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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 files its Initial Comments pursuant to the March 19, 2004 Notice of Further Agency Action and Scheduling ("**Notice**") of the Utah Public Service Commission ("**Commission**").

FURTHER AGENCY ACTION

1. On March 11, 2004, the Division of Public Utilities ("**Division**") submitted a request to the Commission that the Commission conduct an investigation into recent issues that have arisen in association with pole attachments. The Commission granted this request in its Notice.

2. To aid its investigation, the Commission requested interested parties to file initial comments with the Commission, identifying issues that they believe the Commission should address in its pole attachment investigation and the reasons why the Commission should address these issues. *Id*

Pole Attachment Act

3. The federal Pole Attachment Act, 47 U.S.C. § 224, as amended ("**PAA**") authorizes the Federal Communications Commission ("**FCC**") to regulate the rates, terms, and conditions of utility pole attachment agreements entered into by utility companies with telecommunications service providers. Rates must be fair, reasonable and nondiscriminatory.

4. 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.

5. Section 224(c) of the PAA reserves the right of states to regulate the rates, terms, and conditions for pole attachments. The state must certify to the FCC that, in regulating attachment rates, it will consider "the interest of the subscribers of the services offered via such attachments, as well as the interest of the consumers of the utility services." 47 U.S.C. § 224(c)(2)(B).

6. The State of Utah through the Commission certified to the FCC that the State will regulate pole attachments in Utah pursuant to 47 U.S.C. § 224 (c).

7. Utah Code Ann. § 54-4-13 and Utah Admin Code R746-345-1 to -4 provide for the regulation of the rates, terms, and conditions of attachments by cable television companies. No Utah statute or rule specifically addresses attachments by wireline or wireless service providers.

8. For purposes of infrastructure deployment, the Utah Supreme Court has held that the term "Telephone Line" contained in Utah Code Ann. § 54-2-1(23) includes both wireless and wireline telecommunications. Section 54-2-1(23) provides:

> "Telephone line" includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone whether that communication is had with or without the use of transmission wires.

(Emphasis added.) *See Williams v. Hyrum Gibbons & Sons*, 602 P.2d 684, 686 (Utah 1979).

9. Although the Commission has authority to regulate wireless pole attachments in the interests of public convenience and necessity and fair and reasonable rates, the Commission does not have authority to regulate wireless service providers because the FCC regulates them and they are not considered regulated public utilities pursuant to Utah Code Ann. § 54-2-1(23)(b).

T-Mobile

10. T-Mobile holds licenses with the FCC to promulgate and operate a personal communications service (**"PCS"**) in Utah and throughout the country. T-Mobile's PCS includes voice, data and Internet communications.

11. T-Mobile is obligated under its FCC license to, among other things, build out its PCS system to provide uninterrupted wireless telecommunications coverage to the public in its service areas.

12. T-Mobile's PCS is necessary to provide emergency services to the public. Customers rely on T-Mobile to make emergency 911 calls. Police, fire, and medical personnel use T-Mobile to communicate with one another and with other emergency service providers and to respond to emergencies reported by public 911 calls.

13. PCS is a cellular system that relies on a network of antenna facilities or antenna sites. The antenna sites transmit and receive low-power radio signals to and from the customer's handset. Antennae must be in the line of sight of handsets for successful communications. The network of antenna sites is interconnected to the local telephone system through a central switch. Accordingly, in order to establish PCS, T-Mobile must construct a number of coordinated antenna sites.

14. To provide continuous coverage, T-Mobile must build an interconnected system of antenna sites so that, as the customer travels, the signal can be "handed off" from one antenna site to the next without an interruption in coverage.

15. To improve quality of service, coverage within an area in maintained by arranging antennae in a honeycomb-shaped grid. When a grid is placed over a city map, desired antenna locations often fall in sensitive areas such as residential neighborhoods.

