DOCKET FILE COPY ORIGINAL

RECEIVED
JUL 21 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS | ) | GEN Docket No. 90-314<br>ET Docket No. 92-100 |
| | ) | |
| Implementation of Section 309(j) the Communications Act -- Competitive Bidding, Narrowband PCS | ) | PP Docket No. 93-253 |

To: The Commission

## REPLY COMMENTS OF AIRTOUCH PAGING

AirTouch Paging ("AirTouch"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules,[1/] hereby replies to the comments on the Further Notice of Proposed Rulemaking (the "Further Notice")[2/] in the above-captioned proceeding. In reply, the following is respectfully shown:

### I. Preliminary Statement

1. AirTouch filed comments on the Further Notice on June 18, 1997[3/] that argued that:

(a) the public interest is served by converting the smallest service areas from Basic Trading Areas ("BTAs") to Major Trading Areas ("MTAs");

---

1/ 47 C.F.R. § 1.415.

2/ Report and Order and Further Notice of Proposed Rulemaking, GEN Docket No. 90-314; ET Docket No. 92-100; PP Docket No. 93-253, FCC 97-140, released April 23, 1997.

3/ See Comments of AirTouch Paging on the Further Notice of Proposed Rulemaking, filed June 18, 1997.

(b) the existing allocation should not now be radically altered to create additional regional and nationwide channels;[4] and

(c) the 1 MHz of narrowband spectrum in reserve should not be released at this time.[5]

Similar positions supporting AirTouch have been taken by a broad cross-section of other commenters in the proceeding.[6] Rather than reargue these points on reply, AirTouch will comment only on matters on new issues raised by others.

## II. Construction and Coverage Requirements

2. A broad range of opinion was expressed by commenters on the construction and coverage requirements that apply to narrowband PCS spectrum. For instance, one commenter advocates eliminating the current geographic/population buildout requirements altogether, believing the Commission should allow the marketplace to dictate where and how quickly narrowband services will be implemented.[7] Others argue that the Commission should retain the current five- and

---

4/ Comments of AirTouch, Section III.

5/ Comments of AirTouch, Section IV.

6/ Arch Communications Group, Inc. ("Arch"), Benbow PCS Ventures, Inc. ("Benbow"), Celpage, Inc. ("Celpage"), CONXUS Communications, Inc. ("Conxus"), Metrocall, Inc. ("Metrocall"), PageMart, Inc. ("PageMart"), Paging Network, Inc. ("PageNet"), and the Personal Communications Industry Association ("PCIA") all share AirTouch's view that BTAs are too small to reflect efficient narrowband service territories. Ameritech Mobile Services, Inc. ("Ameritech"), API, Conxus, Merlin, Pagemart, PageNet and the Rural Telecommunications Group ("RTG") all oppose the creation of new regional or nationwide licenses, principally on the ground that it is unfair to alter the allocation scheme in midstream. Ameritech, API, Arch, Benbow, Metrocall, CelPage, Morgan Stanley, Motorola, Inc., PageMart, PageNet, and PCIA all oppose the release of the additional 1 MHz of spectrum at this time.

7/ Comments of Ameritech, p. 2. Ameritech did support an alternative "substantial service" standard, but has asked the Commission to clarify its meaning. Id. at p. 4.

ten-year construction benchmarks.[8] Yet another group believes that definitive construction and coverage requirements are needed, but that the existing compliance dates should be extended because of significant delays in the development and delivery of suitable narrowband equipment.[9]

3. AirTouch agrees with those Commenters who argue that meaningful, quantifiable construction and coverage requirements must be maintained, but that the current benchmarks should be adjusted to reflect delays in the development of a competitive and robust narrowband PCS equipment market. Since regional and nationwide narrowband PCS service areas are quite large, the Commission should adopt a licensing scheme that contains effective mechanisms for recapturing spectrum and returning it to the public domain if it is not put to use in significant portions of the authorized service areas within a reasonable time. Concrete geographic area or population coverage standards are the best method for achieving this result.

