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September 28, 2006

Via e-filing and
UPS NEXT DAY MAIL

Ms. Frances Nichols
Administrative Hearings Division
PUBLIC UTILITY COMMISSION OF OREGON
550 Capitol Street N.E., Suite 215
Salem, OR 97301-2551

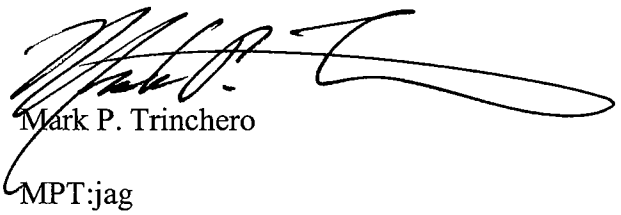
Re: Docket AR 506

Dear Ms. Nichols:

Enclosed for filing in the above-referenced docket are the original Joint Opening Comments of T-Mobile West Corporation, dba T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp. Thank you for your assistance.

Very truly yours,

Davis Wright Tremaine LLP



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MPT:jag

PDX 1535421v1 48172-227
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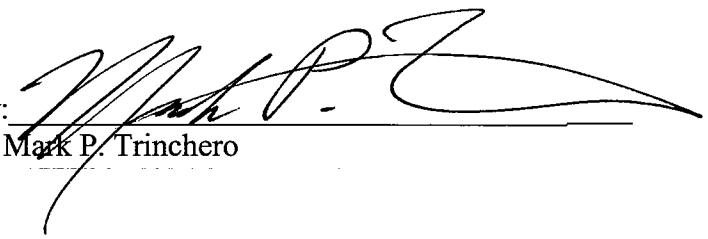
CERTIFICATE OF SERVICE

AR 506

I hereby certify on this 28th day of September, 2006, Joint Opening Comments of T-Mobile West Corporation, dba T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp was sent via UPS overnight mail to the Oregon Public Utility Commission.

A copy of the filing was also sent via US Mail to the service list which is attached.

DAVIS WRIGHT TREMAINE LLP

By: 
Mark P. Trinchero

Summary Report

AR 506 JOINT USE AND SAFETY RULES

Category: Administrative Rule

In the Matter of a Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety.

Filing Date: 1/30/2006

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Law Judge(s):	SMITH, CHRISTINA	(503) 378-6208

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Summary Report
AR 506 JOINT USE AND SAFETY RULES

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

PHASE II

In the Matter of	**)**	**JOINT OPENING COMMENTS OF**
	)	**T-MOBILE WEST CORPORATION,**
Rulemaking to Amend and Adopt	**)**	**D/B/A T-MOBILE, NEW CINGULAR**
Permanent Rules in OAR 860,	**)**	**WIRELESS PCS, LLC, SPRINT**
Divisions 024 and 028 Regarding Pole	**)**	**SPECTRUM L.P., AND NEXTEL**
Attachment Use and Safety.	**)**	**WEST CORP.**

INTRODUCTION

Pursuant to the schedule set forth in Administrative Law Judge ("ALJ") Smith's Ruling issued September 5, 2006, T-Mobile West Corporation, d/b/a T-Mobile ("T-Mobile"), New Cingular Wireless PCS, LLC ("Cingular"), Sprint Spectrum L.P., and Nextel West Corp. ("Sprint Nextel") (collectively "the Wireless Carriers") respectfully submit these joint opening comments. The Wireless Carriers appreciate the opportunity to provide input regarding the Commission Staff's proposed amendments to the Commission's pole and conduit attachment

rules in Division 28 of the Oregon Administrative Code. The Commission Staff ("Staff") and the Oregon Joint Use Association ("OJUA") should be commended for their efforts to refine, clarify and improve upon the Commission's existing pole attachment rules. On the whole, Staff's Proposed Rules[1] significantly improve upon the existing rules and provide a sound basis for resolving disputes between owners and occupants by not only establishing a means for expedited Commission consideration of such disputes, but also by constructing a rational set of rights and obligations of the respective parties. The Wireless Carriers, however, respectfully submit that a few modifications of the proposed rules are necessary to ensure that the rules adequately address the entire scope of pole attachments by any Licensee (as defined *infra* at p. 5), including those made by providers of wireless services in Oregon.

Wireless Network Deployment and Utility Pole Attachments

Pursuant to licenses held with the Federal Communications Commission ("FCC"), the Wireless Carriers provide commercial mobile radio service ("CMRS") through networks of cell sites that are interconnected to the public switched network. Each cell site is designed to provide coverage in a limited geographic area. Most of the cell sites in a network are arranged in a honeycomb-shaped grid, so calls may be handed off from cell site to cell site without interruption as the user travels throughout the service area.

