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## SUMMARY

AirTouch Paging ("AirTouch") is opposing the Petition of American Paging, Inc. ("API") for Partial Reconsideration of the Second Report and Order and Further Notice of Proposed Rulemaking (the "Paging Auction Order") in WT Docket No. 96-18.

API challenges the portion of the Paging Auction Order which granted AirTouch nationwide exclusivity on the frequency 929.4875 MHz. This challenge is subject to summary dismissal under Section 1.429(b) of the Commission's Rules because it raises issues that were not earlier presented for consideration when all of the facts upon which the reconsideration request is based were readily available to API in the course of the proceeding through the exercise of due diligence.

The grant of exclusivity rights on 929.4875 MHz to AirTouch was based on a public interest determination that AirTouch qualified conditionally for such exclusivity when the Paging Auction Order was adopted (February 8, 1996), and was entitled under Section 90.495(c) of the Rules to complete construction of its authorized facilities and retain exclusive status. API has failed to offer any reason for the Commission to revisit this ruling. It would have constituted unfair retroactive rulemaking, and an impermissible modification of AirTouch's 929.4875 MHz licenses, for the Commission to rescind exclusivity rights that AirTouch had earned under the existing rules.

The API Petition falsely accuses AirTouch, PCIA/NABER and the Commission of acting in a surreptitious fashion to deprive API of procedural protections. In truth, the public record reveals that AirTouch sought exclusive status

on 929.4875 MHz in a straightforward, above-the-board, legal and ethical fashion, and that the actions of PCIA/NABER and the Commission were strictly in accordance with proper, established procedures.

The API Petition incorrectly asserts that the grant of nationwide exclusivity to AirTouch resulted in the denial of API's request for regional exclusivity on 929.4875 MHz. API's existing 929.4875 MHz licenses have not been modified or diminished in any respect since the facilities comprising API's regional system remain fully protected as grandfathered incumbent facilities, notwithstanding the grant to AirTouch.

Much of the API Petition is based upon the erroneous claim that API was entitled to special notice and various other procedural protections because API and AirTouch had conflicting interests on this frequency. However, the AirTouch and API requests for licensing rights in 929.4875 MHz were not mutually exclusive in any legal or practical sense, which completely undermines these API procedural arguments.

The API claim that Airtouch failed to comply with Section 90.495(d) of the Rules is shown to be incorrect. AirTouch was not seeking exclusivity protection on multiple unbuilt channels when its request for exclusivity protection on 929.4875 MHz was filed.

In sum, the API Petition must be DENIED on multiple grounds.

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 and Part 90	)	WT Docket No. 96-18
of the Commission's Rules to	)	
Facilitate Future Development	)	
of Paging Systems	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act --	)	
Competitive Bidding	)	

To: The Commission

**OPPOSITION OF AIRTOUCH PAGING TO THE PETITION  
OF AMERICAN PAGING, INC. FOR PARTIAL RECONSIDERATION**

AirTouch Paging ("AirTouch"), by its attorneys and pursuant to Sections 1.106(g) and 1.429(f) of the Commission's Rules,<sup>1/</sup> hereby opposes the Petition of American Paging, Inc. ("API") for Partial Reconsideration (the "API Petition") of the Second Report and Order and Further Notice of Proposed Rulemaking (the "Paging Auction Order")<sup>2/</sup> adopted in this proceeding. In opposition,<sup>3/</sup> the following is respectfully shown:

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<sup>1/</sup> 47 C.F.R. §§ 1.106(g), 1.429(f).

<sup>2/</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate the Future Development of Paging Systems (WT Docket No.96-18), FCC 97-59, released February 24, 1997.

<sup>3/</sup> The API Petition was filed prior to the deadline for seeking reconsideration of the Paging Auction Order. AirTouch reserves the right to file further pleadings in response to any later petitions that are filed with reference to the Commission's decision.

## I. INTRODUCTION

1. On February 9, 1996, the Commission released a Notice of Proposed Rulemaking (the "Paging Auction Notice")<sup>4/</sup> which proposed a transition from site-by-site licensing to geographic area licensing using competitive bidding for common carrier paging and private carrier paging ("PCP") channels. The Paging Auction Notice proposed to exempt from the auction all PCP channels on which the licensee had completed construction as of February 8, 1996 of a sufficient number of facilities to meet the transmitter count and dispersion requirements for nationwide exclusivity.<sup>5/</sup> In contrast, licensees who held a sufficient number of unexpired authorizations to qualify for nationwide exclusivity and were in the midst of large-scale construction programs would lose exclusivity despite their good faith reliance upon the existing exclusivity rules.

