

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC 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)	2020-00343
CONSTRUCT A WIRELESS COMMUNICATIONS)	
FACILITY IN THE COMMONWEALTH OF)	
KENTUCKY IN THE COUNTY OF BATH)	

ORDER

On October 22, 2020, New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (AT&T Mobility), and Uniti Towers LLC (jointly, Joint Applicants) filed an application seeking a Certificate of Public Convenience and Necessity (CPCN) to construct and operate a wireless telecommunications facility. The proposed facility consists of a tower not to exceed 317 feet in height, with attached antennas, to be located at 312 Chandler Road, Sharpsburg, Bath County, Kentucky. The coordinates for the proposed facility are North Latitude 38°16'01.03" by West Longitude 83°50'48.69".

The Joint Applicants have provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility. Based upon the application, the design of the tower and foundation conforms to applicable nationally recognized building standards, and a licensed professional engineer has certified the plans.

Pursuant to 807 KAR 5:063, the Joint Applicants have filed statements of having provided the required notifications regarding the proposed construction. Pursuant to 807

KAR 5:063, the Joint Applicants have filed evidence that the county judge/executive and all property owners within 500 feet and contiguous to the cell site have been notified of the proposed construction. The notices solicited any comments and informed the recipients of their right to request intervention.

The Joint Applicants have filed applications with the Federal Aviation Administration and the Kentucky Airport Zoning Commission seeking approval for the construction and operation of the proposed facility. Both applications have been approved.

On November 6, 2020, SBA Communications Corporation d/b/a SBA Towers III LLC (SBA) filed a motion for intervention in this matter. As grounds for the intervention, SBA avers that the proposed construction would not provide services to a currently unserved part of Kentucky and would be duplicative due to the proximity of SBA's existing tower in the area.¹ In addition, SBA argues that it has the ability to help develop facts that will assist the Commission in determining whether the Joint Applicants have met all of the requirements of 807 KAR 5:063.² On September 9, 2021, the Commission denied SBA's motion, finding that SBA's only interest in AT&T Mobility's rates and service is as a competitor, and thus does not have a special interest in the proceeding that is not otherwise adequately represented, and is not likely to present issues or develop facts that would assist the Commission in considering this matter without unduly complicating the proceeding.³

¹ SBA's Motion to Intervene (filed Nov. 6, 2020).

² *Id.*

³ Order (Ky. PSC Sept. 9, 2021) at 5–6.

SBA owns the tower on which AT&T Mobility currently has its antennae. AT&T Mobility plans to move its antennae from SBA's tower to the new tower once it is built.⁴ While SBA's motion to intervene was pending, SBA filed a total of three public interim comments into the record in support of its motion to intervene and seeking to prevent Joint Applicant's construction of the proposed tower.⁵ The Commission acknowledges that SBA indicates through public comment that it offered to lower the rent on its existing tower;⁶ however, the Commission affords this comment little weight, given the timing and circumstances under which it was filed. Assuming, *arguendo*, that the Commission afforded weight to the offer of lowered rental rates, leases are for a defined time and yet, given the probability this very issue would arise again upon expiration of the lease, evade the Commission's review because of another last-minute offer to lower rental rates. The Commission notes that this offer was made approximately six months after the filing of the application, which only served to disrupt and delay the proceedings before the Commission.

SBA's only interest is to remain AT&T Mobility's landlord, whether by complicating the proceeding or by engaging in rent negotiations within the proceeding. As the Commission has noted in another case in which SBA sought intervention: "The Commission is under no illusion that SBA's request to intervene in this case is anything

⁴ The Commission approved construction of SBA's tower in Case No. 2008-00092, *Application of Shared Towers LLC and American Cellular LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility at Chandler Road Sharpsburg, Kentucky 40374 in the County of Bath* (Ky. PSC June 10, 2008).

⁵ This does not support SBA's argument that its participation would not unduly complicate the proceedings if it were to be granted intervention.

⁶ SBA's Interim Public Comment (filed Apr. 5, 2021).

other than an attempt to protect its monopoly as the owner of the only tower in the area.”⁷ Although SBA has advanced additional arguments since the Commission’s decision in Case No. 2017-00345, SBA’s interest remains the same: 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 competition,⁸ as well as KRS 278.546(4), which states that market-based competition benefits consumers. Unreasonable and excessive fees for rent on a tower have the potential to divert resources that could otherwise be used to invest in expanding wireless networks and conducting necessary network upgrades necessary to meet increased demand for wireless voice and broadband services.

