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**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION  
CASE NO.: 2019-00176**

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 CONVENIENCE AND NECESSITY  
TO CONSTRUCT A WIRELESS COMMUNICATIONS FACILITY IN THE  
COMMONWEALTH OF KENTUCKY  
IN THE COUNTY OF CASEY

**SBA COMMUNICATIONS CORPORATION'S PUBLIC COMMENT CONCERNING  
APPLICANT'S MEMORANDUM IN SUPPORT OF GRANT OF A CERTIFICATE OF  
PUBLIC CONVENIENCE AND NECESSITY**

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Comes SBA Communications Corporation d/b/a SBA Towers III LLC ("SBA"), and for its Public Comment Concerning Applicant's Memorandum in Support of Grant of a Certificate of Public Convenience and Necessity, states that New Cingular Wireless PCS, LLC, a Delaware Limited Liability Company, d/b/a AT&T Mobility ("AT&T") has not proved a public convenience or necessity requires that its application for the construction of a new cellular tower in the vicinity of 74 Antioch Road, Liberty, KY 42539 be approved (the "Proposed AT&T Tower"). As such, the application should now be denied.

On June 7, 2019, AT&T, filed its Application for Certificate of Public convenience and Necessity for Construction of a Wireless Communications Facility in Casey County, Kentucky (the "Application"). There is an existing tower a mere 1/3 mile from the Proposed AT&T Tower. AT&T is currently a tenant on this tower which is owned and operated by SBA (the "SBA Tower").

Pursuant to KRS § 278.020, a certificate of convenience and necessity from the PSC is required before prior to the building of a cellular phone tower. 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)).

The Court of Appeals of Kentucky has also held:

We think it is obvious that the establishment of convenience and necessity for a new service system or a new service facility requires first a showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed and operated.

Second, the inadequacy must be due either to a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business; or to indifference, poor management or disregard of the rights of consumers, persisting over such a period of time as to establish an inability or unwillingness to render adequate service.

*Ky. Utils. Co. v. Pub. Serv. Com.*, 252 S.W.2d 885, 890 (Ky. 1952).

Therefore, in order for AT&T to show it is entitled to a certificate of public convenience and necessity to build the Proposed AT&T Tower, it must show that the existing service (i.e. the SBA Tower) is inadequate and that new service (the Proposed AT&T Tower) is needed. In the filings made in this case, AT&T has not shown this. As such, AT&T's application must be denied.

**1) AT&T has not shown existing service to be inadequate.**

**a) AT&T has not presented evidence that the Proposed AT&T Tower will improve coverage.**

Several months ago, SBA filed a radio frequency study showing that the signals that can be broadcast from the SBA Tower and the Proposed AT&T Tower are almost exactly the same.

*SBA Motion to Intervene*, PSC Case No. 2019-00176, filed June 25, 2019, Exhibit A. This makes logical sense as the Proposed AT&T Tower is physically similar to the SBA Tower in every way, save being located 1/3 mile away. Because of this similarity, there is no reason AT&T cannot continue to co-locate on the SBA Tower.

AT&T now proposes to file its own radio frequency study which it claims will disprove SBA's study's conclusion that the frequencies that can be broadcast off each tower are nearly identical. *Applicant's Motion for Confidential Treatment of Supplementary Evidence*, PSC Case No. 2019-00176, filed December 30, 2019, pp. 2-3. AT&T seeks to file this document under seal, shielding it from the scrutiny of SBA and the public at large. If AT&T is allowed to file that document under seal, this will leave the public in the dark as to how the Proposed AT&T Tower will benefit the public. This is the most salient question in this matter.

**b) Lower rents on a tower are a benefit to AT&T, not the public.**

AT&T claims the Proposed AT&T Tower is a matter of public necessity and convenience because the company can take advantage of lower rents on the new tower. However, possible lower rents on the new tower do not create a *public* convenience and necessity, they are a convenience to AT&T.

There have been no filings by AT&T that state allowing the building of the Proposed AT&T Tower will cause AT&T or any other carrier to lower the fees or rates it charges to Casey County citizens. Instead, AT&T expounds upon how lower rents are helpful to *AT&T*. This is not a benefit to the *public* as is required by the dictates of KRS 278.020, and consequently, the legislative public policy clearly advanced by the General Assembly in passing this statute.

In this same vein, AT&T's continued argument that SBA is acting only out of commercial and proprietary interests in continuing to object to the building of the Proposed AT&T Tower is

duplicitous at best. AT&T is acting solely out of its commercial interests. The company is admitting as much when it argues that the lower rent promised by the Proposed AT&T Tower should be the PSC's main consideration in deciding whether or not to grant the CPCN.

**c) Considering rents when evaluating the reasonableness of co-location is a de facto regulation of rates.**

While the PSC does not generally regulate the rent rates charged by owners of cellular towers, by considering rates here, the PSC is, in effect, regulating rents. By allowing AT&T to succeed with an argument that it should be allowed to build a new tower because the company believes SBA's rent rates are too high and that it can find a lower rate with a new tower, the PSC is essentially telling SBA that it must charge lower rents.

While the PSC does regulate and is empowered by the General Assembly to regulate the rates for a variety of services, none are regulated in the haphazard way proposed here. Parties are normally allowed due process to show that the rates charged are reasonable and a variety of other protections. *See e.g.* KRS 278.190. In this matter, SBA does not even know what the rates for the Proposed AT&T Tower are but is being penalized for not matching those rates. This is inherently illogical and unfair.

**d) The public does not want the Proposed AT&T Tower.**

A public hearing was had on this matter on December 11, 2019. It is notable that of the speakers there, only one speaker spoke in favor of the Proposed AT&T Tower. This person is the owner of the land where the Proposed AT&T Tower will be built; someone with a clear financial interest in this matter. All other speakers were against the Proposed AT&T Tower.

Perhaps most interestingly, more than one speaker noted that there are other areas in Casey County which do not have reliable cellular phone service and asked why the new tower was

proposed to be built in an area where service is already fine. These comments are the very definition of proof that the Proposed AT&T Tower is wasteful duplication.

**2) AT&T bears the burden of proving that it is entitled to a certificate of public convenience and necessity.**

Throughout this matter, AT&T has consistently urged the PSC to grant the company's application to build the Proposed AT&T Tower without any investigation: 1) AT&T fought hard against the intervention of any other party, 2) AT&T requested the public hearing requested by citizens be denied, and 3) AT&T now asks the PSC to stop investigating this matter in its latest filing.

However, AT&T has the burden of proof to show the PSC that it is entitled to the certificate of public convenience and necessity and has admitted as much in its filings with this body. *Applicant's Memorandum in Support of Grant of a Certificate of Public Convenience and Necessity*, PSC Case No. 2019-00176, p. 11. AT&T has failed to carry this burden and SBA's filings and the public's comments show this. In order to prove public convenience and necessity, AT&T must show that it cannot reasonably co-locate on another tower. As it is currently co-locating on the SBA Tower and the only reason for a possible move is rent rates, it cannot show this. As such, AT&T's Application for a Certificate of Public Convenience and Necessity must be denied.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2020, the foregoing document was served via first class

USPS, postage prepaid, upon the following:

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