

**COMMONWEALTH OF KENTUCKY  
BEFORE THE 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

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**RESPONSE TO DAVID GRAHAM LETTER DATED MARCH 2, 2016**

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 David Graham's individually signed letter dated March 2, 2016<sup>1</sup> ("2nd Graham Letter") and reiterate their opposition to his Motion to Intervene. Applicants respectfully state, as follows:

1. The 2nd Graham Letter offers no new evidence in support of intervention and largely duplicates the claims of his initial filing without directly countering the bases for denial of intervention set forth in Applicants' Response filed February 1, 2016 or in the Commission's Order of February 25, 2016.

2. The 2nd Graham Letter again opposes the within application based on "health and safety" and includes an attached article discussing purported "dangers of living near a cell phone tower."

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<sup>1</sup> Said Letter is stamped as RECEIVED by the Public Service Commission on March 3, 2016.

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.”

4. 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).

5. 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 (6<sup>th</sup> 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, just as was his original Motion the 2nd Graham Letter, is in blatant disregard of controlling law and frivolous on health effects of radio frequency emissions issues.

6. The 2nd Graham Letter asserts "there are other locations nearby that could be used...." In addition, the 2nd Graham Letter asserts. "there are already two cell phone towers in this location now." Of course, Mr. Graham offers no expert testimony in or attached to his filing that such locations are feasible and available for leasing and less intrusive than the selected site. He further does not state that he will subsequently offer expert testimony on these issues if granted intervention. A denial of the Application could not be supported by Mr. Graham's assertions.<sup>2</sup> Moreover, Mr.

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<sup>2</sup> 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.

Graham does not detail why the proposed tower site should be rejected under statute or regulation even if his specific allegations as to locations and other towers were true.

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

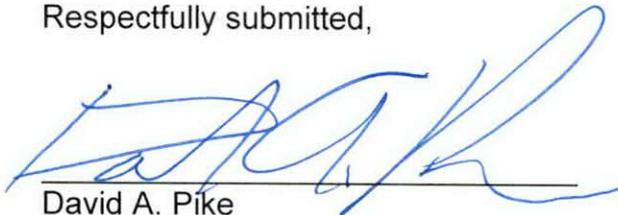
"(b) The commission shall grant a person leave to intervene if the commission finds that he or she had made a timely motion for intervention and that he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or 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 the 2nd Graham Letter adds nothing to the original Motion to Intervene and provides no credible response to the issues raised by Applicant's Response or the Commission's Order entered February 25, 2016.

**WHEREFORE**, Applicants respectfully request the Kentucky Public Service Commission:

- (a) Accept this Response to David Graham Letter Dated March 2, 2016 for filing;
- (b) Deny the Motion to Intervene; and
- (c) Grant Applicants any other relief to which they are entitled.

Respectfully submitted,

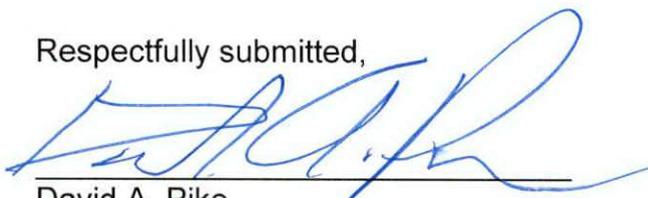


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## CERTIFICATE OF SERVICE

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.

Respectfully submitted,



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