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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

To: The Commission

COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.

AIRTOUCH COMMUNICATIONS, INC.

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Its Attorneys

October 12, 1999

AirTouch Communications, Inc.
October 12, 1999

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AirTouch Communications, Inc.
October 12, 1999

SUMMARY

Limited Commission action regarding state and local right-of-way regulation and taxation with respect to CMRS carriers is appropriate to promote the statutory objectives of promoting competition in local telecommunications markets. While courts have addressed issues regarding state and local governments' authority to regulate rights-of-way, to date, the Commission has not meaningfully clarified the extent to which such requirements are preempted under Sections 253 and 332(c)(3) of the Communications Act. AirTouch submits that the Commission has an important role to play in clarifying issues that arise in right-of-way and taxation disputes.

Courts and the Commission have established that carriers transmitting signals over the facilities of other carriers' wireline facilities do not "use" public rights-of-way for purposes of Section 253(c). Nevertheless, while some states have imposed restrictions on local governments' ability to regulate public rights-of-way in this manner, other states and localities continue to impose such regulation on wireless carriers, among others. Further Commission action is warranted in order to provide meaningful guidance for carriers, local governments and courts as these issues arise in the future.

Specifically, the Commission should take timely action on Section 253 and 332(c)(3) petitions, and consider supplementing its existing procedures to ensure the prompt resolution of such disputes. Furthermore, the Commission should confirm that CMRS and other wireless carriers do not "use" public rights-of-way when transmitting signals over the facilities of other carriers, thus clarifying that a Section 253(c) defense should generally be unavailable where a wireless carrier challenges a state or local government's imposition of right-of-way based franchising or fee requirements.

Finally, AirTouch concurs in the study submitted by CTIA regarding the highly burdensome filing and tax rates imposed on telecommunications carriers in comparison with other businesses. Consistent with Section 601 of the Telecommunications Act and Commission precedent, the Commission should acknowledge in this proceeding the possibility that a particular state or local government tax policy may be subject to preemption under Sections 253 and/or 332(c)(3) of the Act.

AirTouch Communications, Inc.
October 12, 1999

Before the
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Washington, D.C. 20554

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To: The Commission

COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.

AirTouch Communications, Inc. ("AirTouch") hereby submits comments in response to the *Notice of Inquiry* in CC Docket No. 99-217.[1] By this filing, AirTouch (1) provides some limited information for the record discussing its experience with state and local governments regarding right-of-way management issues and recommendations for limited Commission action; and, (2) in regard to the *NOI* provisions relating to state and local taxes, AirTouch concurs in the filing submitted by CTIA which describes the discriminatory and anticompetitive impact of certain state and local tax policies.

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[1] *Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry*, WT Docket No. 99-217, FCC 99-141, ¶¶ 70-84 (rel. July 7, 1999), 64 Fed. Reg. 41883 (Aug. 2, 1999), *Order*, DA 99-1563 (Aug. 6, 1999) ("*NOI*").

BACKGROUND/INTRODUCTION

As the Commission has noted in the *NOI*, "[f]ull and fair competition in the provision of local telecommunications service requires that competing providers have comparable access to the means of transporting signals."[2] The Commission on numerous occasions has adopted rules and policies designed to facilitate competition in the local telecommunications market between CMRS providers and incumbent carriers and the impact of state and local taxes, fees and franchising requirements is relevant to the instant proceeding.[3] To date, however, the Commission has not meaningfully clarified the extent to which such requirements are preempted under Sections 253 and 332(c)(3), despite opportunities to do so -- most notably in the *City of Roseville* proceeding.[4] Instead, the extent to which states and localities may impose such obligations on wireless carriers and others that do not use ROWs has been addressed principally in the courts.[5]

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[2] *Id.* ¶ 71.

[3] *See, e.g., 360 Communications Company Transferor, and ALLTEL Corporation Transferee, For Consent to Transfer Control of 360 Communications Company and Affiliates*, 14 FCC Rcd 2005, ¶ 33 (1998); *Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 8352, 8434-36 (1996); *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8965, ¶ 3 (1996).

[4] *See City of Roseville*, File No. CWD-96-16, 11 FCC Rcd. 1280 (1995).

[5] *See, e.g., Bell Atlantic-Maryland v. Prince George's County*, 49 F.Supp.2d 805, 819 (D.Md. 1999) (carriers that use facilities owned, installed and maintained by others); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 1998 WL 386168 (N.D. Tex. July 7, 1998) (wireless); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F.Supp. 928 (W.D.Tex 1997) (resale/UNEs).

The Commission's inaction for wireless carriers with respect to Sections 253 and 332(c)(3) has rendered its enforcement of these provisions, in essence, a "paper tiger." While courts have struck down numerous local franchising and fee-based requirements for carriers that do not use public rights-of-way, state and local governments *continue* to impose such requirements on wireless carriers.[6] The instant proceeding provides the Commission the opportunity to, at minimum, clarify a number of issues relating to local right-of-way regulation and taxation that continue to arise and frustrate wireless entry into various local markets. Such action would serve the public interest.

