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March 26, 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

In re: WT Docket No. 96-18
PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith, on behalf of American Paging, Inc., by its attorneys, are an original and fourteen copies of its Petition for Partial Reconsideration in the above-captioned matter.

If there should be any questions concerning this matter, please communicate with the undersigned.

Very truly yours,


George Y. Wheeler

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Revision of Part 22 and Part 90)
of the Commission's Rules to Facili-)
tate Future Development of Paging)
Systems)

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

) WT Docket No. 96-18

) PP Docket No. 93-253

To: THE COMMISSION

PETITION OF AMERICAN PAGING, INC.
FOR PARTIAL RECONSIDERATION

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OFFICE OF SECRETARY

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Summary

The Commission and AirTouch failed to observe numerous procedural safeguards for the rights of API and other co-channel licensees regarding the future development of paging systems on 929.4875 MHz. In its single-minded pursuit of a fourth nationwide PCP license grant, AirTouch filed hundreds upon hundreds of applications on 929.4875 MHz just prior to adoption of the Commission's NPRM in hopes of windfall gains. It trampled on the rights of others who did not know that the Commission's NPRM was about to be adopted and that the filing of applications before that adoption date could be tactically significant. It failed to disclose its pending nationwide request on the record so that the comment and reply comment dates in this proceeding came and went without meaningful opportunity for public comment. It conducted ex parte meetings with Commission staff and advisors to Commissioners, without opportunity for affected parties with conflicting applications like API to be present and comment. This record and the corresponding failure of the Commission to give notice that nationwide grant on 929.4875 MHz was under consideration reflects egregious prejudicial error which must be rectified.

In the absence of any meaningful opportunity for public comment regarding the proposed nationwide allocation on 929.4875 MHz we have requested that the public record in these proceedings be reopened ab initio to address the anti-competitive consequences of possible grant of nationwide authority to AirTouch on this channel, the standard under which the Commission is prepared to consider eleventh hour

requests of this nature, the fair consideration of the incumbency rights of licensees like API on this channel, and the failure of AirTouch to establish its eligibility to file in compliance with Commission's restrictions on spectrum hoarding.

We believe that upon the completion of a full and fair public review, the Commission should dismiss AirTouch's nationwide exclusivity request. If AirTouch needs additional spectrum rights on 929.4875 MHz, it should be required to bid for them. This approach provides appropriate opportunity for competitive entry and for incumbent licensees to acquire the spectrum rights in a competitively neutral manner.

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Washington, DC 20554

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of the Communications Act --)
Competitive Bidding)

To: THE COMMISSION

PETITION OF AMERICAN PAGING, INC.
FOR PARTIAL RECONSIDERATION

American Paging, Inc., on behalf of itself and subsidiaries (collectively "API"),¹ by its attorneys, hereby requests reconsideration, pursuant to Sections 1.106 and 1.429 of the Commission's rules, of the final action adopted in the Commission's Second Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding insofar as the Commission granted a nationwide "exclusive" geographic license, without competitive bidding, to AirTouch Paging ("AirTouch") on 929.4875 MHz.²

¹ API participated in these proceedings, filing Comments and Reply Comments on March 18, 1996 and April 2, 1996, respectively.

² Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems (FCC 97-59) in WT Dkt. No. 96-18, ___ FCC Rcd. ___, Para. 51 (1997) ("Second Report and Order").

Statement

The Commission's new classification of "exclusive" geographic licensing for paging is very important in the Commission's present licensing scheme for PCP facilities³. A licensee that does not have geographic exclusivity under these new licensing rules cannot extend its service area into an "exclusive" licensee's territory, even if no interference would be caused. Consequently, if a non-exclusive licensee loses a site or relocates its transmission facilities for any other reason, it cannot replace the service from that site without losing service area to its neighbor with geographic exclusivity. In contrast, the "exclusive" geographic licensee is entitled to expand its service area to fill in all the available blanks, including those caused by the non-exclusive neighbor's loss of a site. Geographic exclusivity is thus very valuable, and an incumbent licensee that is deprived of the opportunity for such exclusivity and is adjacent to a co-channel licensee which is granted geographic exclusivity suffers a substantial impairment in the value of its licenses.⁴ The Commission plans to hold auctions in the near future to permit licensees to bid what will certainly be substantial sums to obtain geographic exclusivity rights and, in the case of existing licensees, to avoid the reduction in the value of their existing networks from not having such exclusivity.

