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

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Federal Communications Commission
Office of Secretary

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

To: The Commission

COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

AirTouch Paging ("AirTouch"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[1/] hereby submits these comments on the *Further Notice of Proposed Rulemaking* ("*FNPRM*") adopted in this proceeding. The following is respectfully shown:

I. INTRODUCTION

1. AirTouch provides local, state, regional, and nationwide wireless messaging services throughout the United States. AirTouch operates on both shared and exclusive frequencies in the VHF, UHF and 900 MHz frequency bands. The *FNPRM* seeks comment on whether additional construction requirements should be imposed on paging systems licensed on a nationwide basis, whether geographic licensees (including holders of nationwide licenses) should be permitted to partition and/or disaggregate licenses, and what procedures could be implemented to reduce fraud associated with the licensing of shared channels.

1/ 47 C.F.R. §§ 1.415, 1.419.

II. DISCUSSION

A. The Commission Should Decline to Impose Additional Construction Obligations on Nationwide Licensees

2. AirTouch strongly opposes the imposition of additional construction requirements on nationwide licensees.[2/] The Commission's Rules relating to nationwide exclusivity on private carrier paging ("PCP") channels, which comprise the vast majority of nationwide licenses, were adopted in late 1993 and were under reconsideration until February, 1996. The Commission did not commence granting nationwide exclusivity to PCP licensees until mid-1994; the grant of several additional PCP nationwide licenses was announced even more recently by the Commission in a *Public Notice* released on May 10, 1996[3/] in connection with this proceeding, and most recently on February 24, 1997, when the *Order* adopted in this proceeding was released. Consequently, many carriers have only recently completed construction of nationwide PCP systems in accordance with the existing rules.[4/] As a result of their compliance with those rules, these nationwide PCP licensees had a reasonable expectation that they would enjoy exclusivity on a nationwide basis.

3. To impose additional construction obligations now, while some nationwide licensees have only recently completed construction, would penalize licensees who budgeted and scheduled construction of extensive systems consistent with the Commission's Rules. In addition, it would place in jeopardy the licenses of companies who complied fully with the Commission's Rules pertaining to exclusive nationwide systems which were in effect at the time they were initially licensed. The Commission should not retroactively change the nature of, or effectively abolish, nationwide licensees' rights in this proceeding.

2/ *FNPRM*, para. 202.

3/ DA 96-748, released May 10, 1996.

4/ Pursuant to 47 C.F.R. § 90.495(a)(3), nationwide licensees are required to construct at least 300 transmitters and must provide service to at least 50 of the top 100 markets, including 25 of the top 50 markets, and two markets in each of the seven RBOC regions.

4. Moreover, additional construction requirements for nationwide exclusive systems are unnecessary and do not serve the public interest. Under the Commission's existing rules, nationwide PCP licensees are required to construct at least 300 appropriately dispersed transmitters. This construction obligation represents a significant undertaking, consuming substantial human and financial resources. This investment alone, as observed by the Commission in adopting these construction requirements, encourages nationwide licensees to continue to expand nationwide systems.[5/] Competition in the marketplace provides an additional incentive for licensees to construct additional sites.[6/] The Commission repeatedly has concluded that the paging industry is highly competitive, and that different policy considerations are warranted.[7/] Paging companies compete based upon several factors, including geographic service footprint. Consequently, nationwide licensees face competitive pressure to establish systems which can compete with those of other nationwide licensees and respond to consumer demand. Finally, nationwide licensees, like other CMRS providers, must demonstrate that they provide substantial service in order to earn a license renewal expectancy. The Commission should therefore decline to impose additional construction requirements on nationwide licensees.

B. The Commission Should Adopt Flexible Partitioning Rules

5. AirTouch supports the Commission's proposal to permit extensive partitioning of paging license areas.[8/] Partitioning serves the public interest by providing licensees with flexibility, results in more efficient use of spectrum, eliminates market entry barriers and encourages market participation by small businesses, promotes competition, and

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5/ *Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz*, 8 FCC Rcd. 8318, 1993, para. 14.

6/ For example, only a mere five years ago, a nationwide system might have 400 transmitters; now, many have over 1,000.

7/ See, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 10 FCC Rcd. 8844, 1995, para. 67.

8/ *FNPRM*, para. 204.

expedites the introduction of service to underserved areas.[9/] The adoption of flexible partitioning rules also promotes regulatory parity.[10/] In light of the foregoing, the Commission should adopt flexible geographic partitioning rules. These rules should permit partitioning of service areas consistent with any service areas defined by the partitioning parties, and should not establish minimum or maximum partition areas.

