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June 3, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

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 Opposition to Motion for Leave to Respond and to Response to Reply to Opposition filed by AirTouch Paging.

If there are any questions or comments concerning this matter, please communicate with the undersigned.

Very truly yours,

George Y. Wheeler

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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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

AMERICAN PAGING, INC. OPPOSITION TO
MOTION FOR LEAVE TO RESPOND AND TO RESPONSE
TO REPLY TO OPPOSITION OF AIRTOUCH PAGING

American Paging, Inc., on behalf of itself and its subsidiaries (collectively "API"), by its attorneys, hereby opposes the Motion for Leave to Respond and Response to Reply to Opposition of AirTouch Paging ("AirTouch") dated May 19, 1997 ("Motion") in the above-captioned proceeding.

* * *

AirTouch's Motion should be denied as an improper attempt to "reply to a reply."[1] The so-called "new arguments" of API were made in response to numerous references in AirTouch's April 9 Opposition in which it claimed to have earned nationwide exclusivity rights at the time of "initial licensing."[2] In response to those claims we

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1 Joppa Associates, 10 FCC Rcd 13103 (1995).

2 AirTouch Opposition, pp. 3-4, 11-12 and 23-24.

presented our own analysis of the relevant facts demonstrating that AirTouch had not obtained Commission approval by February 8, 1996 and therefore was not entitled under Section 90.495(c) of the Commission's rules to retain exclusive status.

AirTouch has chosen the extraordinary step of filing an unauthorized "reply to a reply" because its failure to obtain Commission approval as described in our April 21 Reply means that the Commission should now rescind the grant of nationwide exclusivity on 929.4875 MHZ. It uses the gambit of claiming surprise in an attempt to have an unauthorized second chance to prove its case. If there is any question on this point the Commission should note that significant portions of its Motion repeat or amplify arguments previously made in its Opposition which have no ostensible connection to the so-called "new arguments."[3] AirTouch has provided no compelling reason for the Commission to sanction this unauthorized additional pleading.

In the event, however, the Commission accepts the filing by AirTouch of its Motion as an additional filing under Section 1.45(d) of the Commission's rules, we request that our further analysis of AirTouch's new arguments here also be accepted so that the Commission's determinations "...will be based on as complete a record as possible" and a full analysis of relevant legal precedents.[4]

DISCUSSION

AirTouch claims that it was "initially licensed" within the meaning of former

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[3] AirTouch Motion, p. 2, 3, and 6.

[4] See MCI, 10 FCC Rcd 1072, 1973 (1994). See also TRAC, 4 FCC Rcd 3769 (1989).

Section 90.495(c) of the Commission's rules when its applications were first filed with the Commission.[5] This claim is unjustified legally and factually and contrary to the Commission's established procedures and practices.

1. The failure of AirTouch to make any demonstration in its request for nationwide exclusivity of compliance with the Commission's anti-spectrum hoarding rules[6] or otherwise on the record in these proceedings precluded grant of "initial licensing" under the Commission's former rules as well as grant in these proceedings. If the Commission finds that AirTouch was not eligible to file its nationwide exclusivity request as of February 8, 1996, AirTouch clearly has no basis on which it can claim that grant of nationwide exclusivity is justified under the Commission's former rules.

2. AirTouch's Motion does not present any Commission staff ruling, case authority or other justification for its claims that the self-certification by an applicant under Section 90.159 of the Commission's rules constitutes "initial licensing." Former Section 90.495(c) makes no mention of self-certification under Section 90.159 of the Commission's rules. Nor is this self-certification procedure cited in the Commission's Public Notice (DA 93-1411) dated November 19, 1993 which outlines its procedures for the filing and processing of exclusivity requests for existing and proposed paging

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[5] AirTouch Motion, p. 7. Unlike the circumstances of other nationwide exclusivity requests in these proceedings, AirTouch's request was filed in a last minute attempt to beat the Commission's February 8, 1996 freeze deadline. As discussed in our April 21 Reply (pp. 2-3), its request and all related applications remained pending at that deadline. AirTouch's claims to have obtained Commission authority before February 8 are legally wrong and factually untrue.

[6] Former Section 90.495(d) of the Commission's rules.

systems. In pertinent part, this Public Notice states:

> "NABER will review all submissions for compliance with the exclusivity criteria, after which the requests will be forwarded to the Commission for final review and approval."