As part of the instant proceeding the Commission was also considering the

³ See generally Section 22.503 of the Commission's rules.

⁴ See Declaration of Dean R. LeDour dated March 21, 1997, Attachment A hereto.

grant, without payment, of nationwide geographic exclusivity to certain incumbents on channels which would be excluded from competitive bidding. These channels to be excluded from competitive bidding under these nationwide licensing policies were already extensively occupied by incumbent licensees, including in some cases licensees like API who had filed for regional or local exclusivity under Section 90.495 of the Commission's rules.

API has been licensed for its regional paging network on 929.4875 MHz since 1994. API received certification by PCIA/NABER⁵ in April of 1994 signifying that it had met the Commission's criteria under Section 90.495 of its rules for regional exclusivity on this channel in Florida, Georgia, Alabama, North Carolina and South Carolina. This certification and API's exclusivity request were forwarded to the FCC for final determination on April 13, 1994. Its request has remained pending throughout these proceedings.

In the expectation that it would be confirmed for regional exclusivity under former Section 90.495 of the Commission's rules, API constructed its regional network starting in 1994 to serve Florida and adjacent parts of Georgia, Alabama and Mississippi at a cost substantially exceeding \$2.0 million.⁶ The network currently comprises one hundred and four active sites serving a population base

⁵ PCIA/NABER Request No. 94000259.

⁶ See Attachment A hereto.

exceeding 11,000,000.⁷

During the period when API was building its network, Beep Page, Inc. ("Beep Page"), which was later purchased by AirTouch, requested regional exclusivity on 929.4875 MHz for areas which did not include any of the states covered by API's previous request. PCIA/NABER coordinated regional exclusivity under Section 90.175(c) of the FCC's rules in a manner which avoided geographic overlaps with API.⁸

To this point, 929.4875 MHz was clearly identified as a frequency on which only non-nationwide exclusivity was contemplated. All of this was changed, however, by AirTouch's surreptitious and successful effort to obtain national exclusivity on 929.4875 MHz.

On December 14, 1995, AirTouch consummated its acquisition of Beep Page. On approximately February 5, 1996, AirTouch filed a request for nationwide exclusivity on 929.4875 MHz with PCIA/NABER. That request was based on facilities previously authorized to Beep Page, which had previously sought and been able to justify no more than regional exclusivity. AirTouch clearly recognized this and took heroic secret measures to put itself in a position to make a specious claim to incumbency as a national paging entity on 929.4875 MHz. During the three-day period February 5, 6 and 7, 1996, PCIA/NABER filed with the Commission an

⁷ A map depicting the interference contours for this regional area is Attachment B hereto.

⁸ See PCIA/NABER Request Nos. 940000287 and 940000300.

unprecedented four hundred eighty applications for new facilities on behalf of AirTouch, together with an accompanying request for nationwide exclusivity on 929.4875 MHz. The next day, February 8, 1996, the FCC adopted its Notice of Proposed Rulemaking ("NPRM") in this docket.⁹

The PCIA/NABER certification for nationwide exclusivity submitted on behalf of AirTouch made no reference to the PCIA/NABER regional certification document which PCIA/NABER had submitted to the Commission on behalf of API in 1994. Neither PCIA/NABER nor the Commission gave API notice that AirTouch had requested national exclusivity on 929.4875 MHz or that PCIA/NABER had issued a certification to AirTouch. Nor did either of them notify API that the regional certification previously obtained by API had been effectively nullified, although the effect of national certification on 929.4875 MHz without any explicit exclusions for API's regional exclusivity request was to nullify its regional certification on that channel.

