

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF NEW CINGULAR)	
WIRELESS PCS, LLC D/B/A AT&T MOBILITY FOR)	
ISSUANCE OF A CERTIFICATE OF PUBLIC)	CASE NO.
CONVENIENCE AND NECESSITY TO)	2022-00144
CONSTRUCT A WIRELESS COMMUNICATIONS)	
FACILITY IN THE COMMONWEALTH OF)	
KENTUCKY IN THE COUNTY OF MARION)	

ORDER

On June 3, 2022, SBA Towers VII, LLC (SBA) filed a motion requesting to intervene in this proceeding. SBA argued it had a special interest not otherwise represented, and it should be granted intervention; alternatively, SBA argued it could assist the Commission without unduly complicating the proceeding.

BACKGROUND

SBA argued that it has a special interest not otherwise represented in this proceeding in three separate ways: (1) its ability to promote competition in the wireless telecommunications market through an existing tower with adequate existing and future capacity and coverage; (2) its intervention ensures applicable statutes and regulations are followed and applied fairly and uniformly; and (3) that Kentucky citizens in the area can continue to receive high quality access to telecommunication networks without the need for unnecessary and wastefully duplicative towers that a coverage comparison shows will provide the same quality of coverage in the same area.¹ SBA also stated it

¹ SBA's Motion to Intervene (filed June 3, 2022) at 4–5.

could assist the Commission by helping to develop facts that the Commission would not otherwise be aware of and do so in a manner that would not unduly complicate the proceedings. According to the motion, SBA “seeks to ensure that laws and regulations are fairly and uniformly applied, and that the Commission enters a final order based upon presentation of all evidence required by its own regulation.”² SBA claimed that it is uniquely qualified to assist in the development of the required evidence.³

On June 10, 2022, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T Mobility) and Harmoni Towers, LLC (Harmoni Towers) filed a response to SBA’s motion to intervene.⁴ Noting that the Commission has previously denied SBA attempts at intervention in prior cases, AT&T Mobility and Harmoni Towers argued that SBA should be denied intervention in this matter as the facts are similar.⁵ AT&T Mobility and Harmoni Towers argued that it should not be forced to remain on an SBA tower in order to provide service to its customers because it is contrary to both the Telecommunications Act and Kentucky law.⁶ In support of its application, AT&T Mobility and Harmoni Towers also filed an affidavit with additional specific information and requested confidential treatment for

² SBA’s Motion to Intervene at 5.

³ SBA’s Motion to Intervene at 2.

⁴ AT&T Mobility and Harmoni Towers’ Response to SBA’s Motion to Intervene (Response to Motion to Intervene) (filed on June 10, 2022).

⁵ Response to Motion to Intervene at 2–3.

⁶ Response to Motion to Intervene at 13.

the filing.⁷ On July 26, 2022, the Commission issued an Order granting confidential treatment for the affidavit.⁸

On June 15, 2022, SBA filed a reply in support of its motion to intervene along with three exhibits.⁹ In its reply, SBA cited to a recent appellate court appearance on similar cases to imply AT&T Mobility and Harmoni Towers, and the Commission all acquiesce to SBA's position that intervention should be granted.¹⁰ On June 22, 2022, AT&T Mobility and Harmoni Towers filed a Sur-Reply to SBA's motion to intervene along with ASR Registration Search Results.¹¹

LEGAL STANDARD

There is no intervention as a matter of right in matters before the Commission for any party other than the Attorney General.¹² The regulatory standard for permissive intervention, set forth in 807 KAR 5:001E, Section 4, is twofold. Commission regulation 807 KAR 5:001E, Section 4(11), requires a person to set forth in the motion to intervene either (1) a special interest in the proceeding that is not otherwise adequately represented in the case, or (2) that intervention is likely to present issues or develop facts that will

⁷ AT&T Mobility and Harmoni Towers' Affidavit and Motion for Confidentiality (filed on June 23, 2022).

⁸ Order (Ky. PSC July 26, 2022).

⁹ SBA's Reply in Support of Motion to Intervene, Exhibit 1 Memorandum in Support of Motion to Intervene and Exhibit 2 Marion County FCC ASR Search Results, Exhibit 3 Washington County FCC ASR Search Results (filed on June 15, 2022).

¹⁰ SBA's Reply in Support of Motion to Intervene at 1–3.

¹¹ AT&T Mobility and Harmoni Towers' Sur-Reply to SBA's Motion to Intervene (filed on June 22, 2022).

