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BEFORE THE  
Federal Communications Commission

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WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of the Commission's	)	GEN Docket No. 90-314
Rules to Establish New	)	ET Docket No. <u>92-100</u>
Narrowband Personal	)	
Communications Services	)	

To: The Commission

**CONSOLIDATED REPLY OF AIRTOUCH PAGING TO  
OPPOSITIONS TO PETITION FOR PARTIAL RECONSIDERATION**

AirTouch Paging ("AirTouch"), by its attorneys and pursuant to Section 1.429(g) of the Commission's rules, hereby submits its consolidated reply to (1) the "Partial Opposition of PageMart, Inc. to Petitions for Reconsideration" (the "PageMart Opposition") and (2) the "Opposition to AirTouch Petition for Partial Reconsideration and to PCIA Petition for Reconsideration" filed by Puerto Rico Telephone Company (the "PRTC Opposition"), both filed on November 3, 1994, in the above-captioned proceeding. In reply, the following is respectfully shown:

**I. Background**

1. On October 7, 1994, AirTouch submitted a Petition for Partial Reconsideration (the "AirTouch Petition") of the Second Memorandum Opinion and Order<sup>1/</sup> in

<sup>1/</sup> FCC 94-218, released August 25, 1994 ("Second MO&O").

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this proceeding. Specifically, AirTouch seeks to amend Section 24.130 of the Commission's rules by eliminating eligibility restrictions for the 12.5 kHz unpaired narrowband PCS response channels and by expanding the permissible uses of such channels to allow them to be coupled with either traditional Part 22 and/or Part 90 paging channels or narrowband PCS channels.

2. PageMart supports AirTouch's request to allow response channels to be paired with any spectrum,<sup>2/</sup> but opposes the removal of eligibility restrictions, instead favoring a more restrictive proposal put forth in the Petition for Reconsideration of the Personal Communications Industry Association ("PCIA").<sup>3/</sup> PRTC opposes both the AirTouch and the PCIA Petitions.<sup>4/</sup>

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<sup>2/</sup> PageMart Opposition at 5-8.

<sup>3/</sup> PageMart Opposition at 2-5.

<sup>4/</sup> PRTC Opposition at 1. PRTC also asserts that the AirTouch Petition is "untimely". *Id.* at 6. This claim is without merit. Section 1.429(i) of the Commission's rules provides that "[a]ny order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order." The Second MO&O amended Section 24.130 of the rules in response to a Petition for Reconsideration of the first Memorandum Opinion and Order, 9 FCC Rcd. 1309 (1994), which in turn amended the original rule regarding eligibility for narrowband PCS response channels. Consequently, the AirTouch Petition, filed within 30 days of the Federal Register notice of the Second MO&O, is both timely and proper.

## II. Expanded Eligibility Is Pro-Competitive

3. The Commission already has recognized that expanded eligibility to bid on narrowband PCS response channels will serve to remedy the inequity of precluding licensees authorized after June 24, 1993 from obtaining response channels. In the Commission's words, "licensees of both expanded systems and new systems authorized after June 24, 1993, should have an opportunity to purchase the response channels."<sup>5/</sup> The rule change adopted in the Second MO&O, however, does not go far enough.

4. PageMart's Opposition to expanded eligibility appears to be based on an aversion to facing bidding by additional competitors for the response channels. As noted, PageMart supports AirTouch's proposal to allow the narrowband response channels to be paired with other narrowband PCS spectrum. PageMart holds a nationwide narrowband PCS license, in addition to nationwide Part 22 and Part 90 licenses. Thus, its support of this aspect of AirTouch's proposal is not surprising, because PageMart would then be eligible to bid on response channels in virtually any market and would be allowed to pair those channels with its nationwide narrowband PCS license. Furthermore, because its nationwide PCS license is for a 50 kHz unpaired channel, PageMart is likely to be a major

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<sup>5/</sup> Second MO&O at ¶10 & n.10.

bidder for the 12.5 kHz unpaired response channels. Yet, opposing open eligibility to bid on response channels, PageMart seeks to foreclose similar opportunities for other entities and limit the number of bidders it is likely to compete with for response channels.<sup>6/</sup>

5. PageMart asserts that open eligibility "would unfairly disadvantage existing firms and harm the quality and speed of delivery of service to the public."<sup>7/</sup> PageMart offers absolutely no explanation or reasoning to support this broad claim, and does not explain how a bidder who has committed significant financial resources to obtaining a response channel harms the public. In fact, AirTouch believes that open eligibility will benefit both existing and new entrants by ensuring that the applicant that values the spectrum most will be permitted to purchase it at the auction.<sup>8/</sup>

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<sup>6/</sup> PageMart's partial opposition highlights the need to remove both the eligibility and the use restrictions contained in the present rules. Expanded eligibility for and flexible use of response channels should be adopted simultaneously so that the rules do not favor entities that have not yet acquired narrowband PCS spectrum.

