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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an
Investigation into Pole
Attachments

**INITIAL COMMENTS OF
VOICESTREAM PCS II
CORPORATION DBA T-MOBILE**

DOCKET NO. 04-999-03

VoiceStream PCS II Corporation dba T-Mobile ("**T-Mobile**"), through its counsel, hereby submits to the Public Service Commission ("**Commission**") its comments to the June 3, 2004 proposed rules published by the Division of Public Utilities ("**DPU**") for regulating pole attachments.

Comments

Attached to these Comments as **Exhibit A** are changes to the proposed rules as suggested by T-Mobile. The Comments that follow state the reasons why T-Mobile suggests changes to the proposed rules as contained in Exhibit A.

A. General Comments

1. The term “Public Utility” is defined in UTAH CODE ANN. § 54-2-1 (15). To prevent confusion, the defined term “Public Utility” should also be used in the proposed rules. T-Mobile’s suggested changes to the proposed rules change any reference to “Public Utility company or companies” in the proposed rules to “Public Utility.”

2. The definition of “Public Utility” in UTAH CODE ANN. § 54-2-1 includes “telephone corporation.” *Id.* § 54-2-1 (15) (a). However, the definition of “telephone corporation” excludes providers of “cellular, personal communication systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. Sec. 332 that has been issued a covering license by the Federal Communications Commission. *Id.* § 54-2-1 (23). Because the proposed rules use the defined term “Public Utility,” the proposed rules inadvertently exclude regulation of pole attachments by wireless providers such as T-Mobile. To remedy this situation, T-Mobile’s suggested changes to the proposed rules include: (i) adding the term “Wireless Provider” every time the proposed rules list the types of service providers whose pole attachments are regulated by the proposed rule; (ii) adding a definition for “Wireless Provider” in R746-345-2; and (iii) deleting the term “telecommunication corporations,” which is not defined in either UTAH CODE ANN. § 54-2-1 or the proposed rules.

3. To prevent confusion, T-Mobile suggests changing all references to defined terms in the proposed rules to make them singular, and not plural.

B. Comments to R746-345-1. Authorization

1. R746-345-1 (A) should reference the federal Pole Attachment Act (“PAA”), 47 U.S.C. § 224. The federal PAA requires regulation of pole attachments by the Federal Communications Commission (“FCC”) or by a state that certifies to the FCC that it will regulate pole attachments. Further, the United States Supreme Court confirmed in *NCTA v. Gulf Power Co.*, 534 U.S. 327, 338-39 (2002) that the PAA's term “telecommunications service” includes wireless telecommunications service, such as T-Mobile's service. Therefore, the authorization to promulgate rules contained in the proposed rule should reference the federal PAA.

2. As stated above, wireless providers are specifically excluded from regulation by the Commission in UTAH CODE ANN. § 54-2-1(23)(b). T-Mobile’s suggests clarifying Rule R746-345-1 (B) (1) to include wireless providers, but solely for purposes of pole attachments.

3. Because the federal PAA and implementing regulations require a Public Utility to allow Attaching Entities nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way and to offer rates, terms, and conditions that are just and reasonable, T-Mobile suggests adding a clause to the proposed rules in Rule R746-345-1 (B) (2) confirming this duty.

C. Comments to R746-345-2. General Definitions

For the reasons stated above, T-Mobile proposes adding “Wireless Provider” as a defined term. T-Mobile’s suggested Rule R746-345-2 (D) includes a definition of Wireless Provider that is substantially the same as the definition in UTAH CODE ANN. § 54-2-1 (23) (b).

D. Comments to R746-345-3. Tariffs and Contracts

R746-345-3 states that the standard contract for pole attachments “shall identify all non-recurring charges for pre-construction survey, engineering, make-ready, and change-out.” T-Mobile assumes that the term “change-out” refers to the situation where, because of capacity or structural limitations, the pole selected by the Attaching Entity for attachment cannot bear an attachment and thus the old pole must be “changed out” for a new pole. T-Mobile request that the standard contract make clear that when the Attaching Entity pays the costs associated with a “change-out,” the rates charged for the “changed-out” pole should remain subject to the Commission’s pole attachment rules.

E. Comments to R746-345-5. Rate Formula and Methodology

If there is space available for attachments, then up to all of the usable space on the pole should be accessible to provide maximum flexibility for the Attaching Entity. T-Mobile’s suggested changes to R746-345-5 suggest that all usable space on the pole be accessible to the Attaching Entity.

F. Comments to Proposed Standard Contract

T-Mobile requests that several provisions of the standard contract (currently Pacificorp’s form) be modified as set forth in **Exhibit B** hereto.

REQUEST

For all of the forgoing reasons, T-Mobile requests that the Division make the changes to the proposed rules as suggested by T-Mobile. T-Mobile also requests that the Division require the changes to the proposed standard contract set forth in the comments to the proposed standard contract in Exhibit B hereto.

RESPECTFULLY SUBMITTED this 21st day of June, 2004.

SNELL & WILMER L.L.P.

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