16. Local governments require T-Mobile to complete pubic hearings and obtain a conditional or special use permit for most antenna sites. T-Mobile is working to provide seamless PSC coverage in residential and sensitive land areas. T-Mobile encounters stiff opposition from local residents to proposed antenna sites located in residential and other sensitive areas, especially if the proposal is for a standard monopole exceeding heights of 100' or more with a top array of antenna panels. (See **Exhibit A**.) In contrast, T-Mobile has covered most commercial and industrial properties with wireless antennae and PCS.

17. Most local governments are forcing wireless carriers such as T-Mobile to blend their antenna designs into existing infrastructure and landscapes. This generally means several more antenna sites are needed to cover an area that otherwise could be covered by a standard monopole antenna design.

18. Further, in residential areas, there are very few choices for locating on or even near residential properties. Sometimes church properties can accommodate antenna sites, but in Utah, The Church of Jesus Christ of Latter-day Saints refuses to allow any antennae on its properties even though it operates a church in or near most Utah neighborhoods.

19. Utility poles already exist in most Utah residential neighborhoods and sensitive land use areas. T-Mobile has equipment that can attach to utility poles. (See **Exhibit B**.) Utility poles present a viable option for deploying wireless antennas in a manner that will satisfy concerns of local government and residents who are already used to utility pole infrastructure in their neighborhoods and a legitimate solution for improving wireless telecommunications inside thousands of homes in furtherance of public convenience and necessity.

INITIAL COMMENTS

Based on the foregoing, T-Mobile requests that the Commission address the following issues in its investigation into pole attachments.

Issue #1: Should the Commission adopt rules that apply to wireless pole attachments?

The PAA and public convenience and necessity requires deployment of wireless attachments into residential neighborhoods and sensitive areas. As such, the Commission should consider specifically regulating wireless attachments. While Utah statutes and regulations expressly govern attachments for cable television companies, s*ee* Utah Code Ann.§ 54-4-13 and Utah Admin. Code R746-345-1 to -4, no Utah statute or regulation specifically governs attachments by either wireline or wireless providers like T-Mobile. The Commission must adopt rules that cover all three services to satisfy the mandates of the PAA. Moreover, customers demand seamless uninterrupted wireless service from within their homes. This demand necessitates deployment of wireless antennae on utility pole's because there are few, if any, landowners willing to accept wireless facilities in neighborhoods and sensitive areas and local zoning prohibits or severely limits wireless antennae near homes and sensitive lands.

Issue #2: Should the Commission adopt a rate formula for wireless pole attachments and rules forbidding or limiting additional costs charged wireless providers?

The Commission should investigate whether it should adopt rules containing a rate formula for wireless attachments and whether it should forbid or restrict additional costs charged for wireless attachments, such as application fees, charges for preparing facilities for attachments, inspecting facilities, relocating attached equipment, and compensating utilities for damage to their property, and any other charges above and beyond the attachment rate.

The PAA and FCC rules impose a specific formula to determine the rate a utility can charge for pole attachments. *See* 47 U.S.C. § 224; 47 C.F.R. § 1.1401 *et seq*. The PAA requires that such rates be just, reasonable and nondiscriminatory. *See* 47 U.S.C. § 224 (b)(1). Utah rules regulate the rate that a utility can charge for cable pole attachments. *See* R746-345-2 to -3. The rates must be based on a "fair and reasonable portion of the utility's costs and expenses for the pole plant." R746-345-3. Federal and state rules collectively require just, fair, reasonable and nondiscriminatory rates for pole attachments. The Commission should consider applying this same standard and formula to wireless attachments.

The Commission should consider developing a formula for wireless attachments similar to what the FCC has done for cable and wireline carriers. Public policy requires a rate formula that guarantees fair, reasonable and nondiscriminatory wireless attachment rates.