Nor, finally, did AirTouch at any time before or during these proceedings give any written copies or other notice to API, even though it had to know that grant of its request would reduce the value of API's network, disrupt the future development of that network and take away any chance API might have to expand its network under regional exclusivity or by acquiring co-channel geographic licenses at auction. Instead, API was left in the dark to continue to develop its network in the

⁹ We do not know how AirTouch knew the procedural significance of being on file before adoption of the NPRM.

expectation of being able to obtain, or at least bid for, regional exclusivity.

The Commission's records disclose that although AirTouch made no mention of its 929.4875 MHz in its Comments (or Reply Comments) which would have permitted responses by API and others, AirTouch aggressively advocated grant of its nationwide exclusivity request for 929.4875 MHz in ex parte meetings with staff members in individual Commission offices and with other decisionmakers in the Wireless Telecommunications Bureau.¹⁰ API was neither notified of these meetings nor given the opportunity to attend.

Nor, prior to the release of the Second Report and Order herein, did the Commission give notice that it was considering AirTouch's nationwide exclusivity request for 929.4875 MHz.

The NPRM said the Commission would identify channels to be excluded for nationwide exclusivity,¹¹ and the Commission's Public Notice (DA 96-748) released May 10, 1996, listed the specific PCP channels excluded for nationwide use from its geographic licensing plan on 929 MHz channels. The AirTouch request on 929.4875 MHz was not on the list. This was definite notice, and API was certainly entitled to rely on it, that 929.4875 MHz was not the subject of consideration as

¹⁰ See Ex Parte Notifications of Carl W. Northrop dated July 2, 1996, August 15, 1996 and September 6, 1996, copies attached as Attachments C, D and E hereto. The Commission's public notices reporting these notifications made reference to the instant proceeding, but not to 929.4875 MHz or AirTouch's request for national exclusivity on that channel. API and its counsel were therefore in the dark until release of the Second Report and Order herein.

¹¹ See NPRM, Para. 26.

an exclusive national frequency in this proceeding.

Given AirTouch's stealth in filing its request at the eleventh hour, and in pursuing it not in Comments, to which API and others could respond, but by means of aggressive *ex parte* advocacy, the only reasonable inference is that the AirTouch presentations to the Commission were definitely one-sided. API, whose, rights and request for relief were trampled on here without even being mentioned, has until now been given no opportunity to be heard. Under these circumstances, we submit that API is entitled to have the Commission consider its grant of national exclusivity to Air Touch on 929.4875 MHz ab initio, without any presumption whatever that the initial Commission decision on this subject is entitled to any presumption of regularity or correctness.

Attempt at Settlement

We attempted in the brief time available between the release of the Commission's Second Report and Order and the due date for petitions under Section 1.106 of the Commission's rules to negotiate a possible settlement with AirTouch. Our settlement efforts were rejected largely for reasons unrelated to co-channel frequency conflicts on 929.4875 MHz.

As a company active in numerous proceedings before the Commission, AirTouch is aware and we confirmed that in the event settlement discussions were not successful API would need to preserve its procedural rights on reconsideration. Several days after AirTouch declined to consider any possible settlement, we received the attached threatening letter in a specious attempt by AirTouch to

intimidate API so that it would not file.¹² We strongly object to AirTouch's attempted strong arm tactics and its suggestions that assertion of procedural rights before the Commission is somehow improper.

Discussion

1. The Commission's Failure to Include any Mention of the AirTouch Request on 929.4875 MHz Unlawfully Deprived API of its Rights and Prevented Full and Fair Consideration of that Request in These Proceedings.

Elementary fairness to incumbent licensees with a pending request for regional exclusivity, and to all others who have contemplated possibly bidding for 929 MHz geographic licenses required that the spectrum rights potentially subject to nationwide licensing be fully disclosed on the public record. The Commission itself declared in its NPRM:

"We will announce, by Public Notice, the specific PCP channels excluded for nationwide use at a later time."
(Para. 26).

