

**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

**AT&T MOBILITY'S RESPONSE TO SBA PUBLIC COMMENT  
SUGGESTING RENT REDUCTION ON EXISTING SBA TOWER**

**1.0 INTRODUCTION AND SUMMARY**

New Cingular Wireless PCS LLC d/b/a AT&T Mobility (“Applicant”), by counsel, hereby responds and objects to the December 4, 2020 SBA Communications Corporation (“SBA”) Public Comment suggesting a reduction in rent to \$3,000.00 per month on the existing SBA Tower in the vicinity of the proposed tower site in Casey County, Kentucky (“SBA Comment”).

The SBA Comment, as filed by a company which is not a public utility in Kentucky, should have no impact on the long-pending Public Service Commission (“PSC”) deliberations or decision on the Applicant’s request for a Certificate of Public Convenience and Necessity for construction of a cellular tower at the proposed location. SBA has been denied intervention in this proceeding by the PSC. The SBA Comment is an apparent attempt to upend the PSC’s deliberations and change fundamental evidentiary issues in the case far beyond the role of a non-party.

The PSC has previously recognized that last-minute efforts to identify purported collocation opportunities should not delay or thwart approval of a pending tower application. In fact, it has

granted CPCN's in no less than *five* cellular tower cases (the "Five Precedents")<sup>1</sup> with which we are aware when such issues have arisen. The PSC's well-reasoned findings and application of law for the grant of the CPCNs in the Five Precedents are excerpted in Section 3.0 below. The PSC's Orders in the Five Precedents are equally persuasive in the present proceedings.

The SBA Comment should further be disregarded for at least the following reasons:

(1) The Application is properly reviewed on facts, circumstances, and applicable law at the time of its filing on June 7, 2019;

(2) The PSC (by Order of November 19, 2019, as amended) scheduled and conducted a Public Hearing on the Application on December 11, 2019 "for the purposes of taking public comment" and the proceeding is now in the late stages of a submitted case with the new SBA Comment properly deemed untimely;

(3) The federal Telecommunications Act of 1996 ("TCA") requires state and local governments to make tower permitting decisions in a "reasonable time"<sup>2</sup> and further proceedings associated with the SBA Comment would delay this proceeding far beyond such standard;

(4) SBA's last-ditch effort is not evidence of a solution, but of the ongoing problem in that the non-binding SBA Public Comment states a rent which is still higher than offered by Uniti Towers LLC, and thus unreasonable. Significantly, the SBA Comment mentions nothing about changes to the other egregious terms of the lease on the SBA tower in the vicinity, which are equally important to the SBA Tower not being reasonably available pursuant to 807 K.A.R. 5:063(1)(s).

(5) The SBA Comment further exacerbates the broader problem of SBA's advocacy for Applicant to remain on existing towers which are not reasonably available. The PSC has before it no less than *five* pending SBA Motions to Intervene in other cellular tower cases<sup>3</sup> filed by Applicant. The SBA Comment in the present case appears to be a strategy likely to be duplicated in the other cases with the effect of precipitating broad multi-site delay and complication if the PSC does not timely act to thwart such efforts of a disgruntled competitor.

Applicant requests the PSC to give no effect to the SBA Comment and forthwith proceed to grant the requested CPCN.

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<sup>1</sup> See cases 2014-0098 (Alice Lloyd); 2014-0088 (East Point); 2014-0074 (Index); 2014-00135 (Nippa); and 2014-0087 (Staffordsville).

<sup>2</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>3</sup> See cases 2020-0300 (Lake City Luka); 2020-0310 (Happy Ridge Relo); 2020-0343 (Bethel/Chandler); 2020-0328 (Wisdom Relo/Dry Fork Road); and 2020-0360 (Jamestown Relo). In each of these cases SBA has filed a Motion to Intervene which stands submitted for PSC decision.