2. The Commission's proposal to terminate the nationwide exclusivity rights of licensees who were in the process of building out qualifying nationwide systems generated significant **public** debate in the course of the proceeding. AirTouch, and others who were similarly situated,<sup>6/</sup> openly advocated **on the record**

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<sup>4/</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate the Future Development of Paging Systems (WT Docket No. 96-18), Notice of Proposed Rulemaking, 11 FCC Rcd 3108 (1996).

<sup>5/</sup> See Paging Auction Notice, ¶ 26.

<sup>6/</sup> AirTouch, Tri-State Radio Co., Inc., PageMart II, Inc., and Communications Innovations Corp. all held a sufficient number of unexpired authorizations as of February 8, 1996 to qualify for nationwide exclusivity upon completion of construction. See Paging Auction Order, ¶ 51. Although API purports to be attacking only the exclusivity request of AirTouch on the frequency 929.4875 MHz, in truth its attack necessarily implicates all of those who are similarly situated.

that licensees who had requested nationwide exclusivity rights based on applications filed before February 8, 1996, should be allowed to complete construction of authorized stations and retain exclusivity provided that a compliant system was constructed within the designated construction deadlines.<sup>7/</sup> These parties argued that basic fairness and the language of Section 90.495(c) of the Commission's Rules<sup>8/</sup> demanded such result. Section 90.495(c) of the Commission's Rules provides, in part:

A proposed paging system that meets the criteria for channel exclusivity ...will be granted exclusivity under this section **at the time of initial licensing.**<sup>9/</sup> Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date ....

In light of this explicit rule language, AirTouch and others contended that denying incumbents the right to complete construction of authorized stations and thereby retain their exclusivity constituted an inappropriate retroactive modification of their licenses.

3. The Commission in the Second Report and Order accepted this position. The Paging Auction Order states:

We agree with the commenters that licensees who had obtained sufficient authorizations to be eligible for conditional nationwide exclusivity prior to the Notice, and have since constructed

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<sup>7/</sup> In AirTouch's case, the February 8, 1996 construction deadline was directly challenged in AirTouch's formal comments and reply comments in the proceeding -- with copies of the reply having been served on API -- and in numerous ex parte presentations that were duly noted in the Commission's public notices of such presentations in WT Docket No. 96-18. Attachments 2 and 3.

<sup>8/</sup> 47 C.F.R. § 90.495(c).

<sup>9/</sup> Emphasis added.

nationwide systems, should also receive nationwide geographic area licenses ....<sup>10/</sup>

Consequently, AirTouch and several other licensees were granted nationwide exclusivity because they completed construction of a compliant system within the applicable construction deadlines.<sup>11/</sup>

4. API was an active participant in WT Docket No 96-18, was served with the comments of all those who opposed the retroactive imposition of a February 8, 1996 nationwide exclusivity construction deadline, and yet API never commented on this issue. Having slept on its rights in the course of this proceeding, API now comes forward for the first time on reconsideration to argue that AirTouch should not retain nationwide exclusivity on 929.4875 MHz.<sup>12/</sup>

5. AirTouch demonstrates in this Opposition that the API Petition (i) is procedurally defective; (ii) is based upon false factual premises; and (iii) misstates the governing law. Consequently, the request for reconsideration must be DENIED.

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<sup>10/</sup> Paging Auction Order, ¶ 51. Notably, this holding is based upon general principles that are applicable to multiple licensees, and not upon any unique facts pertaining to AirTouch's 929.4875 MHz system. Consequently, API's focus upon the specifics of the 929.4875 MHz channel misses the point.

<sup>11/</sup> Id.

<sup>12/</sup> As was indicated in the letter AirTouch sent to API on March 21, 1997, a copy of which was included as Attachment F to the API Petition, API tried to use the threat of filing its Petition for Reconsideration to gain leverage over AirTouch and extract a partitioning agreement to which API is not entitled. (AirTouch will supply the transcript of the offending voice message from Larry Piumbroeck to Charlie Jackson to the Commission upon request.) In dismissing the API Petition, the Commission should admonish API that threatening to invoking the Commission's processes to extract concessions from a licensee is not appropriate.