4. Like many other commenters, AirTouch believes that a "substantial service" standard is unworkable.[10] A significant number of carriers have filed comments both in this proceeding and in the market area licensing docket for

---

8/ See, e.g. Comments of Metrocall, p. 8; Celpage, p. 10; PageMart, p. 6; PageNet, p. 12; PCIA, p. 13.

9/ See, e.g. Comments of Arch, p. 15-19; Benbow, p. 13-15; CONXUS, p. 14.

10/ See Comments of Benbow, pp. 13-14; CONXUS, p. 11; Merlin, p. 7; PageMart, p. 7; PageNet, p. 12; PCIA, p. 14; and RTG, p. 12, all of which oppose a "substantial service" standard as being too vague.

for paging channels[11/] indicating that they do not understand what substantial service means, and that this uncertainty would breed litigation.[12/] The public interest demands that the development of innovative narrowband services not become mired in licensing disputes which would distract the attention of the Commission and the carriers from other higher public interest pursuits.

5. Accordingly, AirTouch supports those Commenters who suggest that the current 5-year and 10-year construction benchmarks be adjusted to reflect delays in the development and delivery of narrowband equipment by manufacturers. Although manufacturers have clearly made progress in the development of narrowband technology, the move to commercial sales is taking much longer than expected. Carriers are just now starting to see announcements from equipment manufacturers other than Motorola indicating they are taking orders for narrowband equipment. Unfortunately, announcements of this nature often precede actual equipment production and availability by a considerable margin. Thus, the industry has not reached a point where multiple manufacturers are competing with off-the-shelf equipment.

6. The Commission should not retain construction benchmarks that could effectively force carriers to acquire equipment on a "sole source" basis or build with equipment that is not yet ready for commercial production. Just as competition enhances the quality and cost of communication services, meaningful competition

---

11/ See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 97-59, released February 24, 1997, para. 60.

12/ See e.g., Comments of Metrocall, p. 9; PageNet, pp. 13-14.

between equipment vendors will enhance the price and quality of hardware. In addition, the paging industry has been very successful because it has been able to use commercially available equipment produced in mass quantities. If the current benchmarks are retained, narrowband licensees will be required to either sole source the equipment or use prototype systems with their attendant customer service problems.

7. Accordingly, the public interest demands that the Commission adjust the construction and coverage requirements. Arch and Benbow have suggested that the initial 37.5% population benchmark be moved out to the 10-year period.[13/] CONXUS suggests that the 5-year benchmark be retained, but that it not start to run until the date on which the last narrowband PCS license from the already allocated spectrum has been granted.[14/] In AirTouch's view, either formulation is supported by the public interest and therefore should be adopted by the Commission.

## III. Response Channel Use and Eligibility

8. The current rules limit eligibility for paging response channels to licensees of conventional one-way paging base stations licensed under Parts 22 or 90 of the Rules, and limit use of the channels to "paired communication with existing paging channels to provide mobile-to-base station communications."[15/] The Further Notice asked whether these eligibility and use restrictions should be revisited.

---

13/ Comments of Arch, pp. 17-18; Benbow, p. 15.

14/ Comments of CONXUS, p. 14.

15/ 47 C.F.R. § 24.130.

9. Again, the comments reflect a great diversity of opinion. Some commenters advocate maintaining existing use and eligibility restrictions[16/] while others favor relaxing the use and eligibility restrictions to make all narrowband spectrum licensees eligible to apply for response channels and to couple them with existing spectrum licensed under Parts 22, 24, and 90 of the Rules. Other commenters advocate eliminating the eligibility restrictions altogether to encourage new entrants.[17/]

10. AirTouch generally has opposed narrow eligibility and use restrictions on spectrum on the ground that the communications marketplace is too dynamic for the Commission to maintain and administer such restrictions effectively and fairly. In this particular instance, the restriction on the use of response channels in paired communication only with existing traditional paging channels could be viewed as an unwarranted effort to micromanage spectrum uses. AirTouch supports eliminating the use restriction.

