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APR 25 2018

**PUBLIC SERVICE
COMMISSION**

April 24, 2018

VIA OVERNIGHT DELIVERY

PUBLIC SERVICE COMMISSION
DOCKET SECTION
P.O. BOX 615
211 SOWER BLVD.
FRANKFORT, KY 40601-0615

RE: FILING IN CASE NO. 2017-00435
APPLICATION OF TILLMAN INFRASTRUCTURE LLC, ET AL
HANSEN SITE

DEAR PSC DOCKET STAFF:

PLEASE FIND AN ORIGINAL AND FIVE COPIES OF APPLICANTS' RESPONSE TO MOTION TO
INTERVENE OF SCOTT NORMAN IN THE ABOVE-REFERENCED PROCEEDING.

SINCERELY,

PIKE LEGAL GROUP, PLLC

A handwritten signature in blue ink, appearing to read 'David A. Pike'.

DAVID A. PIKE
ATTORNEY FOR APPLICANTS

RECEIVED

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

APR 25 2018

**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

RESPONSE TO MOTION TO INTERVENE OF SCOTT NORMAN

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, respond and object to the Motion to Intervene of Scott Norman. The Motion is untimely and is otherwise not justified on the merits. Applicants request it be denied. Applicants respectfully state as follows:

1. Initial Notice to and Prior Comments from Scott Norman. As an adjoining landowner to the proposed site property, Movant Scott Norman (“Norman”) received notice by certified letter mailed November 15, 2017 of this Application in compliance with Kentucky law¹. On January 9, 2018, Norman filed letter comments with the PSC objecting to the Application. Nothing prevented him from seeking intervention at that time.

¹See exhibits J and K to Application in within proceeding.

2. Deadline for Motion to Intervene. On January 31, 2018, the PSC Staff responded to Norman's comments and expressly included the deadline for a Motion to Intervene:

"If a person wishes to become a party in this matter, he/she should submit to the Commission a request for intervention, if intervention is desired. If no request for intervention is received within 30 days of the date of this letter, the Commission Staff will presume that the Applicant's reply has satisfied the concerns raised in the attached request for information."

Applicants timely responded to Norman's comments on February 13, 2018. Thus, Norman had ample time to consider Applicants' Response and file any Motion to Intervene within the 30-day deadline set by the PSC. That deadline expired on March 2, 2018.

3. Norman Failed to Meet Deadline. Norman's Motion to Intervene was stamped as "received" by the PSC on April 10, 2018, 39 days after the deadline imposed by the PSC Staff Letter. The PSC's regulation, 807 K.A.R. 5:001 – Section 4(11), precludes grant of a motion to intervene that is not "timely." Norman's Motion is not timely. Consequently, the Motion to Intervene should be denied.

4. PSC Precedent Requires Denial of Norman's Untimely Motion for Intervention. The PSC has repeatedly denied motions to intervene as untimely. See *In the Matter of: Electronic Application of Duke Energy, Inc. for an Adjustment of Rates, etc.*, 2017 Ky. PUC LEXIS 1065 (Case No. 2017-000321 – October 24, 2017); *In the Matter of: Electronic Joint Application of Kentucky Utilities Company and Louisville Gas and Electric Company for Approval of an Optional Solar Share Program Rider*, 2016 Ky. PUC LEXIS 1091 (Case No. 2016-00274 – December 12, 2016); and *In the Matter of Sigma Gas Corporation, Complainant v. B.T.U. Gas Company, Inc., Defendant*, 2009 Ky. PUC

LEXIS 1125 (Case No. 2004-00018 – October 28, 2009). The PSC’s analysis in these cases has consistently focused on whether a movant has shown “good cause” for the delay. Norman’s Motion provides no basis whatsoever for his failure to meet the filing deadline here. The PSC has also focused on the amount of time a movant has had notice of the proceeding. For example, in Case No. 2017-000321, *infra*, the PSC pointed out the Kentucky League of Cities “had at least two and a half months’ notice of the instant matter” but failed to meet the deadline and denied the motion for intervention as untimely. Here, Norman had approximately three and a half months’ notice of the instant matter. Consequently, his motion should be denied.

5. “Second Bite at the Apple”. Even if the Motion to Intervene was found to be timely, other reasons compel its denial. SBA’s tower is on Norman’s property and SBA presumably compensates Norman for such right. SBA filed a Motion to Intervene which the PSC denied on March 26, 2018. Of course, SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers.

Norman’s Motion is nothing more than SBA’s “second bite at the apple” in the wake of the PSC having denied its Motion to Intervene. That the Motion is filed by SBA’s lessor should be lost on no one. Such sequential and duplicative proceedings are inconsistent with the federal Telecommunications Act of 1996 which encourages “rapid deployment of new telecommunications technologies” as well as with the FCC Shot Clock Ruling.² For

² 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.”). See also *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*

the same substantive reasons that SBA's Motion to Intervene was denied, Norman's Motion should be denied as well.

6. Standard for Intervention. 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).

7. No Substantive Basis Exists for Intervention. Norman's Motion to Intervene includes no substantial evidence on any issue which could result in the denial of the request for a Certificate of Public Convenience and Necessity for the proposed tower. He seeks to intervene on the basis of being a "local resident and familiar with the area."³ But he has identified no "special interest in the proceeding" as required by 807 KAR 5:001 or established that the PSC cannot otherwise represent such interests of the general public. Furthermore, simply raising a question as to future monthly cellular phone bills fails to

Proposals As Requiring A Variance, 24 F.C.C. Rcd. 13994, 14013 (2009)(a/k/a "FCC Shot Clock Ruling").

³KRS 278.020(1) makes it clear that the PSC is not required to conduct a public hearing solely based on a neighbor's request: "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).

show how he would “present issues” or “develop facts that assist the commission in fully considering the matter....”

Norman's Motion to Intervene contests whether Applicant AT&T Mobility has a “reasonable opportunity to collocate” with the existing SBA tower consistent with PSC regulations. The PSC ruled on this issue in its March 26, 2018 Order denying the SBA Motion to Intervene:

“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, ... , 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 advance wireless services.” [footnote omitted.] *Id.* at p. 4-5 of PSC Order of March 26, 2018 in Case No. 2017-00435.

The PSC should not grant intervention to Norman to contest an issue which it expressly rejected as a basis for intervention by SBA.

Additionally, lay opinion, such as that offered by Norman, is not substantial evidence justifying a rejection of a cellular tower application. *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 804 (6th Cir. 2012); *Cellco Partnership v. Franklin County, et al*, 553 F.Supp.2d 838, 852 (E.D. Ky. 2008). Moreover, anyone who opposes a tower which is figuratively “in their backyard” can claim it would be bad for the community, or otherwise objectionable, but such claims do not constitute substantial evidence. *T-Mobile Central* at 801.

REQUEST FOR RELIEF

WHEREFORE, there being no grounds for intervention by Scott Norman, Applicants respectfully request the Kentucky Public Service Commission:

- (a) Accept this Response for filing;
- (b) Deny the Motion to Intervene;
- (c) Issue a Certificate of Public Convenience and Necessity to construct and operate the proposed cellular tower at the location set forth herein without further delay; and
- (d) Grant Applicants any other relief to which they are entitled.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of April 2018, a true and accurate copy of the foregoing was sent by U.S. Postal Service first class mail, postage prepaid, to Scott Norman, 1923 Lee Burd Road, Benton, KY 42025-5288 and Ed Roach, VP-Associate General Counsel, SBA Communications Corporation, 8051 Congress Avenue, Boca Raton, FL 33487-1307.

Respectfully submitted,



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