**II. AIRTOUCH ADVOCATED ITS NATIONWIDE EXCLUSIVITY RIGHTS OPENLY AND IN STRICT ACCORDANCE WITH THE COMMISSION'S EX PARTE RULES**

6. The API Petition is replete with false accusations that AirTouch executed a "surreptitious"<sup>13/</sup> plan to garner nationwide exclusivity rights on the frequency 929.4875 MHz. In its Petition, API describes AirTouch's licensing and rulemaking activities as secret,<sup>14/</sup> cynical<sup>15/</sup> and stealthy<sup>16/</sup> undertakings that perverted the exclusivity policies of the Commission,<sup>17/</sup> violated the Commission's ex parte rules<sup>18/</sup> and trampled on the rights of others.<sup>19/</sup> API also faults the Commission and PCIA for their roles in this process.<sup>20/</sup> These baseless allegations reflect a feeble attempt by API to excuse its complete lack of attentiveness to the PCP licensing process and the related matters that were at issue in the market area licensing proceeding.

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<sup>13/</sup> API Petition, p. 4.

<sup>14/</sup> Id.

<sup>15/</sup> Id., p. 20.

<sup>16/</sup> Id., p. 7.

<sup>17/</sup> Id., p. 19.

<sup>18/</sup> Id., pp. 10 -12.

<sup>19/</sup> Id., p. ii

<sup>20/</sup> API suggests that the Commission gave AirTouch special advance notice of the impending PCP application freeze, and that PCIA/NABER accorded special treatment to AirTouch's exclusivity request. These unsubstantiated allegations are untrue. API also faults the Commission and PCIA for failing to give API a special explicit written notice that AirTouch's request for nationwide exclusivity on 929.4875 MHz was under active consideration when in fact no such notice was called for. See, e.g., API Petition, pp. 5, 6, 8, 10, 20.

7. AirTouch sought exclusivity on 929.4875 MHz in a straightforward, legal, ethical, and above-the-board fashion. AirTouch's interest in 929.4875 MHz was a matter of public record long before February 8, 1996. AirTouch sought Commission authority to acquire Beepage in a transaction that was a matter of public record in 1995.<sup>21/</sup> One of Beepage's primary assets was an extensive 929.4875 MHz system in the northeastern and western United States.

8. As soon as the Beepage acquisition was complete in December 1995, AirTouch began work on filing applications to add 929.4875 MHz at other locations across the United States where it was still available.<sup>22/</sup> The applications AirTouch filed to add 929.4875 MHz at other AirTouch locations were a matter of public record and readily available to interested parties for inspection and review.<sup>23/</sup> The request of AirTouch Paging for nationwide exclusivity on 929.4875 MHz was duly noted on the master exclusivity list that PCIA maintains and routinely makes

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<sup>21/</sup> See, e.g., FCC File Nos. D002027 (WPIU282), D002015 (WPIU291), D002014 (WPIU292) and D002010 (WPIU296).

<sup>22/</sup> The fact that AirTouch would seek to duplicate this frequency at other sites throughout the nation where AirTouch had facilities can hardly be considered startling, particularly to a carrier of long standing such as API.

<sup>23/</sup> The applications were not subject to public notice when they were accepted for filing because they predated the August 10, 1996 date after which PCP channels were treated as CMRS and subjected to the same application processing procedures. See Implementation of Sections 3(n) and 332 of the Communications Act (GN Docket No. 93-252), Second Report and Order, 9 FCC Rcd 1411, 1452 ¶ 97 (1994). However, as all those with licensed PCP channels know, the applications are available at the FCC and their pendency can be determined by reference to FCC and commercial databases.

available to 929 MHz applicants upon request.<sup>24/</sup> Attachment 1 hereto is a copy of the current version of the 929 Exclusivity Master List that is maintained by PCIA and distributed **free of charge** to interested persons upon request. AirTouch's nationwide exclusivity request for 929.4875 MHz is listed on page 20 of the list. AirTouch has been advised by Mr. Donald Vasek of PCIA that this AirTouch nationwide exclusivity request was posted to the Master List on or about February 5, 1996 and has been continually listed on all subsequent versions of the master list since that date. The exclusivity request also was a matter of public record at the Commission's offices in Gettysburg after it was forwarded by PCIA to the Commission for action.<sup>25/</sup>

9. AirTouch's actions in the rulemaking proceedings also became part of the public record. AirTouch devoted more than 4 pages of its initial comments on the Paging Auction Notice to the argument that PCP incumbents should be able to retain nationwide exclusivity for compliant systems regardless of whether construction

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<sup>24/</sup> Because PCP services were subject to prior frequency coordination, many of the preliminary licensing functions that were conducted by the FCC for common carrier channels were delegated to PCIA (as successor to NABER) for PCP channels. Just as a common carrier paging license would, in the exercise of due diligence, take steps to receive and review the FCC public notices of common carrier applications to keep abreast of licensing developments, a PCP licensee would take appropriate steps to receive and review the PCIA lists periodically.