As more customers use wireless communications services in more areas, wireless carriers need to install more cell sites in their networks to handle the additional communications traffic. As more and more cell sites are deployed, some of the cell sites will be located in sensitive areas, such as residential neighborhoods and land subject to special land use restrictions. In order to reduce the impact of cell sites in such areas, local governments increasingly require wireless

[1] *See* Staff's Proposed Pole and Conduit Attachment Rules, appended to the Notice of Proposed Rulemaking Hearing, filed with the Secretary of State June 15, 2006 (hereinafter "Staff's Proposed Rules").

carriers to blend their cell sites and antenna designs into existing infrastructure and landscapes. There are very few locations in residential areas where wireless carriers may blend their cell sites and antennas into the existing infrastructure.

In residential and other sensitive areas, utility poles and towers are the most prevalent—and sometimes the exclusive—"existing infrastructure" that is available to wireless carriers. Therefore, utility poles and towers present a viable option for deploying cell sites in a manner that will satisfy concerns of local governments and residents who are already accustomed to utility pole infrastructure in their neighborhoods. While the specific configurations vary, the typical cell site includes (1) antennae which are attached at or near the top of the pole or tower, (2) equipment cabinets located on or near the base of the pole or tower, and (3) coaxial cable or fiber optic cables which are attached to the side of the pole or tower in order to connect the antennae to the equipment cabinets.

The Federal Pole Attachment Act and State Law

The federal Pole Attachment Act, 47 U.S.C. §224, vests authority in the FCC to establish rates, terms and conditions for attachments to utility poles by cable television systems and providers of telecommunications service. This includes attachments to utility poles by providers of wireless service, including the attachment of wires and wireless equipment (i.e., antennae).[2] The federal Pole Attachment Act also provides that the FCC will not have jurisdiction over pole attachments where such matters are governed by a State, and requires the State to certify to the FCC that it regulates such rates, terms and conditions and has issued and made effective rules and regulations implementing its pole attachment authority. 47 U.S.C. §224(c). The State of

[2] *See NCTA v. Gulf Power*, 534 U.S. 327, 339-342.

Oregon has certified to the FCC that it regulates pole attachments. Accordingly, when wireless carriers attach to utility poles in Oregon, this Commission's pole attachment rules apply.[3]

This is consistent with the broad definition of "Licensee" under Oregon law, which states:

> (3) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association that is authorized to construct attachments upon, along, under or across the public ways.[4]

As discussed above, wireless providers are authorized to construct such attachments.[5] Accordingly, attachments made by wireless provider Licensees to utility-owned poles in Oregon are subject to this Commission's oversight pursuant to the Commission's pole attachment rules.[6]

THE PROPOSED RULES

As stated above, the Wireless Carriers believe the proposed rules as drafted are a significant improvement compared with the existing rules. The Commission should adopt the proposed rules with some relatively minor modifications to ensure that attachments by wireless providers are adequately covered. The Wireless Carriers' recommended revisions to Staff's Proposed Rules and supporting arguments are set forth in this section of the joint opening comments.

[3] While Section 332 of the Communications Act, 47 U.S.C. §332, preempts states from regulating the entry of or rates charged by wireless carriers, the Commission's pole attachment rules in Division 28 do neither. Instead, the Commission's rules regulate the rates, terms and conditions that public utilities, telecommunications utilities, consumer-owned utilities and PUDs charge.
[4] ORS 757.270(3). ORS 759.650(2) contains identical language.
[5] *See generally* 47 U.S.C. §224; *see also NCTA v. Gulf Power*, 534 U.S. 327, 339-342.
[6] S*ee* ORS 757.271, *et seq.* and ORS 759.655, *et seq.*

OAR 860-028-0020
Should the following definitions be modified?
Licensee – Include wireless carriers?

The Definition of "Licensee" and the Definition of "Applicant" Should Expressly Cover Wireless Providers

As explained above, wireless providers are "Licensees" under Oregon law. The existing rules simply state that "Licensee" has the meaning given in ORS 757.270 or ORS 759.650.[7] The proposed rules would amend this definition to clarify that: "'Licensee' does not include a government entity."[8] The Wireless Carriers recommend that the rule also be clarified to expressly include wireless providers, so that there is no ambiguity regarding the scope of the rules. The Wireless Carriers propose the following revised definition of "Licensee":

> 860-028-0020 (10) "Licensee" has the meaning given in ORS 757.270 or ORS 759.650. <u>"Licensee"</u> *includes wireless communications service providers, but* <u>does not include a government entity.</u>[9]

Staff's Proposed Rules recommend adding to Division 28 an entirely new section 100, entitled "New or Modified Attachments". New section 100 uses the term "applicant", and expressly clarifies that: "'applicant' does not include a government entity." As with the definition of Licensee discussed above, the term "applicant" should be clarified to expressly include wireless providers. The Wireless Carriers propose the following revised definition of "applicant" in new section 100:

> 860-028-0100 (1): <u>As used in this rule, "applicant"</u> *includes wireless communications service providers, but* <u>does not include a government entity</u>.

