



278.546. Similarly, the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Communications Act"), establishes a national policy to "make available, so far as possible, to all people of the United States, without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151 (emphasis added).

2. Construction of the proposed tower is not only in the interest of AT&T, but in the public interest as well, as it will facilitate the development and deployment of advanced wireless and broadband connectivity. Competitive, market-based infrastructure is needed to provide innovative and economical telecommunications services, and investment in such telecommunications infrastructure is a necessary and critical component of AT&T's mission to provide affordable, advanced communication services to Kentucky businesses and residents. By allowing competition to increase in the provision of towers to wireless companies like AT&T, tower rents are likely to decrease and the options to enhance and expand the availability of advanced wireless services will improve. SBA is attempting to prevent that competition and preserve its power to charge high rates for leasing space on its tower. While foreclosing competition may be in SBA's narrow commercial interest, it is not in the interests of the public.

3. KRS 278.260(1) recognizes the authority of the PSC to make inquiry in connection with a complaint that a "... practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable ... the commission [PSC] shall proceed, with or without notice, to make such investigation as it deems

necessary or convenient.” *Id.* at KRS 278.260(1). Thus, in bringing the reasonableness of SBA’s charges to the attention of the PSC, the Applicants are raising issues within the proper scope of the PSC’s inquiry.

4. SBA owns a tower at 1709 Lee Burd Road, Benton, Kentucky, which is the only tower in the area. AT&T has equipment located on that SBA tower, but it has elected to remove its equipment from the SBA tower and proposes a new communications facility in the vicinity. SBA is attempting to exploit the fact that it has the only tower in the area by demanding unreasonable terms for the co-location of antennas on its tower. This impedes AT&T’s ability to provide innovative and economical services to Kentucky citizens. AT&T should not be forced to pay excessive financial terms demanded by SBA for co-location on its tower when a competitor—Tillman Infrastructure—is willing and able to (i) build a tower that AT&T would find preferable and (ii) offer terms and conditions to AT&T that are more attractive than those offered by SBA.

5. Unreasonable and excessive fees charged by SBA divert resources that could otherwise be used to invest in expanding wireless networks and the availability of wireless services to all Kentuckians, frustrate upgrades, and make it more difficult to deploy new advanced technologies that require the installation of new equipment. In response to SBA’s refusal to charge reasonable rates and facilitate AT&T’s deployment of advanced technologies, AT&T has submitted an application to construct additional telecommunications infrastructure at 1641 Lee Burd Road, Benton, Kentucky (36°49’24.34” North latitude, 88°28’25.57” West longitude) so that it may continue to offer innovative and economical wireless services, consistent with the goals of both

Congress and the General Assembly. See KRS 278.546.

6. While SBA states that it does not believe another facility is needed, the clear intent of SBA's public comments is to prevent competition and perpetuate its position as the sole provider of a tower in the subject geographic area. However, the General Assembly's mission for the PSC with respect to telecommunications is set forth in KRS 278.546, which provides among other things that "[s]tate-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000," and "[c]onsumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical services." SBA's attempt to protect its hold on having the sole tower in the area undermines both of these goals.

7. Contrary to the public comments of SBA, the tower proposed by Applicants is necessary to increase competition between telecommunications infrastructure providers so that AT&T can continue to furnish adequate, efficient and reasonable telecommunications services to residents of Marshall County. See *Bardstown v. Louisville Gas & Electric Co.*, 383 S.W.2d 918, 1964 KY. LEXIS 68 (Ky. 1964). Denial of the requested CPCN would immunize SBA from competition, which is contrary to the interests of Kentuckians. KRS 278.650 authorizes the PSC to approve construction of new cellular towers in the interest of the "public convenience and necessity." This statutory standard is inconsistent with allowing an existing tower owner to hide behind general principals of collocation to demand unreasonable compensation from wireless carrier utilities without regard to competing lower cost site alternatives in

the vicinity.

8. In addition to promoting competition between telecommunications infrastructure providers, approval of the requested CPCN will improve co-location opportunities for other telecommunication providers in this area under business terms that are moderated by competition. The tower proposed by Applicants is designed to accommodate antennas for AT&T and three additional service providers. See Exhibit C of the Application.

9. SBA's tower, however, is not in the long term a viable and reasonable co-location alternative for AT&T or other providers, within the meaning of case precedent and the PSC's own regulations at 807 KAR 5:063. See *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987, 998 (9<sup>th</sup> Cir. 2009); 2009 U.S. App. LEXIS 15924 and *T-Mobile Cent. LLC v. Charter Twp. Of West Bloomfield*, 691 F. 3d 794, 2012 U.S. App. LEXIS 17534, 2012 FED App. 0275P (6<sup>th</sup> Cir.). Excessive rental rates render the tower "not feasible or available" under the *Anacortes* standard and prevent it from being a "reasonably available opportunity to collocate" pursuant to 807 K.A.R. 5:063-Section 1(s).

