

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF TILLMAN INFRASTRUCTURE)	
LLC AND NEW CINGULAR WIRELESS PCS, LLC)	
D/B/A AT&T MOBILITY FOR ISSUANCE OF A)	CASE NO.
CERTIFICATE OF PUBLIC CONVENIENCE AND)	2017-00435
NECESSITY TO CONSTRUCT A WIRELESS)	
COMMUNICATIONS FACILITY IN THE)	
COMMONWEALTH OF KENTUCKY IN THE)	
COUNTY OF MARSHALL)	

O R D E R

On November 14, 2017, Tillman Infrastructure LLC, and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (collectively, "Applicants") filed an application ("Application") seeking a Certificate of Public Convenience and Necessity ("CPCN") to construct and operate a wireless telecommunications facility in Marshall County, Kentucky. On December 4, 2017, SBA Communications Corporation ("SBA") filed a letter of public comment with the Commission. The letter expressed opposition to the proposed facility on the grounds that SBA currently had a tower located approximately 760 feet away from the Applicants' proposed tower and that the Applicants were currently a tenant on the SBA tower.

The Applicants filed a response to the public comment on December 27, 2017. In their response, Applicants allege that SBA is attempting to prevent competition and protect their position as the owner of the only tower in the area.¹

On December 27, 2017, SBA filed a request for intervention. In its request, SBA states it has a wireless tower on the property adjacent to the property on which Applicants are proposing to build the new tower. SBA states that AT&T is currently a tenant on the SBA tower, and the tower complies with regulations and has the structural capacity for the current AT&T equipment.²

SBA further asserts that because AT&T already provides service in this location from SBA's tower, and SBA's tower can handle additional tenants and, because SBA is willing to upgrade the site as necessary to accommodate any proposed changes to configuration by its tenants, that Applicants have not demonstrated that their proposed facility will provide improved coverage for wireless communication in the area.³

Applicants filed a response to the request to intervene on January 11, 2018. In its response, Applicants state that the request for intervention should be denied. They state that the only interest SBA has is indirect as it is seeking to protect its interest as the owner of the only tower in the area and that SBA can make its views known through public comment which is sufficient.⁴

¹ Applicants' Response to Public Comment Filed by SBA Communications Corporation (December 27, 2017) at 4.

² Request to Intervene (December 27, 2017).

³ *Id.*

⁴ Applicants' Response to SBA Communications Corporation Motion to Intervene (January 11, 2018) at 2.

The response also alleges that SBA's assertion that another tower is not needed is not supported by any evidence that service from its tower is superior to service from the proposed tower and, absent such evidence, SBA is left to argue against tower proliferation which is not permissible under federal law.⁵ Applicants also state that co-location is not available to them because rent on the proposed tower will be more reasonable than that currently charged by SBA and AT&T will have the option of upgrading its equipment on the proposed tower without rent increases.⁶

DISCUSSION

The only person with a statutory right to intervene in a proceeding before the Commission is the Attorney General.⁷ Intervention by all others is permissive and is within the sole discretion of the Commission.⁸

In exercising our discretion to determine intervention, there are both statutory and regulatory limitations on the Commission. The statutory limitation, KRS 278.040(2), requires 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."⁹ 807 KAR 5:001 Section 4(11) provides that a motion to intervene, "shall state his

⁵ *Id.* at 2, citing *Cellco Partnership v. Franklin Co., KY*, 553 F.Supp. 2d 838, 845-846 (E.D. Ky. 2008) and *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F3d 794, 804 (6th Cir. 2012).

⁶ *Id.* at 2-3.

⁷ See KRS 367.150(8)(b). The Attorney General has not requested to intervene in this matter.

⁸ *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

⁹ *EnviroPower, LLC v. Public Service Comm'n*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007).

or her interest in the case and how an intervention is likely to present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings." The regulation further provides that:

The 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.

It is under these statutory and regulatory criteria that the Commission reviews a motion for intervention.

Based on a review of the pleadings at issue and being otherwise sufficiently advised, the Commission finds that SBA does not have a special interest in the proceeding over which the Commission has jurisdiction that is not otherwise adequately represented. The Commission also finds that SBA is not likely to present issues or develop facts that will assist the Commission in considering this matter. It is likely that if the Commission permitted SBA to intervene, this intervention would unduly complicate this proceeding.

As noted, *supra*, the Commission's jurisdiction is limited to the rates and services of a utility, and the review of the application is limited to those areas. SBA has not raised any issues related to rates. Neither the letter of December 4, 2017, nor the Request to Intervene filed on December 27, 2017, mentions rates at all.

The Request to Intervene does state that SBA does not believe that the proposed facility will improve wireless service in the area because AT&T is already providing service from SBA's tower and SBA's tower has room for more tenants. However, as the

Applicants point out in the Applicants' Response to Public Comment filed by SBA Communications Corporation, the competition engendered in having more than one tower is likely to improve co-location opportunities for other telecommunications providers in the area. This is likely to lead to the expanded availability of advanced wireless services.¹⁰

The Commission is under no illusion that SBA's request to intervene in this case is anything other than an attempt to protect its monopoly as the owner of the only tower in the area. SBA is not a wireless customer in the area or a property owner. SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers. This runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition.¹¹

Furthermore, the Commission has in the past denied intervention to requesting competitors who have no interest in either rates or services.¹² In that case, in which East Kentucky Power Cooperative filed an application for a Certificate of Public Convenience and Necessity and a competitor, EnviroPower, sought intervention, the Commission found that "EnviroPower's pecuniary interest . . . does not rise to the level of a special interest in this proceeding sufficient to grant intervention."¹³

IT IS THEREFORE ORDERED that SBA's request to intervene is denied.

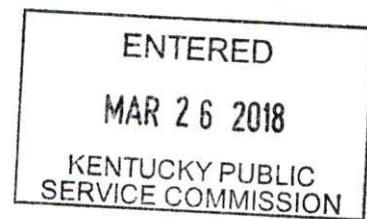
¹⁰ Applicants' Response to Public Comment Filed by SBA Communications Corporation.

¹¹ *T-Mobile USA INC. v. City of Anacortes*, 572 F.3d 987, 991 (9th Cir. 2009).

¹² *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Construction of a 278 MW (nominal) Circulating Fluidized Bed Coal-Fired Unit in Mason County, Kentucky*, Case 2004-00423, order filed April 18, 2005.

¹³ *Id.* at 4.

By the Commission



ATTEST:

Steven R. Benson
Executive Director

*Honorable David A Pike
Attorney at Law
Pike Legal Group PLLC
1578 Highway 44 East, Suite 6
P. O. Box 369
Shepherdsville, KENTUCKY 40165-0369

*New Cingular Wireless PCS, LLC dba AT&T
1010 N St Mary's Street, 9th Floor
San Antonio, TX 78215