The Commission has encouraged co-location as the preferred method in the provision of wireless service; however, the opportunity to co-locate must be “reasonably available.”⁹ Unreasonably high rent or onerous conditions render such opportunities unreasonable.

The Commission, in addition to state law, is bound by federal law when considering the construction of wireless facilities:

A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality.¹⁰

⁷ Case No. 2017-00435, *Application of Tillman Infrastructure LLC and New Cingular Wireless PCS, LLC 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* (Ky. PSC Mar. 26, 2018), Order at 5.

⁸ *T-Mobile USA INC. v. City of Anacortes*, 572 F.3d 987, 991 (9th Cir. 2009).

⁹ 807 KAR 5:063(1)(s).

¹⁰ 47 U.S.C.A. § 332(c)(7)(B)(ii).

Based upon the foregoing, the Commission finds that Joint Applicants, because of the lack of reasonable opportunities to co-locate due to high rental rates, have established a need for the proposed tower.¹¹ The Joint Applicants' determination that based on available information, it is economically feasible to construct a tower rather than remain on SBA's tower due to the lower costs, underscores the need for the tower. Furthermore, the Commission finds that while the proposed tower may result in duplication of facilities, it is not wasteful duplication under Kentucky law. Kentucky's highest court has determined that wasteful duplication is "an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties, such as right of ways, poles and wires."¹² Building a new tower to avoid excessive rental rates is not an excessive investment; neither is an investment to avoid continual contentious rental rate negotiations that pose a significant risk of excess expense. Furthermore, should SBA's tower cease to host cellular antennae for a period longer than three months, SBA must notify the Commission,¹³ at which point the Commission will determine the future of the tower, alleviating any concerns of "unnecessary multiplicity" of wireless towers.

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that the Joint Applicants have demonstrated that a facility is

¹¹ The wireless market is competitive and, other than the placement of towers and interconnection with other telecommunications providers, the Commission has little jurisdiction over wireless providers, including no jurisdiction over the rates and earnings of a wireless provider. See KRS 278.54611. Thus, unlike traditionally regulated utilities, the Commission does not monitor wireless providers for unwise or unreasonable investments in utility plant.

¹² *Kentucky Utilities Co. v. Public Service Com'n*, 252 S.W.2d 885, 890 (Ky. 1952).

¹³ The Commission approved construction of SBA's tower in Case No. 2008-00092, *Application of Shared Towers LLC and American Cellular LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility at Chandler Road Sharpsburg, Kentucky 40374 in the County of Bath*, (Ky. PSC June 10, 2008), Order at 3.

necessary to provide adequate utility service and, therefore, a CPCN to construct the proposed facility should be granted.

Pursuant to KRS 278.280, the Commission is required to determine proper practices to be observed when it finds, upon complaint or on its own motion, that the facilities of any utility subject to its jurisdiction are unreasonable, unsafe, improper, or insufficient. To assist the Commission in its efforts to comply with this mandate, the Joint Applicants should notify the Commission if the antenna tower is not used to provide service in the manner set out in the application and this Order. Upon receipt of such notice, the Commission may, on its own motion, institute proceedings to consider the proper practices, including removal of the unused antenna tower, which should be observed by the Joint Applicants.

IT IS THEREFORE ORDERED that:

1. The Joint Applicants are granted a CPCN to construct a wireless telecommunications facility. The proposed facility consists of a tower not to exceed 317 feet in height, with attached antennas, to be located at 312 Chandler Road, Sharpsburg, Bath County, Kentucky. The coordinates for the proposed facility are North Latitude 38°16'01.03" by West Longitude 83°50'48.69".

2. The Joint Applicants shall immediately notify the Commission in writing if, after the antenna tower is built and utility service is commenced, the tower is not used for three months in the manner authorized by this Order.

3. Documents filed, if any, in the future pursuant to ordering paragraph 2 herein shall reference this case number and shall be retained in the post-case correspondence file.

4. This case is closed and removed from the Commission's docket.

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By the Commission

ENTERED
FEB 04 2022
FCS
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2020-00343

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