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August 18, 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 an original and five copies of the Response of T-Mobile West Corporation, D/B/A T-Mobile to Staff's Comments Regarding Division 28 Issues Lists. Thank you for your assistance.

Very truly yours,

Davis Wright Tremaine LLP

Mark P. Trinchero

MPT:bl

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

PHASE II

In the Matter of)	RESPONSE OF T-MOBILE WEST
)	CORPORATION, D/B/A T-MOBILE
Rulemaking to Amend and Adopt)	TO STAFF'S COMMENTS
Permanent Rules in OAR 860,)	REGARDING DIVISION 28
Divisions 024 and 028 Regarding Pole)	ISSUES LISTS
Attachment Use and Safety.)	

T-Mobile West Corporation, d/b/a T-Mobile ("T-Mobile") respectfully submit this response to "Staff's Comments Regarding Division 28 Issues Lists", filed by Commission Staff on August 16, 2006 ("Staff Comments").¹ T-Mobile urges the Commission to reject Staff's unprecedented attempt to exclude an entire category of parties from providing input regarding the Commission's pole attachment rules and to otherwise unduly restrict the issues to be

¹ T-Mobile notes that Staff's Comments were not timely filed. The procedural schedule in this proceeding called for the Oregon Joint Use Association ("OJUA") to submit an issues list on July 21, 2006, and for parties to file comments regarding the OJUA issues list by August 4, 2006. The issue of whether the rules should be amended to expressly exclude wireless carriers was raised by the OJUA in its July 21, 2006 submission. Nevertheless, Staff waited until August 16, 2006, a mere four business days prior to the deadline for the Administrative Law Judge ("ALJ") to finalize the issues list, to address this issue. The Commission should, therefore, disregard Staff's untimely comments.

addressed in this proceeding. The Commission's review of its pole attachment rules will benefit from comments submitted from a wireless industry perspective. Staff's recommendation that the issues raised by the wireless industry should be put in a separate rulemaking docket would result in a waste of administrative resources, the piecemeal adoption of regulations, and the exacerbation of discriminatory treatment, contrary to the goals set forth by the Commission in its Notice of Proposed Rulemaking Hearing.²

Contrary to Staff's suggestion, the Commission did not narrowly proscribe the extent of the review of its pole attachment rules in this docket. At the public meeting at which this docket was opened, "[t]he Commissioners made clear that they wanted all rules in both Divisions [24 and 28] resolved by the end of this calendar year."³ The Phase II Notice states that the rulemaking is an "effort to establish more *comprehensive* safety and joint use rules"⁴ that are needed "to provide better guidelines that can be used by the Commission in mediating and resolving disputes between owners and occupants in the sharing of utility poles, conduits and facilities."⁵ It also states that the new and amended rules will cover "electric utilities, telecommunications utilities, telecommunications providers, consumer-owned electric utilities, cable television operators, and *others that own or operate* electric or *communication facilities*."⁶ This description provided interested parties with adequate notice that the rules would cover all potential operators sharing poles, including wireless carriers. Thus, Staff's concerns about the scope of the Phase II Notice are not well-founded.

In fact, the rules as drafted and the statutes they implement do not exclude wireless carriers. It was not until the Oregon Joint Use Association ("OJUA") filed its issues list on July

² See Notice of Proposed Rulemaking Hearing, filed with the Secretary of State June 15, 2006 (Phase II Notice").

³ ALJ Memorandum, issued March 10, 2006 (Ar506), p. 1.

⁴ Phase II Notice at 1 (emphasis added).

⁵ *Id.* at 3 (Statement of Need and Fiscal Impact).

⁶ *Id.* (emphasis added).

21, 2006, that the notion of excluding wireless carriers from the purview of the rules was first expressed.⁷ On August 4, 2006, the wireless carriers⁸ filed comments in response to the OJUA's proposed issues list to make clear the wireless industry's intent to participate in the docket and to oppose OJUA's attempt to use this rulemaking to deprive wireless carriers of the same rights afforded other licensees under the rules.

The Commission has made clear that it "does not desire to set joint use policy on a dispute-by-dispute basis, but rather in a public rulemaking setting *where all operators and parties can give input.*"⁹ Staff's recommendation that wireless carriers be excluded from this rulemaking runs directly counter to this stated desire of the Commission. Staff would, instead, have the Commission open a separate proceeding to address wireless carrier concerns. Such an approach would require the Commission to essentially reopen and potential amend the very same rules that it will have just finished reviewing and adopting in this proceeding. The Commission should reject Staff's recommendation.

The Commission has very succinctly stated the nature of the problem that it intends to solve with this rulemaking, namely, that "[n]ew rules are essential so that all operators and their customers are not unjustly subsidizing the costs caused by other operators and their customers."¹⁰ Staff's proposal to carve out wireless operators for treatment at some later date will simply exacerbate the cross-subsidy problem the Commission is attempting to remedy. Unless the rules adopted in this rulemaking clearly establish the rights and obligations of all entities sharing poles, the Commission will find itself back where it started, with an uneven playing field and

⁷ See "Unresolved Issues List for Division 28 Submitted by the Oregon Joint Use Association July 21, 2006", Issue 3 under 860-028-0020.

⁸ T-Mobile, New Cingular Wireless PCS, LLC ("Cingular"), and Sprint Spectrum L.P., and Nextel West Corp. ("Sprint Nextel").

⁹ Phase II Notice at 5 (Statement of Need and Fiscal Impact) (emphasis added).

¹⁰ *Id.*

joint use policy being made on a dispute-by-dispute basis. The Commission should avoid the pitfall recommended by Staff.

For the foregoing reasons, T-Mobile urges the Commission to reject Staff's recommendation to exclude wireless carriers from this proceeding and to adopt the issues set forth in the August 4, 2006 submissions of T-Mobile, Cingular and Sprint Nextel.

Respectfully submitted this 18th day of August, 2006.

T-MOBILE

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CERTIFICATE OF SERVICE

AR 506

I hereby certify on this 18th day of August, 2006, a Response of T-Mobile West Corporation, D/B/A T-Mobile to Staff's Comments Regarding Division 28 Issues Lists 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.

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