

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of the Petition of)
)
The United States Telecom Association)
) **RM-11293**
For a Rulemaking to Amend Pole Attachment)
Rate Regulation and Complaint Procedures)
)

REPLY OF T-MOBILE USA, INC.

I. INTRODUCTION

T-Mobile USA, Inc. ("T-Mobile") supports the above-referenced Petition of the United States Telecom Association ("Petition") and encourages the Commission to initiate a rulemaking proceeding to reexamine the pole attachment rules¹ in the context of current marketplace realities. All providers of telecommunications service, including incumbent local exchange and wireless carriers, have a right to just and reasonable rates, terms and conditions for pole attachments. T-Mobile's experiences in negotiating pole attachment agreements with electric utilities demonstrate that wireless carriers continue to face great difficulties in gaining competitively neutral, non-discriminatory access to utility poles. The results are unreasonable delays, or even denial, of wireless services the public wants and needs. The Commission can reverse this trend by expanding the proceeding to clarify that electric utilities cannot discriminate against wireless telecommunications carriers in making decisions to expand pole capacity. The public interest in promoting ubiquitous wireless service would also be served through rule changes that require utilities to identify all facilities used in distribution, and introduce greater efficiencies into the negotiation process.

¹ 47 C.F.R. § 1.1401 *et. seq.*

II. REEXAMINATION OF THE COMMISSION'S POLE ATTACHMENT RULES IS NECESSARY TO ADDRESS THE COMPETITIVE DYNAMICS OF TODAY'S CONSUMER MARKET FOR TELECOMMUNICATIONS SERVICES.

T-Mobile is one of four facilities-based nationwide wireless carriers. In this vigorously competitive market, there is high consumer demand for quality service and coverage in residential neighborhoods. Recognizing that wireless plays a critical role in public safety, the Commission imposed and enforces wireless E-911 regulations that are performance-based. In many instances, first responders are positioning themselves to rely on availability of wireless priority access to communicate effectively during emergencies. T-Mobile was the first national carrier to work with the Department of Homeland Security on providing wireless priority access. To meet consumer expectations and public safety mandates, wireless carriers must be able to efficiently deploy their telecommunications facilities on utility poles. Under the current pole attachment rules, that objective may not be readily achievable.²

The fact that electric utilities own the majority of poles nationwide is beyond dispute, as demonstrated by the record of this proceeding.³ T-Mobile has conducted a substantial number of pole attachment negotiations and they have all been with utilities. As the only independent nationwide GSM/GPRS provider throughout the United States, T-Mobile cannot rely on pre-existing beneficial ownership of utility poles to achieve the level of service the market demands.

² On December 7, 2005, Fibertech Networks, LLC filed a Petition for Rulemaking proposing that the Commission adopt "best practices" for access to poles and conduits that, if violated, would be considered *per se* unjust and unreasonable. See *Pleading Cycle Established for Petition for Rulemaking of Fibertech Networks, LLC*, Public Notice DA 05-3182 (Released December 14, 2005). T-Mobile supports addressing wireless access in that context as well.

³ *Joint Opposition of American Electric Power Service Corporation, Duke Energy Corporation and Xcel Energy Inc.* at 19 ("*AEPSC*"); *Bell South Corporation Comments* at 4 ("*Bell South*"); and *Opposition of First Energy Corporation* at 4 ("*First Energy*").

T-Mobile agrees that utility dominance in pole ownership has created a "bottleneck" for telecommunications carriers seeking access to residential neighborhoods.⁴ T-Mobile also fits Bell South's description of the "captive pole user," often receiving unfair and unreasonable treatment from utility pole owners.⁵ Local zoning ordinances make building and tower mounted wireless transmitters very difficult to site in residential neighborhoods. Access to poles is sometimes T-Mobile's only option for achieving reliable "last mile" coverage, and the need for pole access will only increase as T-Mobile deploys advanced wireless services.