## 2.0 RELEVANT FACTUAL BACKGROUND

The following are key dates in the processing of the Application for a CPCN:

- Application Filed on June 7, 2019.
- No Deficiency Letter issued by PSC Staff on June 13, 2019.
- SBA Motion to Intervene Filed on June 25, 2019 without offer of Rent Reduction.
- Applicant's Response Opposing SBA Motion to Intervene Filed on July 2, 2019.
- Citizens Motion to Intervene Filed July 25, 2019.
- Applicant's Response Opposing Citizens Motion to Intervene filed August 1, 2019.
- PSC Order Denying SBA Motion to Intervene entered October 1, 2019.
- PSC Order Denying Citizens Motion to Intervene entered October 1, 2019.
- FCC Shot Clock 150-Day Deadline for PSC Decision – November 10, 2019.
- PSC Order Scheduling Local Public Hearing entered November 22, 2020.
- Local Public Hearing Conducted in Casey County on December 11, 2019.
- Applicant's Post-Hearing Memorandum filed December 30, 2019.
- Applicant's Motion for Confidential Treatment of Supplementary Evidence filed December 30, 2019 (along with Sealed Evidence).
- SBA Comment filed December 4, 2020.
- Pendency of Application since Non-Deficient Filing: 551 Calendar Days.

## 3.0 ARGUMENT

Past practice of the PSC and all applicable law require the PSC to fully discount the SBA Public Comment and proceed to complete its deliberations and grant the requested CPCN on all evidence of record.

**3.1 The Five Precedents Support the PSC Ignoring the SBA Comment.** This proceeding is not the first time the PSC has addressed efforts by tower companies to enlist the PSC in forcing FCC-licensed public utility wireless carriers to co-locate on existing towers. The PSC's Orders granting requests for CPCN in each of the Five Precedents included the following language:

"The Commission has long encouraged co-location as the preferred method in expanding telecommunication networks in underserved areas. However, in this matter, due to the delays arising from Appalachian Wireless's initial denial of New Cingular Wireless's co-location request, followed by Appalachian Wireless's subsequent request to intervene to pursue co-location, and concluding with Appalachian Wireless's withdrawal of its request, the Commission must balance its preference for co-location against the federal statutory deadline for action and the need to improve Kentucky's wireless network without undue delay. In this case, the Commission concludes that it is not feasible to pursue co-location and meet the federal statutory deadline by which the Commission must rule on New Cingular Wireless's application. Based upon the facts presented in this case, it is neither

reasonable nor in the public's interest or convenience to require New Cingular Wireless to further pursue co-location. Therefore, we will not require New Cingular Wireless to further pursue co-location, ....”

Similar considerations are present in the this proceeding considering: (1) the long pendency of the case in general; (2) that every day it is not decided is another day beyond the FCC Shot Clock deadline<sup>4</sup>; (3) that federal law encourages rapid deployment of wireless facilities and requires state and local government permitting decisions to be made in a reasonable time; and (4) that Kentucky statutory law recognizes the importance of wireless service to its citizens and the inherent value of competition in the industry.<sup>5</sup> On top of all of those considerations, the case for grant of a CPCN in the present case is even more compelling because the rent and other business terms prevent the SBA Tower from being reasonably available for collocation pursuant to 807 K.A.R. 5:063(1)(s).

SBA’s pleas by public comment for the PSC to consider a suggested new rent - 551 days after a PSC Staff No-Deficiency Letter was issued - should not persuade the PSC to add further steps or otherwise complicate and delay this proceeding to prevent grant of a CPCN to Applicant. Just as with the Five Precedents, the mantra of co-location cannot override other important facts, circumstances, and law<sup>6</sup> impacting the rights of Applicants, the responsibilities of the PSC, and consumer need for wireless service.

**3.2 The Application is Properly Reviewed on Facts and Circumstances at the Time of its Filing on June 7, 2019.** The suggestion of rent reduction is untimely in that Applicant evaluated the SBA tower in connection with due diligence on the proposed Uniti Towers LLC tower. Applicant

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<sup>4</sup> See *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”).