¹² See KRS 367.150(8)(b); *Public Service Commission v. Attorney General of the Commonwealth*, 860 S.W.2d 297, 297 (Ky. App. 1993).

assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

As the Kentucky Court of Appeals recently explained, the Commission “is granted the discretion to decide whether a person” satisfies the legal standard set forth in 807 KAR 5:001E, Section 4(11)(b).¹³ In other decisions, Kentucky courts have held that 807 KAR 5:001E, Section 4(11)(b) grants the Commission “the responsibility for the exercise of sound discretion in the matter affording permission to intervene,” and “[u]nder this regulation, the PSC retains the power in its discretion to grant or deny a motion for intervention.”¹⁴ On October 31, 2022, the Public Service Commission’s (PSC) Orders denying SBA intervention in 14 consolidated cases were upheld by the Franklin Circuit Court.¹⁵

DISCUSSION AND FINDINGS

Based on a review of the pleadings at issue and being otherwise sufficiently advised, the Commission finds that SBA has failed to demonstrate that it has a special interest in the proceeding over which the Commission has jurisdiction that is not otherwise adequately represented nor is SBA likely to present issues or develop facts that will assist the Commission in considering this matter without unduly complicating the proceedings for the reasons discussed below.

¹³ *IOLA Capital v. Public Service Commission of Kentucky*, 653 S.W.3d 563, (Ky. App. July 15, 2022) review denied (Feb. 8, 2023).

¹⁴ *EnviroPower LLC v. Public Service Commission*, 2005-CA-001792-MR, 2007 WL 289328 at 3 (Ky. App. Feb. 2, 2007) (unreported decision).

¹⁵ *SBA Communications Corporation et al vs. Public Service Commission of Kentucky*, 22-CI-00139, Franklin Circuit Court, Opinion and Order (issued on Oct. 31, 2022), (14 consolidated cases, and the Opinion is not final), appeal filed.

Jurisdiction

The Commission's jurisdiction over cellular towers arises out of KRS 278.040 and KRS 278.650. KRS 278.040 is a general grant of jurisdiction to the Commission over utilities in the Commonwealth. KRS 278.650 sets forth the procedures an applicant must follow to be granted permission to construct a cellular tower. The Commission exercised jurisdiction over cellular towers, pursuant to KRS 278.020 and KRS 278.040, prior to the enactment of KRS 278.650 in 1996.¹⁶ The General Assembly, in enacting KRS 278.650, gave the Commission's jurisdiction over the construction of cellular towers (in areas outside of planning and zoning commissions), established minimum notice requirements for cellular tower applications, and provided that "the commission may take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values" when reviewing an application.

The Commission has jurisdiction and the ability to promulgate administrative regulations related to cellular towers pursuant to KRS 278.665 and KRS 278.040. In *Public Service Com'n v. Jackson Cnty. Rural Elec. Co-op., Inc.*, the Court noted that the:

PSC's authority is necessarily one of statutory analysis. KRS 278.040 gives the PSC exclusive jurisdiction over the regulation of utility rates and service and provides that the PSC shall enforce the provisions of KRS Chapter 278 . . . to that end the statute gives the PSC the authority to adopt regulations to implement the provisions of KRS Chapter 278. KRS 278.040(3).¹⁷

¹⁶ See Case No. 1992-00170 *Application of Central Kentucky Cellular Telephone Company for Issuance of a Certificate of Public Convenience and Necessity to Construct an Additional Cell Facility in the Lexington Metropolitan Statistical Area (Athens/Pure Gold Cell Facility)* (Ky. PSC Jan 8, 1993).

¹⁷ *Public Service Com'n v. Jackson Cnty. Rural Elec. Co-op., Inc.*, 50 S.W.3d 764, 767 (Ky. App. 2000), as modified (July 21, 2000).

KRS 278.020, KRS 278.650, and KRS 278.655 are all contained within KRS Chapter 278. The wireless market is competitive and, other than the placement of towers and interconnection with other telecommunications providers, the Commission has little jurisdiction over wireless providers, including no jurisdiction over the rates or return on investment of wireless providers.¹⁸ Since the Commission does not regulate the rates of wireless providers, the traditional basis for requiring a Certificate of Public Convenience and Necessity (CPCN), to ensure that a utility does not make unnecessary or wasteful investments in utility plant that result in unreasonable rate increases,¹⁹ would provide little, if any, support for requiring a CPCN for a wireless facilities. Thus, the Commission's review of a request for a CPCN for a cell tower appears to be primarily intended to be a surrogate for a planning and zoning review, which may look at "the general area concerned and the likely effects of the installation on nearby land uses and values."

In addition to state law, the Commission, is also bound by federal law when considering the construction of wireless facilities, which among other things, requires:

A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality.²⁰

¹⁸ KRS 278.54611.

¹⁹ See *Duerson v. East Kentucky Power Co-op, Inc.*, 843 S.W.2d 34, 342 (Ky. App. 1992) ("We are of the opinion that the foregoing statute and regulation are designed to protect the public against exorbitant utility rates emanating from unnecessary and duplicitous power facilities. We think it unreasonable to conclude that their purpose lies in protecting landowners from eminent domain.").