At the outset, AirTouch acknowledges the statutory limitations on the Commission's authority to preempt state and local right-of-way and taxation authority.[7] However, and as the Commission acknowledges, the Communications Act also imposes limits on states' and localities' exercise of that authority.[8] Section 253(a), for example, provides that "*[n]o* State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service."[9] Further, Congress expressly determined in enacting Section 253 that, in some instances, preemption of state or local requirements may be required to promote the

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[6] *See id.*; *infra* Section I.A.

[7] *See* 47 U.S.C. § 253(d); 141 Cong. Rec. S8212-S8213 (June 13, 1995) (remarks of Sen. Gorton).

[8] *NOI* ¶¶ 73-74.

[9] 47 U.S.C. § 253(a) (emphasis added).

pro-competitive objectives of the 1996 Act.[10] As to state and local right-of-way regulation, Section 253(c) provides that:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to *require fair and reasonable compensation* from telecommunications providers, on a *competitively neutral and nondiscriminatory basis*, for use of public rights-of-way *on a nondiscriminatory basis*, if the compensation required is publicly disclosed by such government.[11]

AirTouch submits that the Commission does have an important role to play in clarifying issues that arise in right-of-way and taxation disputes as courts do, in fact, rely on relevant Commission precedent in these cases.[12] AirTouch further submits that, at minimum, the record in this proceeding will warrant (1) the consideration of policies to facilitate the expeditious case-by-case Commission review of Section 253 and 332(c)(3) petitions, and (2) clarification as to CMRS carriers' "use" of rights-of-way. Further, the Commission should not preclude the possibility that particular state and local taxation policies may be subject to preemption.

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[10] As the Commission is often reminded, the purpose of the Telecommunications Act of 1996 was "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 56, preamble (1996).

[11] 47 U.S.C. § 253(c) (emphasis added). Section 332(c)(3), enacted in 1993, similarly preempts states from regulating the rates and entry of CMRS providers. *Id.* § 332(c)(3).

[12] *See, e.g., BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F.Supp.2d 1304, 1308 (S.D.Fla. 1999) ("[i]n determining what 'manage the public rights-of-way' in federal law means . . . this court will look to the opinion of the agency charged with interpreting and enforcing the [Communications Act], the Federal Communications Commission"); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F.Supp.2d at 815 (same).

DISCUSSION

I. STATE AND LOCAL GOVERNMENTS CONTINUE TO IMPOSE RIGHT-OF-WAY FEES AND FRANCHISING REQUIREMENTS ON WIRELESS CARRIERS

AirTouch submits these comments consistent with the Commission's intent to "compile a record on the basis of which [it], together with representatives of State and local governments and the affected industry, can evaluate whether, and in what form, further action is appropriate."[13] As discussed below, further action is appropriate to ensure meaningful Commission enforcement of Sections 253 and 332(c)(3), principally through prompt case-by-case review and action on individual preemption petitions and Commission clarification regarding wireless carriers' "use" of public rights-of-way.

A. States and Localities Continue to Impose Right-of-Way Franchise and Fee Regulation on CMRS Providers

The Commission has sought comment from carriers on problems they have encountered regarding right-of-way management.[14] In general, AirTouch's experience is that problems have arisen where local and state governments impose right-of-way use fees or franchise regulations purportedly on the basis that wireless carriers "use" or occupy public rights-of-way. As the Commission and courts have determined, however, wireless and other carriers generally do not use rights-of-way for their own facilities.[15]

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[13] *NOI* ¶ 72.

[14] *Id.* ¶ 79.

[15] *See id.* ¶¶ 75-78. As Chairman Kennard also recently acknowledged in testimony before Congress, "some communities have imposed obligations ostensibly related to the use of rights-of-way even on competitors that do not use public rights-of-way for their own facilities, such as

(continued...)

By way of example, in Illinois the legislature on January 1, 1998, enacted legislation with the stated purpose of allowing municipalities to recover costs associated with the regulation of the use of the public rights-of-way for telecommunications activity through a so-called "infrastructure maintenance fee" or "IMF." The legislation authorized the City of Chicago to impose a fee of 2% of gross receipts on all telecommunications carriers, *including wireless*, and authorized all other municipalities to impose a fee of 1% on such carriers. As discussed herein, however, CMRS carriers such as AirTouch affiliate PrimeCo Personal Communications, L.P. ("PrimeCo") do not "use" public rights-of-way in Chicago and other Illinois municipalities.[16] Notwithstanding this fact, as well as the overwhelming precedent demonstrating that wireless carriers do not use public rights-of-way, municipalities throughout Illinois have begun imposing IMFs on such carriers.[17]

PrimeCo and a number of other carriers are parties to an action in state court challenging the IMF on state constitutional grounds.[18] The IMF is problematic under Section 253(c) for a

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[15] (...continued)
wireless service providers and resellers." Statement of William E. Kennard, Chairman, Federal Communications Commission, Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Business Rights and Competition, February 25, 1999, at 15.

