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**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

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

SITE NAME: HANSEN

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**APPLICANTS' RESPONSE TO  
SBA COMMUNICATIONS CORPORATION MOTION TO INTERVENE**

Tillman Infrastructure LLC ("Tillman"), a Delaware limited liability company, and New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility ("AT&T") (collectively, "Applicants"), by counsel, make this Response to the Motion to Intervene filed by SBA Communications Corporation ("SBA") in the within proceeding.

Applicants respectfully state as follows:

1. SBA's Motion should be denied, as there is no good cause to permit SBA to intervene. SBA is not an AT&T customer and is not interested in AT&T's rates and services, nor does SBA have any direct interest in Applicants' proposal to construct a tower. Instead, SBA has only an indirect interest, insofar as SBA seeks to protect its position as the only tower owner in the area. That is an insufficient basis for intervention,

and SBA's intervention would only unduly complicate and disrupt the proceeding. SBA can make its views known to the PSC via comments (as it has already done), and its request to intervene should be denied.

2. SBA's interest in this proceeding is purely proprietary. Nothing in SBA's Motion provides evidence or offers to provide evidence that wireless service from its tower would be superior to that from the proposed Tillman tower, even though Applicants' application provides detailed information on the proposed new tower site and SBA has had ample opportunity to assess service available from the proposed location. Thus, any effort by SBA to produce evidence as to how its tower might provide the needed wireless service from a technical perspective would only complicate and disrupt the proceedings. Moreover, in light of the federal courts' diligence in preventing subjective aesthetic objections from interfering with the permitting of a cellular tower,<sup>1</sup> any SBA argument as to purported tower proliferation or unsightliness cannot be a basis to allow intervention or to deny construction of the proposed new tower.

3. Where, as here, the proposed Tillman tower will meet the objectives for improved wireless service, the only issue is the relative reasonable availability of the alternative locations. As AT&T previously explained, SBA's tower does not provide that "reasonably available opportunity to collocate," within the meaning of 807 K.A.R. 5:063-Section 1(s), because SBA does not make its tower available on reasonable terms.<sup>2</sup> The

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<sup>1</sup> See *Cellco Partnership v. Franklin Co.*, KY, 553 F. Supp. 2d 838, 845-846 (E.D. Ky. 2008); *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 804 (6<sup>th</sup> Cir. 2012).

<sup>2</sup> Applicants' December 27, 2017 Response to SBA's initial comments in this proceeding expounds on this argument in detail and is incorporated herein by reference.

approximate rental cost to provide service from the SBA tower is well below half the rent AT&T would pay on the Tillman tower, including both capital cost and ground rent. In addition, unlike the case with SBA, AT&T will be able to upgrade its equipment on the Tillman tower without additional rent increases. The facts are straightforward, and there is no need for open-ended intervention by SBA in order for the Commission to consider these facts; rather SBA's intervention would only complicate and disrupt the proceedings.

4. If any further inquiry as to cost differential between the SBA site and the Tillman tower is necessary, inquiry by the PSC Staff, with appropriate confidentiality protections, will confirm the overwhelming cost advantage of the Tillman tower and allow the PSC to timely move forward with its decision on the requested certificate of public convenience and necessity ("CPCN"). Such an approach is consistent with the federal Telecommunications Act's encouragement of the rapid deployment of wireless communications facilities,<sup>3</sup> and would be far more likely to resolve this dispute over reasonable availability within the time frames of the FCC Shot Clock Ruling<sup>4</sup> and the PSC's normal time frame for processing cellular tower applications. This approach also would be consistent with the General Assembly's mission for the PSC for telecommunications as set forth in KRS 278.546, which provides among other things that "[s]tate-of-the-art telecommunications is an essential element to the Commonwealth's

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<sup>3</sup>See *Pi Telecom Infrastructure V, LLC v. Georgetown-Scott County Planning Comm'n*, 234 F. Supp. 3d 856 (E.D. Ky. 2017) ("Congress enacted the TCA to promote competition between service providers that would inspire the creation of higher quality telecommunications services and to encourage the rapid deployment of new telecommunications technologies.")

<sup>4</sup>See *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 F.C.C. Rcd. 13994, 14013 (2009) (a/k/a "FCC Shot Clock Ruling").

initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000,” and “[c]onsumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical services.”

5. Via the present Application, AT&T has selected a substantially lower-cost option for provision of wireless infrastructure with a new Tillman tower. Neither federal nor Kentucky law contemplates a competitor seeking to impose unreasonable lease rates being able to disrupt a wireless carrier’s efforts to provide wireless service in a prompt and economical manner. The PSC should not facilitate SBA’s efforts at such disruption by allowing SBA to intervene.

6. KRS 278.650 requires an applicant seeking to construct a cellular tower in areas such as unincorporated Marshall County to apply to the PSC for a certificate of public convenience and necessity pursuant to KRS 278.020(1). KRS 278.020(1) provides in pertinent part that:

“Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion conduct for all interested parties, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part ....” (Emphases added.) *Id.* at KRS 278.020(1).