<sup>5</sup> KRS 278.546.

<sup>6</sup>For example, the Kentucky General Assembly recognizes that consumers benefit from market-based competition, which offers consumers of telecommunications services the most innovative and economical services. KRS 278.546. Accordingly, co-location is not the preeminent criterion for wireless permitting in the Commonwealth. Competition between tower companies is not disfavored.

found the rent and other terms of subleasing on the SBA Tower to be unreasonable. 807 K.A.R. 5:063 Section 1(s) speaks in terms of an applicant's statement that "... there is no reasonably available opportunity to co-locate...." (Emphasis added). The regulation does not require the applicant to represent there never could be a reasonably available opportunity to co-locate in the future. This is an important temporal consideration which SBA is trying to circumvent.

At great effort in time and out-of-pocket expenses in the tens of thousands of dollars, AT&T Mobility and Uniti Towers LLC have identified a suitable location for a new tower site, completed an option/lease with the landowner, completed a tower lease between them, had extensive exhibits prepared by in-house and outside contractor professionals, and have filed the within Application with the PSC as well as made permitting filings with other agencies.

Consideration of SBA's December 2020 suggestion of rent reduction is contrary to 807 K.A.R. 5:063 Section 1(s), which requires an applicant to engage in *pre-filing* efforts to identify and explore a "reasonably available opportunity to collocate...." This regulation does not allow a competitor with a financial stake to delay Applications by purporting to create *post-filing* collocation opportunities.

807 K.A.R. 5:063 - Section 1 begins by identifying the documentation required in order to file with the Commission an application for a certificate to construct a tower. Thus, an applicant properly obtains the required information well before filing the Application, just as Applicant has done in the present case.

Proceeding on to the pertinent Section 1(s), the regulation requires that the applicant "has considered" certain land use and values effects and "has concluded" there is no more suitable location "reasonably available." Significantly, the burden on the applicant is to make such statements upon filing the application. Applicant is not required to make a showing of any such conditions or facts at later dates. Furthermore, the applicant's conclusion is as to there being no more suitable location "reasonably available" rather than conceivably available, or possibly to become available in the future, or that might be available if a tower owner later reverses its original written lease terms, which in this case are memorialized in an existing fully executed tower collocation sublease on the

SBA Tower in the vicinity.

The PSC regulation does not rigidly require the Applicant to collocate merely because another tower is present in the area - instead, it logically contemplates the applicant "attempting to collocate," understanding that for various reasons, not all such attempts will be successful. One obvious reason would be the facts of the present case is the lack of "reasonable availability." In addition, the regulation does not contemplate repeated and ongoing attempts to collocate after an Application is filed - otherwise, a competitor like SBA could make repeated and ongoing attempts to delay the Commission's action on an Application by reversing prior positions or otherwise asserting reasons why collocation might become reasonable in the (purportedly) near future. Instead, the regulation requires an attempt to co-locate prior to filing an Application. Applicant complied with this mandate and nothing more is required. The Commission should - and must - reject any attempt by the Movant to interpret the plain language of this regulation as requiring otherwise.<sup>7</sup>

Applicant should not be subject to the shifting sands of the SBA strategic negotiating position once an application for a CPCN has been filed. SBA's approach identifies no change in "on the ground" physical circumstances, technology, or customer needs which merit further scrutiny by the PSC late in deliberations. Instead, SBA is merely identifying a calculated change in negotiating position based on pecuniary interests which resulted in its Motion to Intervene being denied in this

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<sup>7</sup> In *J. Randolph Lewis v. Jackson Energy Cooperative Corporation, et al*, 189 S.W.3d 87 (Ky. 2005) the Kentucky Supreme Court stated: "It is a primary rule of statutory construction that the enumeration of particular things excludes ideas of something else not mentioned.... The use of extrinsic justifications for expanding the statute was error. Where a statute is unambiguous, there is no need to use extrinsic evidence of legislative intent and public policy which the statute is intended to effect. A reviewing court cannot amend it by means of a so-called interpretation contrary to plain meaning." *Id.* at 92-94.