[16] PrimeCo, like CMRS carriers generally, leases services from facilities-based wireline LECs via T-1s and T-3s for backhaul support purposes, but does not maintain its own facilities such that it "uses" public rights-of-way as courts and the Commission have defined right-of-way "use"; rather, PrimeCo essentially resells ILEC backhaul services as an ILEC customer.

[17] AirTouch also notes that right-of-way use issues have arisen in PrimeCo's Texas markets; while PrimeCo was not a party to the litigation, the outcome of these proceedings is very relevant to CMRS carriers. *See City of Dallas*, (wireless); *City of Austin* (resale/UNEs).

[18] *See PrimeCo et al. v. Illinois Commerce Commission*, No. 98 CH 5500 (Ill. Cook Co., Ch. Div. 1998).

variety of reasons. As a threshold matter, CMRS carriers do not "use" public rights-of-way; thus, by definition, imposing the fee on CMRS carriers for their purported "use" of the rights-of-way is neither fair nor reasonable. In addition, localities threaten carriers with removal of a business license for failure to pay the IMF and thus acts as an entry barrier.[19] Furthermore, it is not competitively neutral. Wireline carriers pass their IMF costs on to CMRS carrier customers; thus, in addition to paying the IMF themselves for purported "use" of rights-of-way, CMRS carriers effectively subsidize wireline carriers' costs for right-of-way use.

B. Some States Have Adopted Right-of-Way Policies to Ensure that Local Fees and Franchise Requirements Are Not Imposed on Carriers that Do Not Use Public Rights-of-Way

The Commission has also requested comment on "successful solutions to problems" that carriers have encountered.[20] Two states in particular in AirTouch markets -- Colorado and Michigan -- have imposed worthwhile statutory limitations on localities' authority to impose right-of-way fees on telecommunications carriers. In Michigan, for example, state law requires localities to review a carrier's request for access to rights-of-way within 90 days after filing an application and provides that any conditions of a permit granted to a carrier "be limited to the provider's access and usage of" such right-of-way. Furthermore, fees or assessments imposed on carriers must be imposed "on a nondiscriminatory basis and shall not exceed the fixed and

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[19] AirTouch Paging has been contacted regarding payment of the IMF, notwithstanding that it has no facilities or retail operations in the City of Chicago. The attached materials underscore the extent to which the IMF is unrelated to a carrier's right-of-way usage. *See* Attachment A; *see also Petition of Pittencrief Communications, Inc., Memorandum Opinion and Order*, 13 FCC Rcd 1735, ¶ 31 (1997) (finding that "no Texas agency may withhold a license, certificate or other operating authority if a CMRS provider fails to pay its required contributions").

[20] *NOI* ¶ 79.

variable costs to the local unit of government in granting a permit and maintaining the right-of-ways [sic] . . . used by" telecommunications carriers.[21]

Colorado has imposed similar limitations on localities' authority to regulate and impose fees on carriers' right-of-way use. The state statute prohibits localities from discriminating among carriers "in the issuance of permits or the passage of any ordinance for the use of it rights-of-way" or "creat[ing] or erect[ing] any unreasonable requirements for entry to the rights-of-way for such providers. Fees or other assessments must be "reasonably related to the costs directly incurred by the political subdivision in providing services relating to the granting or administration of permits" and "reasonably related in time to the occurrence of such costs." Furthermore, the burden of demonstrating the reasonableness of a fee is on the locality. Such fees must also be competitively neutral, and fees may not be collected through the provision of in-kind services.[22]

C. Further Commission Action Regarding Right-of-Way Matters Is Appropriate

The Commission asserts its confidence that "the majority of State and local governments recognize the advantages to their citizens of encouraging new telecommunications competitors and that they are managing their rights-of-way in a competitively neutral way."[23] The Commission must recognize, however, that not all states have adopted such measures; more fundamentally, whether carriers benefit from Section 253 should not be dependent on the

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[21] Mich. Statutes §§ 484.2251-484-1469.

[22] *See* Colorado Statutes §§ 38-5.5-101 through 38-5.5-107.

[23] *NOI* ¶ 72.

vagaries of the state legislative process.[24] Significantly, state and local governments also have revenue demands, and there have been -- and will likely continue to be -- instances in which state and local governments view telecommunications carriers as a potential untapped revenue source. For these reasons, the Commission should (1) act expeditiously on petitions filed, and (2) clarify that CMRS carriers do *not* use public rights-of-way when transmitting signals over the facilities of other carriers. These limited measures will provide meaningful guidance for carriers, localities, and courts as these issues arise in the future.

