

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 CONVENIENCE)	CASE NO.
AND NECESSITY TO CONSTRUCT A)	2020-00361
WIRELESS COMMUNICATIONS FACILITY IN)	
THE COMMONWEALTH OF KENTUCKY IN)	
THE COUNTY OF MARSHALL)	

ORDER

This matter arises upon a motion of SBA Communications Corporation d/b/a SBA Towers VII, LLC (SBA) requesting to intervene in this matter. On November 2, 2020, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) filed an application seeking a Certificate of Public Convenience and Necessity (CPCN) to construct and operate a wireless telecommunications facility in Marshall County, Kentucky. On December 28, 2020, SBA filed a motion to intervene and a memorandum in support of the motion to intervene. In its memorandum, SBA states it has a wireless tower in the immediate vicinity of the proposed tower that is approximately .173 miles or 916 feet away. SBA states that unlike the situation in most other cases before the Commission involving both AT&T and SBA, AT&T is not currently a tenant on the SBA tower.¹ However, SBA does argue that the existing SBA tower is extremely close to the proposed tower, and that the nearby SBA

¹ SBA Towers VII, LLC's Memorandum of Law in Support of its Motion to Intervene at 2.

tower can accommodate AT&T's antennas at or above 260 feet, which is higher than the anticipated 250-foot location for AT&T's antennas on the proposed tower.²

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 present issues and develop facts that will assist the Commission in fully considering this matter. Specifically, SBA argues the tower would be duplicative because it would add no additional coverage. SBA claims it commissioned a study showing that there is little to no additional coverage, and that it has information concerning AT&T's attempts to co-locate. SBA contends it can develop all these facts without unduly complicating or disrupting the proceedings.³

AT&T filed a response to the motion to intervene on January 4, 2021. 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 that needs to be protected and has no place in an action based on public convenience and necessity. AT&T explains that SBA has "repeatedly made similar arguments for intervention in cases with materially equivalent facts in an effort to protect its monopoly position,"⁴ arguing that in each of these cases the Commission has denied SBA's requests for intervention

² *Id.*

³ *Id.* at 3–8.

⁴ Applicant's Response to SBA Communications Corporations Motion to Intervene at 3.

AT&T further argues that SBA's purported analysis of coverage should be rejected as credible evidence because the author is unidentified.⁵ AT&T also state that reasonable co-location is not available to them because SBA offers no evidence that its tower is reasonably available in comparison to the proposed site.⁶

On January 11, 2021, SBA filed a reply to AT&T's response again arguing SBA has unique knowledge allowing it to present issues or to develop facts that assist the commission in fully considering AT&T's application, including technical engineering and AT&T's attempts to co-locate.⁷

DISCUSSION

The only person with a statutory right to intervene in a proceeding before the Commission is the Attorney General.⁸ Intervention by all others is permissive and is within the sole discretion of the Commission.⁹

The standard for intervention is twofold. Commission regulation 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

⁵ *Id.* at 9-10.

⁶ *Id.* at 3.

⁷ SBA Towers VII, LLC's Reply in Support of its Motion to Intervene at 2-3.

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

⁹ *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

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.

Further, it is well established 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.”¹⁰

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 represented and is not likely to present issues or develop facts that will assist the Commission in considering this matter without unduly complicating the proceedings, for the reasons discussed below.

SBA did not provide any evidence that it receives service from or is a customer of AT&T. The evidence provided by SBA is that it is a competitor of the proposed tower, whose primary interest is to remain the only tower in that area without competition. Based upon the evidence of record, the Commission concludes that the only interest SBA has in AT&T’s rates and services is as a competitor. It is well established that the Commission has denied intervention to a competitor of an applicant who does not demonstrate an interest in the applicant’s rates or services, other than an interest as a competitor. For example, in Case No. 2004-00423, the Commission denied intervention in a CPCN case

¹⁰ *EnviroPower, LLC v. Public Service Comm’n*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007).

to a movant whose bid in a competitive power solicitation with the applicant was unsuccessful.¹¹ In that case, the Commission found that the movant's only interest was a pecuniary interest in challenging the rejection of its bid, and that those interests were not aligned with the interest of ratepayers. In Case No. 2011-00124, the Commission denied intervention in a merger case because movant's only interest was as a competitive supplier of retail electric and natural gas.¹² In Case No. 2012-00136, the Commission denied intervention in a pipeline replacement case to a movant whose only interest was as a competitive supplier of natural gas.¹³ Finally, in Case No. 2019-00176, the Commission denied SBA's motion to intervene in a similar matter, finding that SBA's only interest was strictly commercial and lies in ensuring that no other facilities are built, which would allow SBA to remain the only tower in the area with no competition to drive down rents.¹⁴

Based upon the evidence of record and Commission precedent, the Commission further finds that SBA's interest in remaining the only wireless communication facility in the area fails to rise to the level of a special interest that must be protected through intervention. Nor will SBA be likely to present issues or develop facts that assist the

¹¹ Case No. 2004-00423, *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* (KY PSC Apr. 18, 2005).

¹² See Case No. 2011-00124, *Joint Application of Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc. for Approval of the Indirect Transfer of Control of Duke Energy Kentucky, Inc.* (Ky. PSC May 12, 2011).

¹³ Case No. 2012-00136, *An Adjustment of the Pipe Replacement Program Rider of Delta Natural Gas Company, Inc.* (Ky. PSC June 25, 2012).

¹⁴ Case No. 2019-00176, *Electronic Application of 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 Casey* (Ky. PSC Oct. 1, 2019).

Commission in deciding the matter. This is because, as noted above, SBA's interest is as a competitor with an interest in keeping tower rents high by limiting the number of towers. In addition to being contrary to Commission precedent, SBA's interest is contrary to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition.¹⁵ SBA's interest as a competitor is also contrary to KRS 278.546(4), which states that market-based competition benefits consumers.

Thus, for the reasons set forth above, the Commission finds that SBA failed to satisfy the regulatory requirements to grant intervention, and therefore its motion to intervene should be denied.

IT IS THEREFORE ORDERED that SBA's motion to intervene is denied.

¹⁵ *T-Mobile USA INC. v. City of Anacortes*, 572 F.3d 987, 991 (9th Cir. 2009).

By the Commission

ENTERED
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KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2020-00361

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