

**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)
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF MARSHALL)

RECEIVED

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**PUBLIC SERVICE
COMMISSION**

CASE NO.: 2017-00435

SITE NAME: HANSEN

**APPLICANTS' MOTION FOR EXTENSION OF TIME AND FOR CONFIDENTIAL
TREATMENT OF RESPONSES TO COMMISSION STAFF'S FIRST REQUEST FOR
INFORMATION TO TILLMAN INFRASTRUCTURE LLC AND NEW CINGULAR
WIRELESS PCS, LLC D/B/A AT&T MOBILITY**

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, file this Motion for Extension of Time and for Confidential Treatment of Responses to Commission's Staff's First Request for Information from Applicants (the "Request"). This Motion is made pursuant to 807 K.A.R. 5:001, Section 13, and other law. Applicants respectfully state as follows:

1. On November 14, 2017, Applicants initiated this proceeding by filing an application for a Certificate of Public Convenience and Necessity ("CPCN") for construction of a new cellular tower in Marshall County, Kentucky at 1641 Lee Burd Road, Benton, Kentucky (the "Application") with the Kentucky Public Service Commission

("PSC").

2. In Paragraph 10 of the Application, Applicants state "... that there is no more suitable location reasonably available from which adequate services can be provided, and that there are no reasonably available opportunities to co-locate Applicant's antennas on an existing structure." *Id.* at page 10.

3. In a Response to Public Comment in this proceeding, Applicants' December 27, 2017 filing explained an SBA tower at 1709 Lee Burd Road, Benton, Kentucky was not "... in the long term a viable and reasonable collocation alternative for AT&T or other providers...." because "[e]xcessive rental rates render the tower "not feasible or available" under the *Anacortes*¹ standard and prevent it from being a reasonably available opportunity to collocate" pursuant to 807 K.A.R. 5:063 – Section 1(s)."

4. The Request requires Applicants to provide written responses under oath to the following inquiries within a 10-day period expiring Thursday July 12, 2018:

1. Provide the date on which AT&T began leasing space on the SBA Communications Corp. ("SBA") tower located on the property of Scott Norman.

a. Provide the annual amount AT&T paid to SBA as part of its lease as of that date.

b. Provide the date and amount of any increases in the annual amount of the lease between SBA and AT&T, including the annual amount paid currently.

2. State whether AT&T currently leases space or has leased space within the past five years on any other wireless communications facility within a 50-mile radius of the SBA tower located on Mr. Scott Norman's property.

3. If AT&T has leased space within the past five years or currently

¹ *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987, 998 (9th Cir. 2009). See also *T-Mobile Cent. LLC v. Charter Twp. of West Bloomfield*, 691 F.3d 794 (Ky. App. 2012).

leases space on any other wireless communications facility within a 50-mile radius of the SBA tower located on Mr. Scott Norman's facility, state the length of the lease, the starting annual payment for the lease, and the date and amount of any increases to the lease including the amount currently paid.

5. In response to the second enumerated inquiry in the Request, AT&T discloses it currently leases space or has leased space within the past five years on other wireless communications facilities within a 50-mile radius of the SBA tower located on Scott Norman's property. However, with the Request having been issued on July 2, a request for extension of time is warranted on the following bases: (a) the 10-day time period includes the intervening 4th of July holiday when many of AT&T's employees have scheduled more than one day of vacation; (b) there is significant need to coordinate production of information with multiple employees and departments of AT&T to make sure accurate information is compiled from the document repository; and (c) there is a substantial number of leases involved within the specified 50-mile radius.

6. Such extension is further founded on good cause in that in some cases an original lease as well as one or more subsequent amendments may be involved, thus adding additional complexity to the process of tabulating rent increases and calculating the amount currently paid in order to provide accurate responses.

7. This request for extension of time is further properly made as being filed prior to expiration of the 10-day deadline to respond.

8. Based on the foregoing factors, and with best efforts in responding to the Request, Applicants believe a response may be prepared and filed within twenty calendar days after the original deadline of July 12, 2018. Accordingly, Applicants request an extension of time of twenty days to August 1, 2018 to file responses or such other

extended period as the PSC will permit.

9. In requesting this extension of time, Applicants further request confidential treatment of all such ultimately submitted information consistent with 807 K.A.R. 5:001 – Section 13. Rental amounts in leases and information on increases in rent are inherently proprietary and confidential as often being carefully negotiated as to individual sites. Such information is also subject to limited access by Applicants’ employees on a “need to know” basis. Moreover, such information is not generally in the public domain either through filings with the PSC or with other public entities. In addition, unlike the sales price in a deed, rental information is not normally disclosed to county clerks’ offices in connection with recording a real property interest. The normal industry practice is to record only a memorandum of a cell tower lease containing no financial information. If such information was publicly disclosed on a broad basis, such as a 50-mile radius of leases would involve, Applicants would be disadvantaged in future negotiations with Applicants’ competitors and property and/or tower owners. The corresponding damage to Applicants is apparent under such circumstances. Applicants costs to provide wireless service would consequently increase.