1. The Commission Should Take Timely Action on Section 253 and 332(c)(3) Petitions

Notwithstanding judicial decisions to the contrary, states and localities *do* continue to impose franchising and right-of-way fees on CMRS carriers. Whether such state and local regulation occurs sporadically or is "prevalent" is irrelevant to whether such regulation is unlawful under Section 253 and whether Commission action is required in a particular case. As long as ambiguities in Section 253 precedent persist, states and localities can be expected to push the limits of their authority.[25]

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[24] Indeed, it is AirTouch's experience that state and local governments themselves often have diametrically opposed positions on such measures.

[25] In this regard, the National Association of Telecommunications Officers and Advisors ("NATOA") as of the date of this filing has posted a document on its web page (presumably intended for widespread distribution to local governments) titled "Local Government Principles Relating to Rights-Of-Way Management and Compensation & Ownership of Telecommunications Facilities." NATOA, citing the Commission's spectrum auctions, contends that Section 253(c) authorizes localities to demand compensation beyond the recovery of costs, apparently on a market-priced basis. Notwithstanding that courts have recently rejected this interpretation, NATOA asserts that this is "re-affirmed in the Telecommunications Act" and "encourage[s] local governments to study these principles and reference them readily with those responsible for

(continued...)

While Congress intended that the Commission be an available forum when certain disputes arise, carriers have little assurance that disputes brought before the Commission pursuant to Sections 253(d) or 332(c)(3) of the Act will be acted upon in a timely manner.[26] This absence of procedural safeguards, particularly in light of the Commission's handling of the *City of Roseville* proceeding, signals to wireless carriers that Section 253 or 332(c)(3) disputes involving local franchising and related fees will be on a perpetual back burner at the Commission.[27] If Section 253(d) is to "have teeth," the Commission must instead take timely action on such petitions. Otherwise, national policy with respect to local competition will continue to be determined on an *ad hoc* basis in federal district court, contrary to Congress' intent.[28]

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[25] (...continued)
policy and legislation in your state." *See* <www.natoa.org>.

[26] The Commission has released procedures and guidelines for carriers filing Section 253 petitions which establish time limits for pleading cycles and filing/information guidelines, but there is no assurance that the Commission will take action on a petition in a timely manner such that a petitioning carrier with a legitimate grievance will be afforded any meaningful relief. *See Public Notice, Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, FCC 98-295 (rel. Nov. 17, 1998), 63 Fed. Reg. 66806 (Dec. 3, 1998).

[27] With respect to the *Roseville* proceeding referenced herein, on May 23, 1995, U S WEST petitioned the Commission to declare that two ordinances enacted by the City of Roseville, Minnesota constituted unlawful entry regulation preempted by Section 332(c)(3). The Commission put U S WEST's petition on Public Notice September 21, 1995, and comments were received -- many from carriers asking for Commission action to provide guidance to carriers and localities. To address issues regarding enactment of Section 253, further comment was requested in late 1996. On May 9, 1997, the Minnesota legislature amended its statutes to effectively preempt the Roseville ordinances; on October 27, 1997 Roseville repealed the ordinances. Thereafter, on March 23, 1999, the Wireless Telecommunications Bureau dismissed U S WEST's petition without addressing its merits.

[28] Senator Gorton, the primary sponsor of Sections 253(c) and (d) as enacted, stated that for
(continued...)

Whether intentionally or not, the Commission has left the impression that it will "sit" on preemption petitions until either (1) the parties settle the matter, or (2) the state legislature or other governing body takes action to render the issue moot. AirTouch is not suggesting that the Commission preempt state or local governments as a first resort, or attempt to resolve disputes before they become ripe for review -- simply that *some* action on individual petitions, whether favorable or unfavorable, be taken in a timely manner. At minimum, the Commission should consider supplementing its existing procedures for resolving Section 253 and 332(c)(3) petitions with timetables akin to, for example, the 90-day target period for acting on nonstreamlined international Section 214 applications.[29]

2. The Commission Should Confirm that CMRS and Other Wireless Carriers Do Not "Use" Public Rights-of-Way When Transmitting Signals Over the Facilities of Other Carriers

Where a carrier petitions the Commission for a declaratory ruling under Sections 253(a) and (b), the affected state or locality may attempt to invoke Section 253(c).[30] As a practical matter, however, a Section 253(c) defense should generally be *unavailable* to a state or locality where a wireless carrier challenges a state or local government's imposition of right-of-way-based franchising or fee requirement. As the Commission has noted, courts have determined

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[28] (...continued)
disputes involving Section 253(a) and (b), "[t]here ought to be one center place where these questions are appropriately decided by one Federal entity which recognizes the impact of these rules from one part of the country to another and one Federal court of appeals." 141 Cong. Rec. S8212-S8213 (June 13, 1995) (remarks of Sen. Gorton).

[29] *See* 47 C.F.R. § 63.12(d).

[30] *See Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order*, 11 FCC Rcd 13082, ¶¶ 39-42 (1996).