In the absence of any such reference in this former rule or in the foregoing Public Notice, it is clear that the Commission did not intend the mere act of filing an exclusivity request to confer immediate grant of nationwide exclusivity as AirTouch now claims.

4. The language of Section 90.159(d) referencing Section 90.175(d) of the Commission's rules confirms that Section 90.159 is not intended to delegate to applicants the Commission's mandated "licensing" responsibilities. Section 90.175(d) states in pertinent part:

> "Any [coordination] recommendation...is advisory in character and is not an assurance that the Commission will grant a license for operation on that frequency." (Emphasis supplied)

The language of Section 90.159(d) of the Commission's rules also confirms the extremely narrow scope of this temporary operating authority where it states that "...the applicant assumes all risks associated with operation under conditional authority, the termination or modification of conditional authority, or the subsequent dismissal or denial of its application." AirTouch's reliance upon self-certification under Section 90.159 as a basis for claiming binding exclusive channel rights is misplaced and contrary to the plain language of this rule.

5. Section 90.159 temporary operating authority is intended to facilitate early commencement of radio operations for "routine" applications for individual radio

station licenses.[7] Nationwide geographic exclusivity is potentially worth tens of millions of dollars of new asset value to AirTouch and confers future operating rights for vast areas beyond those covered by AirTouch's facilities proposals. The grant of the exclusivity on a nationwide geographic basis as requested by AirTouch can hardly be considered the equivalent of "routine" processing of individual radio station licenses.

6. Furthermore Section 90.159 is specifically tailored to situations where "no major issues" regarding applicant eligibility or interference rights are presented.[8] In this case, AirTouch had made no showing of eligibility under former Section 90.495 (d). The terms of the grant of nationwide exclusivity 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. AirTouch's claim that self certification procedures under Section 90.159 somehow overcome the procedural defects in its own request and permanently foreclose the co-channel rights of API and others is absurd.

7. Finally, AirTouch claims that it would be unfair for the Commission to

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[7] Amendment of Part 90 of the Commission's rules to Implement a Conditional Authorization Procedure, 4 FCC Rcd 8280, 8283 (1989).

[8] See Amendment of Parts 1, 2, and 90 of the Commission's rules to Implement a System of Temporary Licensing, 81 F.C.C. 2d 373, 377 (1980).

rescind the nationwide authorization that AirTouch obtained by stealth.[9] But Section 90.159 of the Commission's rules states that construction and operation under this self-certification procedure is entirely at the applicant's risk. AirTouch chose to expand its facilities on 929.4875 MHZ knowing that the Commission had taken no action on its request for nationwide exclusivity on 929.4875 MHZ prior to the February 8, 1996 processing freeze.[10] Perhaps AirTouch did so because it also knew, as confirmed in its Comments filed March 18, 1996 (pp. 7-8), that all of its "incumbent" facilities would be entitled to full protection from interference in any event.[11] In addition, in the event AirTouch's request for nationwide exclusivity on 929.4875 MHZ is rescinded, it undoubtedly expects to be able to apply and to bid for geographic licenses on this channel. This is not unfair to AirTouch. The Commission should focus instead on the unfairness to API, other comparably situated co-channel incumbents and other potential bidders for geographic licenses on this channel, if AirTouch were somehow permitted to retain nationwide exclusive rights. The co-channel geographic rights of all other potential licensees on 929.4875 MHZ would be permanently precluded if rescission is not granted.

* * *

The Commission now has ample justification as discussed in our April 21 Reply

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9 AirTouch Motion, p. 7.

10 See the Commission NPRM, para. 148.

11 Ibid.

to rescind AirTouch's grant. We originally requested that the Commission reopen these proceedings to consider the nationwide exclusivity request of AirTouch ab initio. These and the other steps which we requested to afford procedural safeguards to API, other co-channel licensees, potential bidders for geographic licenses and other interested persons may no longer be necessary. The Commission should rescind grant of nationwide authority to AirTouch and prepare to auction geographic licenses on 929.4875 MHZ.

Respectfully submitted,

AMERICAN PAGING, INC.

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June 3, 1997

CERTIFICATE OF SERVICE

I, Judy Norris, a legal secretary in the law firm of Koteen & Naftalin, certify that on the 3rd day of June, 1997, copies of the foregoing were deposited in the U.S. mail, postage prepaid, addressed to the following:

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