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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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 THE MOTION
BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION TO STRIKE
EX PARTE FILINGS**

AirTouch Communications ("AirTouch") hereby submits its opposition to the motion of the California Public Utilities Commission ("CPUC") to strike numerous, but unspecified ex parte filings made in this proceeding by many parties. The CPUC moves to strike all ex parte filings introducing new material, including the study of Dr. Jerry Hausman submitted in connection with AirTouch's ex parte presentation.¹ The CPUC does not claim that the ex parte filing of AirTouch, or any other party, violates the Commission's rules. To the contrary, the CPUC

1 Although the CPUC styled its pleading as a "Motion by California to Strike Ex Parte Filings Made By AirTouch" ("CPUC Motion"), in fact the CPUC seeks to strike all ex parte filings made by other cellular carriers that "introduce new material not previously submitted and served during the formal comment cycle" CPUC Motion at 5, N.8.

concedes that the ex parte rules allow parties to make filings after the comment cycle has ended.²

Notwithstanding the fact that ex parte presentations are expressly permitted under the rules, the CPUC complains that the ex parte filings should be stricken because the CPUC does not have an opportunity to respond.³ The CPUC's attack on the Commission's ex parte rules is surprising because the CPUC has utilized the ex parte process in this proceeding on several occasions.⁴ The CPUC essentially complains that only those ex parte presentations opposing its Petition are "unfair," and thus should be stricken. The CPUC has available under the Commission's rules a full and fair opportunity to respond to ex parte filings. Its decision to waive that opportunity does not warrant an abrogation of the Commission's rules to strike valid ex parte submissions or raise any "due process" issues.

2 CPUC Motion at 2.

The rules expressly permit parties, including the CPUC, to submit "data or arguments not already reflected in . . . the written comments." 47 C.F.R. § 1.1206(a)(2).

3 CPUC Motion at 2.

4 See, e.g., Letter from Brian Roberts to Doron Fertig dated November 8, 1994, Letter from Ellen Levine to Regina Harrison dated November 14, 1994, Letter from Ellen Levine to Julia Colgan dated January 17, 1995, Letter from John Leutza to William Caton dated March 1, 1995, Letter from Daniel Fessler to Commissioner Susan Ness dated March 8, 1995, Letter from Daniel Fessler to Chairman Reed Hundt dated March 8, 1995, Letter from Daniel Fessler to Commissioner Andrew Barrett dated March 8, 1995, and Letter from Ellen Levine to William Caton dated March 21, 1995. Indeed, the CPUC itself submitted new information during its ex parte presentation regarding the reseller switch that could not be verified by reference to the written comments.

The Commission's ex parte rules ensure that all interested parties have an opportunity to respond to ex parte presentations by requiring that copies of each ex parte presentation be submitted to the Secretary, who in turn ensures that a public notice is issued reflecting the ex parte filing.⁵ Thus, the CPUC's motion to strike all ex parte filings based on its claim that it has "no knowledge" of such filings is meritless. Moreover, the rules advise that "parties wishing to ensure awareness of all filings should review the public file or record."⁶

Rather than take the trouble of requesting copies of the ex parte presentations and preparing a response, the CPUC has simply filed a blanket motion to strike. The CPUC has failed to make any showing that the Commission's rules deny it an opportunity to submit data and analysis in response to the ex parte submissions.

The CPUC's complaint regarding Dr. Jerry Hausman's study is similarly without merit. Under the rules, AirTouch may submit data and argument beyond that reflected in the written comments. The unpublished study was referred to by Dr. Hausman in response to questions that arose during AirTouch's ex parte presentation.⁷ It is not only entirely permissible under the rules to make ex parte presentations, and submit relevant

5 47 C.F.R. § 1.1206.

6 47 C.F.R. § 1.1206(a)(4), Note 1.

7 During the ex parte presentation, questions arose regarding the assumptions upon which Dr. Hausman relied in his regression analysis.

materials, in response to requests by persons within the Commission⁸ but once such materials are referred to during oral ex parte discussions, they are required by the FCC's rules to be placed into the record of this proceeding.⁹

The CPUC complains that Dr. Hausman's study is based on confidential price and subscriber data that has not been released.¹⁰ The CPUC's argument is undercut by the fact that its Petition is predicated on several secondary sources, including a study by the resellers.¹¹ The CPUC has not included in the record the underlying data for these studies. Moreover, the CPUC is free to present an analysis of its own price and subscriber data to undermine Dr. Hausman's analysis. The CPUC's decision to waive its opportunity to respond is not an adequate basis for a motion to strike.

8 See 47 C.F.R. § 1.1206(a)(3).

9 See 47 C.F.R. § 1.1206(a)(2).

10 CPUC Motion at 3.

11 See e.g., "Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain State Regulatory Authority Over Cellular Service Rates," dated August 8, 1994 at 39, 46, 49, 50, 54-55.

For the foregoing reasons, AirTouch respectfully requests that the CPUC's motion to strike ex parte filings be denied.

Dated: March 28, 1995.

AIRTOUCH COMMUNICATIONS
David A. Gross
Kathleen Q. Abernathy
1818 N Street, N.W.
8TH Floor
Washington, D.C. 20036

PILLSBURY MADISON & SUTRO
Mary B. Cranston
Megan Waters Pierson
P.O. Box 7880
San Francisco, CA 94120-7880

By: _____


David A. Gross

Attorneys for AirTouch
Communications

CERTIFICATE OF SERVICE

I, Jo Ellen Marsh, do hereby certify that I have on this 28th day of March, 1995, caused to be forwarded a copy of the foregoing **OPPOSITION OF AIRTOUCH COMMUNICATIONS TO THE MOTION BY CALIFORNIA TO STRIKE EX PARTE FILINGS MADE BY AIRTOUCH** by first class United States mail, postage prepaid, to the following:

Ellen S. LeVine
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Joel H. Levy
Cohn and Marks
Suite 600
1333 New Hampshire Ave., NW
Washington, DC 20036

Adam Andersen, Esq.
Senior Counsel
Bay Area Cellular Telephone Co.
651 Gateway Boulevard, Ste. 1500
South San Francisco, CA 94080

Leonard J. Kennedy
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Michael Shames
1717 Kettner Blvd., Suite 105
San Diego, CA 92101

Howard J. Symons
Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004

James M. Tobin
345 California Street
San Francisco, CA 94104-2576

Scott K. Morris
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, WA 98033

Luisa Lancetti
Wilkenson, Barker, Kanauer & Quinn
1735 New York Ave., N.W.
Washington, DC 20006

Thomas Gutierrez
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

Mark J. Golden
Personal Communications Industry Association
1019 Nineteenth Street, N.W.
Suite 1100
Washington, D.C. 20036

Russell Fox
Gardner, Carton Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Judith St. Ledger-Roty
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

Peter A. Casciato
A Professional Corporation
Suite 701
8 California Street
San Francisco, CA 94111

Lewis J. Paper
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005

David M. Wilson
Young, Vogl, Harlick & Wilson
425 California Street, Suite 2500
San Francisco, CA 94104

Michael B. Day
Wright & Talisman, P.C.
100 Bush Street
Suite 225
San Francisco, CA 94104

Douglas B. McFadden
McFadden, Evans & Sill
1627 Eye Street, N.W., Suite 810
Washington, D.C. 20006

Jay L. Birnbaum
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, DC 20005-2107

A handwritten signature in black ink, appearing to read "Jo Ellen Marsh", written over a horizontal line.

Jo Ellen Marsh