"that local governments may not impose fees, conditions, and franchise requirements on service providers, such as resellers, purchasers of unbundled network elements, and wireless service providers, that do not use any public rights-of-way for their own facilities."[31] In this regard, the Commission echoed the reasoning of *City of Austin* court in its June 1998 decision in *Entertainment Connections, Inc.* declaring that ECI is not a cable system operator.[32] Such franchise or fee requirements imposed on CMRS carriers *per se* cannot be tied to the management or use of public rights-of-way. Furthermore, because CMRS carriers do not use the public rights-of-way, fees imposed on CMRS carriers for such use are *per se* neither fair nor reasonable.

Given this established precedent, the Commission should declare on its own motion that a Section 253(c) defense is unavailable where a state or local government imposes a franchising or fee requirement on a CMRS or other wireless carrier for purposes of right-of-way regulation or compensation for right-of-way use.[33] Such a declaratory ruling will not undermine local governments' legitimate exercise of their right-of-way authority, but will provide crucial guidance to carriers, localities, and courts.

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[31] *NOI* ¶ 77.

[32] *See Entertainment Connections, Inc., Memorandum Opinion and* Order, 13 FCC Rcd. 14277, ¶ 63 (1998) (citing *City of Austin*).

[33] *See* 47 C.F.R. § 1.2. A declaratory ruling on the Commission's own motion is appropriate here. *See Calling Party Pays Service Offering in the Commercial Mobile Radio Services, Declaratory Ruling and Notice of Proposed Rulemaking*, WT Docket No. 97-207, FCC 99-137, ¶ 8 n.11 (rel. July 7, 1999).

II. STATE AND LOCAL TAX POLICIES IMPOSE A DISPROPORTIONATE AND DISCRIMINATORY BURDEN ON TELECOMMUNICATIONS CARRIERS

The Commission has expressed concern for "the potential discriminatory and anticompetitive effects of certain State and local tax policies."[34] CTIA, in conjunction with a number of wireless carriers (including AirTouch), has compiled a comprehensive study of state- and locally-imposed taxes on wireless carriers. This study demonstrates that telecommunications carriers are subject to significantly higher filing burden and effective tax rate than other comparable businesses, and that wireless and wireline carriers often are subject to different requirements. In Illinois, for example, a general business is only required to file 12 returns, while a telecommunications business must file up to 9,629; in California, a general business must file 5 returns, while a telecommunications business must file up to 1857.[35] Furthermore, as PCIA demonstrated in its November 12, 1998 filing in the Advanced Telecommunications Services proceeding, state and local fees alone for Los Angeles, California amounted to a total assessment amount of greater than 20 percent -- *in addition to* the 7.6 percent corporate income tax.[36] Granted, there are instances in which a remedy is available to carriers under state law. Nonetheless, and while the Commission's authority to preempt state and local taxation authority

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[34] *NOI* ¶ 84.

[35] *See* Telecommunications Tax Task Force of the Committee On State Taxation, COST Telecommunications Tax Study, Sept. 9, 1999.

[36] *See* Personal Communications Industry Ass'n, *Ex Parte* Presentation in CC Docket No. 98-146, filed Nov. 12, 1998 (submitting Michael L. Katz and John B. Hayes, *Unintended Consequences: Public Policy and Wireless Competition,* at 22 (Oct. 1, 1998), in conjunction with Price WaterhouseCoopers, LLP *State and Local Taxes and Fees Imposed on the Wireless Telecommunications Industry*, September 1998).

is admittedly limited, it should not in this proceeding preclude the possibility that a particular state or local government tax policy may be preempted under Sections 253 and/or 332(c)(3).

The Commission should clarify that Section 601(c) does not preclude preemption of state and local taxation law, but simply clarifies that the changes of the 1996 Act did not *expand* the Commission's authority in this area.[37] This is consistent with the Commission's recent determination in another context that "[w]hether a particular state or local tax or fee would constitute [CMRS] rate regulation under Section 332(c), and therefore be preempted, would depend on the specifics of the tax or fee at issue."[38] An interpretation otherwise would invite mischief and frustrate the procompetitive objectives of Section 253(c) by enabling a state or local government to simply label a particular assessment as a "tax" rather than a fee, thus vitiating Congress' intent in enacting Section 253(c).[39]

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[37] Section 601(c) of the Telecommunications Act of 1996 is a savings clause which provides that the Communications Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided" and, with some exceptions, that nothing in the Act "shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation." Telecommunications Act of 1996 § 601(c).

[38] *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 18676, ¶ 90 (1996).

[39] *See AT&T Communications of the Southwest v. City of Austin*, 40 F.Supp.2d 852, 854-55 (W.D.Tex. 1998). Similarly, the Commission and courts have determined that the Section 414 savings clause regarding state common law actions does not operate to enable state tort law to trump Communications Act provisions. *See, e.g., Cahnmann v. Sprint Corp.*, 133 F.3d 484 (7th Cir. 1998) (rejecting "interpretations of savings clauses in common carrier statutes . . . that would empower state courts to gut the federal regulatory scheme or would place the carrier under inconsistent obligations"); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir 1994) (state court action preempted by Commission's exclusive RF emissions authority).

