

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE  
COMMISSION

In the Matter of:

THE APPLICATION OF )  
NEW CINGULAR WIRELESS PCS, LLC )  
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC ) CASE NO.: 2014-00135  
CONVENIENCE AND NECESSITY TO CONSTRUCT )  
A WIRELESS COMMUNICATIONS FACILITY )  
IN THE COMMONWEALTH OF KENTUCKY )  
IN THE COUNTY OF JOHNSON )

SITE NAME: NIPPA

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**AT&T MOBILITY'S RESPONSE AND OBJECTION TO APPALACHIAN WIRELESS'  
MOTION TO INTERVENE**

**1.0 INTRODUCTION AND SUMMARY**

AT&T Mobility<sup>1</sup>, by counsel, responds and objects to Movant's<sup>2</sup> Motion to Intervene.

AT&T Mobility has a gap in wireless coverage in the vicinity of the proposed tower preventing the company from offering wireless services Kentuckians want and need. In attempting to resolve this gap in coverage, and in compliance with 807 K.A.R. 5:063, AT&T Mobility contacted Movant in the summer of 2013 to explore the potential for collocation on one of Movant's existing towers. In an email dated July 1, 2013, Movant's Manager of Technical Operations responded to an AT&T Mobility site acquisition consultant that **"all possible co-locates are on hold . . . ."**<sup>3</sup> AT&T Mobility

<sup>1</sup> New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility.

<sup>2</sup> East Kentucky Network , LLC d/b/a Appalachian Wireless.

<sup>3</sup> E-mail attached hereto and incorporated as **Exhibit A**.

relied in good faith on this written representation and ultimately filed the pending Application to construct a wireless tower. Subsequently, and without acknowledging its prior written representation, Movant inexplicably reversed its position and now seeks to intervene and attempt to compel AT&T Mobility to collocate and pay rent after a blanket communication that collocations were "on hold." Movant's position is simply devoid of any credibility in these circumstances.

Notwithstanding Movant's reversal of position, Movant's effort at intervention is further entirely unwarranted on technical grounds as evidenced by Sherri Lewis, Senior-RAN Engineer - AT&T Network Operations, having ruled out the Movant's tower as an alternative to the proposed site based on consideration of its location and inability to provide connecting coverage within AT&T Mobility's existing network. Movant's "Wittensville" tower is simply not a satisfactory alternative to the site proposed by AT&T Mobility given the unequivocal conclusion of Ms. Lewis as an expert radio frequency engineer in her attached and incorporated correspondence.<sup>4</sup>

In good-faith reliance on Movant's written representations, and at great effort in time and out-of-pocket expenses in the tens of thousands of dollars, AT&T Mobility has identified a suitable location for a new tower site, completed a lease with the landowner, had extensive exhibits prepared by in-house and outside contractor professionals, and has filed the within Application with the Commission as well as made permitting filings with other agencies. At the eleventh hour, Movant first asked for more time to consider intervention, and then finally moved for intervention to press for collocation with no apparent regard for AT&T Mobility's good faith reliance on its written representation and

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<sup>4</sup> See Exhibit B as attached hereto and incorporated by reference.

the huge cost incurred as a result. All appearances are that Movant is either entirely confused as to its position on collocation, or it is seeking to delay<sup>5</sup> the Commission's consideration of AT&T Mobility's Application in the hopes of profiting from the very collocation it already has denied.

Regardless of how Movant has reached its current posture in this proceeding, the Motion to Intervene is contrary to 807 K.A.R. 5:063 Section 1(s), which requires an Applicant to engage in **pre-filing** efforts to identify and explore a "**reasonably** available opportunity to collocate...." This regulation does not allow a competitor with a financial stake to delay Applications by purporting to create **post-filing** collocation opportunities – particularly not after having denied the existence of pre-filing collocation opportunities. To the contrary, a key purpose of the Telecommunications Act of 1996 is to "... encourage the rapid deployment of new telecommunications technologies." (Public Law 104–104, 104th Congress). In addition, the Kentucky General Assembly has adopted KRS 278.546 providing in pertinent part that "... state-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky's citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000." These fundamental statements of federal and state policy weigh heavily against the Movant's self-serving maneuver in seeking intervention and delay.

Thousands of Kentuckians who reside in or will travel through the service area for the proposed tower site will benefit from the timely deployment of the proposed

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<sup>5</sup> A collocation agreement is often very detailed and lengthy. Such agreements may be subject to extended negotiations on many points. Issues can arise as to a variety of indemnifications, insurance, environmental issues, length of term, termination rights, ground space rights, replacement/adding of antennas and appurtenances, regulatory compliance, commencement of and amount of rent, etc. Also, rights and responsibilities as to expensive tower modifications may come into play.

AT&T Mobility communications facility. In contrast, Movant seeks to backpedal from prior representations and plunge all participants into adversarial proceedings – during which Kentuckians will continue to suffer from the coverage gap – that are intended to conclude with Movant receiving rent from AT&T Mobility. Also, as stated above, Movant's efforts are futile in that a Radio Frequency Engineer for AT&T Mobility has ruled out Movant's site based on inability of the site to meet coverage objectives.<sup>6</sup> In these circumstances, AT&T Mobility requests that the Commission expeditiously deny the Motion to Intervene and process AT&T Mobility's Application for the proposed communications facility site without delay.

