800 cell sectors for the five year period. This request came in the form of a data request by the assigned Administrative Law Judge on April 11, 1994, ordering that the carriers compile this largely irrelevant information within 18 days. The CPUC has never requested such detailed information of this nature.

26 D.94-08-022 (mimeo) at 2.

27 See Cal. Pub. Util. Code §§ 1705, 1708, 728. Toward Utility Rate Normalization v. Public Utilities Commission, 22 Cal. 3d 529, 546-547 (1978); see California Portland Cement Co. v. Public Utilities Commission, 49 Cal. 2d 171, 179 (1957).

and rendered conclusions unsupported by or inconsistent with its own prior findings.

The CPUC has submitted to this Commission limited information collected from its "investigation" and has virtually ignored the issues critical to this proceeding. This Commission outlined a number of issues that it considered "pertinent to our examination of market conditions and consumer protection."²⁸

While this Commission determined that a state "should have discretion to submit whatever evidence the state believes is persuasive," it noted eight categories of evidence that it would consider pertinent in evaluating a petition.²⁹ The CPUC has substantially ignored many of those eight categories. The CPUC has provided little or no evidence regarding:

- The number of CMRS providers in the state, the types of services offered by them, and the period of time that these providers have offered service in California;³⁰
- Specific allegations of fact (supported by an affidavit of a person with personal knowledge) regarding

28 Second Report and Order at 1504; see also Section 20.13(a)(2) of the Commission's Rules.

29 Ibid.

30 See Section 20.13(a)(2)(i) of the Commission's Rules. The CPUC did provide a table listing the cellular carriers in California and their length of service. See Petition, Appendix E. This table did not, however, list all CMRS providers, such as Nextel. Moreover, there is no discussion of the types of services provided. There are more CMRS providers in California than any other state, including two cellular carriers in every market--together with Nextel competing across most of the state. These CMRS providers are well established, since California was one of the first states to receive cellular service in 1984 and was the very first state where Nextel began providing ESMR service.