proceeding<sup>8</sup> and the prior Hansen Site Case<sup>9</sup>. The PSC should not indulge SBA's commercially motivated efforts to maintain its status as the having the only existing tower in the vicinity by halting deliberations and making efforts to compel settlement negotiations.<sup>10</sup>

**3.3 The PSC (by Order of November 19, 2019, as amended) Scheduled and Conducted a Public Hearing on the Application on December 11, 2019 “for the purposes of taking public comment.”** SBA had every opportunity to raise the issue of rent reduction as public comment over a year ago at the public hearing in Casey County in which the PSC's aforementioned Order expressly stated such hearing would be “for the purpose of taking public comment.” SBA's failure to take advantage of such opportunity and to, instead, file the SBA Public Comment on December 4, 2020,

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<sup>8</sup>The PSC's denial of the SBA Motion to Intervene in the within proceeding by Order of October 1, 2019 characterized SBA as follows:

“SBA argues in its Memo that its status as the only tower in the area is a special interest that it must be allowed to protect through intervention. It asserts that the KRS 278.020 “protects SBA's interest by disallowing the building of new facilities unless they are a public necessity. [footnote omitted]. However, KRS 278.020 safeguards the interest of the public, not that of SBA. The public's interest lies in ensuring that there is a public necessity for any new facilities built. SBA's interest is strictly commercial and lies in ensuring that no other facilities are built, allowing them to remain the only tower in the area with no competition to drive down rents. SBA's interest in this matter does not coincide with the interest of the public.”

<sup>9</sup> In Hansen, Case No. 2017-00435, the PSC denied the SBA Motion to Intervene in an Order dated March 26, 2018. In doing so, the PSC explained:

The [Public Service] Commission is under no illusion that SBA's request to intervene in this case is anything other than an attempt to protect its monopoly as the owner of the only tower in the area. 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 purposes of the Telecommunications Act of 1996, which is to promote competition. [footnote omitted.] *Id.* at p. 5.

<sup>10</sup> Considering SBA is not a party to this proceeding and the proceeding is before the PSC rather than the judiciary, the Kentucky Rules of Civil Procedure are not applicable. However, SBA's Public Comment is analogous to a party in civil litigation shortly before judgment, and after a hearing, attempting to entirely change its defensive strategy reflected in its answer and other filings. Courts are often unsympathetic to such dilatory efforts to prevent judgment. The PSC should act no differently.

almost a year after the public hearing, bars further consideration of the issue based on laches and waiver. *Urella v. Kentucky Board of Medical Licensure*, 939 S.W.2d 869, 873 (Ky. 1997).<sup>11</sup>

**3.4 The Federal Telecommunications Act of 1996 (“TCA”) Requires State and Local Governments to Make Tower Permitting Decisions in a “Reasonable Time.”**<sup>12</sup> Further proceedings associated with the SBA Comment would delay this proceeding, which was filed June 16, 2019, far beyond the TCA “reasonable time” standard.<sup>13</sup> Moreover, such delay could not be consistent with the broader purposes of the TCA. The U.S. Congress in adopting the Telecommunications Act of 1996 in the Act’s preamble recognized the importance of the “rapid deployment of new telecommunications technologies.”<sup>14</sup> (Emphasis added).

The U.S. Court of Appeals for the Sixth Circuit in its *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794 (6<sup>th</sup> Cir. 2012) Opinion rejected permitting standards which unreasonably extend the decision process:

“We agree with Judge Cudahay and adopt the “least intrusive” standard from the Second, Third, and Ninth Circuits. It is considerably more flexible than the “no viable alternatives standard”, as a carrier could endlessly have to search for different marginally better alternatives. Indeed, in this case the Township would have had

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<sup>11</sup>See also *O’Dea v. Clark*, 883 S.W.2d 888, 891-892 (Ky. Ct. App. 1994); *Kupper v. Kentucky Board of Pharmacy*, 666 S.W.2d 729, 730 (Ky. 1983); *Personnel Board v. Heck*, 725 S.W.2d 13, 17 (Ky. Ct. App. 1986); *Cumberland Valley Rural Electric Cooperative Corp. v. Public Service Commission*, 433 S.W.2d 103, 105 (Ky. 1968).