6. AirTouch agrees with the Commission that certain conditions should be imposed on the partitioning of geographic areas by licensees who obtained the spectrum through bidding credits and installment payments. As a preliminary matter, AirTouch reiterates that several parties to this proceeding, including AirTouch, opposed the application of bidding credits and installment payments to the paging auctions because they did not serve the public interest.[11/] In addition to the lack of evidence that small businesses have been unable to participate in the paging industry, AirTouch respectfully submits that flexible partitioning and disaggregation rules promote the participation of small businesses in the paging industry, thereby making further competitive bidding benefits unnecessary. Notwithstanding those arguments, the Commission has adopted bidding credits and installment payments for entities qualifying as small businesses. In the context of that decision, AirTouch submits the following comments on geographic partitioning by small businesses.

7. AirTouch agrees with the Commission that partitionees who do not qualify for competitive bidding benefits (i.e., do not meet the Commission's definition of "small businesses") should be required to pay, immediately upon consummation of the partitioning, the outstanding principal due, plus interest, and reimburse the FCC for the amount of the benefit

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9/ For these same reasons, AirTouch also supported the adoption of flexible partitioning rules for narrowband PCS. See, Joint Comments of AirTouch Paging and PowerPage, Inc. filed February 10, 1997 in WT Docket No. 96-148.

10/ Partitioning already has been proposed or adopted with respect to broadband and narrowband PCS, 800 MHz SMR, 900 MHz SMR, 220 MHz, Wireless Communications Services, cellular, GWCS, and MDS.

11/ Comments of AirTouch Paging filed March 18, 1996 at pp. 47-50.

received from bidding credits and installment payments, relating to the portion of the geographic area which has been partitioned.[12] These calculations should be based upon the number of POPS and amount of spectrum in the partitioned area regardless of the amount paid by the partitionee to the partitioner.

8. Partitionees who do qualify as small business should be permitted to take advantage of the installment payment program to satisfy their financial obligation, and should be required to assume the partitioner's obligation to make installment payments, but only to the extent the partitioner has the benefit of such program. Moreover, in order to discourage licensees from engaging in sham partitioning arrangements, both the partitionee *and the partitioner* should be responsible for payment of the financial obligations associated with the partitioned area, and a default by either should result in automatic termination of both licenses.[13]

9. AirTouch agrees with the Commission that both the partitioner and partitionee should be subject to the same build-out requirements *within each of their respective licensed areas*,[14] with an important exception. The construction requirements adopted in the *Order* provide that licensees may meet either the three- and five-year construction benchmarks or demonstrate, after five years, that they provide substantial service to the market. AirTouch strenuously opposed the "substantial service" alternative to specific construction requirements,

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12/ *FNPRM*, paras. 205-206.

13/ Such a sham arrangement could benefit a licensee who only constructs a system covering 1/3 of 1/2 of the license area. The licensee could partition a portion of the market in return for a nominal amount of money from the partitionee, knowing that the partitionee intends to default on repayment to the FCC and does not intend to construct facilities. The result is that the original licensee (absent the safeguards advocated by AirTouch) would be able to retain a license for the smaller area in which it constructed a system, and would avoid the financial obligation associated with the second 1/2 of the market in which it did not build.

14/ *FNPRM*, para. 209.

warning that this alternative standard invites mischief.[15] AirTouch believes that the applicability of the substantial service alternative to partitioned areas will prove even more dangerous. Several parties in this proceeding demonstrated that paging services typically are wide-area services, not characterized by niche service offerings. Still, the Commission has decided to permit geographic licensees to make the alternative showing of substantial service in their respective market areas, i.e., MTAs and EAs. In the case of a partitioned license area, however, which could be significantly smaller than an MTA or EA, the failure to impose minimal construction requirements could encourage, and protect, parties seeking to provide service to subscribers with as little as one transmitter. Systems so limited in scope and capacity cannot provide the wide-area services historically sought from paging providers. Also, this loophole in the construction requirements is inconsistent with prior Commission policies adopted to encourage investment in paging systems.

10. AirTouch agrees with the Commission that the license term of the partitionee should be the same as that of the partitioner.[16] The partitionee should receive the same rights as the original licensee acquired in the auction.[17] The partitionee should be entitled to a renewal expectancy based upon a demonstration that it provides substantial service in its license area.

C. The Commission Should Adopt Flexible Disaggregation Rules for Paging

11. AirTouch supports the adoption of flexible disaggregation rules.[18] Like partitioning, disaggregation provides licensees with flexibility, encourages efficient use of the

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15/ Comments of AirTouch Paging filed March 18, 1996 at pp. 18-21.