²⁰ 47 U.S.C.A. § 332 (c)(7)(B)(ii).

Special Interest not Otherwise Represented

SBA claimed to request intervention in the public interest.²¹ SBA argued that its status as the only tower in the area is a special interest that it must be allowed to protect through intervention.²² SBA made broad claims about “less service”, “signal interference,” and claimed that landowners cannot possibly have the knowledge that SBA has about cellular facilities.²³ SBA does not assert an interest intended to be protected by KRS Chapter 278 or KRS 278.650 more specifically. SBA is not a customer nor a utility. SBA’s interest appears to be commercial in ensuring that AT&T Mobility remains a tenant on SBA’s tower. SBA has failed to assert an interest that extended past its limited economic interest.

Recently, the Kentucky Court of Appeals discussed what a special interest may look like as it relates to an application to construct a cellular tower.²⁴ According to the Court of Appeals, an adjoining property owner could have a special interest in the location of a cellular tower under KRS 278.650.²⁵ The Court of Appeals, however, stopped short of stating under what circumstances intervention shall be granted in a proceeding for construction of a cellular tower and reiterated that granting intervention is at the discretion of the Commission.²⁶

²¹ SBA’s Motion to Intervene.

²² SBA’s Motion to Intervene at 4–7.

²³ SBA’s Motion to Intervene at 7–8.

²⁴ *Biddle v. Public Service Commission*, 643 S.W.3d 83 (Ky. App. 2021) *review denied* (Apr. 20, 2022).

²⁵ *Biddle*, 643 S.W.3d at 94.

²⁶ *Biddle*, 643 S.W.3d at 94.

SBA's interest is not of an adjoining landowner who is interested in maintaining property value, or a neighbor interested in the use and enjoyment of their property. SBA's interest is that of a landlord objecting to a tenant finding a new location because that relocation impacts the company's income. The crux of this request is economic—a dispute between landlord and tenant—and the Commission is not the correct forum to litigate such a dispute.

SBA argued that it has an interest in promoting “competition in the wireless telecommunications market through an existing tower with adequate existing and future capacity and coverage is preserved.”²⁷ The Commission does not believe that SBA's stated goal of remaining the only wireless communication facility in the area rises to the level of a special interest that must be protected through intervention. SBA is not a wireless customer in the area or a neighboring landowner. SBA is a landlord with an interest in keeping tenants regardless of the effect such actions have on the public or customers of a particular wireless service provider. This runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition,²⁸ as well as KRS 278.546(4) which states that market-based competition benefits consumers. Furthermore, SBA has no right to be free from competition.²⁹

²⁷ SBA's Motion to Intervene at 5.

²⁸ *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987, 991 (9th Cir. 2009).

²⁹ See *Lexington Retail Beverage Dealers Ass'n v. Department of A.B.C. Board*, 303 S.W.2d 268, 270 (Ky. 1957); *HealthAmerica Corp. of KY v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 948 (Ky. 1985).

SBA does not Present Issues or Further Develop Facts without Unduly Complicating the Proceeding

SBA argued that 807 KAR 5:063 requires AT&T Mobility to provide proof of an attempt to co-locate or reasonable opportunities to co-locate.³⁰ However, 807 KAR 5:063

Section 1(1)(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 . . . (Emphasis added.)

The regulation requires the applicant to provide “a statement”. There is no requirement to provide a radio frequency analysis, contrary to SBA’s argument.³¹ There is no requirement for the applicant to file anything beyond a statement containing the appropriate information about co-location. The regulation does allow for an applicant to file certain documentation, including a radio analysis, if applicable. In the application filed by AT&T Mobility and Harmoni Towers, a statement was provided with regard to land use effects and co-location. The application in this matter complied with the regulation. Further, alleging that an application failed to comply with a regulation alone does not support the conclusion that a party requesting intervention will be able to present issues

³⁰ SBA’s Motion to Intervene at 6.

³¹ SBA’s Motion to Intervene at 6.

or further develop facts that will assist the Commission in making a sound, well-reasoned decision in the issuance of a CPCN.

SBA argued that it could provide information and develop facts that will assist the Commission in making its decision, including its own coverage plot analysis performed by a Radio Frequency Engineer, information regarding its own tower location, details of discussions with AT&T Mobility and Harmoni Towers, and information regarding the facilities that will be placed on the proposed tower.³² The Commission, not SBA, is the entity empowered to determine what evidence to consider. However, the Commission has exclusive province to evaluate the credibility of the witnesses and the weight of the evidence.³³ Stemming from the discretion to weigh the evidence is the ability to determine what evidence should be allowed or needed in any proceeding. The information SBA indicates it plans to provide or develop is not unique to it and could be acquired from AT&T Mobility and Harmoni Towers should the Commission determine that such information is necessary to develop the record.