Unlike ILECs, it is established that wireless carriers are defined as telecommunications carriers under Section 224 of the Communications Act. The Commission⁶ as well as the courts⁷ have reiterated that utilities have an obligation to grant wireless telecommunications providers access to utility poles at rates prescribed by the telecommunications rate formula.⁸ T-Mobile and its affiliates have availed themselves of the Commission's pole attachment complaint process.⁹ Nonetheless, utilities continue to use their pole ownership leverage to unreasonably deny access or extract excessive fees. In this respect T-Mobile's experiences with electric utilities are consistent with the approach taken in Attachment B to BellSouth's comments, "*A Joint-*

⁴ *Petition*, 11-13; *Bell South*, 8-11; *Comments of CenturyTel, Inc.*, 2-3 ("*CenturyTel*"); and *Comments of Alltel Corporation*, 3-4 ("*Alltel*").

⁵ *Bell South*, Attachment A.

⁶ *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777,6798-99 (1998); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 14 FCC Rcd 18049 (1999).

⁷ *National Cable Telecommunications Association v. Gulf Power*, 534 U.S. 327 (2002).

⁸ 47 C.F.R. § 1.1409(e)(2). To expedite pole attachment negotiations, the FCC established rebuttable presumptions for the numerical values. *See, Southern Company Services v. Federal Communications Commission*, 313 F.3d 574 (D.C. Cir. 2002).

⁹ *Omnipoint v. PECO Energy*, Memorandum Opinion and Order, 18 FCC Rcd 5484 (2003).

*Use Bill of Rights: Ten Inalienable Rights Utilities Have for Dealing With Pole Attachments.*¹⁰

The *Bill of Rights* document, directed at electric utilities that are allegedly losing money because of the Commission's "attacher-friendly environment," refers to pole attachment requests as "little more than a nuisance."¹¹ The second article of the *Bill of Rights* document states "Utilities may recover all direct and indirect costs of providing access," and proceeds to list numerous utility costs that should be recovered during pole attachment negotiations, such as, *in addition to make-ready costs*, providing the attaching entity with maps and other data, "pre-construction," engineering, permit applications and audits.¹² These are typical negotiating postures that electric utilities take despite the fact that the Wireless Telecommunications Bureau has reminded utility pole owners that "...section 224 and the Commission's rules do not allow pole access fees to be levied against wireless carriers in addition to the statutory pole rental rate, which is based on the space occupied by the attachment and the number of attaching entities on the pole, together with reasonable make-ready fees. Such overcharges or denial of access for wireless pole attachments may have serious anticompetitive effects on telecommunications competition."¹³

Telecommunications carriers need better tools to deter utilities from unreasonably prolonging negotiations or denying access to wireless carriers that challenge their demands. Based on its experience with pole attachment negotiations, T-Mobile targets

¹⁰ See generally *Bell South*, Attachment B.

¹¹ *Bell South*, Attachment B at 62.

¹² *Id.* at 66.

¹³ *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates*, "Public Notice DA 04-4046, released December 23, 2004.

some areas where Commission action would be effective in restoring a measure of competitive balance to pole attachment negotiations.

III. THE STATUTE PRECLUDES ELECTRIC UTILITIES FROM AGREEING TO EXPAND POLE CAPACITY TO ACCOMMODATE CERTAIN ATTACHING ENTITIES WHILE REFUSING TO DO THE SAME FOR WIRELESS CARRIERS.

T-Mobile routinely requests access to utility poles that may lack the capacity or structural integrity to support wireless telecommunications facilities. Under those circumstances, T-Mobile offers to pay the cost of purchasing and setting a new utility pole. Nonetheless, it is common for utilities to refuse T-Mobile's offer, effectively precluding access to the pole. T-Mobile recognizes that Section 224(f)(2) entitles utilities to refuse access where there is insufficient capacity. A utility's right of refusal, however, is not unconditional.

Section 224(f)(2) of the Communications Act states that "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way *on a non-discriminatory basis* where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." (emphasis added). In *Southern Company v. FCC*,¹⁴ the United States Court of Appeals for the 11th Circuit struck down an FCC requirement that utilities take all reasonable steps to expand capacity. The FCC ordered utilities to treat requests for attachment that require expanded capacity just as the utility would handle its own needs for expanded capacity. The Commission requirement was based on the assumption that the statutory language to handle expansion requests "on a non-discriminatory basis" was intended to prevent the utility from favoring its own needs for additional capacity

¹⁴ 293 F.3d 1338 (11th Cir. 2002) ("*Southern I*").

over those of a cable or telecommunications provider seeking pole attachments.¹⁵

Southern I found the FCC's position "contrary to the plain language of Section 224(f)(2)" because it would require utilities to expand capacity at the request of third parties. The issue of how to appropriately apply the statutory language, "on a non-discriminatory basis," to the exceptions to mandatory access remains unresolved.

