

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF)
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.: 2019-00176
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF CASEY)

SITE NAME: DUNNVILLE RELO / PHIL

APPLICANT'S MOTION FOR CONFIDENTIAL TREATMENT OF SUPPLEMENTARY EVIDENCE

New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility ("AT&T") ("Applicant"), by counsel, files this Motion for Confidential Treatment of Supplementary Evidence (the "Request"). This Motion is made pursuant to 807 K.A.R. 5:001, Section 13, and other law. Applicant respectfully states as follows:

1. Applicant initiated this proceeding on June 7, 2019 by filing an application for a Certificate of Public Convenience and Necessity ("CPCN") for construction of a new cellular tower in Casey County, Kentucky at 74 Antioch Road, Liberty, KY 42539 (the "Application").

2. Paragraph 10 of the Application states "... 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. SBA and citizen opponents have alleged in their unsuccessful efforts at intervention and otherwise that AT&T should not be granted a CPCN for the proposed new tower because of an existing SBA tower in the vicinity.¹ Early on, in its July 2, 2019 Response to the SBA Motion to Intervene, Applicant explained the SBA tower 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*² standard and prevent it from being a reasonably available opportunity to collocate" pursuant to 807 K.A.R. 5:063 – Section 1(s)."

4. No provision of the Kentucky Revised Statutes or regulations adopted by the PSC forecloses the filing of additional evidence by Applicant at the current stage of this proceeding. Furthermore, the PSC has not by Order or otherwise closed the evidentiary record. Accordingly, consistent with due process, Applicant has the right to submit additional evidence into the case record (the "Supplementary Evidence").

5. Applicant submits the following Supplementary Evidence as proof the SBA tower is not reasonably available for collocation:

(a) An Affidavit of a Principal-Network Planning Engineer of AT&T addressing the service advantages of the proposed new cellular antenna tower ("Engineer's Affidavit"); and

(b) Documentation of the cost advantages of the proposed Uniti Towers, LLC cellular tower over the existing SBA tower on which unsuccessful intervenors have demanded that AT&T remain located.

¹ See SBA Motion to Intervene of June 25, 2019 and Residents' filing of same date.

² *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).

Items (a) and (b) are enclosed with this filing in separate sealed envelopes with appropriate "CONFIDENTIAL" labeling. This evidence and other evidence of record show's the SBA tower does not provide a "reasonably available opportunity to collocate," within the meaning of 807 K.A.R. 5:063-Section 1(s).

6. Applicant requests confidential treatment of the Supplementary Evidence, consistent with 807 K.A.R. 5:001 – Section 13, on the following bases:

(a) The discussion in the tendered expert Engineer's Affidavit of the service which can be provided at the existing SBA tower and the service which could be provided from a new tower would provide an unfair commercial advantage to competitors in that they could deduce what technical steps AT&T would take to improve its service in the vicinity depending on whether or not a new tower was approved. The PSC has previously granted confidential treatment of analogous information related to future service such as "business plans", "proposed future pipeline routes," and "critical infrastructure systems." *In the Matter of: Electronic Application of Kentucky Utilities Company for an Adjustment of its Electric Rates and for Certificates of Public Convenience and Necessity*, 2018 Ky. PUC LEXIS 1117 (Case No. 2016-00370 / December 10, 2018). The PSC has also granted confidential treatment to information where "... disclosure of the subject information has the potential to provide more than a trivial unfair advantage to competitors." *In the Matter of: Southeast Telephone, Inc., Complainant v. Bellsouth Telecommunications, Inc. Defendant*, 2006 Ky. PUC LEXIS 254 (Case No. 2005-00533 / March 31, 2006).

(b) Existing and proposed rental amounts are inherently proprietary and confidential as often being carefully negotiated as to individual sites. Such information is

also subject to limited access by Applicant's employees on a "need to know" basis. Moreover, such information is not generally available 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 publicly through filings with county clerks' offices or property valuation administrators 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. Thus, in the wireless industry, an expectation of confidentiality is inherent in commercial rent information.

7. 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 6.878(1)(c) and all other applicable law entitle Applicant to confidentiality protection of the Supplementary Evidence.

8. 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.

9. 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, Applicant requests that information responsive to the Request be classified as confidential on a perpetual basis or for any lesser period established by the PSC in its reasonable discretion.

10. This case has been pending since July 7, 2019, and the PSC has denied intervention by multiple attempted intervenors. No request for intervention is pending. Applicant does not contemplate permissive intervention being granted to any other parties in this proceeding. However, should intervention be later granted to any person, Applicants requests any such intervenor be required to execute an acceptable protective agreement consistent with the rights of Applicant if the PSC is to allow such future intervenor any access to confidential information.

11. Applicant is aware of its obligation to inform the PSC in writing if material granted confidential treatment becomes publicly available as specified in 807 KAR 5:001 – Section 13(10) and shall comply with such obligation.

12. If the PSC disagrees with the within request for confidential treatment of the Supplementary Evidence, Applicant requests the PSC hold an evidentiary hearing, or at least a conference between PSC Staff and Applicant: (a) to protect Applicant’s 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.

13. This Motion is severable in that Applicant requests that if the PSC finds one portion of the Supplementary Evidence should not receive confidential treatment that the remaining portion of such evidence should nonetheless be designated confidential.

REQUEST FOR RELIEF

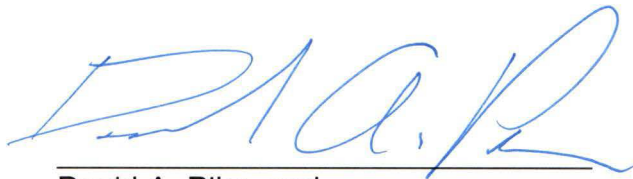
WHEREFORE, Applicant requests the PSC:

- (a) Accept this Motion for filing;
- (b) Grant Applicant confidential treatment of the Supplementary Evidence; and/or
- (c) Grant Applicant any other relief to which it is entitled.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of December 2019, the foregoing was hand-delivered to the offices of the Public Service Commission in Frankfort, Kentucky for filing in the within proceeding. 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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