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

ORIGINAL

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)

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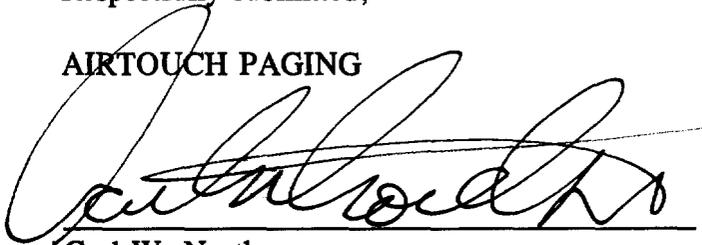
To: The Commission

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

AirTouch Paging, by its attorneys, hereby submits an Erratum to the "Opposition of AirTouch Paging to the Petition of American Paging, Inc. for Partial Reconsideration" filed April 9, 1997 in the above-captioned proceeding. Due to a clerical error, the final round of edits to the Opposition was not reflected in the version of the Opposition that was filed. Electronically red-lined versions of the pages containing corrections are attached hereto and are being served on the parties of record.

Respectfully submitted,

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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~~ were pursuing conflicting interests ~~on~~ in 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.

perfectly natural for AirTouch to seek authority to duplicate the frequency it acquired from Beepage at other AirTouch sites shortly after consummating the transaction.^{30/} 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)^{31/} 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 ~~than~~ that AirTouch filed many more than the 300 sites ~~than~~ that would have been necessary if its primary sole motivation had been to ~~game the~~ garner exclusivity ~~process~~ as API suggests.^{32/}

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

^{30/} 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.

^{31/} 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.

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

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 were in such sufficient conflict as to entitle API to the additional procedural protections normally accorded to a mutually exclusive applicant.^{51/} 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.^{52/} Similarly, API argues that it is entitled to the rights of a mutually exclusive applicant under the Ashbacker Radio Corp. v. FCC case.^{53/}

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,

^{51/} API Petition, pp. 11-12, 16-17.

^{52/} 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.

^{53/} 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~~ **traditional** 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.^{54/} 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

^{54/} 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 MHz 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.^{55/} 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.^{56/}

^{55/} See API Petition, pp. 13-14.

^{56/} 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.

IV. AIRTOUCH IS IN COMPLIANCE WITH SECTION 90.495(d)

30. API concludes its Petition with an unsubstantiated claim that the request of AirTouch for nationwide exclusivity on 929.4875 MHz may not be in compliance with Section 90.495(d), which generally requires an applicant to satisfy the exclusivity criteria on one channel before requesting another exclusive channel assignment.^{64/} Analysis indicates that the grant of nationwide exclusivity to AirTouch in 929.4875 MHz is in full accord with the cited rule section.

31. The Report and Order which established the PCP exclusivity rules made clear with respect to grandfathered systems (*i.e.*, those authorized prior to October 14, 1993) that the Commission would not withhold exclusivity **n on** a second frequency pending construction of another system.^{65/} The resulting inapplicability of Section 90.495(d) of the rules to grandfathered systems is conclusively demonstrated by the Commission's initial Public Notice granting PCP exclusivity to incumbents.^{66/} This release accorded several carriers exclusivity rights on multiple channels in overlapping areas notwithstanding the strictures of 90.495(d). Both of AirTouch's nationwide PCP frequencies -- 929.4125 and 929.9375 MHz -- were grandfathered nationwide exclusive systems and thus would be exempt from 90.495(d).

32. More importantly, AirTouch is operating extensive systems which meet the applicable construction standards. While API marvels at the fact that

^{64/} API Petition, pp. 22-23.

^{65/} PCP Exclusivity Order, 8 FCC Rcd 8318, 8328 at n. 56 (1993).

^{66/} Public Notice, DA 94-564, Mimeo 43234, released May 27, 1994.

AirTouch would have to be operating in excess of 1100 sites to support all of its exclusive channel requests, in fact AirTouch has many more 929 MHz sites than this in operation. **At present, AirTouch has approximately 3900 sites in service nationwide.** Given this fact, the idle speculation by API that AirTouch may not meet the governing standard must be given absolutely no serious consideration.

33. With specific reference to 929.4875 MHz, the Commission's records do in fact contain specific information demonstrating compliance with Section 90.495(d). AirTouch has previously certified to the Commission, with respect to every one of its exclusive channels other than 929.4875 MHz, that construction had been completed of a sufficient number of transmitters on a single count basis to meet the applicable exclusivity standards. Thus, at the time that the exclusivity request for 929.4875 MHz was submitted, this was the only unconstructed channel for which exclusivity was being sought at the time. Under these circumstances, API has no basis to ~~content~~ **contend** that the strictures of 90.495(d) have not been satisfied.

V. CONCLUSION

34. API purports to want the Commission to reopen the record of this proceeding **ab initio** and to take further evidence regarding the AirTouch exclusivity request on 929.4875 MHz. Conspicuously absent from the API Petition is any showing that the result would or should be different following further proceedings. API has failed to offer any reason for the Commission to reconsider its core determination under Section 90.495(c) of the rules that nationwide exclusivity rights were earned at the time of initial licensing subject to the completion of construction.

CERTIFICATE OF SERVICE

I, Yvette Omar, a legal secretary with the law firm of Paul, Hastings, Janofsky & Walker LLP, hereby certify that I have on this 10th day of April, 1997, caused a true and correct copy of the foregoing **Erratum to Opposition of AirTouch Paging to the Petition of American Paging, Inc. for Partial Reconsideration** to be delivered via first class mail, U.S. postage prepaid, to the following:

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