As noted above, on May 10, 1996, after the period for comments and reply comments had closed, the Wireless Telecommunications Bureau released its Public Notice (DA 96-748) listing "...private carrier paging (PCP) licensees who our records indicate have met the construction requirements for nationwide exclusivity as defined in Section 90.495(a)(3) of our rules as of February 8, 1996." The nationwide exclusivity request of AirTouch for 929.4875 MHz was not included on

¹² See letter of Carl W. Northrop dated March 21, 1997, Attachment F hereto. This letter refers to a "transcription of Larry Pinebrook's [Piumbroeck] voicemail message to Charlie Jackson" which we encourage AirTouch to file as part of the record here.

this list although it had been filed in February. The WTB's Public Notice did not state that it intended to supplement its list in a future public notice, and so far as we are aware it did not do so.

In API's view and, we submit, in fact, the Commission's Public Notice constituted a representation that only the channels listed in the Public Notice were possible subjects of a determination in this proceeding that they were to be denominated exclusive national channels. API has, as shown above, been seriously prejudiced by the fact that it was not put on notice that the Commission might consider AirTouch's request for 929.4875 MHz.

Nor could the Commission reasonably conclude that possible grant of AirTouch's request was such a trivial matter that no public notice should be given. The grant of that request was a give-away of an authorization worth tens of millions of dollars. The terms of that grant effectively denied or modified the exclusivity rights of API and other co-channel incumbent licensees and deprived them of the opportunity to bid for geographic licenses. It precluded significant opportunities for non-licensee parties to bid for spectrum rights on this channel. Most of all it prevented development of a full public record regarding the appropriate scope of the Commission's eligibility restrictions for nationwide licensing.

It is clear that in granting Air Touch exclusive use of 929.4875 MHz in this proceeding, the Commission violated Sections 1.413 and 1.415 of its rules, and 5 U.S.C. § 553(b)(3), (c) on which they are based. Section 1.413 and 5 U.S.C. § 553(b)(3) require the Notice of Proposed Rule Making to include

"either the terms or substance of the proposed rule or a description of the subjects and issues involved."

But the NPRM gave no notice that the Commission was considering designating 929.4875 MHz as a nationwide exclusive frequency. On the contrary, it said that a list of such channels would be provided in the future, and when such a list was published, 929.4875 MHz was not on it.

Similarly, Section 4(c) of the Administrative Procedure Act, 5 U.S.C. § 553(c), echoed by Section 1.415 of the rules, provides that the Commission

shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . .

But since the fact that 929.4875 MHz was even under consideration was concealed from API, the Commission did **not** give API an opportunity to submit comments on the AirTouch proposal. In cases where failure to adhere to the requirements of the APA was less egregious than is the case here, Commission orders were held to be erroneous. See, e.g., MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1140-43 (D.C. Cir. 1995); Reeder v. FCC, 865 F.2d 1298, 1304 (D.C. Cir. 1989).

2. The Ex Parte Attempts of AirTouch to Influence the Commission were Impermissibly Prejudicial.

AirTouch attempted to influence decisionmakers at the Commission to grant its request for nationwide exclusivity on 929.4875 MHz in a manner which severely prejudiced the rights of API to present opposing viewpoints. As the Commission has stated:

"A fundamental purpose of the ex parte rules is to ensure that all participants in agency proceedings are afforded a fair opportunity to present information and evidence in support of their positions. This assures participants and the general public that agency decisions are based upon a "public" record developed in the proceeding rather than upon communications that are shrouded in secrecy."¹³

In this case, AirTouch's repeated meetings with staff members in the offices of the Commissioners and key staff members in the Wireless Telecommunications Bureau could not help but taint the record in these proceedings.

Under Sangamon Valley Television Corporation v. U.S., 269 F.2d 221, 106 US App. D.C. 30 (DC Cir. 1959), the "resolution of conflicting private claims to a valuable privilege" in a rulemaking setting must be "...carried on in the open."¹⁴ Longstanding Commission precedent has treated "Sangamon-type" informal rulemaking proceedings. Under Sangamon, such proceedings include rulemakings where the Commission is considering channel assignments, as here, and other quasi-adjudicatory matters in the context of rulemaking proceedings.¹⁵ This means

¹³ Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations, 104 FCC 2d 1323, 1325 (1986).