<sup>25/</sup> API asserts without any basis that AirTouch's exclusivity request received special treatment from PCIA. As far as AirTouch knows, its request was handled no differently or more quickly than others filed in this same time frame. Also, the suggestion that PCIA abandoned its normal coordination procedures in processing AirTouch's 929.4875 MHz request is demonstratively false. The master PCP exclusivity list reflects numerous instances in which incumbent local or regional licensees have been allowed to garner nationwide status upon expanding their systems notwithstanding the presence of other local or regional co-channel licensees.

was completed on or before February 8, 1996.<sup>26/</sup> In reply comments **that were served on API**, AirTouch reiterated its position that PCP channels still under construction were entitled to nationwide exclusivity, and cited numerous other comments that agreed with its substantive position.<sup>27/</sup>

10. Thereafter, AirTouch scrupulously adhered to the meet and disclose rules that pertain to ex parte meetings with decisionmaking personnel in rulemaking proceedings. AirTouch prepared and filed **in the public docket** extensive outlines of the positions it was advocating in meetings with Commission staff. Samples of these notices, which contain explicit references to 929.4875 MHz and are no doubt more detailed than required by the applicable disclosure rules, are gathered in Attachment 2.<sup>28/</sup> In accordance with the usual practice, the Commission issued periodic public notices alerting interested parties of the AirTouch presentations in the paging auction docket. Some of these notices are collected in Attachment 3.

11. The repeated efforts of API to attach sinister motives to AirTouch are completely unjustified. For example, API ascribes a malevolent intent to AirTouch because it filed a considerable number of 929.4875 MHz applications shortly before the imposition of the PCP application freeze.<sup>29/</sup> However, it was

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<sup>26/</sup> See Comments of AirTouch Paging on the Notice of Proposed Rulemaking, WT Docket No. 96-18, filed March 18, 1996 at pp. 8 - 12.

<sup>27/</sup> See Reply Comments of AirTouch Paging, WT Docket No. 96-18, filed April 2, 1996, pp. ii, 4.

<sup>28/</sup> The fact that API included copies of some of these ex parte notices in its Petition conclusively demonstrates that they were matters of public record and available to interested parties.

<sup>29/</sup> See API Petition, p. 19-20.

perfectly natural for AirTouch to seek authority to duplicate the frequency it acquired from Beepage at other AirTouch sites shortly after consummating the transaction.<sup>30/</sup> The Beepage assignment was completed near the middle of December in 1995. Soon thereafter, AirTouch prudently turned its attention to preparing the filings that would be necessary to expand its use of 929.4875 MHz to other areas where the frequency was available. AirTouch has largely automated its application preparation procedures so that it can easily incorporate licensing data electronically from its database of preexisting sites to new applications. As a result, AirTouch was in a position to file a number of applications (480 by API's count)<sup>31/</sup> in a relatively short period of time (i.e., by January 31, 1996). That this undertaking was driven by a legitimate assessment of public service needs and not by the FCC's exclusivity rules is clearly indicated by the fact that AirTouch filed many more than the 300 sites that would have been necessary if its primary motivation had been to game the exclusivity process as API suggests.<sup>32/</sup>

12. API accuses AirTouch of having had special prior notice of the paging freeze and unfairly exploiting this unique knowledge by filing its 929.4875

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<sup>30/</sup> In the course of AirTouch's negotiations with Beepage, AirTouch learned that 929.4875 MHz was available in other areas of the country and that Beepage simply had not chosen to file for it as a nationwide channel. The ability of AirTouch to file 929.4875 MHz on a nationwide basis constituted part of the value AirTouch ascribed to Beepage's assets.

<sup>31/</sup> API contends that AirTouch filed 480 sites on 929.4875 MHz in early February. AirTouch has not taken the time to ascertain the exact number since it is really irrelevant to the issue at hand. However, a brief review of records suggests that the API number is overstated.

<sup>32/</sup> Beepage had over 200 transmitters on 929.4875 MHz in the Northeast alone. Clearly, another 480 were not required for nationwide exclusivity.

MHz applications before the freeze was imposed.<sup>33/</sup> This allegation only further confirms that API has been completely inattentive to what is going on at the Commission. In 1992, the Commission undertook a comprehensive revision of the rules governing common carrier paging licensing in CC Docket No. 92-115 (the "Part 22 Rewrite Proceeding").<sup>34/</sup> In the course of this earlier proceeding, the Commission received some comments suggesting that it adopt a market area licensing scheme for paging in lieu of the transmitter-by-transmitter licensing process that was in place. In its Part 22 Rewrite Order,<sup>35/</sup> the Commission concluded that it lacked a sufficient record upon which to implement without further notice a market area licensing scheme for paging, but clearly indicated its intention to pursue this matter in a separate proceeding encompassing all CMRS paging channels (i.e., common carrier and soon to be reclassified private carrier channels).<sup>36/</sup> As a result, discussions of the implications of implementing an auction-based market area licensing scheme for paging were taking place throughout the paging industry at trade shows, in wireless association meetings, and in conversations with the FCC.<sup>37/</sup> Many in the industry

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<sup>33/</sup> API Petition, pp. 19-20.

