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

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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 Docket No. 94-105 DOCKET FILE COPY ORIGINAL

OPPOSITION OF AIRTOUCH COMMUNICATIONS TO PETITION FOR CLARIFICATION WITH CORRESPONDING EXTENSION OF TIME FILED BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION

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Pursuant to Section 1.45 of the Commission's Rules, AirTouch Communications ("AirTouch") hereby opposes the Petition for Clarification with Corresponding Extension of Time filed by the California Public Utilities Commission ("CPUC") on January 27, 1995. The CPUC ignored the Commission's rules by initially submitting the data it received from the California Attorney General without the requisite affidavit setting forth specific allegations of fact regarding alleged anticompetitive practices and demonstrating personal knowledge of the alleged facts. The CPUC now argues that it should not be bound by those rules because its submission relates to "marketing practices" and that, at most, it should only be required to provide an affidavit attesting to the process by which it acquired the

documents.[1] The CPUC's request is a transparent attempt to circumvent the Commission's clear rule requiring reliable evidentiary support for petitions seeking to regulate cellular rates. The CPUC has neither justified its initial noncompliance, nor demonstrated why the rules should now be disregarded in order to permit an inadequate evidentiary showing. The CPUC's request is simply an untimely petition for reconsideration of the evidentiary standard set forth in the Commission's Second Report and Order, 9 FCC Rcd. 1411 (1994), and thus should be dismissed.

I. THE COMMISSION HAS ESTABLISHED A "STRICT STANDARD FOR AUTHENTICATION".

The Commission set a clear standard for submission of evidence necessary to support allegations of anticompetitive practices by requiring "specific allegations of fact" supported by an affidavit showing personal knowledge of the alleged anticompetitive practices.[2] As the Commission notes, the rules set forth

> "a strict standard for authentication, requiring support in the form of an affidavit by a person with personal knowledge, for allegations relevant to anti-competitive or discriminatory practices or behavior. Thus, our rules require states to submit the appropriate affidavits, at a minimum, before such contentions are even entertained."[3]

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1 See "Petition for Clarification With Corresponding Extension of Time" dated January 27, 1995 ("Petition for Clarification") at 5.

2 47 C.F.R. § 20.13(a)(2)(vi).

3 (Footnote omitted) See "Order [Regarding Treatment of Confidential Materials Filed in Connection With State Petitions For Authority to Regulate Commercial Mobile Radio Service

(continued...)

These requirements should not be dismissed lightly. It is notable that in stating the types of evidence pertinent to its determination, the Commission only required this standard of proof with regard to evidence of anticompetitive practices.[4] The authentication standards are clearly intended to ensure that allegations of such an inflammatory nature be supported by reliable evidence, rather than hearsay or speculation.[5]

In its effort to circumvent the rules, the CPUC has apparently submitted, without the requisite affidavit, selected excerpts of documents taken out of context. The CPUC's submission violates the rules and does not constitute the type of reliable evidence upon which the Commission may rely in ruling on the CPUC's Petition to continue rate regulation.

The CPUC's latest proposal to provide an affidavit setting forth the process by which the CPUC gained access to the documents is similarly inadequate. Such an affidavit would lack

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3(...continued)
Rates]," dated January 25, 1995 ("Order") at 22 (citing 47 C.F.R. § 20.13).

4 See "In the Matter of Implementation of Section 3(a) and 332 of the Communications Act-Regulatory Treatment of Mobile Services, Second Report and Order" ("Second Report and Order") 9 FCC Rcd. 1411, 1521-22 (1994) setting forth eight criteria relevant to the state petitions.

5 It is a "fundamental tenet[ ] . . . of evidence law" that "testimony should be reliable and, thus, must be based on the perceptions of the witness rather than conjecture or second-hand information. . . The importance of the personal knowledge requirement is further indicated by the fact that, in civil cases, it applies not only at trial but also is imposed on affidavits submitted in connection with summary judgment and other motions." 27 Wright & Gold, Federal Practice and Procedure: Evidence § 6021 at 187 (1990). These requirements are a "manifestation" of the laws insistency on the "most reliable sources of information." Id. § 6022 at 189.

the "specific facts" and "personal knowledge" of the alleged anticompetitive practices. Thus, the CPUC's proposal, and any other affidavit lacking these specific requirements, should be rejected.

II. THE CPUC CANNOT JUSTIFY ITS FAILURE TO TO COMPLY WITH THE COMMISSION'S STANDARD.

In order to meet its burden in this proceeding, the CPUC chose to rely solely upon confidential data obtained from the California Attorney General, despite its knowledge of the Commission's evidentiary rules set forth in the Second Report and Order. The CPUC now seeks to compound its procedural abuse by essentially arguing that the Commission's rules should not apply to its Petition.

