

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

April 3, 1995

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20036

Re: PR Docket No. 94-105

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the REPLY TO OPPOSITION OF AIRTOUCH TO MOTION BY CALIFORNIA TO STRIKE EX PARTE FILINGS MADE BY AIRTOUCH in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine  
Counsel for California

ESL:jmc

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**ORIGINAL**

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

**DOCKET FILE COPY ORIGINAL**

In the Matter of )  
)  
)  
Petition 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

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REPLY TO OPPOSITION OF AIRTOUCH TO MOTION  
BY CALIFORNIA TO STRIKE EX PARTE FILINGS MADE BY AIRTOUCH

Pursuant to Sections 1.4 and 1.45, 47 C.F.R. §§ 1.4 & 1.45, of the Rules of the Federal Communications Commission ("FCC"), the People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby submit their reply to the opposition by AirTouch Communications ("AirTouch") to the Motion By California To Strike Ex Parte Filings Made By AirTouch.<sup>1</sup> AirTouch provides no basis to deny the motion, and in fact confirms that the motion should be granted.

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1. The CPUC filed its motion with the FCC on March 16, 1995. AirTouch served the CPUC by mail on March 28, 1995, eleven days after the filing of the CPUC motion. The CPUC actually received the filing on Friday, March 31, 1995. Under Sections 1.4(g)(h) & (i) of the FCC rules, the CPUC is allowed an additional three days to reply beyond the five days provided in Section 1.45(b). In accordance with these rules, the CPUC has until April 7, 1995 to file its reply.

In its motion, the CPUC moved to strike from the public record an unpublished study dated January 3, 1995 prepared by Jerry Hausman ("Hausman") which AirTouch filed ex parte with the FCC in the above-referenced docket on March 8, 1995. As explained in the CPUC motion, to allow AirTouch or any other party to make a voluminous ex parte filing which introduces new material five days after the close of the formal comment cycle makes a mockery of the FCC's orderly pleading process, and is patently unfair and violative of the CPUC's due process rights.

In its opposition to the CPUC motion, AirTouch acknowledges that the additional Hausman study is unpublished, and hence unavailable to anyone else. AirTouch further provides no explanation for why it failed to produce this study during the formal pleading cycle when it had every opportunity to do so. Specifically, notwithstanding that the study is dated January 3, 1995, AirTouch deliberately chose to withhold it in its February 24, 1995 filing and to submit it shortly after the close of the formal pleading cycle.<sup>2</sup> AirTouch also concedes that the additional study contains confidential information which AirTouch does not intend to disclose. Finally, AirTouch makes no attempt to refute the fact that the Hausman study relies in part on the same confidential data contained in another Hausman study for the Cellular Telecommunications Industry Association ("CTIA"), and

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2. The CPUC filed its reply to the supplemental comments on the confidential data on March 3, 1995 in accordance with the FCC's pleading cycle. The Hausman study of January 3, 1995 was submitted on March 8, 1995 to the FCC.

that the FCC refused to consider absent disclosure of such data.<sup>3</sup> In fact, AirTouch does not even cite the FCC's First Confidentiality Order, let alone make an effort to distinguish it.

In short, not only has AirTouch carefully orchestrated the timing of this ex parte filing to deny the CPUC an effective opportunity to rebut it, but AirTouch also seeks to have the FCC ignore its earlier ruling and take on "faith" the accuracy of this new study absent any disclosure by AirTouch of the essential data which supports it.<sup>4</sup> Just as it did with the CTIA study, the FCC should give no substantive consideration to the Hausman study of January 3. Indeed, the study should be stricken from this record. To do anything less would effectively constitute a denial of the CPUC's due process rights.

Notwithstanding all of the above, AirTouch counters that the CPUC itself has made ex parte filings with the FCC, and that AirTouch has acted no differently. AirTouch, however, conveniently fails to point out that none of the CPUC filings

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3. First Confidentiality Order, In the Matter of Petition of the State of California, et al., PR Docket Nos. 94-103, et al., Order, released January 25, 1995. Like the CTIA study, which the FCC has declined to consider, the January 3 Hausman study contains data for the years 1989-1993 which has never been disclosed to anyone to allow an independent assessment of their accuracy, validity or usefulness.