10. 807 K.A.R. 5:001 – Section 13 requires a party subject to a PSC Data Request to identify the specific grounds pursuant to KRS 61.878 (i.e. the “Kentucky Open Records Act”) to request classification of the material as confidential. KRS 61.878(1)(c) exempts from Open Records Act disclosure “... records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.” Kentucky’s appellate courts have

repeatedly recognized the confidential nature of business financial information in connection with the Open Records Act and have applied the exemption from disclosure found in KRS 61.878(1)(c) to such information. *Marina Management Servs. v. Cabinet for Tourism, Dept. of Parks*, 906 S.W.2d 318 (Ky. 1995); *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is “generally recognized as confidential or proprietary” and falls within the wording of KRS 61.878(1)(c)(2)”). KRS 61.878(1)(c) and all other applicable law entitle Applicants to confidentiality protection of the rental information, rent increase information, and term of lease information.

11. 807 K.A.R. 5:001 facially contemplates a party subject to PSC information requests to submit a request for classification of information as confidential along with filing of the confidential information. Because Applicants are seeking an extension of time, and because there are no other third parties to this proceeding, Applicants maintain it would be appropriate, efficient, and consistent with due process for the PSC to rule on confidentiality in this proceeding prior to the actual submission of the information which merits confidentiality protection. Applicants certainly recognize that they have raised the reasonableness of the rent charged by SBA on its tower as a basis for granting of the CPCN. However, it is not at all common for the PSC to seek rental information in cellular tower cases in a broad radius. The 50-mile radius set forth in the Request even extends into multiple states. Accordingly, Applicants believe it is appropriate to raise the confidentiality issue at this stage in order that the PSC may now begin its consideration of the issue of confidentiality protection. There appears to be nothing to be added to

consideration of the issue of confidentiality protection by awaiting preparation and filing of the information responsive to the Request. Consequently, Applicants request the PSC to rule on confidentiality protection on an expedited basis in connection with ruling on the requested extension of time.²

12. 807 K.A.R. 5:001 – Section 13(2) requires a party seeking confidentiality protection to state “... the time period for the material to be treated as confidential and the reasons for this time period...” Cellular tower leases typically extend for multiple renewal terms extending to twenty-five years and beyond. Consequently, there is no short-term horizon when information on rental rates or rates of increase in a broad geographic area would not have substantial proprietary value to competitors or potential ground or tower space lessors. In these circumstances, Applicants request that information responsive to the Request be classified as confidential on a perpetual basis or for any lesser period exceeding twenty-five years as established by the PSC in its reasonable discretion.

13. This case has been pending since November of 2017, and the PSC has denied intervention by two attempted intervenors. No other person has requested intervention. Applicants do not contemplate permissive intervention being granted to any other parties in this proceeding. However, should intervention be later granted to any person, Applicants request any such intervener be required to execute an acceptable protective agreement consistent with the rights of Applicants if the PSC is to allow such future intervener any access to confidential information.

14. Applicants are aware of their obligation to inform the PSC in writing if material

²Applicants reserve all rights as to objection to the breadth of the Request and harm to their proprietary interests should the PSC fail to rule on confidentiality protection prior to the due date for filing of responses.

granted confidentiality becomes publicly available as specified in 807 KAR 5:001 – Section 13(10) and shall comply with such obligation.

15. If the PSC disagrees with the within request for confidential treatment of the responses to the Request, Applicants request the PSC hold an evidentiary hearing, or at least a conference between PSC Staff and Applicants: (a) to protect Applicants' due process rights; and (b) to supply the PSC with a complete record to enable it to make a decision with regard to this matter.

REQUEST FOR RELIEF

WHEREFORE, Applicants request that the PSC:

- (a) Accept this Motion for filing;
- (b) Grant the requested extension of time to respond to the Request for a period of twenty days out to August 1, 2018, or for any other period within the discretion of the PSC;
- (c) Grant Applicants confidential treatment of information to be submitted in response to the PSC Executive Director's Request on an expedited basis and in advance of any deadline for submission of such information; and
- (d) Grant Applicants any other relief to which they are entitled.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of July 2018, the foregoing was hand-delivered to the offices of the Kentucky Public Service Commission in Frankfort, Kentucky. No natural person or entity has been granted intervention in this proceeding. Accordingly, no other service of this Motion has been made.

Respectfully submitted,



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