

ORIGINAL

DOCKET FILE COPY ORIGINAL

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

RECEIVED

OCT 30 1998

In the Matter of)	
)	
Amendment of Part 95 of the Commission's)	WT Docket No. 98-169
Rules to Provide Regulatory Flexibility in the)	RM-8951
218-219 MHz Service)	
)	
Amendment of Part 95 of the Commission's)	WT Docket No. 95-47
Rules to Allow Interactive Video and Data)	RM-8476
Service Licensees to Provide Mobile Services)	

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF AIRTOUCH PAGING

AirTouch Paging ("AirTouch"), by its attorneys, hereby submits its comments on the *Notice of Proposed Rulemaking* released with respect to the above-captioned proceeding (the "NPRM").^{1/} The following is respectfully shown:

I. The Interest of AirTouch

1. The *NPRM* proposes extensive modifications to the rules governing the provision of services in the 218-219 MHz band, previously known as interactive video and data service ("IVDS"), which will, among other things, afford licensees greater flexibility to licenses on those frequencies. AirTouch is an FCC-licensed provider of one-way messaging services and narrowband Personal Communications Services ("NPCS") throughout the nation, including in markets in which IVDS service providers have been licensed.^{2/}

^{1/} FCC 98-228, released September 17, 1998.

^{2/} In addition to the numerous Part 22 and Part 90 licenses held by AirTouch, AirTouch (continued...)

No. of Copies rec'd
List ABCDE

0 + 4

2. In July 1994, AirTouch was at the Omni Shoreham Hotel bidding on narrowband PCS channels at the same time that prospective IVDS licensees were in another room of the same hotel participating in the oral outcry auction for IVDS spectrum. A revision of the IVDS rules as contemplated by the *NPRM* would fundamentally alter the IVDS allocation and, in AirTouch's view, undermine the integrity of the auction processes in which AirTouch and the potential IVDS licensees participated and would accordingly not serve the public interest. In addition, in light of the current freeze on applications in the paging service, a shift in the IVDS rules at this time would be patently unfair and could create unintended consequences.

II. Discussion

A. Introduction

3. The *NPRM* proposes to examine the rules governing the 218-219 MHz frequency band in order to determine whether the rules should be modified "to provide for maximum flexibility."^{3/} To that end, the *NPRM* seeks comment on whether the FCC should, among other things: permit licensees to choose their regulatory status, *i.e.*, private mobile radio service ("PMRS") versus commercial mobile radio service ("CMRS");^{4/} permit licensees to choose, based upon that self-classification, whether or not to interconnect to the public

^{2/} (...continued)

also holds one nationwide 50-12.5 kHz NPCS license and three regional 50-12.5 kHz licenses.

^{3/} *NPRM*, para. 31.

^{4/} *NPRM*, para. 33.

switched network (“PSN”);^{5/} increase limitations on response transmitter unit (“RTU”) effective radiated power;^{6/} extend the license term to ten (10) years from the current five (5) year term with an ability to reamortize any remaining installment payments consistent with the new license term;^{7/} and permit licensees to aggregate spectrum in a market without restriction.^{8/} AirTouch respectfully submits that the proposed revisions to the Commission’s rules would so substantially modify the character of the services that may be offered by licensees in the 218-219 MHz frequency band as to eliminate the possibility they will be used to provide the intended services and would at the same time significantly change the value of the licenses held and undermine the integrity of the auction process.

B. The Proposed Changes Will Virtually Ensure that IVDS Services Will Not Be Offered in the 218-219 MHz Frequency Band

4. In 1992, the Commission set aside the 218-219 MHz frequency band to provide interactive video data services to be used as a way to improve and complement its broadcast television authorizations.^{9/} The Commission found that such an authorization would “permit development of a convenient, low-cost system that provides two-way interaction with commercial and educational programming, along with international and data services that may be delivered by, and coordinated with, broadcast television, cable television, wireless cable,

^{5/} *Id.*

^{6/} *NPRM*, para. 55.