11. As for eligibility, AirTouch does not believe that low-powered 12.5 kHz response channels are especially useful on a stand-alone basis, particularly in light of other spectrum that is available or coming on-line. As a result, AirTouch believes that allowing applications by other than existing narrowband licensees will have no practical affect when the auctions take place. There would appear, therefore, to be no reason to eliminate the eligibility restrictions. Accordingly, the public

---

16/ See Comments of Ameritech, p. 8; Arch, pp. 11-12; Metrocall, p. 9; CelPage, p. 12; Motorola, p. 8; and PCIA, p. 11.

17/ See Comments of Merlin, p. 6.

interest is best supported by eliminating use and eligibility restrictions on the response channels.

## IV. The Narrowband Spectrum Cap

12. The Further Notice asked whether the current narrowband spectrum cap should be lifted. Some commenters support the elimination of the cap.[18/] Others believe there is no need to modify the cap at this time.[19/] PCIA advocates deferring decisions regarding the cap until a spectrum study it proposes is completed.[20/]

13. AirTouch generally opposes spectrum caps. A spectrum cap seems particularly anomalous for narrowband PCS spectrum because other Commission licensees with much broader bandwidth are free to provide competing narrowband services with no limitation on how much bandwidth they might devote to such an enterprise. For example, a cellular or PCS provider with 25 MHz to 40 MHz of spectrum could devote 4 MHz of such spectrum exclusively to narrowband services without violating any Commission rule.

14. The benefits of a narrowband spectrum cap also are questionable in light of the manner in which narrowband service providers have garnered spectrum to meet their service needs. For example, both PageNet and CONXUS were active participants in the 900 MHz SMR auction, and both have publicly indicated their intention to use this spectrum to provide interactive narrowband voice and data

---

18/ See Comments of CONXUS, pp. 14-15; PageMart, p. 7.

19/ See Comments of Arch, p. 12; Benbow, pp. 9-11; Merlin, p. 5.

20/ Comments of PCIA, p. 8.

services. However, the 900 MHz SMR spectrum does not count towards the spectrum cap. The practical effect of this situation is that some spectrum is subject to the cap while other substitution spectrum is not. This seems incongruous.

## V. Bidding Credits

15. Not surprisingly, the record of this proceeding reflects diametrically opposed views about the extent to which bidding credits and installment payment plans should be implemented for as-yet-unassigned narrowband channels. Carriers eligible for treatment as small business designated entities ("DEs") generally advocate maintaining or enhancing the available preferences.[21/] Larger operators who do not qualify as DEs generally oppose these preferences on the ground that they create an uneven playing field.[22/]

16. AirTouch has consistently opposed bidding credits for narrowband PCS on several grounds. First, the number of successful paging operators who qualify as small businesses serves to demonstrate that preferences are not required to promote the meaningful participation of such businesses in narrowband services. Second, results of earlier auctions indicate that benefits accorded by bidding credits become illusory because DEs are incented to bid the credits away when they are bidding against non-DEs.[23/] Finally, AirTouch has been concerned that auctions become skewed when companies without bidding credits are forced to bid against

---

21/ See, e.g., Comments of Benbow, pp. 16-17; CONXUS, pp. 19-21; Merlin, pp. 16-18; CelPage, p. 14; RTG, p. 19.

22/ See e.g., Comments of PageMart, p. 8; PageNet, p. 24.

23/ For example, an applicant with a 25% bidding credit would end up bidding 125% of the fair market value of a license in order to prevail in the auction.

companies with such credits, with the ultimate result that licenses do not end up in the hands of those who value them most highly.

