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PAUL, HASTINGS, JANOFSKY & WALKER LLP DOCKET FILE COPY ORIGINAL
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ROBERT P. HASTINGS (1910-1996)
COUNSEL
LEE G. PAUL
LEONARD S. JANOFSKY
CHARLES M. WALKER

1299 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2400

TELEPHONE (202) 508-9500

FACSIMILE (202) 508-9700

INTERNET www.phjw.com

399 PARK AVENUE
NEW YORK, NEW YORK 10022-4697
TELEPHONE (212) 318-6000

345 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94104-2635
TELEPHONE (415) 835-1600

1055 WASHINGTON BOULEVARD
STAMFORD, CONNECTICUT 06901-2217
TELEPHONE (203) 961-7400

1299 OCEAN AVENUE
SANTA MONICA, CALIFORNIA 90401-1078
TELEPHONE (310) 319-3300

ARK MORI BUILDING, 30TH FLOOR
12-32, AKASAKA 1-CHOME
MINATO-KU, TOKYO 107, JAPAN
TELEPHONE (03) 3586-4711

600 PEACHTREE ST., N.E., STE. 2400
ATLANTA, GEORGIA 30308-2222
TELEPHONE (404) 815-2400

695 TOWN CENTER DRIVE
COSTA MESA, CALIFORNIA 92626-1924
TELEPHONE (714) 668-6200

555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071-2371
TELEPHONE (213) 683-6000

December 15, 1997

WRITER'S DIRECT ACCESS

(202) 508-9531
eajohnston@phjw.com

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By Messenger

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

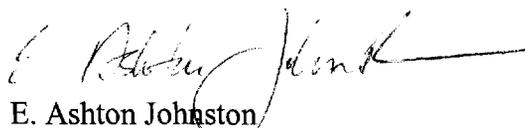
Re: Petition for Waiver
CC Docket No. 96-128

Dear Ms. Salas:

On behalf of AirTouch Paging, we submit herewith for filing an original and four copies of AirTouch Paging's Petition for Waiver.

Please direct any questions concerning this matter to AirTouch Paging's undersigned legal counsel.

Very truly yours,


E. Ashton Johnston

for PAUL, HASTINGS, JANOFSKY & WALKER LLP

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Petition for Waiver) CC Docket No. 96-128
of AirTouch Paging)
of Sections 64.1300(c) and (d))
of the Commission's Rules)

To: The Chief, Common Carrier Bureau

PETITION FOR WAIVER

AIRTOUCH PAGING

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

Carl W. Northrop
E. Ashton Johnston
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1299 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004-2400
(202) 508-9500

December 15, 1997

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SUMMARY

The Commission's Payphone Orders plainly establish that the obligations of payphone service providers ("PSPs") and carriers are reciprocal and that any carrier's obligation to compensate PSPs on a per-call basis is expressly conditioned upon the provision by PSPs of payphone-specific coding digits. Access to payphone-specific coding digits is in turn a prerequisite to selective call blocking, which is a fundamental underpinning of the market-based rates the Commission has deemed are in the public interest. Having relieved PSPs from their obligation to provide the required coding digits — at least until March 1998, and possibly longer — and based on other special circumstances, as well as the public interest, the Commission should extend equivalent relief to AirTouch of its payment obligations. AirTouch therefore requests that it be granted a limited waiver of its obligation to pay any PSP on a per-call basis unless and until that PSP provides Coding Digits and AirTouch is able to selectively block calls from payphones operated by that PSP. AirTouch further requests that this relief be granted retroactive to October 7, 1997.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Petition for Waiver) CC Docket No. 96-128
of AirTouch Paging)
of Sections 64.1300(c) and (d))
of the Commission's Rules)

To: The Chief, Common Carrier Bureau

PETITION FOR WAIVER

AirTouch Paging (“AirTouch”),^{3/} by its attorneys and pursuant to Section 1.3 of the Commission’s Rules,^{4/} hereby petitions the Commission to grant AirTouch a limited, temporary waiver of the obligation to compensate payphone service providers (“PSPs”) on a per-call basis for toll-free calls placed from payphones.^{5/} In support of this petition, the following is respectfully shown:

I. Introduction

1. AirTouch is one of the largest providers of paging and advanced messaging services in the United States, with facilities in approximately 170 markets

^{3/} By this Petition, AirTouch seeks a limited waiver on behalf of itself and of its affiliates AirTouch Paging of California, AirTouch Paging of Ohio, AirTouch Paging of Texas, AirTouch Paging of Kentucky, and AirTouch Paging of Virginia.