^{7/} *NPRM*, paras. 36, 37-39.

^{8/} *NPRM*, paras. 49-53.

^{9/} *Amendment of Parts 0, 1, 2, and 95 of the Commission’s Rules to Provide Interactive Video and Data Services, Report and Order*, 7 FCC Rcd. 1630 (1992).

direct broadcast satellite, or any future television delivery methods.”^{10/} To date, AirTouch is unaware of any wide spread deployment of these services.

5. The proposed rule changes will virtually ensure that the IVDS services contemplated in this band will not be offered. The Commission specifically determined that this service should be regulated as a private carrier radio service,^{11/} *i.e.*, that interconnection was not appropriate for IVDS. Accordingly, under Section 332 of the Communications Act, the service would be classified as PMRS. If the Commission allows interconnection with the PSN before the intended services are even rolled out, the Commission guarantees that this frequency band will be used for services that allow the licensees to derive the greatest revenue per kHz of bandwidth. This is exactly why the Commission has traditionally imposed specific technical, operational and service limitations on the use of new spectrum. Here, the *NPRM* would allow a wider variety of services before the intended services would develop. There is a critical reason why the NPCS spectrum was sold for considerably more than the 218-219 MHz spectrum -- NPCS offers the possibility of deriving greater revenue per kHz of spectrum. If the proposed rules are adopted, AirTouch submits that this spectrum will be immediately converted to some form of CMRS service and no IVDS services will ever be offered. Without a specific record that demand for these services does not exist, nor will it exist in the near future, the Commission must not change the Rules.^{12/}

^{10/} *Id.*, para. 1.

^{11/} *Id.*, para. 54.

^{12/} AirTouch notes that one of the rationales behind broadening the services allowed is because IVDS equipment and services have not been deployed on a wide scale. AirTouch

(continued...)

C. Changing the Rules at this Time Would Change the Character of the Licenses and Undermine the Auction Process

6. Attachment 1 hereto contains excerpts from the Commission's recent Report to Congress on the state of wireless competition.^{12/} The report shows that there were dramatic differences in the prices paid for IVDS spectrum as compared to spectrum that was allocated to uses that permitted interconnected wireless common carrier services. For example, the chart shows that nationwide narrowband PCS spectrum sold on average for \$3.10 per MHz per person in the service territory. In stark contrast, IVDS spectrum sold on average for \$0.85 per MHz/pop. AirTouch submits that these variances are attributable in large measure to the fundamental regulatory differences in terms of permissible services, regulatory classifications, licensee flexibility and power limitations that were intended to govern the spectrum. The proposed rule changes would eliminate these critical distinctions between the IVDS and narrowband PCS spectrum. As described below, this shift undermines the integrity of the auction process.

7. The FCC's Office of Plans and Policy, in its compelling report entitled "*Using Market Based Spectrum Policy to Promote the Public Interest*" (January 1997) emphasized the importance of maintaining reasonable administrative certainty in the rules governing

^{12/} (...continued)

submits that this only shows that the Commission auctioned the spectrum too soon before manufacturers and serious businesses were able to develop equipment and sustainable business plans. This is also true of NPCCS. To date, only three licensees have any deployment of these services, and only one could be said to have a widespread deployment.

^{13/} *Third Annual CMRS Competition Report*, 1998 FCC LEXIS 2816 (June 11, 1998).

spectrum usage if the FCC auction process is to work efficiently.^{14/} Indeed, the report noted the mischief that can be caused when spectrum is acquired under one set of regulatory rules and then converted to other uses. The report properly concludes that bidders will only be able to participate in a rational manner in an auction if they can evaluate all allocated and allocable spectrum at the time of the auction with the assumption that the authorized uses will continue for a reasonable time.^{15/} If, on the other hand, bidders conclude that they can acquire spectrum which has limited uses and convert it to other uses (*e.g.*, such as those which would be permitted by virtue of the proposals contained in the *NPRM*), then bidders will start to game the auction, and the benefits of the carefully crafted spectrum auction processes will be lost.^{16/} Moreover, bidders who are intent on converting spectrum to alternate (potentially more lucrative) uses may outbid those bidders who are most committed to devoting spectrum to the originally intended use, and thus drive them out of the auction, thereby undermining the Commission's objective of fostering particular services which have been found to be in the public interest, as discussed below.