<sup>12</sup>47 U.S.C. § 332(c)(7)(B)(ii).

<sup>13</sup> Although not controlling on the PSC, KRS 100.987(4)(c) provides local planning commissions in Kentucky considering Uniform Applications for construction of a cellular tower to make their decision within *sixty* days of receipt of a complete application. This requirement calls into question why a planning commission can and is required to reach decision in sixty days, while SBA is this month filing a public comment in a PSC CPCN proceeding which was filed June 16, 2019 and remains pending. The SBA approach of raising a new issue at this late date heightens the disparity in the two types of cellular tower proceedings in the Commonwealth. A reasonable time for a PSC decision may be longer than the sixty days applicable to a planning commission but is surely not reasonable to allow the SBA Comment to push PSC deliberations and decision into oblivion beyond *eighteen months*.

<sup>14</sup>See 1996 federal Telecommunications Act Preamble, 110 Stat. 56 (“An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies” (Emphasis added.))



TMobile search for alternatives indefinitely.”

SBA advocates such an endless process for Applicant in which the PSC presides over a process of negotiations over lease terms until, at some point in an uncertain future, perhaps a new lease is negotiated on the existing tower and the within Application is withdrawn.

SBA has no basis to claim the PSC should further consider or take action on the SBA Comment because of purported issues of tower proliferation which inevitably are associated with aesthetic concerns. The Opinion of the U.S. District Court for the Eastern District of Kentucky in *Cellco Partnership v. Franklin County*, 553 F.Supp.2d 838 (E.D. Ky. 2018) rejected such concerns being raised to interfere with permitting decisions. In its Orders denying intervention in this proceeding and in the Hansen Site Case (2017-0435), the PSC likewise recognized such aesthetic concerns were irrelevant to its tower permitting CPCN decisions. Consequently, there is no basis for further delay in the PSC making its permitting decision in this proceeding.

Neither Kentucky law nor the TCA contemplate open-ended proceedings before the PSC prior to it making its decision on the CPCN Application. Consistent with *T-Mobile Central*, Applicant has complied with the requirements of KRS Chapter 278 and implementing regulations in filing the Application with a No-Deficiency letter issued by PSC Staff; and a public hearing has been held. Furthermore, Applicant has considered alternative locations in good faith, including ruling out the existing SBA Tower as not being reasonably available per 807 K.A.R. 5:063 Section 1(s). Nothing more is required. Acceding to the wishes of non-party SBA in complicating and extending this long-pending proceeding would take its disposition far beyond a reasonable time.

Whether the PSC conducts further inquiry or hearing as a result of the SBA Comment is within the discretion of the PSC per KRS 278.020(1). See also *Kentucky Public Service Commission Commonwealth ex rel. Conway*, 324 S.W.3d 373, 379 (Ky. 2010) explaining “Hearings are not necessarily required to resolve the complaint.” SBA by no means has any right to further consideration or action on its comments. On the merits of the issues raised, and in the interest of compliance with the TCA “reasonable time” standard, the PSC should promptly move to final decision on the Application without

regard to the SBA Comment.

### **3.5 SBA's Last-Ditch Effort is Not Evidence of a Solution, but of the Ongoing Problem**

There are a number of lease terms key to reasonable availability which SBA has failed to address by the simple suggestion of rent reduction. Such provisions prevent the SBA tower from being reasonably available even if rent is reduced to \$3,000.00 per month, an amount which still exceeds the monthly rent offered by Uniti Towers LLC. The rent reduction proposal is typical of SBA's "shell game" strategy of stretching out administrative proceedings and keeping unreasonable terms in place for inclusion in any new lease involving general rent reduction.