<sup>7/</sup> PageMart Opposition at 4. Unfortunately, the existing policy will unfairly benefit existing licensees. The existing policy itself restricts eligibility solely to existing licensees. The existing policy, thus, is the ultimate unfair benefit.

<sup>8/</sup> This is the entire premise behind auctioning spectrum in the first place. The auction allows all eligible bidders to value spectrum, with the bidder who values it most ultimately securing the license.

6. As AirTouch noted in its Petition, expanded eligibility would allow narrowband PCS licensees who were not previously Part 22 or Part 90 licensees to acquire response channel licenses. The Commission will conduct two more auctions of narrowband PCS spectrum before auctioning the response channels.<sup>9/</sup> Consequently, it is likely that new entities may hold MTA and BTA narrowband PCS licenses.<sup>10/</sup> Therefore, open eligibility for the four MTA and four BTA response channel licenses would allow these new entrants to gain additional spectrum in markets where they believe such spectrum is necessary to achieve their service goals, would give the same flexibility to other narrowband PCS licensees (including those who have acquired asymmetrical narrowband PCS channel pairings), and would not preclude existing paging licensees from bidding on response channels.<sup>11/</sup> Clearly, open eligibility will ensure that

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<sup>9/</sup> In each Major Trading Area ("MTA"), the Commission will auction seven licenses (two 50 kHz paired with 50 kHz, three 50 kHz paired with 12.5 kHz, and two 50 kHz unpaired), and in each Basic Trading Area ("BTA"), the Commission will auction two licenses (50 kHz paired with 12.5 kHz).

<sup>10/</sup> In fact, three new entities already have emerged from the regional auctions: PCS Development Corporation, Lisa Gaye-Shearing, and Insta-Check Systems, Inc.

<sup>11/</sup> PageMart states that eligibility should be limited in order to "ensure that return-link licenses are available to those firms that have already shown their commitment to serving the relevant geographic area." PageMart Opposition at 3. AirTouch's proposal accomplishes this goal. Obviously, a firm that commits significant resources for a narrowband PCS license will have shown such a commitment, and should not be precluded from garnering additional response channel

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response channel licenses are held by those entities that place the highest value on such licenses.<sup>12/</sup>

7. PageMart expresses support for an alternative standard put forth by PCIA. The PCIA plan, however, retains local presence restrictions that even PageMart concedes "are unduly cumbersome to administer."<sup>13/</sup> PCIA's proposal would allow existing operators licensed on a market area basis to bid on response channels in any overlapping MTA or BTA.<sup>14/</sup> While PCIA's proposal is an improvement on the current rule, AirTouch's proposal offers the fairest and most effective method of ensuring that spectrum is awarded to the entity that places the highest value on it.

8. Open eligibility offers other public interest benefits. Under current Commission rules, each applicant

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<sup>11/</sup>(...continued)

spectrum. In this regard, AirTouch understands that Radiofone has filed a reply in this proceeding indicating that it supports AirTouch's position and intends to bid on response channels.

<sup>12/</sup> PageMart offers the purely hypothetical complaint that open eligibility will result in "speculation" and "anticompetitive bidding," PageMart Opposition at 4-5. PageMart provides no specific instances of what forms of such activities it believes may occur. As PageMart surely is aware, the Commission's rules contain requirements designed to deter speculators, and also contain penalties for certain forms of "anticompetitive" activities. See, e.g., 47 C.F.R. §§ 1.2104(g), 1.2109. In addition, one of the major public interest benefits achieved with auctions is that it deters speculation by allowing the applicant that values the spectrum most to pay the most for it.

<sup>13/</sup> PageMart Opposition at 2, 3.

<sup>14/</sup> PCIA Petition for Reconsideration at 1, 4.

must certify that it is eligible to apply for the channels in its application. The Commission would be required to ensure that the applicant (if it is the successful winning bidder) is actually eligible for the channel. This could overburden scarce Commission resources and ultimately delay licensing. AirTouch's proposal would eliminate this step entirely, thereby simplifying the Commission's application and licensing process.