^{14/} *Id.* at p. 20.

^{15/} For example, had the bidders at the NPCS auction realized that the Commission would relax many of the IVDS technical rules and allow interconnection with the PSN, many may have participated in the IVDS auction instead of or in addition to the NPCS auction, thereby potentially lowering the prices for NPCS licenses.

^{16/} In fact, the many requests for waivers and/or extensions of the construction benchmarks are evidence that there did exist some speculation among bidders for IVDS spectrum in 1994. Permitting these speculators to enjoy a rule change now allows them to reap a regulatorily derived profit would only encourage speculation in future auctions. Speculators could enter into the auction process, buy up spectrum with the expectation of rule changes, avoid their regulatory obligations, and then reap unjust rewards when the FCC changes the rules to help them out of their self-inflicted plight.

D. The Proposed Rule Changes Represent an Impermissible Shift in Regulatory Policy

8. AirTouch notes that the Commission previously has expressed concern that permitting IVDS licensees to interconnect with the PSN would hinder the full development of IVDS, ruling:

we are concerned that allowing interconnection with the PSN at this time could impede IVDS from reaching its full potential. We recognize that interconnection with the PSN, coupled with mobile offerings, might convert IVDS generally from a private service to a commercial service [and], require an application of different and more restrictive regulations from the present regulation...[]... In view of the above-described drawbacks of permitting interconnection with the PSN (*i.e.*, the lack of demonstrated need, the impairment of the development of the service as envisioned, and the resulting potential reclassification of the service as commercial), we decline to permit such interconnection. This determination is consistent with retaining IVDS as a private, although newly mobile, radio service.

IVDS Mobile Services, 11 FCC Rcd. 6610, para. 29 (1996).

9. Notwithstanding the Commission's reasoned and strongly worded rejection of rules that would permit interconnection to the PSN and a reclassification of IVDS, the Commission now appears to be doing an about-face. Without discussing the rationale or the record for its recent change of heart, the Commission simply announced in the *NPRM* that it proposes to change its approach to regulating IVDS. However, the Commission is required to set forth a reasoned analysis for its intended departure from past practices. The *NPRM* fails to

articulate such analysis.^{17/} In light of the foregoing, AirTouch respectfully submits that the Commission cannot implement the proposed departures from past policy.

E. **Revision of the Rules in this Fashion During the
Paging Freeze Would Be Unfair**

10. As a final point, AirTouch notes that there has been a freeze on the filing of applications for new paging facilities licensed under Parts 22 and 90 of the rules since February 6, 1996.^{18/} And, AirTouch understands that not a single waiver of the paging freeze has been granted, though numerous requests have been filed. It would be unfair for the Commission to allow others to convert spectrum to interconnected uses, which could include one-way paging uses, when the existing paging industry is at a standstill by virtue of a freeze that has lasted much longer than originally anticipated.

^{17/} To the extent that the Commission's proposals are based upon the fact that many IVDS licensees have proven unable to use their spectrum for its intended purpose, AirTouch respectfully submits that the appropriate remedy is for the Commission to reclaim such unused spectrum, then adopt revised rules to govern the prospective use of that spectrum, and then re-auction the spectrum. Indeed, it may very well be that either (i) there was no market, or (ii) a market does exist, but equipment has not yet been developed to exploit it. If the Commission is concerned about the lack of use of this band, it should explore why the band is not being used for the services for which it was allocated and licensed, and not merely change the rules.

^{18/} *See Revision of Part 22 and Part 90 of the Commissions Rules to Facilitate Future Development of Paging Systems*, 11 FCC Rcd. 3108 (1996).

