

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF NEW CINGULAR WIRELESS)	
PCS, LLC D/B/A AT&T MOBILITY FOR)	
ISSUANCE OF A CERTIFICATE OF PUBLIC)	CASE NO.
CONVENIENCE AND NECESSITY TO)	2019-00176
CONSTRUCT A WIRELESS COMMUNICATIONS)	
FACILITY IN THE COMMONWEALTH OF)	
KENTUCKY IN THE COUNTY OF CASEY)	

ORDER

On June 7, 2019, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) filed an application (Application) seeking a Certificate of Public Convenience and Necessity (CPCN) to construct and operate a wireless telecommunications facility in Casey County, Kentucky. On June 25, 2019, SBA Communications Corporation (SBA) filed a Motion to Intervene (Motion) and a Memorandum of Law in Support of SBA Communications Corporation's Motion to Intervene (Memo). In its Memo, SBA states it has a wireless tower on the property close to the property on which AT&T is proposing to build the new tower. SBA states that AT&T is currently a tenant on the SBA tower, and the tower complies with regulations and has the structural capacity for the current AT&T equipment.¹

SBA argues that its current status as the only tower in the area is a special interest, which is not being adequately represented and that, if it is allowed to intervene, SBA can

¹ *Memorandum of Law in Support of SBA Communications Corporation's Motion to Intervene (Memo)*, at 2.

present issues and develop facts that will assist the Commission in fully considering this matter. Specifically, SBA has commissioned a study showing that there is little to no additional coverage to be gained by building the proposed tower and thus it is duplicative.²

AT&T filed a response to the request to intervene on July 2, 2019. In its response, AT&T states that the request for intervention should be denied. AT&T argues that SBA's interest is a purely commercial one that does not rise to the level of a special interest which needs to be protected and has no place in an action based on public convenience and necessity and that the only interest SBA has is indirect as it is seeking to protect its interest as the owner of the only tower in the area.³

The response also alleges that SBA's assertion that another tower is not needed is not supported by any evidence that service from its tower is superior to service from the proposed tower and, absent such evidence, SBA is left to argue unsupported claims of tower proliferation which is simply window dressing on its attempt to protect its commercial interest.⁴ Applicants also state that reasonable co-location is not available to them because rent on the proposed tower will be more reasonable than that currently charged by SBA.⁵

On July 8, 2019, SBA filed a Reply to AT&T's Response arguing SBA has unique knowledge about whether AT&T has attempted to co-locate in that it can provide information about AT&T's attempt to negotiate rents on the existing SBA tower. SBA

² *Id.* at 3–5.

³ *Applicant's Response to SBA Communications Corporations Motion to Intervene*, at 2.

⁴ *Id.* at 3.

⁵ *Id.* at 3–4.

states it can also provide information about whether AT&T can deploy advanced technologies on the existing SBA tower.⁶

DISCUSSION

The only person with a statutory right to intervene in a proceeding before the Commission is the Attorney General.⁷ Intervention by all others is permissive and is within the sole discretion of the Commission.⁸

The standard for intervention is twofold. 807 KAR 5:001 Section 4(11) provides that a motion to intervene, “shall state his or her interest in the case and how an 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.”

The regulation further provides that:

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.

It is under these criteria that the Commission reviews a motion for intervention.

Based on a review of the pleadings at issue and being otherwise sufficiently advised, the Commission finds that SBA does not have a special interest in the proceeding over which the Commission has jurisdiction that is not otherwise adequately

⁶ *SBA Communications Corporation's Reply to New Cingular Wireless PCS, LLC, A Delaware Limited Liability Company D/B/a AT&T Mobility's SBA Communications Corporation's Motion to Intervene*, at 3-5.

⁷ See KRS 367.150(8)(b). The Attorney General has not requested to intervene in this matter.

⁸ *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

represented. The Commission also finds that SBA is not likely to present issues or develop facts that will assist the Commission in considering this matter. It is likely that if the Commission permitted SBA to intervene, this intervention would unduly complicate this proceeding.

SBA argues in its Memo that its status as the only tower in the area is a special interest that it must be allowed to protect through intervention. It asserts that the KRS 278.020 “protects SBA’s interest by disallowing the building of new facilities unless they are a public necessity.”⁹ However, KRS 278.020 safeguards the interest of the public, not that of SBA. The public’s interest lies in ensuring that there is a public necessity for any new facilities built. SBA’s interest is strictly commercial and lies in ensuring that no other facilities are built, allowing them to remain the only tower in the area with no competition to drive down rents. SBA’s interest in this matter does not coincide with the interest of the public.

The Commission is not persuaded by SBA’s argument. The Commission has in the past denied intervention to requesting competitors who have no interest in either rates or services.¹⁰ In that case, in which East Kentucky Power Cooperative filed an application for a Certificate of Public Convenience and Necessity and a competitor, EnviroPower, sought intervention, the Commission found that “EnviroPower’s pecuniary interest . . . does not rise to the level of a special interest in this proceeding sufficient to grant intervention.”¹¹ In affirming the Commission’s denial of intervention to EnviroPower as a

⁹ *Memo* at 3.

¹⁰ *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Construction of a 278 MW (nominal) Circulating Fluidized Bed Coal-Fired Unit in Mason County, Kentucky*, Case No. 2004-00423, (KY PSC Apr. 18, 2005).

¹¹ *Id.* at 4.

competitor, the Court of Appeals stated that, “there is the statutory limitation under KRS 278.040(2) that the person seeking intervention must have an interest in the “rates” or “service” of a utility since those are the only two subjects under the jurisdiction of the PSC.”¹² Here, SBA’s interest is not in rates and services, but instead is a pecuniary interest. SBA argues that there is no public necessity because AT&T cannot prove that the “existing facilities are inadequate and that new facilities are not, in fact duplicative.”¹³

The Commission does not believe that SBA’s stated goal of remaining the only wireless communication facility in the area rises to the level of a special interest that must be protected through intervention. SBA is not a wireless customer in the area or a property owner. SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers. This runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition¹⁴ as well as KRS 278.546(4) which states that market-based competition benefits consumers.

For the above reasons, the Commission finds that SBA’s motion should be denied because SBA did not establish that it has a special interest or that its intervention is likely to present issues or develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

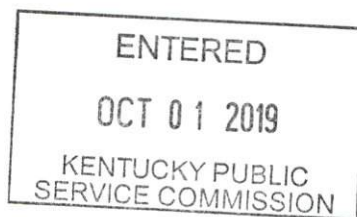
IT IS THEREFORE ORDERED that SBA’s request to intervene is denied.

¹² *EnviroPower, LLC v. Public Service Comm’n*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007).

¹³ *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate*, Case No. 2004-00423, at 4.

¹⁴ *T-Mobile USA INC. v. City of Anacortes*, 572 F.3d 987, 991 (9th Cir. 2009).

By the Commission



ATTEST:


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