^{4/} 47 C.F.R. §1.3.

^{5/} 47 C.F.R. §§ 64.1300(c), (d).

covering more than 30 states and over 3 million units. AirTouch's services are offered on a local, regional, and nationwide basis.

2. AirTouch is a subscriber of toll free (800 and 888) telephone numbers from interexchange carriers ("IXCs"). In addition to using toll free numbers for its own business, AirTouch assigns such numbers upon request to certain customers who use them in conjunction with AirTouch's paging services. As a toll free number subscriber, and as a telecommunications service provider whose customers are significant users of payphones for placing toll free calls, AirTouch is substantially affected by the rules adopted in the above-captioned proceeding.^{6/}

II. Background

3. Section 276 of the Communications Act of 1934 (the "Act"), enacted as part of the Telecommunications Act of 1996 (the "1996 Act"),^{7/} required the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using

^{6/} *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Report and Order*, 11 FCC Rcd 20,541 (1996) ("*First Payphone Order*"), *Order on Reconsideration*, 11 FCC Rcd 21,233 (1996) ("*Reconsideration Order*"), *Second Report and Order*, FCC 97-371, released October 9, 1997, request for stay and petitions for reconsideration pending; appeals pending *sub nom. MCI Telecommunications Corp. v. FCC* (D.C. Cir., Nos. 97-1675, *et al.*) ("*Second Payphone Order*").

^{7/} Pub. L. No. 104-104, 110 Stat. 56 (1996).

their payphone....”^{8/} Congress required the Commission, in implementing the new law, to “promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.”^{9/}

4. The *First Payphone Order* established interim and permanent rules for compensating PSPs for originating access code and toll free calls from payphones. The interim plan required IXCs to pay PSPs \$45.85 per payphone per month,^{10/} and expired October 6, 1997.^{11/} After that date, “every carrier to whom a completed call from a payphone is routed shall compensate the PSP for the call at a rate agreed upon by the parties.”^{12/} In the absence of a negotiated rate, however, the rules required compensation at a per-call rate “equal to [the PSP’s] local coin rate at the payphone in question,”^{13/} except that, under the rules adopted in the *First Payphone Order*, between October 7,

^{8/} 47 U.S.C. § 276(b)(1)(A).

^{9/} 47 U.S.C. § 276(b)(1).

^{10/} 47 C.F.R. § 64.1301.

^{11/} The Commission’s interim compensation plan is the subject of further proceedings on remand from the Court of Appeals. See *Public Notice*, DA 97-1673 (Com. Car. Bur., released August 5, 1997).

^{12/} 47 C.F.R. § 64.1300(a).

^{13/} 47 C.F.R. § 64.1300(c) (1996). In the *Second Payphone Order*, the Commission amended this provision by setting the per-call rate at the local coin rate minus \$0.066. 47 C.F.R. § 64.1300(c) (1997).

1997 and October 6, 1998, carriers were required to pay a per-call rate of \$0.35.^{14/} Representatives of the paging industry, the IXCs, and others appealed the *First Payphone Order* to the U.S. Court of Appeals for the District of Columbia Circuit and the Court vacated the *First Payphone Order* with respect to the \$0.35 per-call rate. On remand, the Commission in the *Second Payphone Order* reduced the per-call rate to \$0.284 and extended the period during which this rate must be paid in the absence of a negotiated rate to October 6, 1999.^{15/}

5. In the *Reconsideration Order*, the Commission stated that “[o]nce per-call compensation becomes effective, ... to be eligible for such compensation, payphones will be required to transmit specific payphone coding digits as a part of their ANI... Each payphone must transmit coding digits that specifically identify it as a payphone, and not merely as a restricted line.”^{16/} Thus, by October 7, 1997, local exchange carriers (“LECs”) were required to provide payphone-specific coding digits (“Coding Digits”) to

^{14/} 47 C.F.R. § 64.1300(d) (1996).