[7] OAR 860-028-0020(7).
[8] Staff's Proposed Rules, page 2 of 11.
[9] Throughout the Wireless Carriers' Joint Opening Comments, underlined material reflects Staff's Proposed modifications to the existing rules, and material in italics reflects the Wireless Carriers' recommended modifications.

OAR 860-028-0020
Should the following definitions be modified?
Authorized Attachment Space – what about vertical attachment of coaxial cables from the ground to the antennae?

The Wireless Carriers recommend that Staff's Proposed Rules should be revised to clarify how Licensees will be charged for vertical attachments. A new subsection, OAR 860-028-0110(4)(d), should be added to Staff's Proposed Rules.

Summary. Licensees should be charged for a minimum of one foot of useable space, and Licensees should be charged for a vertical attachment (*e.g.*, coaxial cable) only to the extent that the vertical attachment renders the subject portion of the pole unusable by any other applicant for any other purpose.

Current and Proposed Rules. Neither the current nor Staff's Proposed Rules address how Licensees should be charged for vertical attachments.

Recommended Change to Proposed Rules. The Wireless Carriers recommend that Staff's Proposed Rule be revised to add a new rule as follows:

> 860-028-0110(4)(d) *A wireless provider's authorized attachment space does not include the length of vertically placed cable, wire, conduit, antenna or other facility unless such attachment prevents another entity from placing an attachment on the usable space of the pole.*

Rationale for Recommended Change. The Wireless Carriers' recommended change would prevent pole owners from an unfair double-recovery of charges from pole attachment Licensees. Vertical pole attachments by wireless carriers do not necessarily prevent other entities from attaching cables or equipment to the pole or tower adjacent to the wireless carriers' vertical attachments. For example, electric utilities almost always have wires (horizontal and vertical) that are attached on the same poles and towers where wireless carriers have vertical pole attachments. In addition, it is common for telephone and/or cable providers to have horizontal pole attachments adjacent to the wireless carriers' vertical attachments. If pole owners charged wireless carriers for the full length of the vertical attachment—while also charging telephone or

cable providers for their horizontal attachments—the pole owner would double recover pole attachment charges for the same usable space. Therefore, pole owners should only charge wireless carriers for those portions of vertical attachments that prevent other entities from placing attachments in the usable space on the pole.

The Wireless Carriers' recommended change is patterned after the pole attachment rules adopted by the Utah Public Service Commission ("PSC"). The Utah PSC has adopted the following rule:

> e. The space used by a wireless provider: (i) may not include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole.[10]

Under Utah's rules, the Pole Owner may not double-recover for pole attachments where the pole may still be used by other entities, even though the pole has a vertical pole attachment by a wireless carrier. The Wireless Carriers encourage the Commission to follow Utah's lead and adopt the same "single recovery" rule for usable space.

OAR 860-028-0020
Should the following definitions be modified?
Pole Cost – limited to distribution poles?

The Wireless Carriers recommend that the definition of "Pole Cost" should include towers.

Summary. Staff's Proposed Rules appropriately include towers within the proposed regulations, and the Wireless Carriers recommend that the Proposed Rules be revised to clarify that towers are included within the meaning of "pole". In addition, the Wireless Carriers recommend that the pole owners be allowed to calculate different rental rates for attachments to towers versus attachments to poles.

[10] UAC R746-345-5.e.i.

Current Statute and Proposed Rules. As noted above, Oregon statutes define Attachment to include certain equipment that is:

> ". . . installed on any pole or in any telegraph, telephone, electrical, cable television or communications right of way, duct, conduit, manhole or handhole or *other similar facility or facilities* owned or controlled, in whole or in part, by one or more public utility, telecommunications utility or consumer-owned utility."[11]

Since a tower is a "pole . . . or other similar facility or facilities", the Oregon Revised Statutes include towers as a structure to which attachments may be made.