CONCLUSION

For the foregoing reasons, AirTouch submits that further Commission action is warranted on the matters discussed in the *NOI*, as discussed herein.

Respectfully submitted,

AIRTOUCH COMMUNICATIONS, INC.

By

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October 12, 1999

ATTACHMENT A

CHICAGO DEPARTMENT REVENUE
TAX DIVISION
TAX DISCOVERY UNIT
333 South State Street, Suite 300
Chicago, Illinois 60604-3913

TE OF THIS NOTICE: 09/23/99
ACCOUNT #: 805115 SITE: 001
FILE #: D98050362

FINAL NOTICE

MAILING ADDRESS:

AIRTOUCH PAGING
12221 MERIT DR-STE# 800
DALLAS TX 75251

DEAR TAXPAYER:

YOU HAVE FAILED TO RESPOND TO PREVIOUS NOTICE(S) SENT TO YOU BY THE DEPARTMENT OF REVENUE. THIS IS A FINAL NOTICE THAT YOUR BUSINESS IS BEING INVESTIGATED FOR POSSIBLE NON-COMPLIANCE WITH CHICAGO TAX LAWS. YOU MUST VERIFY THAT YOU ARE IN COMPLIANCE WITH THE FOLLOWING ORDINANCES:

CODE	DESCRIPTION
7508	TELECOMMUNICATIONS INFRASTRUCTURE MAINTENANCE FEE

WITHIN **15 DAYS FROM THE DATE OF THIS NOTICE**, YOU MUST SUBMIT:

1) A COMPLETED TAXPAYER QUESTIONNAIRE. **YOU MUST COMPLETE THE QUESTIONNAIRE WHETHER OR NOT YOU ARE SUBJECT TO THE ABOVE LISTED TAXES OR CURRENTLY IN COMPLIANCE.**

2) A COMPLETED TAX REGISTRATION FORM, IF YOU ARE SUBJECT TO ANY OF THE ABOVE LISTED TAXES.

3) IF YOU ARE SUBJECT TO AND NOT IN COMPLIANCE WITH ANY OF THE ABOVE LISTED TAXES, A TAX RETURN FOR EACH MONTH BEGINNING JANUARY 1993 THROUGH THE CURRENT MONTH. EACH TAX RETURN MUST INCLUDE TAX, INTEREST AND 10% PENALTY.

4) PAYMENT IN FULL, OR

5) A WRITTEN EXPLANATION AS TO WHY YOU BELIEVE YOUR BUSINESS IS NOT SUBJECT TO ANY OF THE ABOVE TAXES. ORAL REPRESENTATIONS WILL NOT BE ACCEPTED. IF YOU ARE REGISTERED/REMITTING ANY OF THESE TAXES, PLEASE PROVIDE YOUR ACCOUNT NUMBER.

FAILURE TO RESPOND WILL RESULT IN THE HOLDING OF YOUR BUSINESS LICENSE, ISSUANCE OF A JEOPARDY ASSESSMENT AND/OR REFERRAL FOR AUDIT.

PLEASE MAIL ALL DOCUMENTS, PAYMENTS, FILINGS OR CORRESPONDENCE TO:

CHICAGO DEPARTMENT OF REVENUE
TAX DISCOVERY UNIT
333 SOUTH STATE STREET, SUITE 300
CHICAGO, ILLINOIS 60604
ATTN: HILL KIMBERLY

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT ME AT (312) 747-7828. FOR TTY SERVICE, THE HEARING IMPAIRED SHOULD CALL (312) 744-2975.

SINCERELY,

Hill Kimberly

HILL KIMBERLY
AUDITOR

CITY OF CHICAGO
DEPARTMENT OF REVENUE
TAX DISCOVERY UNIT
DEPAUL CENTER SUITE 300
333 SOUTH STATE STREET
CHICAGO ILLINOIS 60604-3913

TAXPAYER QUESTIONNAIRE FOR TELECOMMUNICATIONS

[A] GENERAL INFORMATION

1. Business Name(s)_____
2. Business Address(es)_____
3. Number of years at site(s)_____ 4. Business phone(s)_____
5. Federal Employer Identification Number (F.E.I.N.)_____

[B] BUSINESS CLASSIFICATION

YOU MUST PROVIDE ALL OF THE INFORMATION FOR ONE OF THE CLASSIFICATIONS

Corporation (if not a corporation, go to partnership)

1. Incorporated in the State of_____on_____19_____
2. Is authorized to do business in the State of Illinois ☐Yes ☐No
3. Names of OFFICER(S), DIRECTOR(S), and REGISTERED AGENT of corporation

NAME/TITLE	HOME ADDRESS	SOCIAL SEC. #	PHONE #

4. If the corporation has fewer than 25 shareholders indicate here ☐ and attach a list of the names and addresses of all shareholders and the ownership percentage of each.