^{15/} 47 C.F.R. § 64.1300(d) (1997). Appeals of this decision also have been filed with the Court. See *MCI Telecommunications Corp. v. FCC et al.* (D.C. Cir., Nos. 97-1675 et al.).

^{16/} *Reconsideration Order* at para. 64 (emphasis added). See *id.* at para. 94 (“each payphone should be required to generate 07 or 27 coding digits within the ANI for the carrier to track calls”).

PSPs and PSPs in turn were required to provide those digits to IXC's as an express condition of payment.^{17/}

6. On October 7, 1997, the same day that per-call compensation became effective, the Common Carrier Bureau on its own motion waived until March 9, 1998, the requirement that LECs provide Coding Digits to PSPs and that PSPs provide Coding Digits from their payphones as a condition of receiving per-call compensation from IXC's for toll free and access code calls.^{18/} In granting the waiver, the Bureau noted that three entities — the United States Telephone Association, the LEC ANI Coalition, and TDS Communications Corporation — had requested relief from the Coding Digits requirement that would exceed the relief granted in the *Waiver Order*. The Bureau subsequently issued a *Public Notice* seeking comment on these waiver requests.^{19/}

III. Relief Requested

7. The Commission's Payphone Orders plainly establish that the obligations of PSPs and carriers are reciprocal and that any carrier's obligation to compensate PSPs on a per-call basis is expressly conditioned upon the provision by PSPs of Coding Digits. Access to Coding Digits is in turn a prerequisite to selective call

^{17/} *First Payphone Order*, 11 FCC Rcd at 20,591; *Reconsideration Order*, 11 FCC Rcd at 21,265-66.

^{18/} *Order*, DA 97-2162 (Com. Car. Bur., released October 7, 1997) ("*Waiver Order*"), at para. 2.

^{19/} *Pleading Cycle Established for Petitions to Waive Payphone Coding Digits Requirements, Public Notice*, DA 97-2214 (Com Car. Bur., released October 20, 1997).

blocking, which is a fundamental underpinning of the market-based rates the Commission has deemed are in the public interest. Having relieved PSPs from their obligation to provide Coding Digits — at least until March 1998, and possibly longer^{20/} — the Commission should extend equivalent relief to AirTouch of its payment obligations. AirTouch therefore requests that it be granted a limited waiver of its obligation to pay any PSP on a per-call basis unless and until that PSP provides Coding Digits and AirTouch is able to selectively block calls from payphones operated by that PSP.^{21/} AirTouch further requests that this relief be granted retroactive to October 7, 1997.

IV. Special Circumstances Justify Grant of the Requested Relief

8. “Waiver of the Commission’s Rules is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the

^{20/} The pending waiver requests cited above effectively seek reconsideration of the payphone-specific coding digits requirements and relief that goes well beyond that granted by the *Waiver Order*. See Petition for Waiver of the United States Telephone Association, September 30, 1997, at p. 3 (asking that LECs with non-equal access switches be exempt from any requirement that they provide specific payphone identification information until the switches are upgraded or replaced), at p. 8 (requesting nine months from the date of a Commission order disposing of the request “to deploy their selected technology”) (emphasis added), and at p. 10 (requesting “a blanket waiver for all LECs to permit them to use available technology to provide necessary information that will identify a payphone call.”) (emphasis added). Moreover, the Commission has stated that it plans to address payphone-specific coding digit issues in a subsequent order. *Second Payphone Order* at para. 133.

^{21/} Depending on the technology used to provide Coding Digits, there may be a brief period of time between when the Coding Digits are provided and when AirTouch can block calls; accordingly, AirTouch’s waiver should continue until AirTouch can selectively block calls.

public interest.”^{22/} On at least two occasions during the course of the proceeding implementing Section 276 of the Act, the Bureau determined that this standard was met and granted limited waivers.^{23/} Consistent application of this standard is in the public interest and, under the circumstances, is critical to ensure that AirTouch will not suffer substantial economic harm during the period covered by the waiver granted to the LECs and PSPs.

