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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION
CASE NO. 2017-00435

APR 30 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
DBA 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

SITE NAME: HANSEN

**REPLY OF SCOTT NORMAN TO 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 RESPONSE TO NORMAN'S MOTION TO INTERVENE**

Comes Scott Norman, by and through counsel, and for his Reply to 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") Response to Norman's Motion to Intervene, states as follows:

FACTS

On or about November 14, 2017, Tillman and AT&T filed their Application for Certificate of Public Convenience and Necessity for Construction of a Wireless Communications Facility on land located at 1641 Lee Burd Road, Benton, KY 42025. Tillman and AT&T state that they are applying for the certificate because it "will bring or improve Applicant, AT&T Mobility's, services to an area currently not served or not adequately served by the Applicant increasing coverage or

capacity and thereby enhancing the public's access to innovative and competitive wireless communications services." While AT&T's goal of increasing service to customers in the Commonwealth is laudable, there is already a wireless tower a mere 760 feet from where Tillman plans to build the tower at issue here, and AT&T is a longtime tenant on that tower. No evidence has been presented in this proceeding that AT&T's current service is lacking in the area in any respect or that the new tower is needed. Since AT&T already has adequate coverage in the area, perhaps the company's resources would be better directed at attempting to improve accessibility to wireless facilities elsewhere in the Commonwealth.

Mr. Norman is the owner of land located adjacent to the site of the proposed new tower. There is an existing tower on his land that provides the same service as will be provided by the Tillman tower proposed to be built. As previously noted, AT&T is currently a tenant on the old tower.

Mr. Norman opposes the building of the new tower and seeks to intervene in this matter to present evidence as to why Tillman and AT&T should not be granted the certificate they seek.

ARGUMENT

Pursuant to 807 KAR 5:001 Section 5(11):

(a) A person who wishes to become a party to a case before the commission may, by timely motion, request leave to intervene.

1. The motion shall include the movant's full name, mailing address, and electronic mail address and shall 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.

...

(b) 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.

807 KAR 5:001 Section 5(11).

As Mr. Norman's request to intervene meets all of these requires, the PSC must now allow him to intervene and fully participate in this case.

1) There is no order in this matter setting an intervention deadline, as such his motion is timely filed.

Tillman and AT&T also spend a great deal of their Response arguing that Mr. Norman should not be allowed to intervene because he missed the PSC's "deadline" for doing so. However, there was no official order entered in this matter setting a deadline for intervention. Instead, Tillman and AT&T refer to a letter sent to Mr. Norman by the PSC which stated:

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.

Letter from PSC to Scott Norman dated January 31, 2018.

This letter was sent in response to Mr. Norman's letter of December 13, 2017 wherein he voiced his wholehearted objection to Tillman and AT&T's Application. Tillman and AT&T argue that this statement sets an absolute deadline for intervention by Mr. Norman in this matter. However, that is not a fair reading of the statement, particularly when one considers that, at the time of his the receipt of the letter, Mr. Norman was proceeding in this matter *pro se*.

The statement "the Commission Staff will presume that the Applicant's reply has satisfied the concerns raised in the attached request for information" is far too vague a reply to Mr. Norman's

letter to set up a hard and fast deadline that affects Mr. Norman's substantial rights. First, it confusingly insinuates that Mr. Norman filed a "request for information" when he did no such thing. Mr. Norman's December 13, 2017 letter is clearly not a "request for information" as nothing in the letter could reasonably be said to express a desire for additional material concerning the proposed tower. Letter from Scott Norman to Public Service Commission dated December 13, 2017. It is obviously Mr. Norman's objection to the building of the tower. Residents were told of their right to "submit testimony" concerning the building of the tower in the Notice of Proposed Construction of Wireless Communications Facility Site Name Hansen sent to adjoining landowners at the time of Tillman and AT&T's application; this was Mr. Norman's objective in his December 13, 2017 letter. *See* Application for Certificate of Public Convenience and Necessity for Construction of a Wireless Communications Facility at Exhibit K. As such, the PCS's response that Mr. Norman should not do anything if his "request for information" has been satisfied was unclear at best and better read as completely nonsensical.