## **2.0 FACTUAL BACKGROUND**

In 2013, AT&T Mobility Radio Frequency Engineers identified a gap in coverage in a Search Area in which the proposed tower site is now located. The circular Search Area has an approximate radius of one half mile.<sup>7</sup>

As part of a due-diligence search for an appropriate location for installing wireless facilities to remedy this coverage gap, in 2013 AT&T Mobility site acquisition consultants asked Appalachian Wireless about the availability of its tower<sup>9</sup> in the Search Area for collocation.

AT&T Mobility's consultant received the following email response dated July 1, 2013 from Mike Johnson, Movant's Manager of Technical Operations:

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<sup>6</sup> **Exhibit B** attached hereto and incorporated by reference.

<sup>7</sup> See Exhibit E to Application in within Commission proceeding.

<sup>9</sup> Movant's "Wittensville" Site. (Commission Docket 2009-00453). As the Commission and Movant are well aware, the antenna height available on a tower, its structural integrity, availability of sufficient ground space for equipment, and appropriate utility and vehicular access, among other factors, are all critical for the suitability of an existing tower for collocation.

"As I had told you on the phone, and also Greg Saunders, ***all possible co-locates are on hold*** due to our LTE build of our 2 LTE networks, along with the LRA. Sending a certified letter does not fix inadequate tower loading capabilities."<sup>10</sup>

This July 1, 2013 email from Mr. Johnson obviously is inconsistent with his affidavit of May 15, 2014 – which Movants submitted in support of their [Motion] – indicating he "... does not recall any other contact from AT&T concerning co-location on any other EKN sites...." except the Evarts site (which is not related to this proceeding).<sup>11</sup>

In good-faith reliance on the Movant's unequivocal written statement that "all possible co-locates are on hold," AT&T Mobility proceeded with due diligence to pursue alternative means of remedying the coverage gap, including the ordering of costly technical services as previously detailed.

AT&T Mobility completed its due diligence, including preparation of costly and comprehensive exhibits, and filed its Application for a Certificate of Public Convenience and Necessity for its proposed tower site with the Commission on April 11, 2014 ("Application"). After carefully reviewing the Application, Commission Staff accepted it for filing.<sup>12</sup>

All proper sign posting, certified mail and newspaper notice publication were made by Applicant.

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<sup>10</sup> Copy attached hereto and incorporated by reference as **Exhibit A**.

<sup>11</sup> Affidavit attached to and incorporated in Movant's Motion to Intervene herein.

<sup>12</sup> By letter of April 25, 2014, Linda Faulkner, Filing Division Director, notified the undersigned that "The Commission staff has reviewed ... in the above case ... and finds that it met the minimum filing requirements upon receipt of the original on April 11, 2014 and has been accepted for filing." *Id.* at Letter of April 25, 2014 in Case No. 2014-0088. No further documentation as to the site selection statements required by 807 K.A.R. 5:063 - Section 1(s) was subsequently requested by Commission Staff. AT&T Mobility maintains and preserves that Movant is required to meet the clear and satisfactory evidence burden set forth in KRS 278.430 in any challenge to site selection requirements as a result of the April 25, 2014 letter stating that "minimum filing requirements" had been met.

Beginning on or about April 8, 2014, counsel for AT&T Mobility began receiving phone messages and written communications from counsel for Movants. In neither those nor subsequent communications did Movants inform AT&T Mobility of any change to its prior written statement that "all possible co-locates are on hold," and no two-party negotiations have occurred. This causes AT&T Mobility to be wary of Movant's real motives for seeking to intervene in this proceeding and thereby delay Commission action on AT&T Mobility's Application.

### **3.0 ARGUMENT**

**A. Public Interest vs. Movant's Proprietary Interest.** The public will benefit from swift approval of AT&T Mobility's Application. The public convenience and necessity require the construction of the proposed Wireless Communications Facility ("WCF") on authority of KRS 278.020, KRS 278.650 and implementing regulations authorized by KRS 278.665. The construction of the WCF will bring or improve the Applicant's services to an area currently not served or not adequately served by the Applicant by increasing coverage or capacity and thereby enhancing the public's access to innovative and competitive wireless communications services. The WCF will provide a necessary link in the Applicant's communications network that is designed to meet the increasing demands for wireless services in Kentucky's wireless communications service area. The WCF is an integral link in the Applicant's network design that must be in place to provide adequate service.

In contrast, the only entity that would benefit from the delay sought by the Movant is the Movant itself. Having previously and unequivocally declined to discuss the possibility of AT&T Mobility's collocation on its tower, Movant now has reversed course

and seeks intervention to attempt to compel AT&T Mobility to co-locate (and, of course, to pay Movant for doing so) on the very same tower. The public, in the meantime, continues to suffer from the coverage gap that AT&T Mobility's proposed tower is designed to remedy. An AT&T Mobility Radio Frequency Engineer has explained Movant's tower would not meet the relevant coverage objectives so the collocation would be contrary to the public interest.<sup>15</sup> On these facts, and on all applicable law as discussed below, intervention is not warranted pursuant to 807 K.A.R. 5:001 - Section 11 or any other authority and should be denied.