9. Finally, expanded eligibility and more flexible use is consistent with the current regulatory philosophy that Part 22, Part 90, and Part 24 licensees be treated in a similar manner. Licensees should be permitted to determine on their own whether the best use of the 12.5 kHz channels is to utilize them in connection with an existing paging channel or a newly allocated narrowband PCS channel. By the same token, AirTouch's proposal will permit licensees to treat and value similarly all narrowband PCS spectrum. The limit on permissible use of the response channels contained in Section 24.130(a) of the rules will lead to these channels being valued differently (and perhaps less). These channels are, however, no different than the 12.5 kHz mobile-to-base portions of the 50/12.5 kHz narrowband PCS channels.

10. PRTC's Opposition also is based on a desire to limit the number of bidders it will face.<sup>15/</sup> According to PRTC, the "apparent" reason for allocating response channels and imposing eligibility restrictions was to deliberately favor existing paging licensees over later market entrants, by "allow[ing] existing paging licensees to upgrade their systems in order to compete with PCS licensees."<sup>16/</sup> PRTC cites nothing in the record of this proceeding to support this claim, and makes no compelling argument why it should not have to bid against other entities that are willing to purchase the spectrum in order to provide competitive services. In short, PRTC's opposition simply reflects its desire to prevent narrowband PCS licensees from purchasing spectrum in its market.<sup>17/</sup>

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<sup>15/</sup> AirTouch notes that the record in this docket reflects other evidence of PRTC's efforts to stifle competition. PRTC filed a Petition for Reconsideration of the Second MO&O seeking to reverse the Commission's decision to divide the territory of Puerto Rico into two BTAs. Significantly, the Commission already has "found that a single BTA could potentially preclude many individuals and companies from competing against PRTC...." Opposition of Pegasus Communications, Inc. at 7 (citing Implementation of Section 309(j) of the Communications Act, Competitive Bidding, Third Memorandum Opinion and Order, at ¶55 and n.101). Pegasus' observation that PRTC "seeks a unitary BTA to protect its island-wide paging facilities," Pegasus Opposition at 7-8, applies equally to PRTC's opposition to open eligibility for narrowband PCS response channels.

<sup>16/</sup> PRTC Opposition at 4.

<sup>17/</sup> The AirTouch Petition noted that the apparent reason for the eligibility restrictions was to limit the pool of lottery applicants to those local carriers with the greatest need for response capacity in an effort to get the licenses into  
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11. In sum, the only parties that oppose expanded eligibility seek to limit the number of competitors they will face in the bidding for such channels. The limitations on response channel eligibility adopted in the Second MO&O, however, no longer can be justified in view of the Commission's intent to award the channels to the entities that most value them. The Commission's goals can be accomplished through the auction process without Commission-defined restrictions on the nature and extent of the local presence that is required to be eligible and without artificial barriers to efficient spectrum use.

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<sup>17/</sup>(...continued)

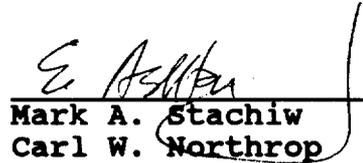
the hands of those who would put them to the highest and best use. The AirTouch Petition further noted that the idea of limiting response channels eligibility arose before the Commission adopted auction procedures, when the Commission was required to hold lotteries for mutually exclusive applications. In its Opposition, PRTC asserts that "reserving response channels for existing paging licensees had nothing to do with the use of lotteries." PRTC Opposition at 3-4. In the Second MO&O, at ¶8, however, the Commission stated that the decision to restrict eligibility "was intended to facilitate our licensing process and provide a simple method for determining mutually exclusive applications." It is unarguable that the eligibility restrictions were adopted before the Commission either had authority to auction spectrum or adopted narrowband PCS auction rules. See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, 8 FCC Rcd. 7162, released July 23, 1993; Implementation of Section 309(j) of the Communications Act, Competitive Bidding, Third Report and Order, released May 10, 1994.

WHEREFORE, the foregoing premises duly considered, AirTouch Paging renews its request that on reconsideration of the Second Memorandum Opinion and Order in GEN Docket No. 90-314 and ET Docket No. 92-100, the Commission amend Section 24.130 of its rules consistent with AirTouch Paging's Petition for Partial Reconsideration.

Respectfully submitted,

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November 16, 1994

**CERTIFICATE OF SERVICE**

I, Sondra R. Rich, hereby certify that on this 16th day of November, 1994, I caused a true and correct copy of the foregoing Consolidated Reply of AirTouch Paging to Oppositions to Petition for Partial Reconsideration to be delivered by hand or first-class United States mail, postage prepaid, to the following:

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