Second, the PSC's letter of January 31, 2018 does not actually state that if Mr. Norman does not intervene within 30 days, he will be forever barred from doing so. Instead, it vaguely states that, if he does not intervene, the PSC will "presume that the Applicant's reply has satisfied the concerns raised in the attached request for information." Letter from PSC to Scott Norman dated January 31, 2018. This is not clear enough to now be relied on by Tillman and AT&T as an absolute deadline.

Furthermore, none of the cases cited by Tillman and AT&T in support of their argument that the PSC precedent "requires" denial of an untimely motion for intervention concern a letter such as the one at issue here. In each of those cases, an official order of the PSC required potential intervenors to file a motion requesting intervention by a specified date. In this matter, there has

been no such order, there was only a letter to Mr. Norman that vaguely suggested he could choose intervene within the next 30 days.

As there is no actual order in this case stating a deadline for intervention and the letter sent by the PSC to Mr. Norman relied on here by Tillman and AT&T is incomprehensible and vague, Mr. Norman's motion to intervene has been timely filed.

2) Tillman and AT&T's Response was filed late and should be disregarded.

Tillman and AT&T complain at length in their Response that Mr. Norman failed to file his Motion to Intervene timely. However, Tillman and AT&T have little room for criticism as their Response to Mr. Norman's Motion was also not timely filed under 807 KAR 5:001.

Pursuant to 807 KAR 5:001 Section 3(11), intervention in a proceeding concerning an application for Certificate of Public Convenience and Necessity for Construction of a Wireless Communications Facility can be granted upon the motion of the person or entity requesting to intervene. Motion practice is governed by 807 KAR 5:001 Section 5. This section states that responses to motions should be filed within 7 days of the filing of the motion. Mr. Norman's Motion to Intervene was filed on April 10, 2018. Tillman and AT&T's Response was not filed until April 25, 2018, making it 5 days late under the rule stated in Section 5. As the Response was not timely filed, it should be disregarded by the PSC. At a minimum, because of Tillman and AT&T's untimely filing, their arguments concerning the timeliness of Mr. Norman's filings should be ignored.

3) Mr. Norman should be allowed to intervene in this matter.

Pursuant to 807 KAR 5:001, Mr. Norman should be allowed to intervene in this matter if he has a special interest in this case that is not otherwise adequately represented and his intervention is likely to present issues and develop facts that assist the commission in fully

considering this matter. As Mr. Norman meets both of these requirements, he should now be allowed to intervene in this matter.

Mr. Norman's special interest in this case is two-fold. First, he is owner of land adjacent to the plot on which Tillman seeks to build the new tower. In the past, the PSC has allowed adjoining landowners with concerns similar to Mr. Norman's to intervene without any further analysis. In *In the Matter of: Application of Kentucky-American Water Company for a Certificate of Convenience and Necessity Authorizing the Construction of Kentucky River Station 11, Associated Facilities and Transmission Main*, the intervenor, Citizens for Alternative Water Solutions ("CAWS") was a collection of concerned citizens, including several adjoining landowners. In *In the Matter of: Application of Kentucky-American Water Company for a Certificate of Convenience and Necessity Authorizing the Construction of Kentucky River Station 11, Associated Facilities and Transmission Main*, Case No. 2007-00134, Order dated May 11, 2007 Motion of Citizens for Alternative Water Solutions ("CAWS") for Full Intervention. The PSC granted the group's motion to intervene with no analysis. PSC Order dated May 11, 2007. In *In the Matter of: Application of Bluegrass Wireless, LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Cell Site (Lily II) in Rural Service Area (Laurel) of the Commonwealth of Kentucky*, Case No. 2005-00320, the intervenors were again adjoining landowners, the Shandoans. In *In the Matter of: Application of Bluegrass Wireless, LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Cell Site (Lily II) in Rural Service Area (Laurel) of the Commonwealth of Kentucky*, Case No. 2005-00320. In their Motion to Intervene they stated they were adjoining landowners; that the wireless tower in question was unneeded; that the tower would affect their property values and use of their property; both during construction and after its building, concerns about the aesthetic value of their property; concerns

about surrounding wildlife; and safety concerns. Letter from L. Glenn Shadoan and Sue L. Shadoan to Public Service Commission dated September 27, 2005. The PSC granted the Shadoans' Motion to Intervene with no analysis. PSC Order dated October 7, 2005. If the PSC declines to allow Mr. Norman to participate in this matter, it will be a departure from established precedent.