17. Despite AirTouch's general objections to bidding credits per se, it historically has not objected to according small businesses favorable payment terms for their licenses through the use of installment payment plans. There has been, however, a significant regulatory shift which has caused AirTouch to revisit this position. Massive defaults that have occurred or been foretold with regard to the C Block broadband PCS auctions have caused the Commission to conclude that "installment payments may not always serve the public interest."[24/] In the recent SMR Auction Order, the Commission found "that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants," and as a result the Commission eliminated installment payments in favor of larger bidding credits.[25/]

18. AirTouch is concerned that a similar result could occur in the narrowband services. Larger bidding credits would serve only to exacerbate the competitive disparities that exist when one carrier without a credit is forced to bid against another carrier who receives a significant credit.

19. AirTouch also is concerned that establishing substantial bidding credits will encourage applicants to adopt artificial business and ownership structures in order to take advantage of the available credit. AirTouch notes that several

---

24/ Amendment of Part 90 of the Commission's Rules to Facilitate Further Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Memorandum Opinion and Order on Reconsideration, FCC 97-224, released July 10, 1997, para. 130 (the "SMR Auction Order").

25/ Id.

commenters advocate a relaxation of the attribution rules applicable to DEs,[26] which would likely encourage non-small businesses to participate as significant investors and decisionmakers in so-called DE applicants. AirTouch opposes regulations that have encouraged carriers to adopt cumbersome and artificial organizational structures in order to become eligible beneficiaries of government largesse.

## VI. Conclusion

The foregoing premises having duly considered, AirTouch Paging respectfully requests that the Commission amend its narrowband PCS rules consistent with these reply comments.

Respectfully submitted,

**AIRTOUCH PAGING**

By: Mark A. Stachiw/EAJ

Mark A. Stachiw, Esq.
Vice President, Senior Counsel
and Secretary
AirTouch Paging
12221 Merit Drive, Suite 800
Dallas, Texas 75251
(972) 860-3200

By: E. Ashton Johnston

Carl W. Northrop
E. Ashton Johnston
Paul, Hastings, Janofsky & Walker LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004-2400
(202) 508-9500

July 21, 1997

101186.1

---

26/ See Comments of Arch, pp. 14-15; CONXUS, pp. 18-19.

## Certificate of Service

The undersigned hereby certifies that on this 21st day of July, 1997, a true and correct copy of the foregoing Reply Comments of AirTouch Paging was sent via first-class mail, postage prepaid, or hand delivered, to the following:

Frederick M. Joyce
Christine McLaughlin
Joyce & Jacobs
1019 19th Street, N.W.
14th Floor - PH2
Washington, D.C. 20036

George Y. Wheeler
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036

Monica A. Leimone
Paul, Weiss, Rifkind,
Wharton & Garrison
1615 L Street, N.W.
Washington, D.C. 20036

Dennis L. Myers
Ameritech Cellular Services
2000 West Ameritech Center Drive
Location 3H78
Hoffman Estates, IL 60195

Katherine M. Holden
Stephen J. Rosen
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

John A. Prendergast
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W., Suite 300
Washington, D.C. 20018

Robert L. Hoggarth
Senior Vice President,
Paging and Narrowband
PCIA
500 Montgomery Street
Suite 700
Alexandria, VA 22314-1561

Kathryn A. Zachem
Kenneth D. Patrich
John B. Branscome
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Suite 600
Washington, D.C. 20006

Caressa D.Bennet
Gregory W. Whiteaker
Bennet & Bennet, PLLC
1019 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036

David M. Wilson, Esq.
Young, Vogl, Harlick & Wilson
425 California Street
Suite 2500
San Francisco, CA 94104

Gerald S. McGowan
Terry J. Romine
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036

Judith St.Ledger-Roty
Edward A. Yorkgitis, Jr.
Paul G. Madison
Kelley, Drye & Warren, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Richard C. Barth
Director of Telecommunications
Strategy and Policy
Motorola, Inc.
1350 I Street, N.W.
Suite 400
Washington, D.C. 20005

Sharon L. Henry

Sharon L. Henry