

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 AND NECESSITY	)	CASE NO.
TO CONSTRUCT A WIRELESS	)	2021-00145
COMMUNICATIONS FACILITY IN THE	)	
COMMONWEALTH OF KENTUCKY IN THE	)	
COUNTY OF MONTGOMERY	)	

ORDER

This matter arises upon a motion of SBA Towers VII, LLC (SBA) requesting to intervene in this matter. On March 29, 2021, 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 Montgomery County, Kentucky. On April 13, 2021, SBA filed a motion to intervene. SBA states that it owns a tower in the immediate vicinity of the proposed tower that is 0.6362 miles away. SBA further states that AT&T is currently a tenant on the SBA Tower, further states that AT&T is currently a tenant on the SBA Tower, and, from its place on the SBA tower, AT&T can and already does broadcast its wireless signal to the surrounding area in nearly exactly the same manner, and providing the same coverage proposed by AT&T in its application.<sup>1</sup>

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<sup>1</sup> SBA Towers VII, LLC Motion to Intervene at 2.

SBA argues that it can both provide and test the sufficiency of technical information that will assist the Commission in making its determination of whether Kentuckians will be best served by the construction of an additional wireless communications facility.<sup>2</sup> SBA further argues that its commercial interest is no different from that of industry trade organizations that the Commission grants full intervention to in rate cases.<sup>3</sup> In conjunction with the commercial interests at issue, SBA asserts it can provide firsthand knowledge regarding AT&T's attempts to co-locate as required by 807 KAR 5:063(1)(s).<sup>4</sup>

AT&T filed a response to the motion to intervene on April 20, 2021, arguing that SBA's request for intervention should be denied because SBA does not have a direct interest in the construction of the cell tower, but instead has only an indirect interest that is purely proprietary in its effort to protect its financial position as the only tower owner in the area. AT&T states that SBA has repeatedly made similar arguments for intervention in cases with materially equivalent facts and in each of these cases the Commission has denied SBA's requests for intervention.

AT&T argues that SBA's tower is not a reasonably available for co-location because it will cost AT&T over \$2 million over the next 20 years if it remains on SBA's tower as opposed to co-locating on the tower proposed in this proceeding.<sup>5</sup> AT&T further argues that SBA's arguments regarding service in the coverage area are not credible because SBA failed to either attach a copy of the study to its motion for AT&T to review

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<sup>2</sup> *Id.* at 3–4.

<sup>3</sup> *Id.* at 4–5.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> Applicants' Response to SBA Towers VII, LLC's Motion to Intervene at 1, 3–4, and 10.

and respond to it specifically, or to identify the purported expert who conducted the study for his or her qualifications to be examined.<sup>6</sup>

On April 23, 2021, SBA filed a reply to AT&T's response again arguing that SBA has unique knowledge allowing it to present issues or to develop facts that assist the Commission in fully considering AT&T's application.<sup>7</sup>

### DISCUSSION

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

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.

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<sup>6</sup> *Id.* at 11.

<sup>7</sup> SBA Towers VII, LLC's Reply in Support of Motion to Intervene at 2–3.

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

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

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.”<sup>10</sup>

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 to a movant whose bid in a competitive power solicitation with the applicant was unsuccessful.<sup>11</sup> In that case, we found that the movant’s only interest was a pecuniary

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

<sup>11</sup> 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).

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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 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

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<sup>12</sup> 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).

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

<sup>14</sup> 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).

competition.<sup>15</sup> 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.

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

By the Commission



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