Kentucky Public Service Commission implementing regulations at 807 KAR 5:001 provide in pertinent part that in order to intervene, a movant shall (among other things) “state his or her interest in the case and how 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.” Further, in order to intervene, a would-be intervenor must have “a special interest in the case that is not otherwise adequately

represented,” or “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 KAR 5:001. SBA's Motion to Intervene fails to satisfy these standards. The PSC and its Staff are well-qualified to examine the facts surrounding Applicants' proposed tower in connection with their statutory and regulatory obligations. Direct participation in the case by SBA as an intervener would not add to the PSC's analysis and its ultimate decision on the request for a CPCN. Such full participation by SBA as an intervener would only complicate and disrupt the proceedings.

7. Kentucky's appellate courts have upheld PSC denials of requests for intervention in CPCN cases. For example, in *EnviroPower, LLC v. PSC*, 2007 Ky. App. Unpub. LEXIS 121 (Ky. App. 2007), the Kentucky Court of Appeals upheld the PSC's denial of a motion to intervene in a CPCN proceeding which had been upheld by the Circuit Court. The Court of Appeals noted that a PSC decision to deny intervention is reviewed only for an abuse of discretion, and found that the PSC did not abuse that discretion in denying intervention to a person seeking intervention (EnviroPower) that did not “have an interest in the ‘rates’ or ‘service’ of a utility” seeking a CPCN, but that instead was merely a competitor. While EnviroPower held permits under which it had expected to construct the facility that the CPCN authorized the utility to self-construct instead, the Court agreed that this was insufficient to give EnviroPower a right to intervene, as it “had a mere expectancy and no fundamental property right.”

8. All the same is true here. SBA claims no interest in AT&T's rates or services, but instead is merely a competitor of Tillman that would prefer to prevent AT&T from using

Tillman's proposed tower. SBA may have some expectancy that wireless carriers will use its tower, but that does not equate to any fundamental property right to compel wireless carriers to use SBA's tower or to prevent the construction of competing infrastructure. Just as in *EnviroPower*, SBA is attempting to advance its pecuniary interests rather than public issues regarding rates and service. Consistent with the PSC's decision as upheld by the Court of Appeals in *EnviroPower*, SBA's Motion to Intervene should be denied.

9. The PSC has repeatedly denied intervention in other proceedings. Critical to these denials have been factors such as the potential interveners being "unlikely to present issues or develop facts that will assist the Commission in considering the matter" or that the party requesting intervention is not a customer of the applicant, does not receive services from the applicant and/or does not pay any rates charged by the applicant. All of these same factors warrant denial of SBA's Motion. See *In the Matter of 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 Graves* (Case No. 2017-00368), 2017 Ky. PUC LEXIS 1148 (November 30, 2017); *In the Matter of 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 Butler* (Case No. 2017-00369), 2017 Ky. PUC LEXIS 1167 (December 30, 2017); *In the Matter of: Tariff Filing of East Kentucky Power Cooperative, Inc. and its Member Distribution Cooperatives for Approval of Proposed Changes to their Qualified Cogeneration and Small Power Production Facilities Tariffs and the Implementation of Separate Tariffs for Power Purchases from Solar*

*Generation Qualifying Facilities* (Case No. 2017-00212), 2017 Ky. PUC LEXIS 967 (September 22, 2017); *In the Matter of: Electronic Application of Kentucky Power Company ....* (Case No. 2017-00179), 2017 Ky. PUC LEXIS 833 (August 16, 2017); and *In the Matter of the Joint Application of PNG Companies LLC ... for Approval of an Acquisition of Ownership ....* (Case No. 2017-00125), 2017 Ky. PUC LEXIS 412 (April 20, 2017). In all of these denials of intervention, the PSC has pointed out that, even with denial of intervention, the requesting person or entity may still file comments in the record of the case and review the progress of the proceedings via the PSC's online docket. Thus, intervention is not essential to allow any person or entity to be heard in a PSC proceeding. The same is of course true here.

10. In the alternative, should the PSC grant intervention to SBA, the scope of such intervention should be reasonably limited to prevent the proceeding from expanding to issues beyond technical compliance with PSC requirements, the service need in the relevant portion of Marshall County, and whether the SBA tower is reasonably available pursuant to 807 K.A.R. 5:063 – Section (1)(s). The PSC has limited the scope of intervention in other cases. Examples include *In the Matter of: Adjustment of Rates of Columbia Gas of Kentucky, Inc.* (Case No. 2007-00008 – Order of April 2, 2007); *In the Matter of: An Investigation of East Kentucky Power Cooperative, Inc.'s Need for the Gilbert Unit and the Kentucky Pioneer Energy, LLC Purchase Power Agreement* (Case No. 2003-00030 - Order of September 2, 2003); and *In the Matter of: Application of Atmos Energy Corporation for an Adjustment of Rates and Tariff Modifications* (Case No. 2013-00148 – Order of September 3, 2013).

## REQUEST FOR RELIEF

**WHEREFORE**, there being no ground for intervention by SBA, Applicants respectfully request the Kentucky Public Service Commission:

- (a) Accept this Response for filing;
- (b) Deny the Motion to Intervene; and
- (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 11th day of January 2018, a true and accurate copy of the foregoing was sent by U.S. Postal Service first class mail, postage prepaid, to Ed Roach, VP-Associate General Counsel, SBA Communications Corporation, 8051 Congress Avenue, Boca Raton, FL 33487-1307.

Respectfully submitted,



David A. Pike  
Attorney for Applicants