Likewise, Staff appropriately included towers within the scope of Staff's Proposed Rules. In the list of duties of pole owners, Staff's Proposed Rules require owners to establish construction standards for attachments to "poles, *towers*, and for joint space in conduits."[12] The remaining sections of the current rules and Staff's Proposed Rules, however, do not refer to towers. The Wireless Carriers recommend a simple revision to the definition of Pole Cost to clarify that towers are included.

In addition, Staff's Proposed Rules include detailed calculations and rebuttable presumptions for calculating pole attachment rental rates, but the Proposed Rules do not provide separate presumptions for calculating tower rental rates. Therefore, the Wireless Carriers recommend that the definition of Pole Cost be revised to clarify that the presumptions for poles will not apply to towers.

Recommended Change to Proposed Rules. The Wireless Carriers recommend simple additions to the definition of Pole Cost in Staff's Proposed Rules to clarify that towers are included within the rules, and to clarify that the presumptions for pole rental rates do not apply to tower rental rates:

[11] ORS 757.270(1) and ORS 579.650(1). (Emphasis added.)
[12] Proposed OAR860-028-0115(1).

860-028-0020 (20) "Pole cost", *when calculating rental rates for poles,* means the depreciated original installed cost of an average bare pole to include support equipment of the pole owner, from which is subtracted related accumulated deferred taxes, if any. There is a rebuttable presumption that the average bare pole is 40 feet and the ratio of a bare pole to the total pole for a public utility or a consumer-owned utility is 85 percent, and 95 percent for a telecommunications utility. *"Pole cost", when calculating rental rates for towers, means the depreciated original installed cost of an average tower to include support equipment of the pole owner, from which is subtracted related accumulated deferred taxes, if any. The rebuttable presumptions stated above do not apply to towers.*

Rationale for Recommended Changes. First, it is common for wireless carriers to attach their communications equipment to towers. The Bonneville Power Administration ("BPA") regularly allows wireless carriers to attach equipment to the BPA's towers. In addition, wireless carriers attach equipment to towers within the state of Oregon, including towers owned by Portland General Electric. Staff's Proposed Rules should incorporate the utility industry's current practices of allowing attachments to towers.

Second, Staff's Proposed Rules recognize there is a strong public policy in favor of collocation on utility poles. Staff's Proposed Rules state:

> Any entity requiring pole attachments to serve customers should use poles jointly as much as practicable.[13]

There is no public policy reason for the Commission to encourage wireless communications companies to attach antennas to poles, but to discourage wireless communications companies and utilities from attaching antennas to towers. To the contrary, local jurisdictions and public policy strongly encourage wireless communications companies to use existing infrastructure as much as possible.[14] The proposed rules should be consistent with public policy.

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[13] Proposed OAR 860-028-0060.

[14] See, for example: Eugene City Code Section 9.5750: Telecommunications Devices–Siting Requirements and Procedures.
(1) Purpose. The provisions of this section are intended to ensure that telecommunication facilities are located, installed, maintained and removed in a manner that:
(a) Minimizes the number of transmission towers throughout the community;
(b) Encourages the collocation of telecommunications facilities;

Finally, Staff's Proposed Rules do not indicate that the rebuttable presumptions for Pole Costs do not apply to towers. The Wireless Carriers agree that the rebuttable presumptions should apply to Pole Costs for poles, but the same presumptions should not apply to Pole Costs for towers. The costs for towers and the amount of usable space and unusable space on towers are significantly different than the costs and amounts of useable and unusable space on poles. The Wireless Carriers recommend that the electric utilities be allowed to apply the rebuttable presumptions to the Pole Costs for poles, and not be required to apply the rebuttable presumptions to the Pole Costs for towers.

OAR 860-028-0110 and OAR 860-028-0310
Should rates be nondiscriminatory?
Should charges be supported by detailed invoices?

The Wireless Carriers recommend that rental rates, terms and conditions should be nondiscriminatory, and make ready charges should be cost-based, reasonable, nondiscriminatory, and supported by detailed invoices.

Summary. Pole Owners currently perform pole change outs for wireless carriers. The Commission's current rules require pole Owners to charge for pole change outs based on actual costs. Staff's Proposed Rules deleted all requirements concerning pole change outs, and deleted the requirement that make ready costs be based upon actual costs. The Wireless Carriers recommend that Staff's Proposed Rules be revised to: (1) retain the current rules' requirements that pole change outs and Make Ready Work be based upon actual costs, (2) require pole rental rates, terms and conditions be nondiscriminatory, and (3) require that the charges for Make Ready Work be reasonable and disclosed on detailed invoices.

Current and Proposed Rules. The Commission's current rules require pole Owners to perform pole change outs, and to charge for those services based upon their actual costs:

(c) Encourages the use of existing buildings, light or utility poles or water towers as proposed to construction of new telecommunications towers.