16/ *FNPRM*, para. 211.

17/ As the Commission noted, the partitionee cannot receive a license term longer in duration than that acquired by the partitioner, because the partitioner does not hold the longer license term to partition.

18/ *FNPRM*, para. 212.

spectrum, and promotes regulatory parity.[19] AirTouch submits that flexible disaggregation rules should be adopted which permit parties to assess the feasibility of and benefits associated with spectrum disaggregation. This approach is consistent with the Commission's policy of permitting flexible use of the spectrum.[20]

12. AirTouch submits that the rules relating to spectrum disaggregation by licensees who qualified for competitive bidding benefits during the auction should be identical to those adopted with respect to partitioning. Non-qualifying disaggregatees should be required to submit complete payment of principal and interest due at the time of disaggregation, and to reimburse the Commission for the bidding credit and installment payment advantages gained by the original licensee.[21] Calculations of these amounts should be based upon the number of POPS covered and the amount of spectrum disaggregated. The license term of the disaggregatee should be the same as that of the disaggregator, and the disaggregatee should be entitled to a renewal expectancy based upon a demonstration that substantial service is being provided.[22]

13. AirTouch respectfully submits that both the disaggregatee and the disaggregator should be required to comply with the build-out requirements.[23] The Commission's proposal to permit either of these licensees to meet the construction built-out requirements would permit licensees who have not effectively utilized their spectrum to cherry-

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19/ See, Joint Comments of AirTouch Paging and PowerPage, Inc. filed February 10, 1997 in WT Docket No. 96-148.

20/ See, Gregory L. Rosston and Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest, January 1997.

21/ *FNPRM*, para. 214.

22/ *FNPRM*, para. 217.

23/ *Cf.*, *FNPRM*, para. 216.

pick by engaging in sham transactions in order to retain and pay for only that portion of the spectrum which they intended to use.[24/]

14. AirTouch believes that a combination of partitioning and disaggregation should be permitted.[25/] Rules which accommodate both partitioning and disaggregation promote the participation of small businesses in the paging industry and the efficient use of spectrum.

D. The Commission Should Adopt Additional Measures to Reduce Fraud Associated with Shared Channel Licensing

15. AirTouch agrees that additional measures should be adopted to reduce fraud associated with the licensing of shared channels.[26/] In earlier stages of this proceeding, AirTouch supported the exclusive licensing and auction of shared channel spectrum. Much of this spectrum, e.g., AirTouch's 152.48 MHz channel, has been heavily constructed and provides wide-area service to many subscribers. AirTouch submits that it would be reasonable to convert these channels to an exclusive licensing scheme to limit the opportunity for additional congestion on these channels. The exclusive licensing and auction of current shared channels also would eliminate the fraud previously experienced in connection with the allocation of shared channels.

16. Notwithstanding the above, AirTouch believes there are other measures which the Commission could implement in an effort to curb fraud associated with shared channel licensing. AirTouch notes that paragraph 219 of the Commission's *FNPRM* provides an excellent concise description of the risks associated with shared channel investments. The text of this paragraph could be incorporated into publicly-distributed information as well as into the signature block on the FCC Form 600. Application mills should be required to incorporate this cautionary language into solicitations in a conspicuous manner, so that prospective investors

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24/ This situation is analogous to the sham partitioning arrangement described above in footnote 13.

25/ *FNPRM*, para. 218.

26/ *FNPRM*, para. 220.

would be provided with information material to their assessment of the quality of the investment.[27] The distribution of this information, and its inclusion in the FCC Form 600 may assist in reducing fraud on the "front end," i.e., before investors obtain their licenses.

17. Fraud also is experienced on the "back end," i.e., after investors obtain licenses which are then further devalued by the current licensing process which could result in the licensing of several other parties on the same frequency in the same area. AirTouch proposes that the Commission work with the Personal Communications Industry Association to ensure that a limited number of applicants are licensed on the same frequency in the same area. Although this would not convert these licenses to exclusive status, it would provide some measure of protection against dilution of the value of licenses acquired.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, AirTouch respectfully requests that the Commission adopt rules consistent with the proposals set forth herein.

Respectfully submitted,

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27/ Typically, this would be in capital letter print and bold face type.

Certificate of Service

I, Myra Burke, a secretary with the law firm of Paul, Hastings, Janofsky & Walker LLP, hereby certify that a copy of the foregoing **Comments on Further Notice of Proposed Rulemaking**, was sent via first class U.S. mail, postage prepaid, or hand-delivered on this 17th day of April 1997, to the following:

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