NAME	ADDRESS	OWNERSHIP
		%

5. If the corporation has 25 or more shareholders indicate here ☐ and attach a list of the names and addresses of any shareholders owning 5% or more of the shares of the corporation and indicate the ownership percentage of each.

NAME	ADDRESS	OWNERSHIP
		%

6. List **all** entities in your corporate structure including parent companies, subsidiaries and all other related entities. Attach **a separate sheet of paper.**

Partnership (if not a partnership, go to sole proprietorship)

1. Indicate the name of each partner, the partner's status (i.e. general or limited), and the percentage of each partner's ownership interest. (Attach an additional sheet if necessary)

NAME/STATUS	HOME ADDRESS	SOC. SEC. #	OWNERSHIP
			%
			%
			%

Sole Proprietorship

1. The taxpayer is a sole proprietorship and is not acting in any representative capacity on behalf of any beneficiary ☐Yes ☐No If no, complete items 2 and 3 of this section.

2. If the sole proprietorship is held by agent(s) or nominee(s), indicate the principal(s) for whom the agent(s) or nominee(s) hold such interest:

NAME	ADDRESS	SOC. SEC. #

3. If the interest of a spouse or any other party is constructively controlled by another person or legal entity, state the name and address of such person or entity possessing such control and the relationship under which the control may be exercised.

NAME	ADDRESS	RELATIONSHIP

[C] TYPE OF BUSINESS

1. Describe **IN DETAIL** the nature of this business _____

_____

_____

2. Do you sell or resell telecommunication services? [ ] yes [ ] no [ ] sell [ ] resell
3. Do you sell or resell air time for cellular telephones? [ ] yes [ ] no [ ] sell [ ] resell
4. Do you sell or resell air time for pagers? [ ] yes [ ] no [ ] sell [ ] resell
5. Do you sell or resell local landline telecommunication service? [ ] yes [ ] no [ ] sell [ ] resell

6. Do you sell or resell long distance landline telecommunication service? [ ] yes [ ] no [ ] sell [ ] rese
7. Do you sell or resell prepaid phone cards? [ ] yes [ ] no [ ] sell [ ] resell
8. Do you sell or resell prepaid cellular phone cards? [ ] yes [ ] no [ ] sell [ ] resell
9. If you answered yes to questions 7 or 8, please explain in detail how the phone cards are sold and used. An explanation of how cards are recharged and how time balances are accounted for by your business is required. *(Please attach a separate sheet of paper.)*
10. Do you provide teleconferencing services? [ ] yes [ ] no
11. If so, please provide a detailed explanation of how the teleconferencing transmission is done. *(Attach a separate sheet of paper.)*

12. Describe your method of billing for each of the services you provide. _____

_____

13. How many customers do you have with a billing address in Chicago? _____
14. If a reseller, please list the name and address of each of your vendors. *(Attach a separate piece of paper.)*
15. If you are a reseller, what is your method of mark-up on telecommunication services? Be very specific, *(i.e., how much are you charged by your vendors and how much do you charge your customers).* _____

_____

_____

16. If you are a reseller, do you pay Telecommunications Tax to your vendors? [ ] yes [ ] no
17. If you are a reseller, do you pay Infrastructure Maintenance Fee to your vendors? [ ] yes [ ] no
18. If you are a reseller, do you pay Emergency Telephone Surcharge-wireless to your vendors? [ ] yes [ ] no
19. If you are a reseller, do you pay Emergency Telephone Surcharge (landline) to your vendor? [ ] yes [ ] no
20. Do you collect any of the above listed taxes from your customers? [ ] yes [ ] no
21. If so, which ones? *(Attach a separate sheet of paper.)*

22. Is this business currently registered with the City of Chicago Department of Revenue to pay ANY City taxes? ☐Yes ☐No

If yes, for what City taxes are you registered? _____

_____

23. Is merchandise rented or leased either as a lessee or lessor? ☐Yes ☐No
    a) List examples of items. _____
    b) List lessors _____
    c) Do your lessors collect Chicago Transaction Tax from you? ☐Yes ☐No

24. Total current number of employees whether compensated or not. _____
25. Total number of employees prior to 7/1/95. _____

26. Total amount of purchases per year from vendors located outside the city purchased for use in the City?

_____

27. Are there any additional business sites? ☐Yes ☐No
If yes, list **EACH** business site. Use additional pages if necessary.

28a. Does this business own, partially or completely, one or more other businesses? ☐Yes ☐No

b. Is this business owned, partially or completely, by one or more other businesses? ☐Yes ☐No

c. **If you answered yes to 28a, 28b, or both, complete parts [A] and [B] of this form for each business.**

29. Has this business been a party to a merger, acquisition or bulk sale in the last five years? ☐Yes ☐No
If yes, please describe the transaction, identify all parties, list each party's F.E.I.N. and provide the names and addresses of the officers of each party. Also, provide the name, address and telephone number of the contact person for each party.