¹⁴ Id. at 224. See also Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 56 (C.A.D.C. 1977).

¹⁵ The language of Section 1.1208(c)(2) of the Commission's rules which references the "...allotment of a channel in the radio broadcast or television broadcast services" does not diminish the impact of Sangamon as the controlling case precedent for these proceedings. Allocations decisions conferring "valuable privileges" are clearly not restricted to mass media services. The protection of affected parties from the adverse influence of prejudicial ex parte contacts is the essence of the policy articulated by the Court in Sangamon, which is fully

(continued...)

that under applicable case law, ex parte presentations at least with regard to specific nationwide channel allocation proposals at issue here should have been prohibited.

The goal of AirTouch's numerous presentations was clearly to obtain a nationwide allocation on 929.4875 MHz. The direct benefit to AirTouch was that such an allocation would necessarily mean its undisclosed request for nationwide PCP exclusivity on this channel would be granted. By avoiding the need to bid for spectrum rights on this channel, AirTouch stood to acquire spectrum rights potentially worth tens of millions of dollars.

The opportunities which AirTouch attempted to create for itself unfairly prejudiced the rights of API. In the words of the Sangamon Court "...the private approaches to members of the Commission vitiated its action and the proceeding must be reopened."¹⁶

3. Grant of AirTouch's Request is also Impermissibly Prejudicial to API's Rights Under Section 316 of the Communications Act.

The failure of the Commission and AirTouch to give API notice and opportunity to comment on the merits of the AirTouch request on 929.4875 MHz also violates API's rights under Section 316 of the Communications Act of 1934.¹⁷

¹⁵(...continued)
applicable here."

¹⁶ Ibid.

¹⁷ Section 316(a)(1) states:

The Commission has long established policies under Section 316 which are intended to protect licensees such as API by requiring that they be given the right to be heard before their license rights are diminished. In Federal Communications Commission v. National Broadcasting Company, Inc., 319 U.S. 239, 63 S.Ct. 1035, 87 L.Ed. 1374 (1943), the Supreme Court found that changes in the Commission's rules in combination with a grant of new co-channel operating authority "...was in fact and in substance" a modification of license of the incumbent licensee.¹⁸ Interpreting Section 312(b) of the Communications Act (the predecessor of Section 316), the Court found:

"We can accord no other meaning to the language of the proviso which requires that the holder of the license which is to be modified must have notice in writing of the proposed action and the grounds therefor and must be given reasonable opportunity to show cause why an order of modification should not issue."¹⁹

Similar rights are owed to API in these proceedings with respect to grant of nationwide exclusivity to AirTouch.

In this case, the Commission's grant to AirTouch on 929.4875 MHz necessarily involves a corresponding but unstated modification or nullification of the

¹⁷{...continued)

"...No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification..."

¹⁸ Id., at 245.

¹⁹ Ibid.

license rights of API to operate its existing one hundred and four station paging network on this channel.

Under the restrictions adopted by the Commission in Section 22.503 of the Commission's rules, any diminishment of the composite interference contour of API's existing network automatically increases the interference protection rights owed to AirTouch under its nationwide license. If API loses use of any transmitter site from which its existing composite interference contour is measured, the Commission's rules require that the replacement site must not extend the previously established interference contour. Since API would be barred from extending coverage, its only recourse is to give up interference protection rights reducing the dimensions of its composite interference contour to comply with the Commission's site replacement policies.

The foregoing redefinition of interference protection rights between AirTouch and API resulting from grant of nationwide exclusivity automatically downgrades spectrum rights currently held by API to a secondary status comparable to that of grandfathered licensees. This change which potentially threatens API's long term ability to provide coverage and capacity to its customers on 929.4875 MHz alters fundamental parameters of its license authorizations. The procedural protections under Section 316 of the Communications Act require that API be afforded an opportunity to contest this result on the record before not after the decision is made.

