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January 29, 2016

VIA EXPRESS MAIL

Linda Faulkner
Division of Filings
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602-0615

RECEIVED

FEB 1 2016

Public Service
Commission

Re: Response to Jan. 12, 2016 Motion for Intervention
PSC Case No.: 2015-00404
Site Name: Pea Ridge

Dear Linda:

Please accept this letter and the attached document as an official filing in the above-referenced Public Service Commission action. If you have any questions or comments concerning this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "D. A. Pike", written over a horizontal line.

David A. Pike
Attorney for Applicants

Enclosure

cc: J.E.B. Pinney, Div. of General Counsel

RECEIVED

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

FEB 1 2016

In the Matter of:

Public Service
Commission

THE APPLICATION OF)
NEW CINGULAR WIRELESS PCS, LLC)
D/B/A AT&T MOBILITY)
& AMERICAN TOWERS, LLC)
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC) CASE NO.: 2015-00404
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF WOLFE)

SITE NAME: PEA RIDGE

* * * * *

RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

Applicants New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility ("AT&T Mobility") and American Towers, LLC ("American Towers"), by counsel, make this Response to the Motion to Intervene dated January 11, 2016 submitted by David Graham in the within proceeding. Applicants respectfully state, as follows:

1. David R. Graham, by said Motion to the Kentucky Public Service Commission, opposes the within application based on "health, safety, and environmental reasons" and because of his allegation "the tower would be approx. 175 ft. from the Daniel Boone National Forest Land." He also indicated he believes "the people in this Community should be protected from the radiation of a cell phone tower especially the children."

2. By correspondence dated January 5, 2016, a copy of which was filed with the commission on January 5, 2016, Applicants have previously responded to Mr. Graham's concern as to the safety of the proposed tower. Said correspondence included a report

dated January 10, 2014 prepared by Nitesh Ahuja, a Kentucky licensed professional engineer, explaining the tower's safety design features, which report includes certifications from said engineer that the tower would be constructed in compliance with the National Tower code and that the predicted mode of wind-induced failure would affect a "zero fall zone' at ground level." Mr. Graham has offered no indication or commitment he would produce contrary expert testimony on such issues. The Commission could not deny the application based on Mr. Graham's lay opinion as to safety issues considering the applicable law holding lay testimony is not "substantial evidence" in Telecommunications Act cases the Sixth Circuit. See *Cellco P'ship v. Franklin Cnty.*, 553 F.Supp. 2d 838 (E.D. Ky. 2008); *T-Mobile Cent. v. Charter Twp. of W. Bloomfield*, 691 F.3d 794 (6th Circ. 2012). Accordingly, it would be an exercise in futility which wasted both Commission and Applicant resources to allow Mr. Graham's intervention in order to offer lay testimony on safety issues.

3. The Motion includes no assertion that any provision of law requires the tower to be a particular distance from Daniel Boone National Forest. Applicants maintain the proposed tower meets all requirements of law and regulation. Mr. Graham does not represent Daniel Boone National Forest. Applicants included notice to the USDA - US Forestry Division, 100 Vaught Road, Winchester, KY 40391 in the notice list referenced in an Exhibit to the Application. The US Forestry Division has not sought intervention. Accordingly, Mr. Graham asserts no persuasive basis to intervene on grounds of the distance of the tower from the Daniel Boone National Forest.

4. As stated in prior filings in this proceeding, in accordance with KRS Chapter 100 and the Telecommunications Act of 1996, the environmental effects of radio

frequency emissions are not at issue in this case and may not be considered by the Public Service Commission in its evaluation of the proposed facility. Radio frequency emissions are the subject of federal regulation, and the Telecommunications Act of 1996 expressly prohibits state regulation of wireless communications facilities on the basis of environmental effects or radio frequency emissions. Specifically, the Federal Telecommunications Act of 1996, as codified at 47 U.S.C. Section 332(7)(B)(iv), provides:

“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission’s regulations concerning such emissions.”

5. Applicant is licensed by the Federal Communications Commission (“FCC”) to provide wireless communications services to the area to be served by the proposed wireless communications facility, and a copy of the relevant FCC license granted to Applicant New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility was filed as part of the subject Application. Accordingly, Applicant, is subject to the FCC regulation referenced at 47 U.S.C. Section 332(7)(B)(iv).

6. The U.S. Court of Appeals for the Sixth Circuit has upheld the prohibition of consideration of the environmental effects of radio frequency emissions in Kentucky Public Service Commission proceedings regarding wireless communications facilities. Specifically, in *Telespectrum, Inc. v. Public Service Commission*, 227 F.3d 414 (6th Circuit 2000), the Court held:

“[C]oncerns of health risks due to the emissions may not constitute substantial evidence in support of denial by statutory rule, as no state or local government or instrumentality thereof may regulate the construction of personal wireless facilities “on the basis of the environmental effects of

radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.' 47 U.S.C. § 332(c)(7)(B)(iv)." *Id* at 425.

In 2012, the Sixth Circuit relied upon *Telespectrum, supra*, and recognized the continuing validity of 47 U.S.C. Section 332(c)(7)(B)(iv). *T-Mobile Central v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 800 (6th Circ. 2012). On the specific facts of the *T-Mobile Central* case, the Sixth Circuit explained that "Concerns that the RF emissions could potentially impact trees or children at the daycare were prohibited by statute as grounds to deny a wireless permit." *Id.* at 800. Thus, Mr. Graham's Motion is in blatant disregard of controlling law and frivolous on health effects of radio frequency emissions issues.

7. The Public Service Commission should not become a facilitator to Mr. Graham's efforts to circumvent clear and controlling legal precedent. 807 K.A.R. 5:001 - Section 4 - (11)(b) provides:

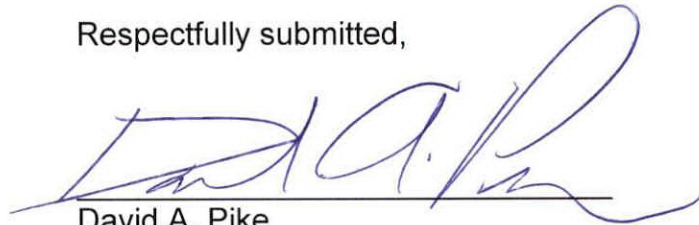
"(b) The commission shall grant a person leave to intervene if the commission finds that he or she had made a timely motion for intervention and that he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or 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. 5:001 - Section 4 -1 (11)(b).

When read in connection with the statutory and Sixth Circuit prohibition of consideration of radio frequency emissions effects of a wireless communications facility, it is clear Mr. Graham's Motion to Intervene may not be lawfully granted. Mr. Graham's candid identification of the prohibited issues he wants to address leave the Commission no choice but to reject his request in order to preserve the integrity of this proceeding.

WHEREFORE, Applicants respectfully request the Kentucky Public Service Commission:

- (a) Accept this Response for filing;
- (b) Deny the Motion to Intervene
- (c) Grant Applicants any other relief to which they are entitled.

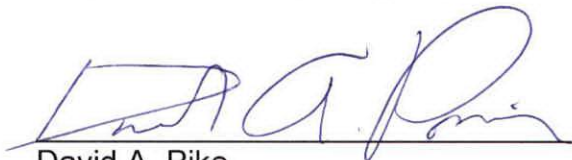
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of January 2016, a true and accurate copy of the foregoing was sent by U.S. Postal Service first class mail, postage prepaid, to David R. Graham, P.O. Box 553, Campton, KY 41303.



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