

Bradley R. Cahoon (5925)
Scott C. Rosevear (9953)
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an
Investigation into Pole
Attachments

**VOICESTREAM PCS II
CORPORATION DBA T-MOBILE'S
BRIEF IN REPLY TO STANDARD
POLE ATTACHMENT CONTRACT
COMMENTS**

DOCKET NO. 04-999-03

VoiceStream PCS II Corporation dba T-Mobile ("**T-Mobile**"), through its counsel, submits to the Public Service Commission ("**Commission**") its Brief in Reply to Standard Pole Attachment Contract Comments filed by the parties to this Investigation.

COMMENTS

T-Mobile's suggested changes to the Standard Pole Attachment Contract ("**Standard Contract**"), including the changes that T-Mobile suggested in its Initial Comments, are attached as **Exhibit A** to this Brief. The comments that follow are in direct reply to the Standard Contract

comments submitted by the Utah Division of Public Utilities (“DPU”) to the Commission on April 15, 2005.

A. Reply to DPU Issue No. 6 – Easements

At the request of PacifiCorp and Qwest, the Standard Contract includes language limiting the attaching entity’s access to the land upon which the pole is located:

The right of access to Pole Owner’s poles granted by this Agreement does not include any right of access to the land upon which the pole is situated nor does it include any right to cross the land from pole-to-pole with Licensee’s Equipment and such access rights are specifically disclaimed.

Standard Contract § 3.11.

In its Initial Brief, DPU concludes that “this language merely clarifies that the contract itself does not give a legal easement or right-a-way [sic] and that such right might exist regardless of a pole attachment agreement.” DPU Initial Brief at p.8. DPU then recommended that the Commission adopt the foregoing language.

T-Mobile disagrees with DPU’s position that the Standard Contract should not allow the attaching entity to use the easements or rights of way of the pole owner for purposes of accessing the pole when such access is not covered by a public right of way. To the contrary, to the extent the pole owner holds an easement, right of way, or other pole access rights, the attaching entity should be able to use those same rights to access the poles for attaching and maintaining its equipment.

The federal Pole Attachment Act and the proposed Utah Pole Attachment rules require a pole owner to allow an attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable. *See* 47 U.S.C. § 224; Proposed UTAH ADMIN. CODE R746-345-1. Further, the federal Pole Attachment Act specifically requires a pole owner to give an attaching entity nondiscriminatory access to rights-of-way owned or controlled by the pole owner. *See* 47 U.S.C. § 224; *see also UCA, LLC v. Lansdowne Community Development, LLC*, 215 F.Supp 2d 742 (E.D. Va. 2002). The Standard Contract should reflect these state and federal mandates by not expressly disallowing the attaching entity's use of the pole owner's easements and rights of way to access the pole owner's poles for purposes of attaching and maintaining attached equipment. The attaching entity should be allowed to use the right of way or easement of the pole owner to the extent allowed by the pole owner's right of way or easement.

T-Mobile is not suggesting that the Standard Contract purport to grant the attaching entity a right that is beyond the scope of the right of way or easement of the pole owner. However, to the extent the pole owner has the right to access the pole via a right-of-way or easement, and the attaching entity's use of that falls within the scope of the access rights, based on state and federal mandates, the Standard Contract should allow the attaching entity's use of those rights. *See Exhibit A*, § 3.11.

B. Reply to DPU Issue No. 9 – Indemnity, Liability & Damages

DPU's brief correctly recognizes the need for an indemnity provision in the Standard Contract. However, DPU has suggested the use of a one-sided indemnity provision that is

inconsistent with the federal Pole Attachment Act and the proposed Utah Pole Attachment rules and is unacceptable to T-Mobile. The indemnity provision offered by DPU reads as follows:

