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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an
Investigation into Pole
Attachments

**VOICESTREAM PCS II
CORPORATION DBA T-MOBILE'S
COMMENTS TO DECEMBER 2005
DRAFT OF STANDARD POLE
ATTACHMENT CONTRACT**

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 Comments to the December 2005 Draft of the Standard Pole Attachment Contract.

COMMENTS

T-Mobile's suggested changes to the December 2005 Draft of the Standard Pole Attachment Contract ("**Standard Contract**") are attached as **Exhibit A** to these Comments. The Comments that follow state the reasons why T-Mobile requests these changes to the Standard Contract.

A. Standard Contract § 9.01: Limitation of Liability and Indemnification

The Standard Contract as currently drafted includes a one-sided indemnity provision that is inconsistent with the federal Pole Attachment Act and with the purpose of the proposed Utah Pole Attachment rules. Such an indemnity provision is unacceptable to T-Mobile. The indemnity provision contained in the Standard Contract states 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 further warrants that its own attachments to its poles shall be constructed and maintained 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.

Standard Contract § 9.01. The Federal Pole Attachment act requires the regulation of pole attachments with terms that are just and reasonable. 47 U.S.C. § 224(b). The FCC has stated that one-sided indemnification provisions in pole attachment contracts are not just or reasonable. *See Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333 (2003). The indemnification language proposed in the Standard Contract is certainly not a mutual or two-sided indemnification. Rather, it make Licensee responsible for the damage caused by its conduct, but limits Pole Owner's responsibility to repair or replacement of defective poles. Such a one-sided indemnification provision is unacceptable to T-Mobile.

Moreover, as T-Mobile has pointed out in earlier comments, under the indemnification provision contained in the Standard Contract, the Pole Owner may be able to collect more compensation from the attaching entity for a service interruption than the pole owner's own customers can collect from the pole owner for the same service interruption. As an example, under the tariff filed with the PSC by Qwest, 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 contained in the Standard Contract would potentially allow Qwest to recover from the attaching entity any and all expenses associated with an interruption of service, even those expenses that exceed what Qwest's customers can recover from Qwest for the same service interruption. Such a provision would unjustly enrich the Pole Owner, is clearly unfair to the attaching entity and runs counter to the purpose of the Standard Contract and the proposed Pole Attachment rules.

As it has stated on previous occasions, T-Mobile believes that the Standard Contract should contain mutual indemnification language. **Exhibit A** hereto contains indemnification language, which was originally proposed by the Utah Rural Telecom Association, that 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 indemnification language contained in Exhibit A hereto. *See* **Exhibit A** § 9.01.

B. Standard Contract § 9.02: Notice, Defense, Cooperation and Settlement

Section 9.02 of the Standard Contract, which establishes procedures for indemnification, states:

The indemnifying Party shall have the right, but not the obligation, to defend the other regarding any claims, demands or causes of action indemnified against. Each Party shall give the other prompt notice of any claims, demands or causes of actions for which the other may be required to indemnify under this Agreement. Each Party shall fully cooperate with the other in the defense of any such

claim, demand or cause of action. Neither shall settle any claim, demand or cause of action relating to a matter for which such party is indemnified without the written consent of the indemnitor.

Standard Contract § 9.02. While T-Mobile believes that the indemnitor should have the ability to settle a claim against the indemnitee after receiving written consent from the indemnitee, T-Mobile also believes that Section 9.02 should contain a provision preventing the indemnitor from admitting the guilt or liability of the indemnitee when it settles any claims on behalf of the indemnitee. See T-Mobile's Suggested Changes at **Exhibit A**, § 9.02. The addition of such a provision will give further protection to the indemnified party who is, based on the provisions of the Standard Contract, relying on the indemnitor for protection from claims that fall within the indemnification provision.

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.

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