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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

THE APPLICATION OF)	
NEW CINGULAR WIRELESS PCS, LLC,)	
A DELAWARE LIMITED LIABILITY COMPANY,)	
D/B/A AT&T MOBILITY)	
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC)	CASE NO.: 2019-00176
CONVENIENCE AND NECESSITY TO CONSTRUCT)	
A WIRELESS COMMUNICATIONS FACILITY)	
IN THE COMMONWEALTH OF KENTUCKY)	
IN THE COUNTY OF CASEY)	

SITE NAME: DUNNVILLE RELO / PHIL

**APPLICANT'S RESPONSE TO
MOTION TO INTERVENE OF ELWOOD HOSKINS, SUSAN HOSKINS,
AND MANDY WAHL**

New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility ("AT&T") ("Applicant"), by counsel, makes this Response to the Motion to Intervene filed by Elwood Hoskins, Susan Hoskins, and Mandy Wahl (the "Three Residents").¹ AT&T objects to such Three Residents Motion and requests it be denied.

Applicant respectfully states as follows:

1. Overview. The Three Residents Motion should be denied, as there is no good cause under statute or regulation to permit intervention. The Three Residents are

¹The Three Residents Motion to Intervene is buried on the last page of a document filed July 25, 2019 with the Public Service Commission. The document is styled on its first page as a "Reply to New Cingular Wireless PCS, LLC ... Response ... to ... Public Comments Requesting a Hearing."

merely duplicating intervention claims on which, Scott Norman, a county resident who had leased land for a tower to SBA, failed to prevail on in PSC Case No. 2017-00435 (the “Hansen” Case). In such case, the PSC denied a request for citizen intervention by Order entered July 2, 2018. None of the Three Residents are seeking intervention as an AT&T customer for wireless services in the vicinity and have not stated an interest in AT&T’s rates and services. Furthermore, none of them have any direct interest in Applicant’s proposal to construct a tower.

2. The Critical Issue Ignored by the Three Residents - “Reasonable Availability” of Alternative Location. Where, as here, the proposed tower will meet the objectives for improved wireless service, the only issue is the relative reasonable availability of the alternative locations. SBA’s tower does not provide that “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 considering the rent and other terms offered by Uniti Towers LLC.

The approximate rental cost to provide service from the SBA tower is substantially above the rent AT&T has been offered on the proposed tower, including both capital cost and ground rent. Without revealing confidential information, we can state that the SBA monthly rent is more than \$1,000.00 per month higher than the rent proposed by Uniti Towers LLC. Thus, the SBA rent is substantially above current market rent. Allowing intervention by the Three Residents would not change these critical facts and would only complicate and disrupt the proceedings.

Significantly, the Three Residents conspicuously fail to address the “reasonably available opportunity to collocate” issue in their Motion, particularly the import of market

rent to the analysis. Presumably, they read Applicant's of record Response to the SBA Motion to Intervene in this proceeding addressing this issue and simply chose to ignore it as being inconvenient to their cause. This issue was dispositive in supporting denials of intervention and grant of a CPCN in PSC Case No. 2017-00435. The same result is warranted in the present case.

3. No Statute, Regulation, Real Estate Instrument, Empirical Evidence, or Violation of Right Supports Intervention. The Three Residents' July 25, 2019 Filing asserts "Elwood Hoskins and Susan Hoskins live and own property in Casey County, including property that is leased to SBA Communications Corporation d/b/a SBA Towers III LLC ["SBA"]." The Filing goes on to state "[t]he Hoskins believe that the AT&T site that is proposed for a second cell tower in close proximity to the existing SBA cell tower is too close to their property and too close to a nearby church and graveyard/cemetery where their family members are buried." They identify no setback requirement in statute or regulation or restriction in the proposed tower site chain of title as to their property, the church, or the graveyard/cemetery. Moreover, they proffer no hint of factual evidence showing damage to their Constitutional or statutory rights, their property, the church, or the graveyard/cemetery. Just as a lease to SBA in Case No. 2017-00435 was insufficient to sustain Motions for Intervention by SBA and lessor Scott Norman in such proceeding, it should be similarly insufficient in the present case.