Except for liability caused by the gross negligence or intentional misconduct of Pole Owner, Licensee shall indemnify, protect and hold harmless Pole Owner, its successors and assigns, from and against any and all claims, demands, causes of action, costs (including attorney's fees) or other liabilities for damages to property and injury or death to persons which may arise out of, or be connected with: (a) the erection, maintenance, presence, use or removal of Licensee's Equipment; or (b) any act of Licensee on or in the vicinity of Pole Owner's poles. Except for liability caused by the gross negligence or intentional misconduct of Pole Owner, Licensee shall also indemnify, protect and hold harmless Pole Owner, its successors and assigns from and against any and all claims, demands, causes of action, costs (including attorney's fees), or other liabilities arising from any interruption, discontinuance, or interference with Licensee's service to its customers which may be caused, or which may be claimed to have been caused, by any action of Pole Owner undertaken in furtherance of the purposes of this Agreement. In addition, Licensee shall, upon demand, and at its own sole risk and expense, defend any and all suits, actions, or other legal proceedings which may be brought against Pole Owner, or its successors and assigns, on any claim, demand, or cause of action arising from any interruption, discontinuance, or interference with Pole Owner's service to Pole Owner's customers to the extent caused, or which may be claimed to have been caused, by any action of Licensee. To the extent Licensee shall be found to have caused such interruption, discontinuance, or interference, Licensee shall pay and satisfy any judgment or decree which may be rendered against Pole Owner, or its successors or assigns, in any such suit, action, or other legal proceeding; and further, Licensee shall reimburse Pole Owner for any and all legal expenses, including attorneys fees, incurred in connection therewith, including appeals thereof.

Pole Owner warrants that its work in constructing and maintaining the poles covered by this Agreement shall be consistent with prudent utility practices. **POLE OWNER DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED,**

INCLUDING BUT NOT LIMITED TO THE WARRANTY OF MERCHANTABILITY, FITNESS FOR PARTICULAR PURPOSE, AND SIMILAR WARRANTIES. Pole Owner's liability to Licensee for any action arising out of its activities relating to this Agreement shall be limited to repair or replacement of any defective poles.

Notwithstanding the above, under no circumstances shall either Party be liable to the other Party for economic losses, costs or damages, including but not limited to special, indirect, incidental, punitive, exemplary or consequential damages.

DPU Brief at pp. 11-13. This indemnification language runs counter to federal and Utah state mandates for just, nondiscriminatory access to poles. The FCC itself has stated that indemnification provisions in pole attachment contracts should be mutual, i.e., each party to the pole attachment contract should be responsible for damage caused by its own conduct. *See Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333 (2003). Moreover, under the indemnification language suggested by DPU, the pole owner may be able to collect more compensation from the attaching entity for a service interruption than the pole owner's customers can collect from the pole owner for the same service interruption. For example, under Qwest's tariff, a Qwest customer receiving Qwest's switched access service can be reimbursed for an interruption of that service only for interruptions of 24 hours or more, and the reimbursement cannot exceed the monthly rate for the service. *See Qwest Utah Access Service Tariff Section 2.4.4.* However, the indemnity language proposed by DPU would potentially allow Qwest to recover from the attaching entity any and all expenses associated with

an interruption of service. Such a provision is clearly unfair to the attaching entity and runs counter to the purpose of the Standard Contract and the proposed Pole Attachment rules.

T-Mobile wishes to stress that it simply cannot and will not enter into the Standard Contract if it contains such an unreasonable indemnification provision. Any indemnification clause should include a mutual indemnification that requires both parties to indemnify the other party for liabilities associated with the pole or the pole attachment. T-Mobile believes the language proposed by the Utah Rural Telecom Association (“**URTA**”), which is included in T-Mobile’s proposed changes to the Standard Contract in **Exhibit A**, successfully and fairly balances the interests of both pole owner and attaching entity. T-Mobile urges the Commission and the parties to this Investigation to adopt the language proposed by URТА. *See* **Exhibit A** § 9.01.

REQUEST

Based on the forgoing, T-Mobile requests that the Commission make the changes to the Standard Contract as set forth in **Exhibit A** to these comments.

RESPECTFULLY SUBMITTED this ___ day of _____, 2005.

SNELL & WILMER L.L.P.

Bradley R. Cahoon
Scott C. Rosevear
Attorneys for T-Mobile