4. AirTouch does not dispute that it wants the FCC to rely on the Hausman study even though Hausman plainly stated "Please do not cite or quote" the study. "The Cost of Cellular Telephone Regulation, Preliminary Draft" at 1, Hausman, Jan. 3, 1995. The FCC, however, cannot base a decision on a study not publicly available, based on undisclosed data, and not subject to any serious scrutiny by the parties in this proceeding.

introduced new studies or any new confidential data.<sup>5</sup> In contrast, AirTouch prepared a wholly new study of over thirty pages containing new data -- much of which is undisclosed -- and then intentionally timed the submission of that study in a manner to sandbag the CPUC. Such conduct hardly constitutes the fair play contemplated by the FCC's orderly pleading process.

AirTouch's further claim that the CPUC has a "full and fair opportunity" to respond to AirTouch's new study is belied by Airtouch's failure to disclose any of the confidential data which underlies that study; hence, the claim is illusory. In addition, unlike AirTouch, the CPUC lacks the financial resources to maintain a Washington office in order to review the ex parte filings or presentations which the CPUC understands AirTouch and other cellular carriers are making on almost a daily basis.<sup>6</sup> Indeed, had AirTouch not been directed by the FCC to serve the CPUC with its new study, the CPUC would not have learned of it at all.<sup>7</sup>

AirTouch's additional claim that AirTouch merely submitted the January 3 study in response to yet another undisclosed ex

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5. Indeed, a number of the ex parte filings cited by AirTouch were made by the CPUC at the request of FCC staff. See AirTouch Opp. at 2 n.4.

6. Public notice of an ex parte filing typically takes at least a week or more, and does not identify the nature of the filing. Such notice simply mentions the party making the filing and the FCC Bureau or Commissioners' Office with which the party met.

7. The National Association of Regulatory Commissioners likewise lacks the resources to review the numerous federal dockets in which each of its 51 members are involved in order to ascertain whether ex parte filings have been made in each.

parte presentation by AirTouch in which certain unidentified questions arose in connection with Hausman's earlier study is disingenuous. Hausman's study of January 3 makes no attempt to respond to any particular questions in connection with Hausman's previous study. Indeed, the previous study is not even referenced in the January 3 study.<sup>8</sup>

Finally, as discussed, AirTouch readily acknowledges that the January 3 study relies on confidential price and subscriber data, but argues that the CPUC petition is "predicated on several secondary sources, including a study by the resellers." AirTouch Opp. at 4. AirTouch again conveniently ignores the fact that all sources upon which the CPUC relied are either public documents, studies disclosed in CPUC proceedings in which AirTouch actively participated, or studies disclosed under protective order.<sup>9</sup> Not surprisingly, AirTouch is unable to point to any specific confidential data undisclosed by the CPUC because there is none. In contrast, by AirTouch's own admission, Hausman's January 3 study is unpublished. And, unlike the CPUC, AirTouch has shared with no one the confidential data underlying the Hausman study.

In sum, AirTouch's opposition to the CPUC's motion lacks any merit. For the reasons stated herein and in the CPUC motion, the

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8. Moreover, Hausman's analysis submitted in AirTouch's February 24, 1995 filing was apparently made well after Hausman prepared his January 3, 1995 study.

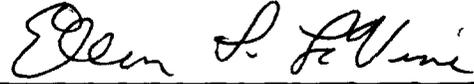
9. The studies cited by the CPUC and noted by AirTouch include publicly-available reports from the Congressional Budget Office and the National Telecommunications and Information Administration. See, e.g., CPUC Petition at 54-55 cited by AirTouch.

FCC should strike from this record any ex parte materials, including the Hausman study of January 3 submitted by AirTouch, which introduce new data that the CPUC has had no effective opportunity to analyze.

Respectfully submitted,

PETER ARTH, JR.  
EDWARD W. O'NEILL  
ELLEN S. LEVINE

By:



Ellen S. Levine

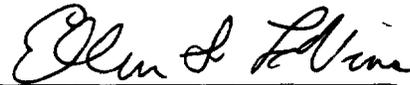
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Attorneys for the People of the  
State of California and the  
Public Utilities Commission  
of the State of California

April 3, 1995

CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 3rd day of April, 1995 a true and correct copy of REPLY TO OPPOSITION OF AIRTOUCH TO MOTION BY CALIFORNIA TO STRIKE EX PARTE FILINGS MADE BY AIRTOUCH was mailed first class, postage prepaid to all known parties of record.



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Ellen S. LeVine