<sup>34/</sup> Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services (CC Docket No. 92-115), Notice of Proposed Rulemaking, 7 FCC Rcd 3658 (1992).

<sup>35/</sup> Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services (CC Docket No. 92-115), Report and Order, 9 FCC Rcd 6513 (1994).

<sup>36/</sup> Part 22 Rewrite Order, 9 FCC Rcd at 6516, ¶ 11.

<sup>37/</sup> On information and belief, API was privy to some of these discussions and fully aware that the Commission was actively considering initiating a proceeding to adopt market area licenses for paging.

were concerned that the transition might entail the imposition of a licensing freeze because such freezes had accompanied virtually every Notice of Proposed Rulemaking in which broad geographic market areas were being established for auctions purposes<sup>38/</sup> and a freeze had been imposed when exclusivity was first proposed for the 929 MHz channels. Thus, it was widely known that a freeze was possible, and all prudent paging carriers took steps to file promptly applications that were necessary to meet near-term public needs.<sup>39/</sup> For API to ascribe untoward motives to AirTouch in these circumstances, or to accuse the Commission of giving AirTouch unfair prior notice, is totally inappropriate.

13. API also seeks to attach corrupt intentions to the fact that AirTouch's initial formal comments and reply comments in WT Docket No. 96-18 failed to make specific reference to 929.4875 MHz, while certain ex parte comments offered greater detail on the specific circumstances surrounding this channel.<sup>40/</sup> Again, API makes much of nothing. As earlier noted, the argument of AirTouch and others that they should retain nationwide exclusivity if they completed construction

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<sup>38/</sup> See, e.g., 800 SMR Freeze Order, 9 FCC Rcd. 7988, 8042 (1994); MDS/MMDS Freeze Order, Mimeo No. 34165 released July 28, 1993; 39 GHz Freeze Order, 11 FCC Rcd. 1156 (WTB 1995); 220-222 MHz Freeze Order, 6 FCC 3333, ¶ 4 (1991).

<sup>39/</sup> Attachment 4 hereto is a copy of a public filing AirTouch made on January 31, 1996 in which it openly opposed the imposition of a paging licensing freeze. This public filing was not required by any ex parte rules because it predated the release of the Paging Auction Notice, and thus there was no ongoing rulemaking proceeding that brought the meet-and-disclose rules into play. If AirTouch's knowledge of the possibility of a paging freeze was a deep dark secret resulting from some special access it had to agency information, it would not be likely to air the issue in an entirely voluntary public submission.

<sup>40/</sup> API Petition, p. 6.

within the term of issued authorizations, was based primarily on a principle of law (i.e., that Section 90.495(c) granted exclusivity at the time of initial licensing and not when construction was completed) rather than upon the particular facts pertaining to 929.4875 MHz. It was, therefore, perfectly natural and appropriate for AirTouch to devote its comments in the proceeding to the broader legal issue, rather than to a dissertation of the licensing status of 929.4875 MHz. Early ex parte presentations likewise made no specific reference to 929.4875 MHz.<sup>41/</sup>

14. It was only later in the course of the proceeding that questions arose at the Commission staff level as to the number of channels that potentially were affected by the February 8 construction completion date, and the construction progress and public service records of carriers who were affected by the cut-off. AirTouch provided information concerning its situation on 929.4875 MHz and made the information available to all interested parties through its ex parte notices. This is, of course, the precise reason that the Commission has meet-and-disclose rules governing rulemaking proceedings (i.e., so that a public record will be available to interested parties when new information arises in the course of a proceeding). And, AirTouch scrupulously abided by those ex parte rules by filing detailed summaries of every presentation it made. The fact that API chose to ignore the public record is its own fault, and should not give rise to attacks on the manner in which AirTouch proceeded.

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<sup>41/</sup> See Attachment 5. Had the omission of references to 929.4875 MHz in the formal comments been a mere device to mask AirTouch's real agenda, the specific references to 929.4875 MHz no doubt would have cropped up in the early ex parte presentations.