T-Mobile contends that in light of the *Southern I* decision, the only reasonable interpretation of the language qualifying the exceptions to mandatory access is to compare how electric utilities treat requests to expand capacity from different attaching entities. Therefore, if an electric utility agrees to allow an attaching entity to build a utility pole to create excess capacity, the electric utility cannot refuse the same request if it is made by T-Mobile. The electric utility cannot discriminate in consenting to provide excess capacity by favoring one attaching entity over another. Whether an ILEC or T-Mobile changes out a pole, the utility receives an identical end result: a stronger and/or taller new pole at no cost to the utility, plus increased revenue from leasing the additional pole capacity. The record of this proceeding demonstrates, however, that electric utilities do discriminate among different entities seeking additional capacity.

A number of utilities opposing the Petition discuss the long-standing reliance on joint-use agreements to define the pole attachment relationship between utilities and ILECs. Central to the joint-use agreement are the "joint use responsibilities" of ILECs.¹⁶ The Petition's opponents complain that ILECs are "shirking" those responsibilities because ILECs are not setting new poles or making necessary capital improvements to

¹⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Obligations*, Order on Reconsideration, 14 FCC Rcd. 18049, ¶51 (1999).

¹⁶ *First Energy*, 4-6; *Comments of the United Telecom Council and the Edison Electric Institute*, ("UTC") 13-15; *AEPS*, 16-19.

existing poles.¹⁷ Utilities are therefore "forced" to renegotiate joint-use agreements at much higher rates to create the right incentives for ILECs to contribute more to upholding the "joint use responsibilities." T-Mobile submits that the existence of agreements between electric utilities and ILECs that permit ILECs to set new poles and/or improve existing poles at their own cost requires these utilities to offer telecommunications and cable providers the same opportunity to expand capacity. To do otherwise would violate the statute's prohibition on non-discriminatory treatment of different attaching entities.

T-Mobile does not intend this position to be viewed as supporting joint use agreements. T-Mobile is merely noting the status quo as described by the interested parties. T-Mobile believes the record supports the assertion that current joint use agreement practices impose unjust and unreasonable pole attachment practices on ILECs with no efficient and effective recourse.¹⁸ If, however, the Commission adopts rules that would provide ILECs with rights to just and reasonable terms and conditions now conferred on all other providers of telecommunications services, T-Mobile's non-discrimination analysis would remain equally applicable.

T-Mobile also reiterates that if agreement is reached on setting a new pole to expand capacity at a particular site, that does not relieve a utility of its obligation to make access available pursuant to just and reasonable rates, terms and conditions. The telecommunications formula governs T-Mobile's access to the new pole, and attachment fees must be equitably shared among all attaching entities.

¹⁷ *First Energy*, 13-15.AEPS, 17-18.

¹⁸ As AEPs notes, joint use agreements can be contested at the state public utility commission level. AEPs at 19. CenturyTel reflects the realities that state-by-state proceedings are extremely time-consuming and can lead to situations where, under current rules, both the state and the FCC decline to exercise jurisdiction. *CenturyTel* at 4. The public interest weighs in favor of a stream-lined federal process to prevent further denial of service to consumers.

IV. RULE CHANGES CAN INTRODUCE GREATER EFFICIENCIES INTO THE NEGOTIATION PROCESS.

A. Utilities Should Identify Facilities Allocated to Local Distribution.

Southern I held that the Commission's jurisdiction under Section 224(f)(1) of the Communications Act to mandate access covers all local distribution facilities "regardless of whether they are used in part for transmission wires or other transmission facilities."¹⁹ It is not, however, readily apparent which utility facilities are potentially available for attachment.

For cost-recovery purposes, utilities must allocate facilities to local, interstate, or mixed jurisdiction. State public utility and Federal Energy Regulatory Commission ("FERC") regulations as well as orders govern each utility's allocation practices. The public interest in expanding availability of service offerings would be promoted by providing telecommunications and cable service providers with ready access to information identifying all utility facilities allocated in whole or part to local distribution. Having a comprehensive grasp of all attachment options within a service area will enable wireless carriers and other attaching entities to identify optimal strategies for enhancing service quality, coverage, and functionalities.