4. Grant of Nationwide PCP Exclusivity to AirTouch Without Giving API Notice and Opportunity to be Heard Violates the Holdings in Ashbacker Radio Corp. v. FCC.

The Commission's established policies regarding the processing of mutually exclusive applications under the Ashbacker Doctrine²⁰ also require that API be afforded an opportunity to contest grant to AirTouch of nationwide exclusivity on 929.4875 MHz. Under Section 1.1208(1)(i)(C) of the Commission's rules, AirTouch was prohibited from making *ex parte* presentations to obtain grant of its request.

As described above, API filed its PCP exclusivity request in 1994 nearly two years before the February 1996 filings of AirTouch for nationwide exclusivity. Despite the fact that both requests remained pending during these proceedings, neither the Commission nor AirTouch notified or offered API opportunities to participate in the Commission's review of AirTouch's request. The discussions which took place between AirTouch and Commission officials, without opportunity for API to be present, compounded this prejudice in violation of Section 1.1208(c)(1)(i)(C) of the Commission's rules.

We raise these matters because it is clear that the grant to AirTouch of nationwide authority conferred license rights which were mutually exclusive with any opportunity for API to preserve its proposed regional exclusivity filing rights or

²⁰ 326 U.S. 327 (1945)

to acquire geographic licensing rights on this channel at auction.²¹ API's regional exclusivity request was effectively denied by the adoption of the Commission's new geographic licensing rules, and its opportunity to refile co-channel applications under the Commission's geographic licensing rules was blocked by the grant to AirTouch.

AirTouch's nationwide request necessarily encompassed co-channel spectrum rights in the entire area for which API had previously requested regional exclusivity. This meant that in addition to applying for license authority surrounding API's proposed regional service area, AirTouch was also seeking primary license status for the same areas as those requested by API. As described in preceding sections of this Petition, the rights at issue are critically important to the ability of paging licensees to address the coverage and capacity needs of their customers. The Commission's decision to award such a nationwide license to AirTouch conferring exclusive primary rights necessarily conflicted with the rights of other licensees with pending co-channel exclusivity requests.

It is now long after the time when the Commission and AirTouch should have

²¹ The use of first-come first served licensing on which the Commission had routinely relied to avoid conflicting requests for co-channel PCP exclusivity was ignored in this case. AirTouch's request was granted even though it was filed nearly two years after the filing of API's request. Alternative measures such as frequency coordination also failed to avoid conflicts here. In this case PCIA/NABER coordinated the specific frequency use which created the co-channel conflict at issue here. Private settlement procedures favored by the Commission under Section 309(j)(6)(E) of the Communications Act were also ignored because neither the Commission nor AirTouch disclosed to API its co-channel request much less sought to settle the conflicting claims.

extended to API its rights as a conflicting applicant. The private meetings between AirTouch and Commission staff members, to which API was not invited, have already had an important influence on the outcome of these proceedings. Procedural due process requires that at a minimum the Commission should rescind its grant to AirTouch and reopen these proceedings to permit a full and fair examination of the conflicting exclusivity requests on this channel.

5. Grant of Nationwide Exclusivity to AirTouch on 929.4875 MHz Violates the Commission's Pro-Competitive Mandate.

AirTouch's eleventh hour attempt to have 929.4875 MHz excluded from geographic licensing under competitive bidding contradicts the Commission's fundamental pro-competitive goals in these proceedings. If AirTouch's grant were permitted to stand, this would mean a total of twenty-three of the thirty-five PCP channels available for exclusive licensing would be excluded from geographic licensing under competitive bidding. The large number of such exclusions, approximately 66 percent of the total exclusive PCP channels is ample grounds to subject the last-minute AirTouch request to strict scrutiny to determine its anti-competitive impact.

Also the Commission should consider that AirTouch is separately being granted three other nationwide exclusive PCP channels. This is not a situation where AirTouch does not already have significant nationwide and other PCP spectrum resources. It is also true that denial here would not prevent AirTouch from bidding for spectrum rights on 929.4875 MHz in the event the Commission

decided to auction this channel.