15. In sum, API is wrong to accuse AirTouch of a surreptitious campaign to garner exclusivity on 929.4875 MHz. If API was unaware of this request, it was because API failed to look. This failure of API to exercise due diligence renders its Petition defective and subject to summary dismissal. Section 1.429(b) of the Commission's Rules<sup>42/</sup> bars a petitioner from basing a reconsideration request on facts that have not previously been presented to the Commission for consideration unless (i) the new facts were unknown to the petitioner until after his last opportunity to present them to the Commission and (ii) the petitioner could not through the exercise of due diligence have learned of the facts in question prior to such opportunity. Certainly, a petitioner cannot satisfy this requirement by ignoring the public record in a rulemaking proceeding, ignoring publicly available licensing documents routinely made available by the frequency coordinator and the Commission, and then claiming surprise.

**III. THE API PETITION IS BASED UPON  
FUNDAMENTAL MISSTATEMENTS OF THE  
OPERATIVE FACTS AND ERRORS OF LAW**

16. The API Petition posits a series of alternative arguments all of which are intended to show that API has been unfairly prejudiced by the manner in which the Commission, AirTouch and PCIA have proceeded in connection with the 929.4875 MHz exclusivity request. Analysis reveals that these arguments are based upon false factual and legal premises.

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<sup>42/</sup> 47 C.F.R. § 1.429(b).

**A. API Received the Exclusivity It Requested on 929.4875 MHz**

17. One constantly recurring theme throughout API's Petition is that its longstanding request for regional exclusivity on the frequency 929.4875 MHz was prejudiced by the AirTouch nationwide exclusivity request.<sup>43/</sup> In fact, API goes so far as to claim that its own request for regional exclusivity was "effectively denied" by the adoption of the market area licensing rules and the grant of nationwide exclusivity to AirTouch.<sup>44/</sup> This is simply untrue. Under the new licensing scheme, API has received and will continue to enjoy all of the protection to which a regionally exclusive licensee is entitled, notwithstanding the grant to AirTouch.

18. Under the PCP exclusivity program, as originally promulgated<sup>45/</sup> and as affirmed on reconsideration,<sup>46/</sup> a carrier is not granted regional exclusivity within a defined geographic area, but rather enjoys protection within the protected contours of the 70 or more transmitters located in up to 12 states that comprise the regional system.<sup>47/</sup> **This is precisely the exclusivity protection that API now enjoys under the new market area licensing rules.** New rule section 90.493(b) makes it clear that reclassified PCP channels are now subject to the licensing rules

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<sup>43/</sup> API Petition, pp. 8-10, 15-16.

<sup>44/</sup> Id., p. 16.

<sup>45/</sup> Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz (PR Docket No. 93-35), Report and Order, 8 FCC Rcd 8318 (1993) ("PCP Exclusivity Order").

<sup>46/</sup> 11 FCC Rcd 3091 (1996).

<sup>47/</sup> See 47 C.F.R. §§ 90.495(a)(2) and (b)(2).

specified in Part 22 of the Commission's Rules.<sup>48/</sup> New rule section 22.503(i) in turn makes it clear that incumbent PCP operators are entitled to co-channel interference protection from all geographic area licensees.<sup>49/</sup> Thus, contrary to API's claim, its regional exclusivity rights have been preserved and protected in the course of the market area licensing proceeding; not ignored or diminished. So, the Commission can and should dismiss summarily API's claim that its regional exclusivity rights have been prejudiced in the course of this proceeding.

19. API is wrong to suggest that it would have been able to **expand** its system beyond the existing contours had it formally been granted regional exclusivity. Regional exclusive licensees are entitled to protection from new facilities, but they never were given expansion rights in areas where they have not filed for facilities and constructed them. The concept behind regional exclusivity was to permit a licensee to have exclusive protected contours in certain areas without having to maintain 6 proximate transmitters in each service area. That benefit still accrues to API under the new rules.<sup>50/</sup>

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<sup>48/</sup> 47 C.F.R § 90.493(b) (1997).

<sup>49/</sup> 47 C.F.R § 22.503(h) (1997).

<sup>50/</sup> API also has not distinguished itself from all other regional exclusive licensees which already have nationwide licensees overhanging them, or will have market area licensees overhanging them. Although API aims its petition solely at AirTouch and the 929.4875 MHz channel, its Petition really seeks to upset the carefully crafted structure the Commission has constructed.