4. The PSC Has Ruled Land Use Concerns Fail to Support Intervention. The Three Residents' July 25, 2019 Filing asserts "The Hoskins, as members of the public, have standing to urge the Public Service Commission ("PSC") to require co-location on existing towers rather than create duplicative and unneeded additional cell tower

construction in an area already adequately served with the existing cell tower.” Their July 25, 2019 Filing further states, “As residents and property owners in the area of the existing SBA cell tower and the nearby proposed cell tower, Hoskins and Wahl have unique knowledge of the current and historic land uses in the area and the character of the area.” In the face of similar argument, a request for intervention by Scott Norman in Case No. 2017-00435 was denied by PSC Order of July 2, 2018. This is no reason for the PSC to change its approach in the present case.

5. Neighbors’ General Land Use Concerns are Not Dispositive on Intervention.

The PSC is not a zoning or historic preservation board. PSC statutes and implementing regulations do not establish “current and historic land uses in the area and the character of the area” as dispositive criteria which determine the PSC’s decision on an application for a CPCN. Per KRS 278.650, the PSC “may take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values.” However, it is not required to do so, and, research in PSC Orders indicates it would not be the common practice of the PSC to delve into such issues. Also, the Three Residents’ protests on the land use issues ring disingenuous with one tower already being in this area.

Intervention founded on the bases articulated by the Three Residents is without merit and would be an exercise in futility if granted. Such proceedings would only serve to delay the deployment of wireless infrastructure. Moreover, the Three Residents have made no indication they would be able to offer expert testimony and/or empirical factual data that would allow a denial of the Application to survive judicial review under the

“substantial evidence” test of the federal Telecommunications Act (“TCA”) on the basis of general land use concerns of neighbors.

6. Cemetery Concerns Fail to Support Intervention. The fact that Mandy Wahl’s granddaughter is apparently buried in a nearby cemetery and the Hoskins may have relatives buried in such cemetery has no impact on the PSC decision. No applicable common law, statute, or regulation prevents a cell tower from being sited within the distance from a cemetery that the proposed site is located. Obviously, Applicant has no intent to disturb any cemetery or access by relatives. Apparently, the Three Residents want the PSC to establish something like a “tower exclusion zone” of indeterminate size around the cemetery. As a matter of common knowledge, utility installations, homes, and commercial facilities are often near cemeteries. Moreover, the Three Residents identify no objective harm or damage that occurs from a cellular tower within a particular radius of a cemetery. Generalized aesthetic concerns cannot be a consideration.² Of course, neither can the environmental effects of radio frequency emissions per federal statute.³ Thus, the statements regarding relatives being buried in a cemetery in the vicinity provide no basis

²Under 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 (6th Cir. 2012). Of course, that kind of vague objection to “unchained proliferation” is all that the Three Residents proffer here. Neither the PSC enabling statutes nor its implementing regulations establish any specific objective standards for aesthetic considerations in rulings on a request for a CPCN for a new tower.

³47 U.S.C. Section 332(c)(7).

to grant intervention and would only complicate and delay the proceedings if intervention was granted on such basis.

7. The Three Residents Motion Fails to Recognize Competition is a Desired

Outcome. The PSC's March 26, 2018 Order in Case No. 2017-00435 explains:

"The Request to Intervene does state that SBA does not believe that the proposed facility will improve wireless service in the area because AT&T is already providing service from SBA's tower and SBA's tower has room for more tenants. However, as the Applicants point out in the Applicants' Response to Public Comment filed by SBA Communications Corporation, the competition engendered in having more than one tower is likely to improve co-location opportunities for other telecommunications providers in the area. This is likely to lead to expanded availability of advanced wireless services. [footnote omitted].

... SBA is not a wireless customer in the area or a property owner. SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers. This runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition. [footnote omitted]." *Id.* at p. 5.

The Three Residents found their intervention argument on the theory "Kentucky law and policy strongly support co-location as a requirement to reduce and avoid duplication of services and to avoid the unneeded construction of cell towers." The Three Residents' argument does not consider the role of competition in promoting collocation as expressed in the above PSC Order. It is simply an inaccurate understanding of the PSC's role under current statutes to believe it must promote collocation through a reduced number of towers at all cost.

The General Assembly recognizes that consumers benefit from market-based competition, which offers consumers of telecommunications services the most innovative and economical services. See KRS 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).

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. The Three Residents are attempting to prevent that competition and preserve SBA’s power to charge high rates for leasing space on its tower, which can only have the effect of slowing deployment of new or expanded wireless services. While foreclosing competition may be in SBA’s narrow commercial interest for which the Three Residents wish to be advocates for, it is not in the interests of the public.