T-Mobile proposes that the Commission require each utility to include, as part of its response to a request for access, a map identifying the specific location of all facilities allocated in whole or in part to local distribution. Locations on the map must be consistent with FERC and the relevant state public utility commission determinations of the jurisdictional allocations in effect for the particular utility, including the seven-factor

¹⁹ *Southern I* at 1345-1346.

jurisdictional test adopted in FERC Order 888.²⁰ In the alternative, the utility should respond to a request for access from telecommunications and cable service providers with information regarding the jurisdictional status of requested facilities, in accordance with FERC Order 888.

T-Mobile further observes that a little more than a year ago, the Commission adopted rules authorizing use of the local distribution grid for providing broadband over powerline (BPL).²¹ The Commission coordinated its BPL proceeding closely with FERC in recognition of the fact that while today's BPL technologies do not use transmission facilities, the technology could evolve in that direction. As FERC and the Commission continue to monitor the development of BPL, T-Mobile recommends that the agencies jointly exercise jurisdiction to reserve for future consideration the ability to address the competitive implications of a transmission facilities-based BPL offering.

B. The Commission Should Provide Expedited Mediation to Address Unresponsiveness During Access Negotiations.

The Commission's Rules require that if a utility does not grant a request for access within 45 days, the utility must confirm the denial in writing by the 45th day.²² In reality, the request for access often languishes well past the 45th day, with the utility declining to proceed with negotiations but also declining to provide written denial of access. During one recent pole attachment negotiation, T-Mobile e-mailed a proposed pole attachment

²⁰ See *promoting Wholesale Competition Through Open Access to Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,0036 at 31,783-84 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 at 30,336 (1997), *order on reh'g*, Order No. 888-B, 81 FERC Stats & Regs. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC Stats. & Regs. ¶ 61,046 (1998), *aff'd sub nom, New York v. FERC*, 535 U.S. 1 (2002).("Order No. 888").¶

²¹ *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines For Access Broadband Over Power Line Systems*, Report and Order, 19 FCC Rcd 21265 (2005),

²² 47 C.F.R. § 1.1403(b).

agreement to an electric utility on March 9, 2004. Despite repeated follow-up activities, the utility did not respond to T-Mobile's proposed agreement and request for access until August 6, 2004, when the utility provided T-Mobile with redlines to the proposed pole attachment agreement. T-Mobile sent its response to the utility's redlines on September 29, 2004. T-Mobile continued to follow-up with the utility until October 29, 2004, when the utility sent T-Mobile a reply that was not responsive to T-Mobile's September 29, 2004 feedback on the redlined proposed agreement. Finally, on November 23, 2004, the utility sent T-Mobile a letter denying attachment. Clearly, it is unacceptable to hold pole attachment negotiations in limbo for more than eight months. While the party requesting access could file a complaint pursuant to Section 1.1404(m) of the Rules, many instances are like the one T-Mobile has described, where negotiations have never progressed to the point where a substantive record has developed.

To further streamline the process and conserve public as well as private resources, T-Mobile proposes that the Commission adopt an interlocutory tool to keep negotiations moving. If a utility neither grants nor denies access within forty-five days of an access request, on day forty-six, the requesting party should have the option of submitting to the Commission the access request, together with a declaration verifying the date access was requested and that no response was received from the utility on day forty-five. The submission should be accompanied by a certificate evidencing service on the utility. When pole attachment negotiations have been initiated, utilities should be required to respond in writing to written proposals of the party seeking access on day thirty after the utility has received the proposal. If negotiating access has stalled, Enforcement Bureau staff would quickly contact the utility and the party seeking access to encourage

expedited completion of the negotiation process. This type of informal mediation by the Commission could promote more successful negotiations and reduce the need to file complaints.

V. CONCLUSION

For the reasons stated herein, T-Mobile supports the Petition, and urges the Commission to initiate a rulemaking proceeding to revise its pole attachment regime.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Helen Wheeler, hereby certify that copies of the foregoing Reply of T-Mobile USA, Inc. were sent on December 19, 2005, via first-class mail, postage prepaid, to the following:

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