**B. Specific Allegations of the Motion to Intervene are Unproven and/or in Error.** The Motion to Intervene alleges Movant's site "... is designed to host multiple wireless service providers' facilities and is capable of hosting the services proposed by AT&T to the general service area." (Motion to Intervene, Para. 4, p. 2). However, the Movant does not indicate whether any wireless company has collocated on this tower since its construction was approved by the Commission in docket 2009-00453.<sup>16</sup> Furthermore, Movant does not identify any wireless carriers with which it has entered master collocation agreements. AT&T Mobility has master collocation agreements with numerous FCC-licensed wireless carriers operating in Kentucky including several of its largest competitors in the state. Finally, the statement that the Movant's site "... is capable of hosting the services proposed by AT&T to the general service area" is not certified by a Professional Engineer licensed in Kentucky and appears to be simply the

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<sup>15</sup> See attached and incorporated **Exhibit B**.

<sup>16</sup> If there are any existing collocations on its tower, Movant should be able to produce collocation notices which have been filed for Movant's "Wittensville" Site (Case No. 2009-00453) as is required by 807 K.A.R. 5:063 - Section 3.

opinion of Movant's counsel. In contrast, pursuant to 807 KAR 5:063, Applicant submitted engineering drawings signed and stamped by a Kentucky-licensed Professional Engineer in support of the design of its proposed tower.

Even if a collocation with Movant was successfully negotiated, the net opportunities for wireless service to the citizens in the area would be less than if the AT&T Mobility tower was approved because it is designed for three collocators beyond AT&T Mobility as evident from Exhibit B to the Application. Paragraph 5 of the Motion to Intervene includes a numerical comparison of the Movant's tower with the planned AT&T Mobility tower and concludes the Movant's tower will provide "... potentially more efficient coverage...." This analysis and conclusion is not attributed to any radio frequency engineer and so appears to merely be the lay opinion of the attorney signing the Motion.

Notwithstanding all of the representations of the Movant's Attorney in the Motion to Intervene, AT&T Mobility hereby submits a letter from its Radio Frequency Engineer making it clear the Movant's "Wittensville" tower is not a suitable collocation alternative to provide the needed wireless service:

"I have reviewed the feasibility of co-location of AT&T Mobility's equipment on East Kentucky Network, LLC's Wittensville tower located at N37 degrees 52' 54.6"; W82 degrees 47' 9.6" (NAD83) as a possible alternative to the Nippa wireless communications facility proposed for construction in the above-referenced case. The Wittensville tower is located over 1.3 miles from the proposed Nippa site and is located too far north to provide adequate coverage to AT&T Mobility's target service area. Additionally, co-location on the Wittensville tower would not provide connecting coverage within AT&T Mobility's existing network.

For these reasons, co-location of AT&T Mobility's equipment on the Wittensville tower would not be a satisfactory alternative to construction of the proposed Nippa wireless communications facility." Id. at May 23, 2014 Letter of Sherri Lewis, Senior RAN Engineer, AT&T Network Operations



as attached hereto and incorporated as Exhibit B.

Paragraph 6 of the Motion to Intervene makes several legal arguments and references an affidavit of EKN employee Michael Johnson, Technical Operations Director, attached as Exhibit B to the Motion. The Affidavit recites that Mr. Johnson recalls being contacted about collocation on one EKN site. It further states that he does not "... recall any other contact from AT&T concerning co-location on any other EKN sites." *Id.* at Exhibit B to Motion to Intervene. Of course, recollection can be fickle. See above-referenced email of Michael Johnson dated July 1, 2014, attached and incorporated as Exhibit A, stating to the AT&T Mobility Site Acquisition Vendor that **"all possible co-locates are on hold...."** See also Exhibit E to the Application which is the signed Site Acquisition Alternative Site Analysis Report indicating Michael Johnson of EKN was contacted and he "declined to lease space to AT&T based on future modifications to the site currently being contemplated by the company."

The Affidavit mentions nothing about any search of records or emails of EKN in preparation of the Affidavit. The only conclusion to be drawn is that Mr. Johnson's Affidavit is in error. Written evidence trumps his "recollection."

Paragraph 7 of the Motion to Intervene attaches a letter from Movant's counsel as Exhibit C. The letter states in pertinent part:

"Our client must respectfully disagree that it was properly consulted by New Cingular regarding co-location upon the existing site now operated by Appalachian Wireless. Our client finds no written documentation of any such request from New Cingular. If any telephone conversation as described in the New Cingular application took place, such would have been at least 18 months ago when Appalachian Wireless was unsure about how much space was needed to add 4G/LTE capabilities to its tower." *Id.* at Motion to Intervene, Exhibit C.

Of course, the collocation rejection email of Mr. Johnson is dated *July 1, 2013*, so

it is much more recent than 18 months. In the same manner as the Affidavit, the letter from Movant's counsel is inconsistent with recent and unequivocal correspondence from an authoritative manager that Movant's towers were not available for collocation.

In summary, the Motion to Intervene on its face makes unproven and/or erroneous allegations which are wholly inadequate to support any relief which would delay AT&T's efforts to resolve a gap in coverage and provide needed service without delay.

**C. Movant's Absence of Standing Based on Unrecognized Interests.** As a disgruntled competitor seeking to compel AT&T Mobility to collocate and pay rent at a location it has previously said is not available, Movant lacks a sufficient "special interest" to have standing to even make such a Motion.