The PSC should consider Applicant's Post-Hearing Memorandum in Support of the Application filed December 30, 2019 in deliberating any further action in this proceeding. Such Memorandum references the following which is subject to a Motion for Confidential Treatment:

(1) An Affidavit of a Principal-Network Planning Engineer of AT&T addressing the service advantages of the proposed new cellular antenna tower; and

(2) Documentation of Cost Advantages of the proposed new Uniti Towers LLC ("Uniti") communications facility over the existing SBA tower on which non-party objectors have demanded that Applicant remain located.

SBA's Comment cannot override the evidentiary weight of such submissions supporting the grant of a CPCN.

A collocation agreement is necessarily very detailed. Such agreements may be subject to extended negotiations on many points. Issues can arise as to a variety of indemnifications, insurance, environmental issues, length of term, termination rights, ground space rights, replacement/adding of antennas and appurtenances, regulatory compliance, commencement of and amount of rent and escalation thereof, etc. Also, rights and responsibilities as to expensive tower modifications associated with structural loading may come into play. A mere suggestion of rent reduction as found in the SBA Comment does not resolve these other issues, including all information subject to the referenced Motion for Confidential Treatment which independently prevent the SBA Tower in the vicinity from being reasonably available pursuant to 807 K.A.R. 5:063 Section 1(s).

**3.6 The SBA Comment Further Exacerbates the Broader Problem of SBA's Effort to Confine Applicant to Existing Towers.** The PSC has before it no less than five pending SBA Motions to Intervene in other cellular tower cases<sup>15</sup> filed by Applicant. The SBA Comment in the present case appears to be a strategy likely to be duplicated in the other cases with the effect of precipitating broad multi-site delay and complication if the PSC does not timely act to thwart such efforts of a disgruntled competitor.

The specter of a piecemeal approach of SBA making suggestions of settlement late in proceedings in one tower CPCN case after another, without resolving the reasonable availability issue is troubling. The obvious intent of such efforts is to encourage the PSC to abate proceedings or take other action to indulge such proposals, which necessarily would involve protracted delay. It is not in the interest of the public convenience and necessity, competition, or improvement of wireless service in the Commonwealth to fall into the trap set by SBA. Absent PSC action to bring such proceedings to a close, SBA could sequence such requests over many cases to maximize delay and complication of proceedings. The PSC has previously recognized in denying the SBA Motion to Intervene that "... SBA's interest is not in rates and services, but instead is a pecuniary interest...."<sup>16</sup>

In recognition of all of the specifics of the Casey County site and of the global facts and circumstances of other pending cases, the PSC should take no action in response to the SBA Comment and should proceed forthwith to grant of the requested CPCN in this proceeding.

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<sup>15</sup> See cases See cases 2020-0300 (Lake City Luka); 2020-0310 (Happy Ridge Relo); 2020-0343 (Bethel/Chandler); 2020-0328 (Wisdom Relo/Dry Fork Road); and 2020-0360 (Jamestown Relo). In each of these cases SBA has filed a Motion to Intervene which stands submitted for PSC decision.

<sup>16</sup> PSC Order of October 1, 2019, p. 2 (2019-0176).

#### 4.0 CONCLUSION AND REQUEST FOR RELIEF

Applicant AT&T Mobility respectfully requests the Kentucky Public Service Commission:

- (a) accept this Response to the SBA Comment for filing;
- (b) promptly grant the requested Certificate of Public Convenience and Necessity to construct and operate the cellular tower at the location set forth in the Application without delay; and/or
- (c) grant Applicant any other relief to which it is entitled.

Respectfully submitted,

*David A. Pike*

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And

*F. Keith Brown*

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of December, 2020, a true and accurate copy of the foregoing was electronically filed with the PSC and sent by U.S. Postal Service first class mail, postage prepaid, to:

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Tia J. Combs,  
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Respectfully submitted,

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