I certify, under penalty of perjury, that I have completed this certificate accurately. I also acknowledge that this questionnaire must be returned to the city of Chicago Department of Revenue within 20 calendar days from the date I received this questionnaire.

Signature of Owner or Officer **Date**

Print Name of Signatory

QUESTIONS?
If you have any questions regarding this questionnaire, please contact Kimberly Hill at (312) 747-7828. Completed questionnaire should be mailed to:

CHICAGO DEPARTMENT OF REVENUE
TAX DISCOVERY UNIT
DEPAUL CENTER SUITE 300
333 SOUTH STATE STREET
CHICAGO, ILLINOIS 60604
ATTN: KIMBERLY HILL

CITY OF CHICAGO

DEPARTMENT OF REVENUE

TELECOMMUNICATIONS TAX AND TELECOMMUNICATIONS INFRASTRUCTURE MAINTENANCE FEE REGISTRATION FORM - 2000

This form must be completed by telecommunications retailers, and all telecommunications resellers that are not retailers and all othe businesses that install, own, operate or control equipment in the public way that is used or designed to transmit telecommunications

I. GENERAL INFORMATION

Business Name: _____

Doing Business As: _____

Attention: _____

Business Address: _____
If more than one business site please attach a listing of all sites

City: _____ State: _____ Zip: _____

Mailing address: _____
If different from above

City: _____ State: _____ Zip: _____

Business Phone Number : ( ) _____

Business Fax Number : ( ) _____

Mail to:

CHICAGO DEPARTMENT OF REVENUE
ATTN: DATABASE MANAGEMENT
TAX REGISTRATION FORM
333 S. STATE ST STE 300
CHICAGO IL 60604-3981

II. BUSINESS CLASSIFICATION

a. Check the type of business ownership: _____ Sole proprietorship _____ Partnership

_____ Limited Partner _____ Limited liability company _____ Corporation

b. _____ S.S.N. (if sole proprietor) _____ F.E.I.N. _____ I.B.T.N. _____ S.I.C.

c. If you are a corporation: Date of incorporation: _____ State of incorporation: _____

d. Individual responsible for filing Chicago tax returns: _____ Name _____ Title _____ S.S.N.

e. List owners, corporate officers, general partners or limited liability company managing members or managers.
Attach additional sheets if necessary.

Name: _____ SSN: _____ Title: _____

Home Address: _____ City: _____ State: _____ Zip: _____

Name: _____ SSN: _____ Title: _____

Home Address: _____ City: _____ State: _____ Zip: _____

III. OTHER INFORMATION

a. Number of employees: _____ Number of employees that work 50% or more in the City of Chicago: _____

b. Is this business a lessor or lessee of personal property that is used in Chicago _____ Yes _____ No. If yes what type of personal property does the business lease? _____

c. Does this business purchase nontitled personal property from a retailer located outside Chicago for use in Chicago? ____ Yes ____ No

IV. BUSINESS OPERATIONS

a. Is the business currently registered for any City of Chicago Tax? _____ Yes _____ No

b. If Yes, provide the City of Chicago Drev Number and tax type: _____

c. Is the business a retailer of telecommunication services? _____ Yes _____ No

d. Is the business a reseller of telecommunication services? _____ Yes _____ No

e. What type of telecommunications service is provided? Check all that apply.

____ Wireline Telephone Service	_____ Wireless Telephone Service	_____ Other/List Type
____ Local	_____ Long Distance	_____
____ Private Line Service	_____ Private Line-Internal Use Only	_____

f. Provide a brief description of your business operations: _____

g. Provide the business start date: _____

h. If a retailer, provide the date of the first taxable transaction: _____

I If a retailer, provide the date of the first transaction subject to the Infrastructure Maintenance Fee: _____

V. DISCLOSURE REQUIREMENTS

a. Per section 3-75-060 of the Telecommunications Infrastructure Maintenance Fee Ordinance list the following information for every telecommunications reseller or other telecommunications provider with whom the registering business has a contractual relationship to provide telecommunications services or to make available telecommunications facilities in the public way.
Attach additional sheets as needed

	BUSINESS NAME	ADDRESS	CITY	STATE	ZIP	CITY OF CHICAGO DREV NUMBER
1.						
2.						
3.						
4.						
5.						

Note: Any change in the information provided on this form, including the creation or termination of a contractual relationship must be reported on the City of Chicago Telecommunications - Infrastructure Change Form (TICF) within 30 days after the date of occurrence.

VI. OWNER / OFFICER STATEMENT

I hereby certify that the information contained in this registration and any sheets attached hereto is true and correct.

Print Name _____ Title _____

Authorized Signature _____ Date _____