III. Conclusion

11. In sum, AirTouch believes that the proposed rule revisions would eliminate several critical distinctions between the rules governing IVDS and other wireless services, such as narrowband PCS, which also were licensed through an auction process at the same time. Changing the rules after the completion of the auction would encourage gaming of the auction process and also call into question the integrity of the underlying auctions.

WHEREFORE, the foregoing reasons having been duly considered, AirTouch respectfully submits that the Commission should decline to adopt certain of the rule revisions proposed by the *NPRM* as discussed in these comments.

Respectfully submitted,

AIRTOUCH PAGING

Mark A. Stachiw, Esquire
Vice President, Senior Counsel
and Secretary
AirTouch Paging
Three Forest Plaza, Suite 800
12221 Merit Drive
Dallas, TX 75251
(972) 860-3200

By: 
Carl W. Northrop
Christine M. Crowe
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004
(202) 508-9500

Its Attorneys

October 30, 1998

ATTACHMENT 1

THIRD ANNUAL CMRS COMPETITION REPORT

Federal Communications Commission

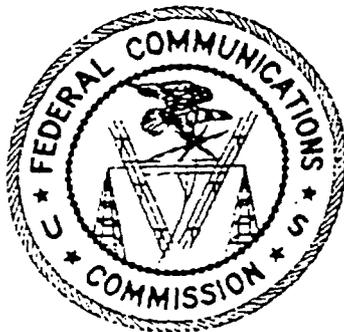


Table 1B: FCC Auctions Summary -
Auction Results

Auction Number and Name	Total Winning Bids (1)	Bid Price (dollars per person per MHz)	Auction Duration			Number of Winning Bidders
			Began	Ended	# Rounds	
1 Nationwide Narrowband PCS	\$650,366,374	\$3.10	7/23/94	7/29/94	27	6
2 Interactive Video and Data Service	\$213,892,375	\$0.35	7/23/94	7/29/94	Oral Outcry	173
3 Regional Narrowband PCS	\$392,706,797	\$3.46	10/26/94	11/8/94	105	9
4 A & B block Broadband PCS	\$7,721,184,171	\$0.52	12/5/94	3/13/95	112	13
5/10 C block Broadband PCS(2)	\$10,102,121,394.75	\$1.33	12/13/95 7/3/96	5/6/96 7/16/96	184 25	90
6 Multichannel Distribution Service	\$216,239,603	\$0.067 (3)	11/13/95	3/23/96	181	67
7 900 MHz Specialized Mobile Radio	\$204,267,144	\$0.24 (3)	12/5/95	4/15/96	168	80
8 Digital Broadcast Service	\$682,500,000	\$0.0062	1/24/96	1/25/96	19	1
9 Digital Broadcast Service	\$52,295,000	\$0.0006	1/25/96	1/26/96	25	1
11 D, E, & F block Broadband PCS	\$2,517,439,565	\$0.33	8/26/96	1/14/97	276	125
12 Cellular Unreserved	\$1,842,533	n/a	1/13/97	1/21/97	36	10
13 Interactive Video and Data Service	(4)	(4)	(4)	(4)	(4)	(4)
14 Wireless Communications Service	\$13,638,940	\$0.0018	4/15/97	4/25/97	29	17
15 Digital Audio Radio Service	\$173,234,388	\$0.0274	4/1/97	4/2/97	25	2
16 Upper 800 MHz Specialized Mobile Radio	\$96,232,060	\$0.04	10/23/97	12/8/98	235	14
17 Local Multipoint Distribution Service	\$578,663,029	\$0.0018	2/18/98	3/25/98	127	104

Source: Federal Communications Commission

(1) Total Winning Bids includes high bids from the auction (net of any bidding credits) plus the price paid for any pioneer preference licenses.

(2) C block broadband PCS was auctioned in two auctions. The Total Winning Bids, Bid Price, and Number of Winning Bidders have been combined to avoid duplication.

(3) Estimated to adjust for encumbered spectrum.

(4) The second IVDS auction was postponed on January 29, 1997.