The Commission should consider whether to adopt a rate formula for wireless attachments because a rate formula will benefit both the public and utilities. The public, wireless customers, utilities and wireless providers would all benefit from a rate formula that guarantees a fair and reasonable rate for wireless attachments. The public significantly benefits from improved wireless communications inside homes, especially during emergencies. Further, the interest of utilities is served when they receive fair and reasonable rate revenue for their investors.

In addition, the Commission should consider whether to adopt rules restricting utilities from assessing wireless providers additional fees and charges, including charges for application fees, preparing facilities for attachments, inspecting facilities, relocating attached equipment, and compensating the utility for damaged property. These fees and charges include any other charge above and beyond the attachment rate. The Commission should consider forbidding such

charges because the utilities already are or should be compensated for the same in the regulated rate. Moreover, the Commission should consider adopting rules limiting utilities from charging any extra costs to the wireless providers.

Finally, the Commission should consider adopting a rate formula for wireless attachments that does not include an assessment for unusable space. Under FCC regulations, 13.5 feet of the standard 37.5 foot high pole is deemed unusable space. The PAA forbids charging cable providers for unusable space but allows telcos to be charged for unusable space. This distinction is illogical and arbitrary. The Commission is free to develop its own formula and standards. As such, the Commission should consider not allowing utilities to charge wireless providers for unusable space. A fair and reasonable rate should be based on space used for the attachment.

Issue #3: Should the Commission adopt procedural rules governing utilities' consideration, response and determinations of attachment requests?

The Commission should consider whether to establish procedural rules that a utility must follow in considering, approving or denying pole attachment requests. Specifically, the Commission should consider whether to (i) require utilities to provide information in response to an attachment request that will allow the requestor to verify the fair and reasonable rate that the utility may charge for the attachment; and (ii) impose deadlines on utilities for responding to and for approval or denial of attachment requests.

T-Mobile's own experience with attachment requests demonstrates why the Commission needs to consider adopting procedural rules. In 2003, T-Mobile began negotiating with Pacificorp for wireless antennae attachments. To that end, T-Mobile requested information from Pacificorp to help T-Mobile determine what PacifiCorp could charge as a fair and reasonable attachment rate. Unfortunately, PacifiCorp did not cooperate. On December 16, 2003, T-Mobile sent a letter to Pacificorp, formally requesting information pertaining to PacifiCorp's plant in order to determine the proper attachment rate. Despite T-Mobile's efforts, Pacificorp has not

provided the information requested by T-Mobile, and it still has not decided whether to grant T-Mobile's attachment request. PacifiCorp has all the information needed to determine a fair and reasonable rate, i.e., information relating to Pacificorp's costs in erecting and maintaining utility plant. T-Mobile cannot verify the fairness of Pacificorp's rate, unless PacifiCorp provides T-Mobile with the requested information.

Issue #4: Should the Commission adopt rules allowing for attachments not only on poles but also on transmission towers and other facilities and inside rights of way?

The Commission should consider expanding the definition of pole attachment to include not only poles but also transmission towers, other facilities and rights of way. The PAA and the FCC regulations define "pole attachment" to include "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right of way owned or controlled by a utility." 47 U.S.C. § 224(a)(4); 47 C.F.R. § 1.1402. The Commission is free to broaden its own definition of pole attachment and is not bound to follow the PAA and FCC here. The distinction traditionally made between distribution poles and transmission towers is artificial and arbitrary when considering wireless attachments. Many neighborhoods have been built up against and around transmission towers and substations. These facilities often are ideally located to accommodate wireless attachments. As long as the proposed facility, whether as existing or replaced, is suitable and safe for attachment, there is no rational reason not to allow a wireless attachment. That cable or telcos did not contemplate having to use transmission towers or other utility facilities besides distribution poles, ducts and conduits does not mean wireless attachments should be so limited.

Public convenience and necessity requires that all potential utility facilities be allowed for wireless attachments so long as the location is or can be made suitable and safe, and the attacher pays a fair and reasonable rate.