While the Three Residents state they do not believe another facility is needed, the clear intent of their Motion is to prevent competition and perpetuate SBA’s 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." (Emphasis added). Any attempt to confine service to a sole tower in an area undermines both of these goals.

Contrary to the argument of the Three Residents Motion, 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 and others using wireless services in Casey County. See *Bardstown v. Louisville Gas & Electric Co.*, 383 S.W.2d 918, 1964 KY. LEXIS 68 (Ky. 1964). Denial of the requested Certificate of Public Convenience and Necessity ("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 persons with purported concerns over tower proliferation and an existing tower owner to hide behind their misguided theories of collocation requirements without regard to competing lower cost site alternatives in the vicinity.

8. Nothing in the Three Residents Motion provides evidence or offers to provide evidence that wireless service from the existing tower would be superior to that from the proposed tower. The Three Residents Motion references purportedly "unneeded additional cell tower construction in an area already adequately served with the existing

cell tower.” The Three Residents identify no qualifications any of them have as to what level of cellular service is needed, and have proffered no indication they would produce expert testimony on such issue. However, even if they could produce some competent evidence, they would have to show service would be superior from the existing tower to have any potential impact on whether Applicant was granted a CPCN for a new tower. The Three Residents have failed to make any showing or proffer of evidence of superior service if the proposed tower is not constructed.

9. PSC Staff Review More Effectively Meets Standards for Agency Review than Adversarial Intervention Proceedings by a Competitor. If any further inquiry as service need or cost differential between the SBA site and the proposed tower is necessary, inquiry by the PSC Staff, with appropriate confidentiality protections, will confirm the overwhelming cost advantage of the proposed tower and allow the PSC to timely move forward with its decision on the requested CPCN. The Three Residents have offered no indication they could provide valuable information or testimony on the critical cost differential issue. Such an approach is consistent with the federal Telecommunications Act’s encouragement of the rapid deployment of wireless communications facilities,⁴ and would be far more likely to resolve this dispute over reasonable availability within the time frames of the FCC’s Shot Clock Ruling⁵ and the PSC’s normal time frame for processing

⁴See *Pi Telecom Infrastructure V, LLC v. Georgetown-Scott County Planning Comm’n*, 234 F. Supp. 3d 856 (E.D. Ky. 2017) (“Congress enacted the TCA to promote competition between service providers that would inspire the creation of higher quality telecommunications services and to encourage the rapid deployment of new telecommunications technologies.”)

⁵See *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 F.C.C. Rcd. 13994, 14013 (2009)(a/k/a “FCC Shot Clock Ruling”).

cellular tower applications.

10. The Three Residents Fail to Meet Standards for Intervention. Kentucky Public Service Commission implementing regulations at 807 KAR 5:001 – Section 4(11) provide in pertinent part for a movant to (among other things) “state his or her interest in the case and how 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.” Further, in order to intervene, a would-be intervenor must have “a special interest in the case that is not otherwise adequately represented,” or “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 KAR 5:001 – Section 4(11).

On all of the above argument, the Three Residents Motion to Intervene fails to satisfy the standards of 807 KAR 5:001 – Section 4(11). Simply being a neighbor or county resident is not a “special interest.” The PSC and its Staff are well-qualified to examine the facts surrounding Applicants’ proposed tower in connection with their statutory and regulatory obligations without intervention by local residents. Direct participation in the case by the Three Residents would not add to the PSC’s analysis and its ultimate decision on the request for a CPCN. Essentially, the Three Residents seek intervention to raise issues more appropriate for a zoning board hearing than a PSC CPCN proceeding. The PSC recognized in its March 26, 2018 Order in PSC Case No. 2017-00435 denying intervention to SBA that “[i]t is likely that if the Commission permitted SBA to intervene, this intervention would unduly complicate this proceeding.” The PSC should reach the

same conclusion in the present case.