A. Material Adverse Events Have Occurred Which Subject AirTouch to Unjustified Compensation Obligations

9. After the Court remanded this proceeding, the Commission continued to support its market-based per-call compensation plan by citing the ability of carriers to selectively block calls as a fundamental safeguard among the balance of factors necessary to achieve market-based rates. According to the Commission, “[c]arriers have significant leverage within the marketplace [if they can block calls] to negotiate for lower per-call compensation amounts ... and to block subscriber 800 calls from payphones when the associated compensation amounts are not agreeable to the carrier.”^{24/} Indeed, when it generally affirmed the Commission’s per-call compensation plan, the Court relied on the

^{22/} *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

^{23/} *Waiver Order; Order*, DA 97-678 (Com. Car. Bur., released April 4, 1997).

^{24/} *Second Payphone Order* at para. 97.

Commission's assurances that selective call blocking would serve as a fundamental check on a PSP's ability to set unreasonably high rates that carriers could not avoid.^{25/}

10. The Bureau's *sua sponte* waiver of LECs' and PSPs' Coding Digits obligations constitutes a material adverse change affecting AirTouch's own rights and obligations as a toll free number subscriber, by forcing AirTouch to pay PSPs non-market-based rates.^{26/} Waiver of the LECs' and PSPs' obligations without a corresponding limited waiver of AirTouch's reciprocal obligations would be arbitrary and capricious and result in substantial harm to AirTouch.^{27/}

^{25/} See *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, 567, *clarified on rehearing*, 123 F.3d 693 (D.C. Cir. 1997) ("a 'buyer' (the carrier or the 800 service subscriber) will have the option of rejecting a 'seller's' (the PSP) excessively priced service"). This requirement flows from the compensation method adopted by the Commission. AirTouch notes that if the "coin in the box" compensation method had been adopted instead, blocking would be unnecessary.

^{26/} AirTouch did not oppose the LECs' request for relief from the Commission's explicit requirement that such a solution is required; rather, AirTouch believes its own obligations should be suspended until such time as the required solution is implemented by the LECs. Proceeding in this fashion obviates the need to resolve immediately the LECs' request for additional relief that would allow them to satisfy their Coding Digits obligations through alternative software solutions (*see* note 18, *supra*).

^{27/} The timing of the LECs' admissions that nearly one-half of payphones will not be capable of transmitting Coding Digits for an indefinite period also constitutes a "special circumstance," because it precluded a thorough consideration of alternatives to per-call compensation in the absence of call blocking capabilities. The LECs did not formally notify the Commission that "per-call tracking and payphone coding ... issues cannot be resolved before the October 7 implementation date" until the very eve of that implementation date, and nearly one year after the Commission established that deadline. Petition for Waiver of the United States Telephone Association, September 30, 1997, at p. 2.

11. AirTouch cannot absorb the Commission-mandated payments to PSPs for toll free calls and therefore has been compelled to offer its customers the choice of either blocking calls or paying per-call charges.^{28/} However, by virtue of the Waiver Order and other circumstances, AirTouch will not receive the necessary Coding Digits in some cases and thus cannot block calls that are not specifically identified as payphone calls. The current method of call blocking used by IXC requires that each call be identified with unique digits that allow an IXC to block the call if AirTouch or its customer has determined that it does not want to accept calls to its toll free number placed from payphones. IXCs currently use “ii” (“information identifier”) numbers — specifically, 07 and 27 — as part of the ANI to perform this blocking function. Unfortunately, as the Commission is well aware from the extensive record of this proceeding, many payphones (so-called “smart” payphones) do not transmit ii digits that specifically identify the lines as payphones.^{29/} If AirTouch blocks calls from smart payphones on a wholesale, non-selective basis in order to avoid PSP compensation charges, all toll restricted lines, not just payphone lines, also are affected — including

^{28/} Many customers opt for paging service because it is a relatively inexpensive communications service that is available for a fixed monthly fee. Forcing such customers to accept and pay for calls from payphones over which they have no control could fundamentally alter the price and cost structure of the service to the paging customer’s detriment. For this reason, AirTouch feels compelled for public interest reasons to give its toll free number customers the option of blocking calls from payphones.