Nothing in KRS Chapter 278 or Commission precedent suggests that the collocation provisions of 807 K.A.R. 5:063 are for the financial benefit of competing wireless carriers or tower owners. Movant is not in the position of a "private attorney general" with rights to enforce such provisions through intervention. It is the Commission which is to interpret and enforce the collocation provisions of its regulations.

In addition, nothing in applicable law allows a competing carrier to intervene for the purposes of representing wireless customers AT&T Mobility is seeking to serve by its new tower. Likewise, it would strain credulity to allow a tower company owning a tower in the vicinity to intervene to make its own aesthetic objection to a new tower in the vicinity or to represent any interests of nearby property owners who might object to the aesthetics of another tower in the area. Even in circumstances in which aesthetics

are credibly raised, the Commission has stated "... in the last analysis, when no such reconciliation is possible, the need for service must triumph over aesthetics."<sup>17</sup>

Ultimately, the only arguable "special interest" of Movant is nothing more than its desire to draw AT&T Mobility into negotiations and obtain rent payments that would benefit no person or entity other than the Movant. That simply is not a sufficient interest to support intervention.

The Kentucky Supreme Court addressed the standing of a competitor to challenge agency action in HealthAmerica Corporation of Kentucky v. Humana, 697 S.W.2d 946 (Ky. 1985)<sup>18</sup>:

"It is fundamental that in order to have standing in a lawsuit a party must have a judicially recognizable interest in the subject matter of the suit. ....

HealthAmerica made no showing of how any legal right would be affected by the decision of the state except that it would be placed at a competitive disadvantage in regard to the other HMOs that might be able to provide coverage. ***The only right or claim of standing by HealthAmerica arises from its fear of competition which is a normal business risk. This is not only remote and speculative, but they have no right to be free of competition. ....***

Here there is no allegation of fraud, bad faith or collusion. ***HealthAmerica has not shown a legal or beneficial interest in the subject matter of the controversy and it has no standing to bring this action.*** Id. at 947-948 (emphasis added).

Like HealthAmerica in this Kentucky Supreme Court decision, Movant is simply a competitor seeking participation in proceedings in order to gain a competitive advantage in the marketplace. As such, Movant has no judicially recognizable interest.

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<sup>17</sup> Order of Public Service Commission of Kentucky, 2001 Ky. PUC LEXIS 1528 (December 7, 2001), Case No. 2001-083.

<sup>18</sup> In accord is Lexington Retail Beverage Dealers Assn. v. Department of Alcoholic Beverage Control Board, 303 S.W.2d 268 (Ky. 1957).

The Kentucky Court of Appeals' unpublished Opinion in Enviropower, LLC v. Public Service Commission of Kentucky, et al, 2007 Ky. App. Unpub. LEXIS 121 (Ky. App. 2007) illustrates the broad discretion of the Commission in deciding on whether to grant intervention. Interestingly, the Court of Appeals explained that the person seeking intervention "... must have an interest in the 'rates' or 'service' of a utility, since those are the only two subjects under the jurisdiction of the PSC." Id. See KRS 278.040(2). Obviously, Movant is not attempting to contest "rate" issues. In addition its Motion does not contest "service" issues because the service<sup>19</sup> AT&T Mobility will provide to Kentuckians would be the same at either a new tower or on a collocation (even if everything Movant has alleged is true and the two locations are presumed equivalent from a radio frequency coverage standpoint). All that Movant is seeking to contest by intervention is the location of antennas and equipment and its financial interest in having such installations located on its tower. Such financial interest does not compel the Commission to grant intervention.

**D. Proper Analysis of Nearby Land Uses and Values.** In compliance with 807 K.A.R. 5:063 Section 1(s), AT&T Mobility has considered the likely effects of the installation of the proposed WCF on nearby land uses and values. Once again, in an attempt to line its own pockets, Movant argues that this regulation requires the Commission to consider whether the Movant's property would be more valuable if the communications facility was located on its tower rather than on the property which is the

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<sup>19</sup> KRS 278.010(13) defines "service" to "... include any practice or requirement in any way relating to the service of any utility, including the voltage or electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantify, and pressure of any commodity or product used or to be used for or in connection with the business of any utility..." Again, Movant's asserted interests have nothing to do with the service to be provided by AT&T Mobility to customers. Instead, Movant's interests only involve the location from where such service is provided.

subject of the Application.<sup>20</sup> Clearly, such analysis is not logically contemplated by the aforementioned regulation. Otherwise, every property owner in the vicinity could claim his or her property would be more valuable if the tower were placed on it, thereby producing rental income for the property owner. Such flawed logic provides no basis for intervention.

**E. Applicant's Obligation as to Collocation Investigation Pursuant to Commission Regulation.** Given the sequencing of the steps of 807 K.A.R. 5:063 in the preparation and filing of an Application for a Certificate of Public Convenience and Necessity, an Applicant must be allowed to rely upon representations of persons or entities owning structures on which an Applicant might collocate its communications facilities. Specifically, 807 K.A.R. 5:063 provides in pertinent part:

"(1) To apply for a certificate of public convenience and necessity a utility proposing to construct a telecommunications antenna tower in an area which is not within the jurisdiction of a planning unit that has adopted planning and zoning administrative regulations in accordance with KRS Chapter 100, shall file with the Public Service Commission, the following information:

(s) A statement that the utility has considered the likely effects of the installation on nearby land uses and values and has concluded that there is no more suitable location reasonably available from which adequate service to the area can be provided, and that there is no reasonably available opportunity to co-locate, including documentation of attempts to co-locate, if any, with supporting radio frequency analysis, where applicable, and a statement indicating that the utility attempted to co-locate on towers designed to host multiple wireless service providers' facilities or existing structures, such as a telecommunications tower, or another suitable structure capable of supporting the utility's facilities; and ...." (Emphasis added). Id. at 807 K.A.R. 5:063 - Section 1(s).