**B. AirTouch and API Are Not Mutually Exclusive Applicants**

20. Another recurring complaint in the API Petition is that the licensing rights being sought by AirTouch and API with respect to 929.4875 MHz are in such conflict as to entitle API to the additional procedural protections normally accorded to a mutually exclusive applicant.<sup>51/</sup> Thus, API argues that the parties' requests for exclusivity on 929.4875 MHz constitute "conflicting private claims to a valuable licensing privilege" which convert the rulemaking proceeding on this issue into a restricted, quasi-adjudicatory proceeding with limited ex parte contact permitted.<sup>52/</sup> Similarly, API argues that it is entitled to the rights of a mutually exclusive applicant under the Ashbacker Radio Corp. v. FCC case.<sup>53/</sup>

21. The Commission must give these API arguments short shrift because the AirTouch and API requests for operating authority on 929.4875 MHz are not mutually exclusive or otherwise in conflict in any legal or practical sense. Indeed, the API Petition completely ignores the licensing distinctions which applied to PCP channels prior to the August 10, 1996 reclassification date (i.e., the date after which PCPs were classified as CMRS). Since PCP channels initially were shared,

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<sup>51/</sup> API Petition, pp. 11-12, 16-17.

<sup>52/</sup> API cites Sangamon Valley Television Corp. v. U.S., 269 F.2d 221 (D.C. Cir. 1959) in support of this proposition. There is, however, absolutely no correlation between the broadcast channel allocation proceedings at issue in Sangamon, and the transition to market area licensing rules for paging at issue in WT Docket No. 96-18. Nor is there any similarity between the ex parte contacts in the Sangamon case which the Court explicitly found "did not go into the public record" (269 F.2d at 224) and the AirTouch contacts which were placed "on the record" through the meet-and-disclose procedures.

<sup>53/</sup> 326 U.S. 327 (1945).

and then were subject to a first-come, first-served exclusivity scheme based upon prior frequency coordination managed by PCIA, traditionally mutually exclusive application processing rules and procedures did not apply. The effort of API to invoke legal principles which pertain only to mutually exclusive applications is, therefore, completely misguided.

22. Because the AirTouch exclusivity request is based upon authorizations requested and licensed after October 14, 1993, AirTouch was required to provide co-channel protection to API's incumbent 929.4875 MHz facilities.<sup>54/</sup> Consequently, in seeking to duplicate the 929.4875 MHz channel at locations around the country after consummating the acquisition from Beepage, AirTouch protected the authorized stations of API in the southeast portion of the U.S. which are depicted on Attachment B of the API Petition.

23. Moreover, AirTouch Paging notified API in writing **prior to the submission of the API Petition** that AirTouch understood and intended to fully abide by its obligation to protect API's incumbent 929.4875 MHz facilities even though AirTouch had been granted nationwide exclusivity. The AirTouch letter, which is included as Attachment F of the API Petition, provides, in pertinent part:

AirTouch understands that [API] currently has stations authorized and in service on 929.4875 MHz in the Southeastern United States. Under the Commission's Rules, those constructed stations are entitled to protection as incumbent

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<sup>54/</sup> See former Section 90.495(b)(4). If API was truly interested in protecting license rights under Section 316, it would acknowledge and accept AirTouch's claim that rescinding the nationwide exclusivity rights granted upon initial licensing of AirTouch's 929.4875 MHz nationwide system based upon an arbitrary retroactively imposed February 8, 1996 construction deadline would have been improper.

facilities. AirTouch will protect [API] from any interference from any new AirTouch nationwide facilities. Further, to the extent that [API] has construction permits for additional facilities on this frequency and places those facilities in service on a timely basis, AirTouch will likewise protect those facilities from interference from any new AirTouch nationwide facilities.

In light of the current licensing situation and AirTouch's explicit recognition of its obligation to protect the API facilities, the Commission should ignore API's contention that the AirTouch and API requests for operating authority on 929.4875 are mutually exclusive, or otherwise represent conflicting requests for a valuable right.

**C. The API Licenses for 929.4875 Have Not been Modified**

24. API also claims that the grant of nationwide exclusivity to AirTouch necessarily involves a corresponding but unstated "modification or nullification" of API's license rights in violation of Section 316 of the Communications Act.<sup>55/</sup> As shown above, API's license rights are not modified, and in fact are to be protected by AirTouch as an incumbent 929.4875 MHz licensee. In actuality the Commission has preserved and protected API's license rights, and it has no basis to contend that its license has been modified.<sup>56/</sup>

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<sup>55/</sup> See API Petition, pp. 13-14.

<sup>56/</sup> To the extent that API is unhappy that its ability to alter its 929.4875 MHz contours has been curtailed by the new licensing scheme, it had complete notice and an opportunity to comment in the rulemaking proceeding. Indeed, many commenters, including AirTouch, argued that some de minimis changes in contours should be allowed by incumbent licensees who do not acquire the market area license. The Commission addressed these comments by allowing incumbents to expand outside of their grandfathered contours with the consent of the market area licensee. Paging Auction Order, ¶ 57.

