

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of)
) Docket No. UT-990873
)
TELECOMMUNICATIONS ACT) COMMENTS OF
FEE RULEMAKING) AIRTOUCH PAGING
)

AirTouch Paging ("AirTouch") respectfully submits the following comments in response to the Washington Utilities and Transportation Commission's (the "Commission") Notice of Opportunity to File Written Comments dated July 9, 1999 in this Docket.

1 **If the Commission adopts filing fees for arbitrations or contested matters, the most**
2 **prevailing party must be entitled to recover its fees from the other party.**

3 If the Commission implements filing fees for arbitrations or contested cases that it
4 conducts under the Telecommunications Act of 1996 (the "Act"), then AirTouch urges the
5 Commission to adopt a cost recovery rule which entitles the most prevailing party to recover its
6 filing fees from the other party. There are several public policies that support this
7 recommendation.

8 First, the parties to a dispute should have every incentive to resolve their differences
9 before the Commission is requested to arbitrate an agreement or conduct hearings on a contested
10 case. In the three years since the Act was passed, incumbent local exchange companies
11 ("ILECs") have routinely taken positions in negotiations and in proceedings before this
12 Commission that are directly contrary to the express provisions of the Act, the express provisions

1 of FCC's orders and administrative advice letters, and the express rulings of courts.¹ Today,
2 ILECs have little or no financial disincentive from continuing to take these unfounded positions
3 before the Commission. In many cases, the arbitrations or contested cases to be filed with the
4 Commission will arise out of an ILEC's having taken an unfounded position in their negotiations
5 with the competitive local exchange carriers ("CLECs"). If the Commission decides to
6 promulgate rules that implement filing fees, the Commission's rules should entitle prevailing
7 parties to recover their filing fees and thereby create a financial incentive for the parties to take
8 reasonable positions that are founded in law.

9 Second, if a prevailing party is not entitled to recover its filing fees, the Commission may
10 create a significant *disincentive* that may keep some CLECs from presenting their matters to the
11 Commission for resolution. The Commission has asked commenters to address whether the
12 filing fees should be based upon the average or actual resource costs of such proceedings. As the
13 Commission knows, the Commission's resource costs of arbitrations and contested cases can
14 exceed tens of thousands of dollars. This cost would be in addition to the professional and

¹ For example, in the recent Washington arbitration between AirTouch and U S WEST Communications, Docket No. UT-990300, U S WEST continuously asserted that paging carriers are not entitled to termination compensation under the Act. U S WEST took this position in spite of the fact that an arbitrator for the Commission had already ruled that paging carriers are entitled to termination compensation, the FCC's First Report and Order implementing the Act expressly ruled that paging carriers are entitled to termination compensation, and every state jurisdiction which addressed the question had ruled that paging carriers are entitled to termination compensation. In addition, U S WEST took the position that AirTouch must be required to pay monthly recurring charges for the facilities that U S WEST uses to deliver traffic to AirTouch's paging switch. U S WEST took this position in spite of the fact that the FCC's First Report and Order ruled that ILECs must stop charging paging carriers for the delivery of traffic from their networks as of the effective date of the First Report and Order in 1996, and in spite of a letter from the Chief of the Common Carrier Bureau of the FCC reiterating that requirement. In fact, U S WEST continues to issue bills to AirTouch for the facilities that U S WEST uses to deliver its traffic to AirTouch. AirTouch was forced to file a complaint in the United States District Court in Colorado in order to secure a commitment from U S WEST that it would start providing additional interconnection facilities between U S WEST's network and AirTouch's paging switch. U S WEST is still asserting before the United States District Court that it is entitled to be paid for the facilities it uses to deliver its traffic to AirTouch's paging switch. See, AirTouch Paging, Inc. v. U S WEST Communications, Inc., No. 99-WM-12, (D. Co., filed January 5, 1999).

1 managerial costs that parties incur to participate in the proceedings. If the Commission adopts a
2 resource cost fee structure, the Commission's actions will have a significant chilling effect on the
3 ability or desire of many of the new CLECs to protect their statutory rights through the
4 Commission's arbitration or contested case procedures.² Most of the CLECs have significantly
5 lesser financial resources than the ILECs. If the Commission adopts rules that create a significant
6 or open-ended financial liability for CLECs that cannot be recovered if they prevail, then the
7 Commission will cause some CLECs to forego the dispute resolution procedures and concede on
8 their positions with the ILECs.

9 Third, if the Commission doesn't allow the prevailing party to recover its costs, then the
10 Commission will create an *incentive* for the ILECs to continue taking extreme positions. The
11 ILECs fully understand the costs that CLECs incur when CLECs must challenge their positions
12 in a regulatory or judicial proceeding. If the Commission requires CLECs to incur significant or
13 open-ended filing fees in order to challenge the positions taken by the ILECs, then the ILECs
14 will have an additional incentive to take unfounded positions and either exact concessions from
15 CLECs or cause them to incur even more costs in order to enforce their rights under the Act.

16 Finally, the Commission should follow the common practice in civil courts which allows
17 the prevailing party to recover its costs. Under RCW 4.84.010, prevailing parties are entitled to
18 recover certain costs of the action, including filing fees. Parties to civil actions expect that the
19 prevailing party will recover their costs. The Commission should follow this common cost
20 recovery rule in any rules that are adopted as part of this proceeding.

¹ ² In AirTouch's arbitration experience, the legal and managerial costs of securing its rights under the Act greatly
² exceeded the financial benefits from the arbitration due to the unreasonable and unsupported positions that were
³ taken by U S WEST.

1 **Conclusion**

2 AirTouch takes no position on whether the Commission should adopt filing fees for
3 proceedings under the Act. If filing fees are adopted, AirTouch urges the Commission to create
4 rules that encourage parties to take reasonable positions and settle their disputes by allowing the
5 prevailing party to recover its costs.

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FOSTER PEPPER & SHEFELMAN PLLC

Richard J. Busch
Attorney for AirTouch Paging

777 108th Avenue NE, Suite 1500
Bellevue, WA 98004

(425) 646-3733 Phone
(425) 455-5487 Fax
busch@foster.com