The plain language of this regulation makes clear the Commission does not

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<sup>20</sup>In addition to the flaw in logic, Movant's assertions of impact on property value are not supported by reference to valuation analysis by an expert appraiser.

contemplate, require, or allow an open-ended collocation inquiry that continues until the Commission enters an order on the Application. Instead, the temporal context is much more compact, which makes good sense for encouraging wireless deployment and for administrative economy of proceedings before the Commission.

807 K.A.R. 5:063 - Section 1 begins by identifying the documentation required in order to file with the Commission an application for a certificate to construct a tower. Thus, an applicant properly obtains the required information well before filing the Application, just as AT&T Mobility has done in the present case.

Proceeding on to the pertinent Section 1(s), the regulation requires that the applicant "has considered" certain land use and values effects and "has concluded" there is no more suitable location "reasonably available." Significantly, the burden on the applicant is to make such statements upon filing the application. Applicant is not required to make a showing of any such conditions or facts at the time of a Motion to intervene, an informal conference, or the public hearing, instead the Applicant must make the required conclusion upon filing. Furthermore, the applicant's conclusion is as to there being no more suitable location "reasonably available" rather than conceivably available, or possibly to become available in the future, or that might be available if a tower owner later reverses its original, written, and unequivocal decision of unavailability.

Moreover, the regulation does not rigidly require the Applicant to collocate merely because another tower is present in the area – instead, it logically contemplates the applicant "attempting to collocate," understanding that for various reasons, not all such attempts will be successful. One obvious reason would be the facts of the present case

in which collocation was unequivocally declined on the original "attempt." In addition, the regulation does not contemplate repeated and ongoing attempts to collocate after an Application is filed – otherwise, a competitor like the Movant could engage in repeated and ongoing attempts to delay the Commission's action on an Application by reversing prior positions or otherwise asserting reasons why collocation might become reasonable in the (purportedly) near future. Instead, the regulation requires an attempt to co-locate prior to filing an Application. AT&T Mobility complied with this mandate and nothing more is required.

The Commission should – and must – reject any attempt by the Movant to interpret the plain language of this regulation as requiring otherwise.<sup>21</sup> Movant is free to petition the Commission for prospective regulatory amendments, but it is not free to act as though the regulation says something other than or in addition to what it actually says.<sup>22</sup> Movant cannot justify its Motion to Intervene unless it convinces the Commission to do just that. Thus, its Motion should be denied.

**F. Proper Application of Commission Regulations and Doctrines of Detrimental Reliance, Laches and Estoppel Foreclose Intervention.** Applicant AT&T Mobility undertook all appropriate due diligence and compliance actions in site selection and preparation of the Application filed for a Certificate of Public Convenience

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<sup>21</sup> In J. Randolph Lewis v. Jackson Energy Cooperative Corporation, et al, 189 S.W.3d 87 (Ky. 2005) the Kentucky Supreme Court stated: "It is a primary rule of statutory construction that the enumeration of particular things excludes ideas of something else not mentioned.... The use of extrinsic justifications for expanding the statute was error. Where a statute is unambiguous, there is no need to use extrinsic evidence of legislative intent and public policy which the statute is intended to effect. A reviewing court cannot amend it by means of a so-called interpretation contrary to plain meaning." Id. at 92-94.

<sup>22</sup> As explained by the Kentucky Supreme Court, "Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history or the canons of construction." Desean Maynes v. Commonwealth of Kentucky, 361 S.W.2d 922, 925 (Ky. 2012). See also Commonwealth v. Steve Plowman, 86 S.W.3d 47, 49 (Ky. 2002) ("An unambiguous statute is to be applied without resort to any outside aids.")

and Necessity pursuant to KRS 278.020 and implementing regulations. As discussed above, AT&T Mobility even obtained a *July 1, 2013* email from Appalachian Wireless Manager of Technical Operations Mike Johnson stating "***all possible collocates are on hold . . . .***" Neither KRS Chapter 278, the Commission's implementing regulations, nor any other applicable law required AT&T Mobility to do anything further in connection with investigation of collocation on the Appalachian Wireless site after receipt of this correspondence. AT&T Mobility should be able to rely on this email in the proceeding in the same manner that a civil litigant could rely on an Answer to a Request for Admissions in civil litigation. See CR 36.01 and 36.02.<sup>23</sup> Nonetheless, AT&T Mobility now finds itself in a contested proceeding with Movant attempting to intervene and force a collocation on its tower.