> (6) The rental rates referred to in sections (3) and (4) of this rule do not cover the costs of special inspections or preconstruction, make ready, *change out*, and rearrangement work. Charges for those activities shall be based on *actual (including administrative) costs*.[15]

Staff's Proposed Rules deleted the words "change out" from the rules. In addition, change out services are not mentioned in the new definition of Make Ready Work, and the Proposed Rules deleted the requirement that charges for Make Ready Work be based upon actual costs:

> Make ready work means administrative, engineering, or construction activates necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities. Make Ready work costs are nonrecurring costs, and are not contained in carrying charges.[16]

Recommended Changes to Proposed Rules. The Wireless Carriers recommend that Staff's Proposed Rules be revised as follows:

> 860-028-0020 (11) "Make ready work" means administrative, engineering, or construction activities necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities, *including pole change out and pole extension activities*. Make ready work costs are nonrecurring costs, *must be reasonable, cost based (including administrative costs), nondiscriminatory, and supported by detailed invoices*, and are not contained in carrying charges.

Rationale for Recommended Changes. The Wireless Carriers recommend that the Proposed Rules be amended to require that charges for Make Ready Work be based upon actual costs for two reasons. First, the current rules adopted the public policy that nonrecurring costs for pole attachments should be based upon actual costs, and the Commission should not change its policy in this rule making proceeding. Second, Oregon's pole attachment statutes require that pole attachment rates be set no less than "all the *additional costs* of providing and maintaining pole attachment space for the licensee" nor more than "the *actual capital and operating*

[15] OAR 860-028-0110(6). (Emphasis supplied.)
[16] Proposed OAR 860-028-0020(11).

expenses, including just compensation".[17] Therefore, the pole attachment statutes require the Commission to set rates based upon the pole Owner's costs or expenses, and the Proposed Rules should incorporate a cost-based standard for charges for Make Ready Work to remain in compliance with Oregon law.

The rates, terms and conditions for all pole attachments and conduit attachments (including charges for Make Ready Work) should be nondiscriminatory. All Licensees should be entitled to be treated in a fair and nondiscriminatory manner. Pole Owners should also be required to comply with Oregon's nondiscrimination requirements for utilities.[18] The Wireless Carriers recommend that the Commission adopt the recommended rule change to ensure all Licensees that they are entitled to nondiscriminatory treatment.

The Wireless Carriers also recommend that the Charges for Make Ready Work be reasonable, and disclosed on detailed invoices. Oregon's pole attachment regulation statutes expressly require that all pole attachment rates be reasonable.[19] To avoid any confusion and to ensure that the parties and the Commission consistently apply a standard consistent with that set

[17] ORS 757.282(1) and 759.665. (Emphasis supplied.)
[18] ORS 757.310 provides: Prohibition related to charges for service. (1) A public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount prescribed in the schedules or tariffs for the public utility.
(2) A public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount the public utility charges any other customer for a like and contemporaneous service under substantially similar circumstances.
(3) A difference in rates or amounts charged does not constitute a violation of subsection (2) of this section if the difference is based on:
(a) Service classification under ORS 757.230;
(b) Contracts for services under ORS 757.516; or
(c) An optional schedule or tariff for the provision of energy service that takes into account a customer's past energy usage and provides price incentives designed to encourage changes in the customer's energy usage that correspond to changes in the cost of providing energy.
ORS 757.325 provides: Undue preferences and prejudices. (1) No public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.
(2) Any public utility violating this section is guilty of unjust discrimination.
[19] ORS 757.273; ORS 757.282; ORS 759.655; ORS 759.665.

forth in the statute, the Wireless Carriers encourage the Commission to expressly include the "reasonable rate" statutory requirement in the Proposed Rules.

The Wireless Carriers also recommend that pole owners be required to provide detailed invoices for charges for Make Ready Work simply because without detailed invoices, Licensees cannot determine whether the charges for Make Ready Work are reasonable. The Commission should revise the Proposed Rules to require detailed invoices so the Licensees may confirm the reasonableness of the charges for Make Ready Work.

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CONCLUSION

For the foregoing reasons, the Wireless Carriers urge the Commission to clarify that the rules in Division 28 apply when wireless service providers attach to utility poles in Oregon. The Wireless Carriers further recommend that the Commission adopt the relatively minor recommended changes to the rules set forth herein, which are needed to ensure that wireless attachments to utility poles are adequately addressed in order to minimize confusion and disputes in the future.

Respectfully submitted this 28th day of September, 2006.

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