Issue #5: Should the Commission adopt rules requiring utilities to allow attachers to replace existing poles that are unsuitable for attachments and requiring that replacement costs be factored into attachment rate?

The Commission should consider adopting rules requiring utilities to allow attachers to replace poles that are unsuitable for wireless attachments. Many times an existing pole is inadequate or unsuitable for a wireless attachment and must be replaced in order to complete the attachment. Often utilities will not allow a pole or facility to be replaced, even when the wireless provider would cover the replacement cost and replacement is feasible. Public convenience and necessity requires that facilities unsuitable for wireless attachments be replaced as long as the utility is fairly and reasonably compensated for the attachment and the replacement is feasible and safe.

The Commission should consider adopting rules requiring the factoring of the cost of replacing an existing facility unsuitable for attachment into the attachment rate analysis. The wireless provider must pay all costs associated with the pole replacement, and the utility takes ownership and control of the replaced facility. As such, the utility receives the economic benefit of depreciation and avoided replacement costs for its investors. The wireless provider should not be unfairly burdened with the entire replacement cost in addition to having to pay a separate attachment rate that excludes the replacement cost accounting. The Commission should consider adopting rules requiring the factoring of facility replacement costs and benefits into an attachment rate formula.

Issue #6: Should the Commission adopt rules allowing wireless providers to relocate an attachment to a new pole or facility if the original location proves unsuitable?

The Commission should consider adopting rules allowing wireless providers to transfer an attachment to a new pole or facility if the original location proves unsuitable. Once a fair and reasonable attachment rate is established, the attacher should be allowed flexibility to relocate if an original location proves unsuitable. Unsuitability results from changes in coverage

requirements or design or engineering limitations. Utilities should not be allowed to forbid relocations if another more suitable location is needed for better wireless service.

Issue #7: Should the Commission consider forbidding utilities from charging additional rates or rent when additional equipment is attached, such as shelters or cabinets, on property owned or controlled by the utility?

There may be instances when a wireless provider desires to add additional equipment to an existing attachment, such as shelters, cabinets or switching equipment. The attachment should not be restricted to preclude attachment of additional equipment. Further, the wireless provider should not be charged in excess of the fair and reasonable rate for the particular attachment, whether additional equipment is added or not. For this reason, the Commission should consider forbidding additional rent or rates for the addition of equipment to an existing attachment subject to a fair and reasonable rate.

Issue #8: Should the Commission amend its declaratory rulings procedure to allow for expedited disposition of pole attachment disputes?

The Commission should consider modifying its declaratory rulings procedures promulgated at Utah Admin. Code R746-101 to allow for expedited disposition of attachment disputes. Because time is of the essence for accomplishing wireless attachments to improve PCS coverage inside homes, a more streamlined and expedited process is needed to resolve attachment disputes. While the Commission should anticipate that most utilities will act in good faith to comply with Commission rules, disputes no doubt will on occasion arise. An expedited declaratory ruling process for attachment disputes is in the public interest here.

Issue #9: Should the Commission adopt rules allowing the Commission to review rates charged under existing agreements?

The Commission should consider adopting rules that allow for review of rates charged under existing agreements. T-Mobile has an existing 1997 agreement with PacifiCorp. This

agreement pre-dated the United States Supreme Court decision confirming that the PAA covers wireless attachments. T-Mobile contends that the rates PacifiCorp charges under the 1997 agreement are excessive and discriminatory because they are not fair and reasonable and are significantly more than rates PacifiCorp charges other wireless providers such as Qwest Wireless. For this reason, the Commission should consider promulgating rules allowing for review of rates charged under existing utility agreements.

REQUEST

For all of the forgoing reasons, T-Mobile requests that the Commission's investigation into pole attachments include all of the issues set forth above. T-Mobile reserves the right to raise additional issues in response to issues raised by other participants in this docket investigation.

RESPECTFULLY SUBMITTED this 1st day of April, 2004.

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