If Movant's policy on collocation availability changed subsequent to July 1, 2013, it had many months prior to the filing of the Application on March 14, 2014 to notify AT&T Mobility. However, no such notice was received before the filing of the Application. And even Movant's communications after the filing of the Application are far from proof that a co-location was, is, or will be reasonably available – they merely speak in terms of beginning negotiations and about a "***possible*** co-location agreement which ***may*** affect the course and outcome of further proceedings in this matter."<sup>24</sup> Such vague and conditional post-filing statements could never constitute the availability of reasonable collocation prior to filing, and they certainly do not constitute reasonable availability in light of Movant's prior statements that collocation was not available at this

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<sup>23</sup> CR 36.02 provides in pertinent part: "Any matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

<sup>24</sup> Movant's Request and Motion for Extension of Time, p. 1 (emphasis added).



site.

Not surprisingly, following the July 1, 2013 letter from Movant's representative indicating collocation was not available, AT&T Mobility and its representatives proceeded with due diligence and preparation of the Application including the exhibits required by 807 K.A.R. 5:063 at great cost. As stated above, estimated costs incurred in this effort are in the tens of thousands of dollars. The expenditures were a direct result of written communication from Movant that collocation was not available. Significantly, that written communication did not come from a general agent of an entity unfamiliar with wireless collocation matters -- but was directly provided by the Manager of Technical Operations of a licensed wireless carrier and public utility under the jurisdiction of the Commission who must be deemed to understand that denial of collocation availability would result in pursuit of a raw land tower site at substantial due diligence and Application and Exhibit preparation cost. Otherwise, the integrity of the site selection process pursuant to 807 K.A.R. 5:063 breaks down, with the carrier applicant being unable to rely upon statements of any third party wireless industry professionals in connection with site selection.

At the mere mention of a **possible** co-location agreement which **may** affect the course and outcome of further proceedings, Movant would apparently have AT&T Mobility absorb the above costs incurred in reliance on Movant's representations and proceed to negotiate a collocation agreement with Appalachian Wireless. For Movant to seek intervention to force such a collocation is simply outrageous. The Commission should in no way participate in such a maneuver by grant of intervention.<sup>25</sup>

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<sup>25</sup> In the alternative, if the Commission were to grant intervention, it should require Movant to post bond so that such costs may be secured for reimbursement if the Commission ultimately rules collocation is not

The relevant Commission regulation even provides standards which leave no doubt intervention should be denied in the present circumstances:

807 K.A.R 5:063 - Section 4(11)(b) provides "[t]he commission shall grant a person leave to intervene if the commission finds that he or she has made a timely motion for intervention and that he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings." (Emphasis added). Id. at 807 K.A.R. 5:063 - Section 4(11)(b).

Movant's Motion to Intervene is not *timely* because Movant is bound by the email of July 1, 2013 and it waited far too long to reverse course (so long as to induce AT&T Mobility to proceed with a raw land tower site at great cost). Moreover neither in its Motion, its Brief, nor any other manner has the Movant informed the Commission that its current, post-Application position that "a **possible** co-location agreement . . . **may** affect the course and outcome of further proceedings" is a complete reversal of its prior, pre-Application position that "**all possible co-locates are on hold.**" It is difficult to see how intervention by an entity that is pursuing its own financial interests and that can and does change course in this manner could assist the Commission in addressing AT&T Mobility's Application. Finally, Movant's efforts to require negotiation of a collocation agreement at this late stage would *unduly complicate* and *disrupt the proceedings* before the Commission with no benefit to the public – the only benefit would be to the Movant in getting a second bite at the apple on a collocation agreement that it expressly stated it would not allow last summer.

In circumstances in which there is no statute or regulation to the contrary, the Commission is free to consider equities of particular circumstances. Such authority is

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compelled by the relevant facts, circumstances, and applicable law.

inherent in the determination that "... the public convenience and necessity require the service or construction." KRS 278.020(1). Movant's reversal of course on collocation availability and its inadvertent or knowing failure to disclose such reversal until after the Application was filed provides ample justification for application of equitable principles. We note also that the judiciary considers delay and prejudice in evaluation of requests for permissive intervention. CR 24.02.

Kentucky's appellate courts have repeatedly recognized the doctrines of detrimental reliance, laches<sup>26</sup>, and estoppel to impact how one party may proceed as to another or to a governmental agency and have held parties accountable for their actions accordingly.

Electric & Water Plant Board of the City of Frankfort v. Suburban Acres Development, Inc., et al, 513 S.W.2d 489 (Ky. 1974) illustrates application of these doctrines:

"It is apparent from the content of the letter and the record that there existed a dispute between the Electric & Water Plant Board and a public utility as to who would serve the involved area with electricity. We do not consider that Suburban should be penalized by waiting for the resolution of the dispute in view of the language of the letter and the circumstances of its issuance.

We are of the opinion that this situation presents a state of facts which constitute estoppel. The Electric & Water Plant Board was informed that a letter of commitment for service was necessary to arrange for financing; the letter was furnished. Suburban in reliance on the letter made financial commitments and commenced construction.

...

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<sup>26</sup> See John S. Wiggington v. Commonwealth of Kentucky, 760 S.W.2d 885 (Ky. App. 1988)("The basis of the doctrine of laches is that neglect or omission to assert one's rights within a reasonable period of time, where it causes prejudice, injury, disadvantage or a change of position to the other party, will bar enforcement of the claimant's rights.") See also City of Paducah v. Gillispie, 115 S.W.2d 574 (Ky. App. 1938).

... And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. ....