^{29/} See, e.g., USTA Ex parte filing, July 28, 1997.

hotels, motels, hospitals, and business lines.^{30/} The result is a substantial erosion of the public's ability to reach AirTouch's toll free number subscribers. Thus, any PSP's inability to transmit Coding Digits prevents AirTouch from selectively blocking calls from that PSP's payphones.

12. Special circumstances similar to those which the Bureau claimed justified waiver of the Coding Digits obligations also warrant granting a limited waiver to AirTouch. The Bureau expressly cited high implementation costs and technological obstacles that have prevented many LECs from providing the required Coding Digits that are necessary to block calls as the basis for granting a waiver.^{31/} These considerations weigh even more heavily in AirTouch's favor: AirTouch itself does not control the technology by which toll free calls are delivered to its network from payphones, and is dependent on IXCs for the information necessary to process Coding Digits and to implement selective blocking.

^{30/} Moreover, any method of identification other than payphone-specific coding digits would require an IXC to perform a database search for every call in order to determine if the call was placed from a payphone. This would result in substantial cost increases — perhaps as much as \$0.06 to \$0.08 per call. Even assuming these costs were acceptable, it is AirTouch's understanding that IXCs are not able to perform the database dips, which the Commission's rules will require for all payphone calls starting in October 1999 when the compensation rate "floats". Waiver of AirTouch's compensation obligation would accelerate this process.

^{31/} "We grant this waiver to address the special circumstance that transmission of payphone-specific coding digits is not yet ready for implementation for certain phones." *Waiver Order* at para. 10.

**B. AirTouch Will Suffer Substantial Harm
Without the Requested Relief**

13. The Bureau grossly underestimated the nature and extent of the harm to other parties when it stated that a waiver of the obligation to provision Coding Digits “will not significantly harm any parties.”^{32/} In the *Waiver Order*, the Bureau found no problem with “requir[ing] IXCs to pay compensation for certain calls without the ability to block those calls on a real-time basis,”^{33/} because “the mandate of Section 276 is that the Commission adopt rules that provide PSPs with per-call compensation, and the waiver will most expeditiously lead to this result.”^{34/} Further, the Bureau “conclude[d] that the potential harm from the absence of compensation to PSPs would be greater than the potential harm to IXCs from the inability to block certain payphone calls before March 9, 1998.”^{35/} These conclusions are based on several erroneous assumptions: First, that the IXC is the only party incurring any cost for compensating PSPs.^{36/} Second, that

^{32/} *Waiver Order* at para. 12.

^{33/} *Id.* at para. 13.

^{34/} *Id.*

^{35/} *Id.* (emphasis added).

^{36/} Although IXCs have an obligation to pay compensation directly to PSPs, the IXCs will pass on to their customers not only the per-call compensation amount (see First Payphone Order at para. 83) and also may pass through the costs of tracking and blocking payphone calls, which could be substantial. *See, e.g.,* Request for Stay of the Personal Communications Industry Association, CC Docket No. 96-128, December 1, 1997, at pp. 6-7; Petition for Reconsideration of AT&T Corp., December 1, 1997, at p. 20.

only the IXC has an interest in call blocking.^{37/} Third, that there is a statutory mandate for “per-call compensation”.^{38/} Finally, and most importantly, that only IXCs face “potential harm”. AirTouch, to the extent it must pay compensation on a per-call basis without the ability to block calls selectively, and AirTouch’s subscribers, are in fact substantially and materially harmed.