The CPUC proffers several excuses for its noncompliance. First, the CPUC complains that it cannot make the proper evidentiary showing because the Commission has not allowed discovery in this proceeding.[6] The CPUC has not been constrained from conducting discovery to support its Petition to regulate rates for cellular service. To the contrary, the CPUC instituted an investigation tailored to collect evidence to support its Petition and conducted discovery in that proceeding.[7] The CPUC cannot, therefore, rely upon the absence

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6 Petition for Clarification at 5.

7 See "Administrative Law Judges' Ruling Directing Parties to Provide Supplemental Information" in CPUC I.93-12-007, dated April 11, 1994; "Administrative Law Judges' Ruling Directing Parties to Provide Further Supplemental Information" in CPUC I.93-12-007, dated April 22, 1994.

of discovery in this proceeding as a justification for its lack of compliance with the Commission's rules.

Recognizing that it has not and cannot meet the Commission's requirements with this type of "evidence," the CPUC has adopted a new characterization for its submission, claiming that it "concerns . . . marketing practices," and thus the affidavit requirement does not apply.[8] The CPUC's new label is irrelevant. The Commission has found that allegations of anticompetitive or discriminatory practices or behavior are at issue.[9] The CPUC cannot reject this finding by simply identifying the specific subject matter that may be addressed in the documents. Indeed, the CPUC has not proffered any other basis for submitting the information.

In the absence of any legitimate justification for its noncompliance, the CPUC makes a misguided comparison to the data supporting the affidavit of Dr. Jerry Hausman, submitted in support of AirTouch's opposition to the CPUC's Petition to regulate rates for cellular service.[10] The CPUC argues that if

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8 Petition for Clarification at 4.

9 Order at 22.

10 Petition for Clarification at 6. The CPUC makes reference to its motion to compel production of the data supporting the affidavit of Dr. Hausman submitted by AirTouch. Petition for Clarification at 3. The CPUC fails to acknowledge, however, that AirTouch voluntarily agreed to supply Dr. Hausman's data, even before the CPUC filed its motion. In fact, the CPUC utilized Dr. Hausman's data in preparing its reply memorandum in support of its Petition, yet the CPUC failed to withdraw is motion to compel production of the data. See "Appendices to Reply by California to Oppositions to CPUC Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates," dated October 18, 1994, Appx. H.

it is obligated to submit an affidavit supporting the documents obtained from the California Attorney General, then an affidavit supporting the data relied upon by Dr. Hausman should be required. The data supporting Dr. Hausman's affidavit, as the CPUC recognizes, pertains to pricing data from the top MSAs.[11] Dr. Hausman's affidavit, and thus the underlying data, clearly was not submitted to support allegations of anticompetitive conduct, but rather to provide rate information. The Commission did not impose an affidavit requirement in connection with this type of evidence.[12] In fact, under the CPUC's theory, much of the source data relied upon and submitted by the CPUC should be disregarded because it was not accompanied by affidavits.

As demonstrated above, there is no justification for disregarding the Commission's "strict standard for authentication." Moreover, if the Commission intends to rely upon the confidential data obtained from the California Attorney General, it must provide the affected parties with notice and an opportunity to object to disclosure of the information,[13] as well as undertake a complicated review[14] which will inevitably

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11 See "Emergency Motion to Compel Production to the California Public Utilities Commission of Information Contained in Oppositions to California's Petition to Retain State Regulatory Authority Over Intrastate Cellular Service Rates," dated September 29, 1994, at 2.

12 See Second Report and Order at 1521; C.F.R. § 20.13(a)(2)(iii).

13 See 5 U.S.C. §552 (b)(4); 18 U.S.C. § 1905; Executive Order No. 12600, 52 Fed. Reg. 23781 (June 23, 1987).

14 See In re Applications of Craig O. McCaw and AT&T, (FCC 94-238), adopted Sept. 19, 1994; released Sept. 19, 1994 (mimeo) at 87.

delay the proceeding. In light of the improper nature of the CPUC's request and the inevitable delay that will occur should the Commission decide to release the confidential data, the Commission should deny the request. The vast majority of the confidential data submitted by the CPUC will be included in the record under the Protective Order. This evidence, as well as that submitted by other parties, is sufficient to allow the Commission to render a decision on the CPUC's Petition without abrogating the Commission's rules.

III. CONCLUSION.

For the foregoing reasons, AirTouch Communications respectfully requests that the Commission deny the CPUC's request for clarification and corresponding extension of time.

Dated: February 1, 1995.

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CERTIFICATE OF SERVICE

I, Jo Ellen Marsh, do hereby certify that copies of the foregoing "OPPOSITION OF AIRTOUCH COMMUNICATIONS TO PETITION FOR CLARIFICATION WITH CORRESPONDING EXTENSION OF TIME FILED BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION" were sent via first class mail, postage prepaid, on this 1st day of February, 1995 to the following parties:

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