The factual situation here falls within the essential elements so described." Id. at 491.

Likewise in the present proceeding, the elements for application of estoppel are present and fully justify denial of the Motion to Intervene.

Urban Renewal and Community Development Agency of Louisville v. Goodwin, 514 S.W.2d 190, 191 (Ky. 1974) illustrates application of estoppel where persons relying on certain "... correspondence and negotiations ... built a new roof and improved the electrical wiring and plumbing" to a residence.

Similar principles were explained in Hunts Branch Coal Co. v. Canada, 599 S.W.2d 154 (Ky. 1980):

"One who knows or should know of a situation or a material fact is precluded from denying it or asserting the contrary where by his words or conduct he has misled or prejudiced another person or induced him to change his position." Id. at 155.

More recently, in Grayson Rural Electric Corp. v. City of Vanceburg, 4 S.W.3d 526 (Ky. 1999) the Kentucky Supreme Court addressed a dispute over which power provider should serve a particular area. The Supreme Court began its analysis stating that "Estoppel is established where another party relies in good faith on the representations made by the estopped party." Id. at 531. Throughout a multi-million dollar construction project, one of the litigants had "... acknowledged that Vanceburg [the other litigant] served the area lying between South Portsmouth and Vanceburg." Id.

at 531. The Supreme Court also recognized "... Vanceburg had made significant capital investments in facilities located in the disputed area to improve service...." and that "As a result of this reasonable reliance, Vanceburg changed its position to its detriment." Id. at 531. The Supreme Court applied estoppel and, in reversing the Court of Appeals, allowed Vanceburg to serve its existing customers in the disputed area.

The parallels of the above case precedent with the present proceedings and conduct of Movant inducing reliance by AT&T Mobility could not be more clear. Application of doctrines of detrimental reliance, laches, and estoppel are fully justified to support denial of the Motion to Intervene.

#### 4.0 CONCLUSION AND REQUEST FOR RELIEF

Movant's requested intervention in this proceeding is wholly unwarranted based on all of the foregoing facts, circumstances, applicable law, and other argument.

Applicant AT&T Mobility respectfully requests the Kentucky Public Service Commission:

(a) accept this Response to the Appalachian Wireless Motion to Intervene for filing;

(b) conduct an Informal Conference with Commission Staff and Parties' counsel of record on the Motion to Intervene at the Frankfort, Kentucky offices of the Commission;

(c) deny and overrule the Appalachian Wireless Motion to Intervene after any Reply allowed by Commission regulations, and after completion of the aforementioned Informal Conference;

(d) in the alternative, consider and decide whether any further proof or evidentiary hearing is necessary for the Commission to reach a decision on the Motion to Intervene;

(e) take the Application under submission on the existing record after denial of the Motion to Intervene;

(f) AT&T Mobility having met the requirements of KRS §§ 278.020(1), 278.650, and 278.665 and all applicable rules and regulations of the PSC, after due consideration, grant a Certificate of Public Convenience and Necessity to construct and operate the WCF at the location set forth in the Application without delay; and/or

(g) to grant AT&T Mobility any other relief to which it is entitled.

## 5.0 CERTIFICATE OF SERVICE

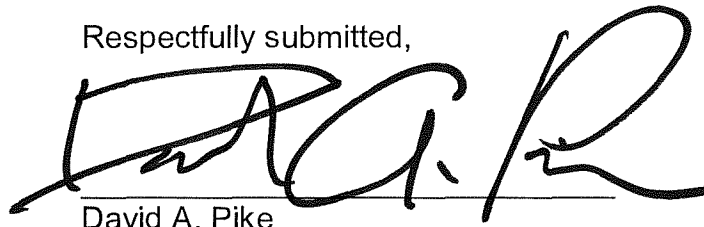
The undersigned hereby certifies the within was mailed by U.S. Postal Service first class mail postage prepaid to the following on this 2nd day of June 2014:

William S. Kendrick  
Francis, Kendrick & Francis  
P.O. Box 268  
Prestonsburg, Kentucky 41653  
(Attorney for East Kentucky Network, LLC, d/b/a Appalachian Wireless)

Jeff Derouen  
Executive Director, PSC  
211 Sower Blvd.  
P.O. Box 615  
Frankfort, KY 40602

Richard G. Raff  
Jeb Pinney  
Division of General Counsel  
Kentucky Public Service Commission  
211 Sower Blvd.  
P.O. Box 615  
Frankfort, KY 40602

Respectfully submitted,



David A. Pike  
and



F. Keith Brown  
Pike Legal Group, PLLC  
1578 Highway 44 East, Suite 6  
P. O. Box 369  
Shepherdsville, KY 40165-0369  
Telephone: (502) 955-4400  
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and

Patrick W. Turner  
General Attorney - Kentucky  
AT&T Kentucky  
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Email: pt1285@att.com  
Attorneys for New Cingular Wireless PCS, LLC  
d/b/a AT&T Mobility



# **EXHIBIT A**

**Kit Nickel**

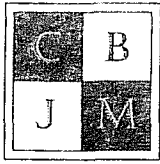
**From:** Mike Johnson [mjohnson@ekn.com]  
**Sent:** Monday, July 01, 2013 9:41 AM  
**To:** kit.nickel@cbjm.com  
**Subject:** Co-locations  
**Signed By:** mjohnson@ekn.com

Kit,

As I had told you on the phone, and also Greg Saunders, all possible co-locates are on hold due to our LTE build of our 2 LTE networks, along with the LRA. Sending a certified letter doesn't fix inadequate tower loading capabilities.