10. While SBA asserts that a new facility would contribute to the unnecessary proliferation of tower sites in Marshall County, it has offered no objective evidence that Marshall County is over-built with unnecessary tower sites.

11. Further, to the extent SBA's comment is intended to suggest that a tower (other than SBA's, presumably) would be unaesthetic, such generalized concerns do not provide any basis for denial of the application. Similar arguments based upon unsupported lay opinions regarding the siting of cell towers were rejected by the PSC in

Case No. 2017-00368. The proposed facility has been designed, configured, and located in such a manner that it will prevent or limit potential adverse effects on surrounding properties. The tower will be galvanized steel to minimize its visibility. The requested CPCN is for a proposed land use that is consistent with the existing tower owned by SBA. Since the proposed tower is a compatible land use given the existing tower in the area, and since the tower is designed to minimize visual impact, aesthetic objections cannot support a denial of the requested CPCN.

12. Indeed, the U.S. Court of Appeals for the Sixth Circuit has affirmed that lay opinion or generalized aesthetic concerns are not substantial evidence that would justify rejection of an application. Under federal law, any decision rendered by state or local authorities regarding the placement of wireless facilities must be in writing and supported by substantial evidence in a written record. 47 U.S.C. § 332(c)(7)(B)(iii). Generalized aesthetic concerns based on lay opinion, such as what any resident in any area in which any tower is placed might make, do not constitute substantial evidence. See *Cellco Partnership v. Franklin Co.*, KY, 553 F. Supp. 2d 838, 845-846 (E.D. Ky. 2008); *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 804 (6<sup>th</sup> Cir. 2012). But that kind of vague objection to “unnecessary proliferation of tower sites” is all that SBA proffers here.

13. Ultimately, the Public Service Commission’s decision in the proceeding must be based on the public convenience and necessity rather than the pecuniary interests of SBA. KRS 278.020 (1); 807 KAR 5:063. Allowing SBA to thwart the building of a new tower that will foster competition and the provision of new wireless installations necessary to provide wireless technology to retail and business customers

and emergency service providers<sup>1</sup> would not be consonant with any rational basis or statute, regulation, or written policy of the PSC. Wireless carriers should not be made subject to the whims of SBA in its attempts to extract the highest compensation from them. Applicants' proposal for a new tower is in compliance with all requirements of relevant PSC regulations and other applicable law, and results from a "good faith effort" to evaluate alternatives. *T-Mobile Central LLC, supra* at 808.

14. In consideration of all of the foregoing facts, law, and circumstances, SBA's tower does not provide a "reasonably available opportunity to collocate," within the meaning of 807 K.A.R. 5:063-Section 1(s), because SBA does not make its tower available on reasonable terms. The PSC should not facilitate SBA's efforts to extract onerous financial terms when the proposed new tower on other property meets service needs and all applicable law.

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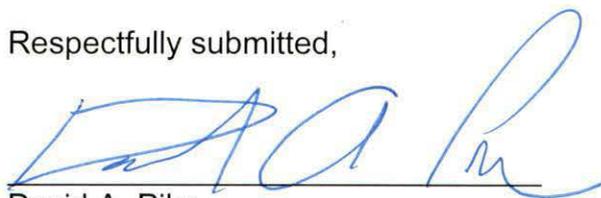
<sup>1</sup> A Federal Communications Commission Consumer Guide (October 29, 2014) states: "It is estimated that about 70% of 911 calls are placed from wireless phones and that percentage is growing."

## REQUEST FOR RELIEF

**WHEREFORE**, there being no ground for denial of the subject application and substantial evidence in support of the requested CPCN, Applicants respectfully request the Kentucky Public Service Commission:

- (a) Accept this Response for filing;
- (b) Issue a Certificate of Public Convenience and Necessity to construct and operate the wireless communications facility at the location set forth in the Application without further delay; and
- (c) Grant Applicants any other relief to which they are entitled.

Respectfully submitted,

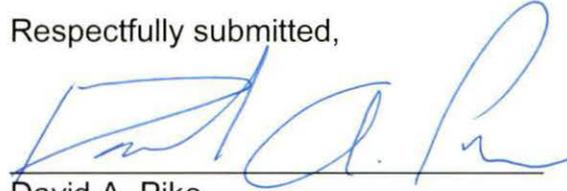


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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of December 2017, a true and accurate copy of the foregoing was sent by U.S. Postal Service first class mail, postage prepaid, to Ed Roach, VP-Associate General Counsel, SBA Communications Corporation, 8051 Congress Avenue, Boca Raton, FL 33487-1307.

Respectfully submitted,



David A. Pike  
Attorney for Applicants