25. The complaints by API that it has now become locked into its current contours, and will be unable to replace a lost site, again fail to properly reflect the past and present licensing situation.<sup>57/</sup> The Commission previously relaxed the paging application freeze to allow incumbent operators to file expansion sites within 40 miles of an existing operating site.<sup>58/</sup> As far as AirTouch can determine, API made no serious effort to expand its licensing coverage during this period in which the interim freeze was relaxed.<sup>59/</sup> API's protestations that it has been deprived of a valuable right to expand its network seem particularly hollow in light of the complacency shown during this incumbent expansion period.<sup>60/</sup>

26. Equally unpersuasive are API's avowed concerns that it will be precluded from replacing service from any site that it loses. The new rules give an incumbent licensee considerable flexibility to make changes in existing operations within their composite interference contour without prior authorization from the Commission.<sup>61/</sup> This is actually a more liberal modification standard than applied

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<sup>57/</sup> As mentioned earlier, API has completely failed to distinguish its situation from all other regional exclusive licensees who have nationwide licensees overhanging them or who will have market are licensees overhanging them.

<sup>58/</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate the Future Development of Paging Systems (WT Docket No.96-18), First Report and Order, 11 FCC Rcd 16570, ¶ 25 (1996), recon. granted in part, 11 FCC Rcd 7409 (1996).

<sup>59/</sup> API cannot claim that AirTouch's 929.4875 MHz nationwide exclusivity request had any bearing on its actions because API claims to have been unaware of the AirTouch request.

<sup>60/</sup> Indeed, many other incumbent licensees took advantage of this relaxation of the freeze to file applications necessary to continue to serve evolving service demands.

<sup>61/</sup> 47 C.F.R. § 22.165(d)(1) (1997).

when API was first licensed.<sup>62/</sup> Consequently, API has not been prejudiced.

Moreover, the contour map which was included as Attachment B of the API Petition shows an extensive composite interference contour which serves to accord API great leeway in making necessary system modifications over time. The Commission must, therefore, dismiss the stated concerns as being largely inconsequential. In truth, there is nothing unique or compelling about API's situation that should cause the Commission to revisit the incumbent modification and expansion rights that have been adopted by the Commission in this proceeding following the development of a full record.

**D. API Was Not Deprived of Any Notice to Which It Was Entitled**

27. Throughout its Petition, API complains that it was denied explicit written notice that AirTouch's request for nationwide exclusivity on 929.4875 MHz was under consideration by the Commission. API first chides AirTouch for failing to serve copies of its request or the associated applications on API.<sup>63/</sup> Next, API faults PCIA/NABER for failing to notify API that AirTouch had filed a request for exclusivity on a channel of interest to API. Finally, API blames the Commission for releasing its public notice listing certain specific PCP channels that were to be

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<sup>62/</sup> Previously, PCP operators did not have the same flexibility as common carrier carriers to make permissive changes to licensed facilities. Moreover, the use of the composite interference contour as the benchmark for assessing a permissive change is more liberal than the prior Part 22 rule which only allowed changes that maintained coverage within existing interference and service area contours. See Paging Auction Notice, ¶ 39.

<sup>63/</sup> API Petition, p. 3.

exempted from the auction without indicating that other requests, including the AirTouch request, were still under consideration.

28. Conspicuously absent from API's litany of complaints is any citation to a Commission rule that establishes a right in API to the advance written notice that it would have liked. API is seeking the kind of notice that would only pertain to a mutually exclusive applicant -- which is not API's status. Indeed, it is significant that API has failed to provide any evidence that it offered other co-channel carriers within API's region the kind of notice that it now claims it deserved from AirTouch. Nor is there any indication that API complained to PCIA/NABER or the Commission when its various requests for local exclusivity were granted by the Commission without first being listed for comment by potentially adverse parties in a Commission public notice. The Commission should be wary when a licensee seeks to impose obligations on others which have not been undertaken by the licensee itself.

29. API's criticism of the Commission's public notice listing the nationwide PCP channels that had been found to be exempt from the auction proceeding is specious. As is clear from the language of that document, the notice was only intended to list those channels which had been found by the Commission to be fully constructed on a nationwide basis as of February 8, 1996. AirTouch's 929.4875 MHz channel did not fit this criterion, and thus was properly excluded from the notice at that time. Nevertheless, the fact that AirTouch and others were seeking to have the February 8 construction completion deadline removed was a matter of public record. API simply has no basis to complain.