The anti-competitive consequences from grant of AirTouch's request on the other hand are immediate and unavoidable under Section 22.503(f) of the Commission's rules. The more than thirty five companies who obtained PCIA/NABER certifications for regional or local exclusivity on 929.4875 MHz would have no opportunity to bid for spectrum rights on the channels covered by their exclusivity requests. Nor would the more than twenty-three licensees other than AirTouch who hold 929.4875 MHz authorizations at approximately four hundred and five transmitter locations have such opportunities. By any measure, this is a significant level of competitive interest in this channel which under the Commission's pro-competitive policies should be encouraged and supported in these proceedings by auctioning spectrum rights on this channel.

Nationwide exclusivity for AirTouch also effectively strands competitive growth in the existing networks of co-channel licensees like API. These existing licensees have already demonstrated that they are active competitors whose networks require the flexibility to expand on a co-channel basis to meet customer needs. It is self-evident that being frozen in place under procedures where these licensees can only lose service area rights and never have the right to expand is a crippling restriction in a business as dynamic and competitive as the paging industry. The members of the public who rely on these paging network services deserve support in these proceedings by affording providers like API reasonable opportunities to expand service coverage to meet their needs.

On a final related point we want to emphasize that API and perhaps many other licensees on 929.4875 MHz do not have any realistic option of acquiring 929 MHz spectrum on the remaining one-third of the exclusive channels which are proposed to be auctioned.²² This means these licensees will not be able to duplicate current coverage and to provide for geographic expansion to mitigate the anti-competitive impact of grant to AirTouch. The prejudice to API and to other similarly situated licensees represents both an unfair financial loss and an irreparable loss of the public benefits from competition.

A fair balancing of the rights of all competitors using or proposing to use 929.4875 MHz would surely result if grant of nationwide exclusivity to AirTouch were rescinded and geographic licensing on this channel accomplished under competitive bidding selection. AirTouch, API and the numerous other licensees and applicants on this channel would then be assured of a fair, prompt and efficient selection process.

6. Grant to AirTouch of Nationwide Exclusivity on 929.4875 MHz was an Improper Perversion of Commission's Earned Exclusivity Policies.

We have previously described how AirTouch shortly after consummating its acquisition of Beep Page filed numerous applications with PCIA/NABER requesting nationwide exclusivity on 929.4875 MHz literally hours before the Commission's adoption of the NPRM in this proceeding. The circumstances suggest that having gained advance knowledge of the Commission's impending action, AirTouch

²²

See Attachment A.

requested that the PCIA/NABER staff file on an expedited basis an unprecedented four hundred eighty applications during a three day period February 5, 6 and 7, 1996. Its accompanying request for nationwide exclusivity was processed by PCIA/NABER and forwarded to the FCC during that same period.

The foregoing actions demonstrate that AirTouch's nationwide request was unlike any other such request before the Commission. Filing numerous applications at the eleventh hour can only be interpreted as a cynical attempt to hype its nationwide exclusivity request, i.e. to make up in numbers what that request otherwise lacks in credibility. If indeed it is the case that AirTouch had advance knowledge of the release of the Commission's NPRM, we think it would be improper for the Commission to consider its nationwide exclusivity request under the same policies which apply to other nationwide requests.

Nor can AirTouch claim that it had a reasonable expectation that it would qualify for anything more than regional exclusivity originally requested by Beep Page. Based on its acquisition of Beep Page, AirTouch requested and was granted license rights as successor to the pending regional exclusivity requests of that company. If there was any finding at the time of the Commission's approval of the Beep Page assignment that AirTouch would be permitted to upgrade these regional exclusivity requests it acquired, we can find no record of it.

Nor does the PCIA/NABER nationwide coordination contribute in any material way to the credibility of AirTouch's request. On its face, this coordination purports to find the AirTouch and its affiliates have proposed more than the three hundred