Thanks,

Mike Johnson  
Manager of Technical Operations  
Appalachian Wireless  
201 Technology Trail  
Ivel, Ky 41642  
800-438-2355 ext.212  
(606)794-4836 Fax



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June 20, 2013

Mike Johnson  
Manager of Technical Operations  
Appalachian Wireless  
101 Technology Trail  
Ivel, KY 41624

Dear Mr. Johnson:

I am writing you on behalf of my client, AT&T Mobility ("AT&T"). AT&T is working on new sites within the Appalachian Wireless territory, and I have been trying to reach you regarding several existing tower sites owned by Appalachian Wireless.

I left an initial voice mail message for your real estate group on May 3<sup>rd</sup>, and then dropped in to your corporate offices on May 13<sup>th</sup>, when a woman from your group was kind enough to come downstairs to the lobby and provide me with your name and phone number. After a few messages left, I have yet to hear back from anyone.

I would very much appreciate if you could respond to me confirming what the process would be for obtaining information for Appalachian Wireless towers for the purpose of evaluating them for collocation potential. AT&T is interested in limiting the impact of new tower sites where possible, and I have come across a number of your sites which might meet their needs. I am attaching a list of Appalachian tower sites for which I would like to obtain information.

Thank you very much for your time and assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kit Nickel".

Kit Nickel  
Site Acquisition Specialist

cc: Eric Bowman, Kentucky Public Service Commission

Hindman, KY	FCC ID #1229140	Perkins Branch Road
Pippa Passes, KY	FCC ID# 1042400	Jacob's Ridge Road
Paintsville, KY	FCC ID# 1276168	Hilltop Road
Index, KY	FCC ID# 1265239	US 460
Prestonsburg, KY	No FCC ID	Big Branch/Bull Creek South of town 37-29-24.12 / -82-45-57.57
Staffordsville, KY	FCC ID# 1244186	Rule Branch Road
Paintsville, KY	No FCC ID	Mill Street North of town 37-49-9.86 / -82-48-33.46
Evarts, KY	NO FCC ID	KY Route 38 East of town 36-51-57.5, -83-11-11.2
Auxier, KY	NO FCC ID	KY Route 3 (access off Heritage Hills Road) West of town 37-43-30.42, -82-46-49.81

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Total Postage & Fees	\$	

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 or PO Box No. 211 SOWER / PO BOX 615  
 City, State, ZIP+4  
 FRANKFORT, KY 40602-0615

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p><i>[Signature]</i></p> <p>B. Received by (Printed Name) _____</p> <p>C. Date of Delivery          JUN 24 2013</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes          If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>1. Article Addressed to:</p> <p>ERIC BOWMAN          KPSC          211 SOWER BLVD          PO BOX 615          FRANKFORT KY          40602-0615</p>	<p>3. Service Type</p> <p><input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>
<p>2. Article Number          (Transfer from service label)</p> <p>7010 2780 0002 4192 8995</p>	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>

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 Hilliard, OH 43026  
 USPS

Sent To: MIKE JOHNSON / APP. WIRELESS  
 Street, Apt. No., or PO Box No: 101 TECHNOLOGY TR.  
 City, State, ZIP+4: IVEL, KY 41029 41042

7010 2780 0002 4192 8988

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature <input checked="" type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <input type="checkbox"/> Date of Delivery</p> <p>C. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No          If YES, enter delivery address below:</p>
<p>1. Article Addressed to:</p> <p>MIKE JOHNSON          APPALACHIAN WIRELESS          101 TECHNOLOGY TR.          IVEL, KY 41024</p>	<p>3. Service Type</p> <p><input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>
<p>2. Article Number          (Transfer from service label)</p> <p>7010 2780 0002 4192 8988</p>	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>

# **EXHIBIT B**



Sherri Lewis  
RF Design Engineer

AT&T Mobility  
3231 N. Green River Rd.  
Evansville, IN 47715

T: 812-457-3327  
F: 812-457-3203

May 23, 2014

Kentucky Public Service Commission  
c/o Jeff R. Derouen, Executive Director  
211 Sower Boulevard  
Frankfort, KY 40601

RE: PSC Docket No. 2014-00135 (AT&T Nippa Site)  
Review of Co-location Feasibility for EKN Wittensville Tower

Dear Commissioners:

I have reviewed the feasibility for co-location of AT&T Mobility's equipment on East Kentucky Network, LLC's Wittensville tower located at N37° 52' 54.6"; W82° 47' 9.6" (NAD83) as a possible alternative to the Nippa wireless communications facility proposed for construction in the above-referenced case. The Wittensville tower is located over 1.3 miles from the proposed Nippa site and is located too far north to provide adequate coverage to AT&T Mobility's target service area. Additionally, co-location on the Wittensville tower would not provide connecting coverage within AT&T Mobility's existing network.

For these reasons, co-location of AT&T Mobility's equipment on the Wittensville tower would not be a satisfactory alternative to construction of the proposed Nippa wireless communications facility.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Lewis".

Sherri Lewis  
Senior-RAN Engineer  
AT&T Network Operations