Second, Mr. Norman has an existing contract with SBA for the tower currently existing in the area. Undoubtedly Tillman and AT&T will argue that this is just a case of sour grapes from Mr. Norman, who stands to lose a large sum of income because of the tower's removal. However, such a reaction ignores the legal requirements for obtaining a certificate of convenience and necessity to build a new tower.

Pursuant to KRS § 278.020, a certificate of convenience and necessity from the PSC is required before a utility may "commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010." KRS § 278.020. No standard for whether such a certificate should be granted is listed in KRS § 278.020. However, Kentucky courts have established that:

To be entitled to such a certificate of necessity, the applicant must demonstrate a need for the proposed facility and the absence of wasteful duplication. A "need" may be demonstrated by "showing of a substantial inadequacy of existing service" and "wasteful duplication" may be demonstrated by showing "an excess of capacity over need," "excessive investment in relation to productivity," or "unnecessary multiplicity of physical properties."

Citizens for Alternative Water Sols. v. Kentucky Pub. Serv. Comm'n, 358 S.W.3d 488, 490 (Ky. Ct. App. 2011) (citing *Ky. Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885 (Ky.1952)).

A party, such as Tillman, that wishes to build a new facility must prove the old facilities are inadequate and that new facilities are not duplicative. As such, Mr. Norman is entitled to preserve his status as the only landowner in the area with a tower unless Tillman and AT&T can prove a new tower is absolutely necessary. Further, because the law requires a showing of necessity on

the part of those wishing to build a new tower, that the tower currently located on Mr. Norman's land would be the only tower in the area was part of the basis of his bargain in allowing the tower to be built. He has an interest in preserving this bargain and KRS § 278.020 is written so as to protect that interest.

Additionally, pursuant to the requirements of 807 KAR 5:001 Section 5(11)(b), Mr. Norman will present an issue that is not currently presented in this matter. Proper analysis of this case will inherently cause the PSC to review whether there is a "substantial inadequacy of existing service" and whether or not there is additional capacity on the existing wireless facilities in the area. Whether or not service is currently inadequate should require the PSC to request information about existing service from residents like Mr. Norman. As Mr. Norman has stated in his past correspondence with the PSC, cellular telephone service in this area is good; a new tower will certainly be the sort of wasteful duplication that KRS § 278.020 was enacted to avoid.

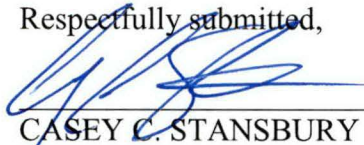
Furthermore, AT&T is required by KRS § 278.020 and 807 KAR 5:063 Section 1(s), when requesting to build a new wireless tower, to present evidence concerning attempts to co-locate on existing structures, such as the existing SBA tower on Mr. Norman's land. AT&T states in its filings in this matter that the company has tried co-location and is currently using the SBA tower on Mr. Norman's land, but the rates charged by SBA on the existing tower are too high. *See Applicants' Response to SBA Communication's Corporation Motion to Intervene at 2.* However, AT&T has not filed any evidence in the record that supports these bald assertions; there is no documentation concerning these rental rates on either tower anywhere in the record. This information is required for proper adjudication by the PSC, and Mr. Norman intends to present it.

CONCLUSION

In the instant case, Tillman and AT&T seek to build a wireless communications facility, that by their own admission, is wholly and completely duplicative of a facility located on Mr. Norman's land a mere 760 feet away. In fact, AT&T is *currently co-locating on the facility*, making it more than obvious that a new facility is unneeded and duplicative. Tillman and AT&T's argument that Mr. Norman (and by proxy SBA) wish to block the building of Tillman's new facility because they are financially interested in being the only tower in the area is simply a subterfuge meant to distract the PSC from the fact that they cannot prove that they are entitled to the certificate they seek pursuant to KRS § 278.020 and that AT&T and Tillman would financially benefit from building a new tower. As a concerned citizen, Mr. Norman seeks to intervene in this matter and present these issues to the Commission.

Wherefore, Scott Norman, respectfully requests that the Public Service Commission grant his motion for full intervention in this matter and set this matter for public hearing so that he may present evidence to the Commission.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was served on April 30, 2018, via first class USPS mail, postage prepaid, upon the following:

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