SBA stated that it could provide information as to whether AT&T Mobility had negotiated in good faith before deciding to apply for a CPCN.³⁴ SBA argued it could correct the record and provide information that AT&T Mobility and Harmoni Towers had excluded.³⁵ The Commission, however, does not have jurisdiction over negotiations

³² SBA's Motion to Intervene at 6–7.

³³ *Energy Regulatory Commission v. Kentucky Power Company*, 605 S.W. 2d 46, 50 (Ky. App. 1980).

³⁴ The Commission is not required to make a finding that a party negotiated in good faith regarding co-location. Negotiations between a landlord and tenant are legislated separately and litigated before a different legal body. The Commission must consider need and wasteful duplication. Co-location is just one aspect of the wasteful duplication analysis.

³⁵ SBA's Motion to Intervene at 8–9.

between parties of a rental dispute, which appears to be SBA's main concern in raising this issue. Further, AT&T Mobility and Harmoni Towers have provided a statement that they have considered co-location and it was not reasonably available,³⁶ and if it were necessary, the Commission could request additional sworn evidence from the AT&T Mobility and Harmoni Towers regarding an issue.³⁷

Denying SBA's motion to intervene would also not prevent SBA from participating in the case. SBA can review all public documents filed in this case and monitor the proceedings via the Commission's website. In addition, SBA may file substantive comments as frequently as it chooses to the extent it disagrees with statements or information provided by AT&T Mobility and Harmoni Towers, and those comments will be entered into the record of this case. Thus, allowing SBA to intervene would not likely result in the presentation of additional issues and facts but it would allow SBA to use these proceedings to improperly promote interests that are outside of the scope of the Commission's review, which would unduly complicate the proceeding.

For the reasons discussed above, the Commission finds that SBA failed to establish that its intervention is likely to present issues or develop facts that will assist the Commission without unduly complicating the proceeding. It is apparent that SBA seeks to remain as the sole facility and landlord in a specific area. As stated previously, the dispute between a landlord and tenant is not a basis for intervention before the Commission.

³⁶ Application at 4-5.

³⁷ See, e.g. 807 KAR 5:001E, Section 4(12)(d)(allowing requests for information that must be answered under oath).

The Commission finds that the denial of SBA's request to intervene to keep AT&T Mobility as a tenant is consistent with previous decisions to deny intervention for similarly situated entities.³⁸ The Commission has consistently denied intervention to SBA in other proceedings.³⁹ Despite new arguments, the nucleus of the issue is a landlord tenant dispute.⁴⁰ SBA's only interest is commercial and lies in ensuring that no other facilities are built, which would allow SBA to remain the only tower in the area. Conversely, one of the stated purposes of the Telecommunications Act of 1996, is to promote competition,⁴¹ as well as KRS 278.546(4), which states that market-based competition benefits consumers.

³⁸ Case No. 2004-00423, *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* (Ky. PSC Apr. 18, 2005), Order *aff'd by EnviroPower LLC v. Public Service Commission*, 2005-CA-001792-MR, 2007 WL 289328 at 4 (Ky. App. Feb. 2, 2007) (The Commission denied intervention in a CPCN case to a movant whose bid in a competitive power solicitation with the applicant was unsuccessful. 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."); Case No. 2011-00124, *Joint Application of Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc. for Approval of the Indirect Transfer of Control of Duke Energy Kentucky, Inc.* (Ky. PSC May 12, 2011), Order (The Commission denied intervention in a merger case because movant's only interest was as a competitive supplier of retail electric and natural gas); Case No. 2012-00136, *An Adjustment of the Pipe Replacement Program Rider of Delta Natural Gas Company, Inc.* (Ky. PSC June 25, 2012), Order (The Commission denied intervention in a pipeline replacement case to a movant whose only interest was as a competitive supplier of natural gas).

³⁹ Case No. 2019-00176, *Electronic Application of New Cingular Wireless PCS, LLC D/B/A AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility in the Commonwealth of Kentucky in the County of Casey* (Ky. PSC Jan. 21, 2021), Order; Case No. 2017-00435, *Application of Tillman Infrastructure LLC and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility in the Commonwealth of Kentucky in the County of Marshall* (Ky. PSC Mar. 26, 2018).

⁴⁰ Case No. 2017-00435, *Application of Tillman Infrastructure LLC and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility in the Commonwealth of Kentucky in the County of Marshall* (Ky. PSC Mar. 26, 2018), Order at 5.

⁴¹ *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987, 991 (9th Cir. 2009).

The Commission, based upon the foregoing, finds that SBA has not demonstrated a basis for intervention under 807 KAR 5:001E, Section 4.

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

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PUBLIC SERVICE COMMISSION

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