14. Blocking solutions other than per-call blocking simply do not achieve the intended results of the Commission’s per-call compensation scheme. A PSP’s inability to provide Coding Digits makes it impossible for AirTouch to selectively block calls from that PSP’s payphones. Consequently, that PSP has no incentive to negotiate rates. Moreover, without the ability to selectively block calls, AirTouch’s liability for calls from payphones would be unlimited. AirTouch should not be forced to pay non-market-based rates, or to face unlimited financial exposure. According to the LECs, nearly 40% of all payphones are within the relief granted by the *Waiver Order*. The economic harm of paying non-market-based rates to such a large number of payphones, when AirTouch likely would be unable to collect anything from its customers, plainly

^{37/} Certainly, the Court of Appeals recognized that the toll free number subscriber also must have the ability to block calls if the Commission’s “market-based” plan is to have any viability. *See Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d at 566-67. In any event, the IXC has an interest in blocking because its subscribers will demand that calls be blocked in order to avoid paying non-market rates.

^{38/} The statute requires that PSPs be compensated for “each and every completed” call, but does not mandate a specific mechanism (e.g., per-call, per-payphone, or per-unit of measured time) to achieve that result.

would be substantial. Granting AirTouch's requested limited waiver will remedy these harms.

C. The Public Interest Will Be Served by Granting the Requested Relief

15. Under the circumstances, a limited waiver of the general rule will serve the public interest. The Commission has determined that "fair" compensation — the statutory standard — is achieved by a market-based rate. Both the Commission and the Court have affirmed the principle that selective call blocking is a *sine qua non* of a market rate. Competition among PSPs and widespread public payphone use — the express public interest purposes of Section 276 of the Act — can only be achieved by strict adherence to the Commission's market-based rules and policies. Compelling AirTouch to make payments that are inconsistent with the adopted standard does not serve the public interest.

16. Furthermore, the requested limited waiver of payment obligations would properly incent LECs and PSPs to expedite their provision of Coding Digits. In this regard, it must be understood that Section 276 of the Act did not mandate a date by which PSP compensation should begin;^{39/} again, the only requirement was that PSPs be fairly compensated. Under the Commission's own rules, fair compensation results when,

^{39/} Compare *Waiver Order* at para. 11. AirTouch disagrees that the Commission is under a mandate to ensure that PSPs are compensated by a date certain. Rather, denying compensation under appropriate circumstances, such as to PSPs that have not complied with their obligations, is fully consistent with the Act's requirement that compensation be "fair".

to use the Court's terms, the "seller" (PSP) and the "buyer" (the toll free service subscriber) have agreed on a rate, or, if they have not agreed on a rate, the "buyer" can block the "seller's" ability to compel payment of a rate not agreed to by the parties. The present compensation structure does not allow this to happen. Therefore, it would be manifestly unfair to compel AirTouch to pay rates imposed unilaterally by the "seller."^{40/}

17. In sum, the Commission's general rule established the provision of Coding Digits by PSPs and LECs as a prerequisite to per-call compensation payments for toll free calls from payphones. Those Coding Digits, in turn, are a prerequisite for selective call blocking. The Commission already has determined that "special circumstances" justify a waiver of PSPs' and LECs' obligations to provision Coding Digits. Countervailing special circumstances and public interest considerations warrant reciprocal relief from the general rule for AirTouch.

^{40/} Indeed, this is a hallmark of market-based rates. Without this ability to refuse the call, PSPs have no incentive to charge reasonable rates.

V. Conclusion

WHEREFORE, the foregoing premises duly considered, AirTouch Paging requests that the Commission immediately grant AirTouch the relief requested herein.

Respectfully submitted,

AIRTOUCH PAGING

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

By:



Carl W. Northrop
E. Ashton Johnston
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1299 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004-2400
(202) 508-9500

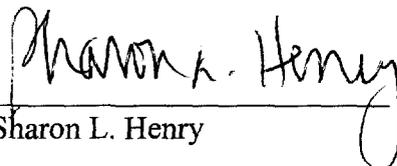
December 15, 1997

CERTIFICATE OF SERVICE

I, Sharon L. Henry, a secretary with the law firm of Paul, Hastings, Janofsky & Walker LLP, certify that I have on this 15th day of December, 1997 caused true and correct copies of the foregoing Petition for Waiver of AirTouch Paging to be delivered by hand to the following:

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Robert Spangler
Acting Chief, Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 6008
Washington, D.C. 20554


Sharon L. Henry