11. The PSC has Denied Intervention in Many Cases. Critical to the PSC's many denials of requested intervention have been factors such as the potential interveners being "unlikely to present issues or develop facts that will assist the Commission in considering the matter" or that the party requesting intervention is not a customer of the applicant, does not receive services from the applicant and/or does not pay any rates charged by the applicant. All of these same factors warrant denial of the Three Residents Motion. See *In the Matter of 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 Graves* (Case No. 2017-00368), 2017 Ky. PUC LEXIS 1148 (November 30, 2017); *In the Matter of 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 Butler* (Case No. 2017-00369), 2017 Ky. PUC LEXIS 1167 (December 30, 2017); *In the Matter of: Tariff Filing of East Kentucky Power Cooperative, Inc. and its Member Distribution Cooperatives for Approval of Proposed Changes to their Qualified Cogeneration and Small Power Production Facilities Tariffs and the Implementation of Separate Tariffs for Power Purchases from Solar Generation Qualifying Facilities* (Case No. 2017-00212), 2017 Ky. PUC LEXIS 967 (September 22, 2017); *In the Matter of: Electronic Application of Kentucky Power Company* (Case No. 2017-00179), 2017 Ky. PUC LEXIS 833 (August 16, 2017); *In the Matter of the Joint Application of PNG Companies LLC ... for Approval of an Acquisition of Ownership* (Case No. 2017-00125), 2017 Ky. PUC LEXIS 412 (April 20,

2017); *In the Matter of: 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 ...* (Case No. 2018-00031 – Order of June 1, 2018); *In the Matter of Application of East Kentucky Network, LLC D/B/A Appalachian Wireless...* (Case No. 2018-00095 – Order of September 7, 2018).

12. Opportunity to File Comments in Absence of Intervention. In all of above-referenced denials of intervention, the PSC has pointed out that, even with denial of intervention, the requesting person or entity may still file comments in the record of the case and review the progress of the proceedings via the PSC’s online docket. Thus, intervention is not essential to allow any of the Three Residents to be heard in a PSC proceeding.

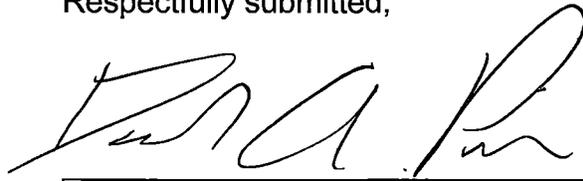
13. Three Residents have No *Right* to Intervene. The Three Residents have only a right to *request* intervention in Commission proceedings pursuant to applicable regulations. 807 KAR 5:063 Section 1(1)(n)3; 807 KRS 5:120 Section 2(5)(c) (“interested persons have right to *request* to intervene”). See also *Bee’s Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765, 766 (Ky. 1960) (“limitation [on individual participation in Commission proceedings] was not in violation of the Constitution, and ... deprives no one of his rights”). Intervention is in the “sound discretion” of the PSC. *Inter-County Rural Elec. Co-Op. Corp. v. Public Service Commission*, 407 S.W.2d 127, 130 (Ky. 1966).

REQUEST FOR RELIEF

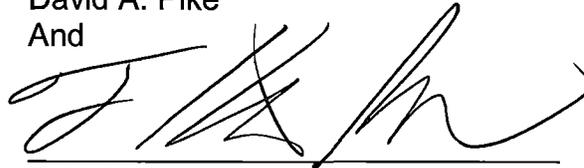
WHEREFORE, there being no grounds for intervention by any of the Three Residents, Applicant respectfully requests the Kentucky Public Service Commission:

- (a) Accept this Response for filing;
- (b) Deny the Three Residents Motion to Intervene; and
- (c) Grant Applicant any other relief to which it is entitled.

Respectfully submitted,



David A. Pike
And



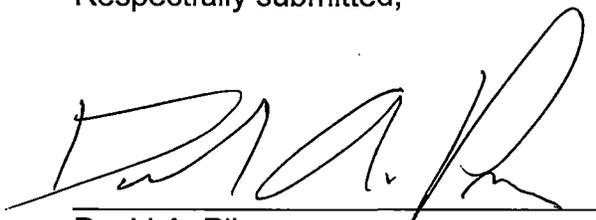
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CERTIFICATE OF SERVICE

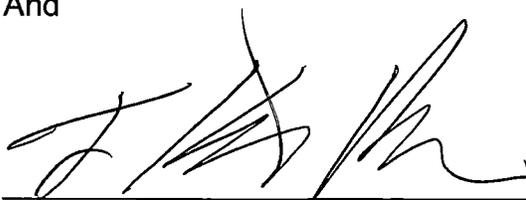
The undersigned hereby certifies that on this 1st day of August 2019, a true and accurate copy of the foregoing was sent by U.S. Postal Service first class mail, postage prepaid, to:

W. Henry Graddy, IV
Dorothy T. Rush
W.H. Graddy & Associates
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Versailles, Kentucky 40383

Respectfully submitted,

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

David A. Pike
And

A handwritten signature in black ink, appearing to read 'F. Keith Brown', written over a horizontal line.

F. Keith Brown
Attorneys for Applicant