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MAR 9 2016

Public Service
Commission

March 8, 2016

VIA OVERNIGHT DELIVERY

Linda Faulkner
Division of Filings
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602-0615

Re: Response to March 2, 2016 Joint Motion for Intervention (Banks and Denniston)
and
Response to March 2, 2016 Letter of David R. Graham
(Two Separate Filings)
PSC Case No.: 2015-00404
Site Name: Pea Ridge

Dear Linda:

Please accept this letter and the two attached documents as official filings in the above-referenced Public Service Commission action. If you have any questions or comments concerning this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D.A. Pike', written over a horizontal line.

David A. Pike
Attorney for Applicants

Enclosure

cc: J.E.B. Pinney, Div. of General Counsel

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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MAR 9 2016

Public Service
Commission

In the Matter of:

THE APPLICATION OF)
NEW CINGULAR WIRELESS PCS, LLC)
D/B/A AT&T MOBILITY)
& AMERICAN TOWERS, LLC)
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC) CASE NO.: 2015-00404
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF WOLFE)

SITE NAME: PEA RIDGE

**RESPONSE IN OPPOSITION TO JOINT MOTION TO INTERVENE OF RAYMOND
BANKS AND GARRETT DENNISTON**

Applicants New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility ("AT&T Mobility") and American Towers, LLC ("American Towers"), by counsel, make this Response to the Joint Motion to Intervene dated March 2, 2016¹ and submitted by Raymond Banks and Garrett Denniston ("Movants") in the within proceeding. Applicants respectfully state, as follows:

1. Movants oppose the within application due to purported "safety, health, safety, and environmental reasons" and because of a cell tower could purportedly "be built at another location if one is needed."

2. By correspondence dated January 5, 2016, a copy of which was filed with the commission on January 5, 2016, and which is incorporated herein by reference, Applicants have previously addressed Movants' concern as to the safety of the

¹ Stamped as RECEIVED by the Public Service Commission on March 2, 2016.

proposed tower. Said correspondence included a report dated January 10, 2014 prepared by Nitesh Ahuja, a Kentucky licensed professional engineer, explaining the tower's safety design features, which report includes certifications from said engineer that the tower would be constructed in compliance with the National Tower code and that the predicted mode of wind-induced failure would affect a "zero fall zone' at ground level." Movants have offered no indication or commitment they would produce contrary expert testimony on such issues. The Commission could not deny the application based on Movants' lay opinion as to safety issues considering the applicable law holding lay testimony is not "substantial evidence" in Telecommunications Act cases the Sixth Circuit. See *Cellco P'ship v. Franklin Cnty.*, 553 F.Supp. 2d 838 (E.D. Ky. 2008); *T-Mobile Cent. v. Charter Twp. of W. Bloomfield*, 691 F.3d 794 (6th Circ. 2012). Accordingly, it would be an exercise in futility which wasted both Commission and Applicant resources to allow Movants' intervention in order to offer lay testimony on safety issues.

3. As stated in prior filings in this proceeding, in accordance with KRS Chapter 100 and the Telecommunications Act of 1996, the environmental effects of radio frequency emissions are not at issue in this case and may not be considered by the Public Service Commission in its evaluation of the proposed facility. Radio frequency emissions are the subject of federal regulation, and the Telecommunications Act of 1996 expressly prohibits state regulation of wireless communications facilities on the basis of environmental effects or radio frequency emissions. Specifically, the Federal Telecommunications Act of 1996, as codified at 47 U.S.C. Section 332(7)(B)(iv), provides:

“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission’s regulations concerning such emissions.”

5. Applicant is licensed by the Federal Communications Commission (“FCC”) to provide wireless communications services to the area to be served by the proposed wireless communications facility, and a copy of the relevant FCC license granted to Applicant New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility was filed as part of the subject Application. Accordingly, Applicant, is subject to the FCC regulation referenced at 47 U.S.C. Section 332(7)(B)(iv).

6. The U.S. Court of Appeals for the Sixth Circuit has upheld the prohibition of consideration of the environmental effects of radio frequency emissions in Kentucky Public Service Commission proceedings regarding wireless communications facilities. Specifically, in *Telespectrum, Inc. v. Public Service Commission*, 227 F.3d 414 (6th Circuit 2000), the Court held:

“[C]oncerns of health risks due to the emissions may not constitute substantial evidence in support of denial by statutory rule, as no state or local government or instrumentality thereof may regulate the construction of personal wireless facilities “on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.’ 47 U.S.C. § 332(c)(7)(B)(iv).” Id at 425.

In 2012, the Sixth Circuit relied upon *Telespectrum, supra*, and recognized the continuing validity of 47 U.S.C. Section 332(c)(7)(B)(iv). *T-Mobile Central v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 800 (6th Circ. 2012). On the specific facts of the *T-Mobile Central* case, the Sixth Circuit explained that "Concerns that the RF emissions could potentially impact trees or children at the daycare were prohibited by statute as

grounds to deny a wireless permit." *Id.* at 800. Thus, the Movants' Motion is in blatant disregard of controlling law and frivolous on health effects of radio frequency emissions issues.

7. The Movants' Joint Motion asserts "the tower could be built at another location if one is needed" Of course, Movants offer no expert testimony in or attached to their filing that there is a lack of need for the facility or that other locations are feasible and available for leasing and less intrusive than the selected site. They further do not state that they will subsequently offer expert testimony on these issues if granted intervention. A denial of the Application could not be supported by their assertions.² Moreover, Movants do not detail why the proposed tower site should be rejected under statute or regulation even if their specific allegation as to other locations of a tower were true.

8. Movants identify themselves as public officials, but Kentucky law provides for no special weight or right of a local official to intervene in a cellular tower proceeding before the Kentucky Public Service Commission.

9. The Public Service Commission should not become a facilitator to Movants' efforts to circumvent clear and controlling legal precedent. 807 K.A.R. 5:001 - Section 4 - (11)(b) provides:

"(b) The commission shall grant a person leave to intervene if the commission finds that he or she had made a timely motion for intervention

² As stated by the U.S. District Court in *Cellco Partnership, et al v. Franklin County, Kentucky, et al*, 553 F.Supp.2d 838 (E.D. Ky. 2008): "Area residents questions the safety of the proposed tower, the need for it, whether there were other suitable locations for it, and whether it would affect property values. There is no evidence, however, that any of these residents had any personal knowledge regarding these issues. Nor did any of these residents offer any evidence in support of their concerns. Thus, this testimony is "unsupported opinion" and does not constitute evidence supporting the Planning Commission's denial of the application." (*Emphasis added*). *Id.* at 849.

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." (Emphasis added). Id at 807 K.A.R. 5:001 - Section 4 -1 (11)(b).

When read in connection with the statutory and Sixth Circuit prohibition of consideration of radio frequency emissions effects of a wireless communications facility, it is clear Movants' Joint Motion to Intervene may not be lawfully granted. The candid identification of the prohibited issues Movants want to address leave the Commission no choice but to reject the request in order to preserve the integrity of this proceeding.

WHEREFORE, Applicants respectfully request the Kentucky Public Service Commission:

- (a) Accept this Response for filing;
- (b) Deny the Joint Motion to Intervene
- (c) Grant Applicants any other relief to which they are entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of March 2016, a true and accurate copy of the foregoing was sent by U.S. Postal Service first class mail, postage prepaid, to David R. Graham, P.O. Box 553, Campton, KY 41303, Raymond Banks, P.O. Box 173, Compton, KY 41301; and Garrett Denniston, 154 Back St., Compton, KY 41301.



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