

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

In the Matter of:

APPLICATION OF VERTICAL BRIDGE DEVELOPMENT, LLC AND)
NEW CINGULAR WIRELESS PCS, LLC DBA AT&T MOBILITY)
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO CONSTRUCT) **CASE:**
A WIRELESS COMMUNICATIONS FACILITY AT) **2020-00270**
STATE ROUTE 2194W, HICKORY)
GRAVES COUNTY, KENTUCKY 42051)

SITE NAME: US-KY-5040 / WORKMAN ROAD

**APPLICANT’S RESPONSE TO SBA COMMUNICATIONS CORPORATION MOTION
TO INTERVENE**

Vertical Bridge Development, LLC, a Delaware limited liability company, and New Cingular Wireless PCS, LLC, a Delaware limited liability company dba AT&T Mobility (“AT&T”) (collectively “Applicant”), by counsel, renders this Response to the Motion to Intervene filed by SBA Communications Corporation (“SBA”).

[Note: Applicant recognizes that the core of the current Motion to Intervene has been considered in prior cases by the Commission and that in each case the Commission has denied SBA’s intervention requests. Applicant desires not to present redundant arguments but submits the following concise Response out of respect to the Commission and in consideration of its time.]

SBA’s Motion to Intervene should be denied because their argument fails to meet the standard criteria for granting intervention. The standard for intervention is found in 807 KAR 5:001 Section 4(11) and provides that a motion to intervene, “...shall state his or her interest in the case and how an 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.” The regulation further states that, “The commission shall grant a person leave to intervene if the commission finds that he or she

has 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.”¹

The Kentucky Public Service Commission (“Commission”) has previously denied motions by SBA in Case Nos. 2019-00176 and 2017-00435 based on the above criteria and should deny SBA’s request in this case. SBA does not have a special interest in the proceeding that is not otherwise adequately represented. Nor has/will SBA be able to present issues or develop facts that will assist the Commission in considering this matter. Allowing SBA to intervene would unduly complicate this proceeding.

1. SBA does not have a special interest in this case. SBA’s interest in this proceeding is purely pecuniary. SBA’s easement on the land upon which its tower sits is merely a mechanism to obtain the necessary property rights to construct and operate their tower. It does not rise to the level of an interest in “rates” or “service” of a utility. The Commission has considered similar SBA arguments in several prior proceedings and has in their March 26, 2018 Order in Case No. 2017-00435 stated, “The 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.”

2. Construction of the proposed tower is in the public interest.

a. SBA’s Motion fails to recognize that competition is a desired outcome as to wireless facilities. One of the stated purposes of the Federal Telecommunications Act is to promote competition.² This purpose has been reiterated by the Commission in those cases previously mentioned in this Response.³ It is further outlined in KRS 278.546(4) which states, “Consumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and

¹ 807 KAR 5:001 Section 4(11)(b)

² T-Mobile USA Inc. v. City of Anacortes, 572 F.3d 987, 991 (9th Cir. 2009).

³ Kentucky Public Service Commission Case Nos. 2017-00435 and 2019-00176.

economical services.” SBA’s only interest is to remain the only tower in the area with no competition.

- b. SBA’s Motion fails to provide evidence that wireless service from its tower would be superior to that from the proposed tower. The radio frequency study provided in SBA’s Motion concludes, “...the proposed site provides comparable coverage to Graves County, KY due to its close proximity to the existing site.”⁴ The study further states that additional RF coverage, such as 5G technologies, were not reviewed.⁵ Any effort by SBA to produce evidence as to how its tower might provide the needed wireless services from a technical perspective would only complicate and disrupt the proceedings. AT&T strives to provide consumers of wireless services with the most innovative services at reasonable charges.
- c. AT&T made the argument that, “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”, in their response to motion to intervene dated July 02, 2019 in Case No. 2019-00176 and I respectfully restate that argument verbatim: *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 communications 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, which can only have the effect of slowing deployment of new or*

⁴ SBA Motion to Intervene, Exhibit A.

⁵ Id.

expanded wireless services. While foreclosing competition may be in SBA's narrow commercial interest, it is not in the interest of the public.

3. AT&T colocation efforts have been duly noted. SBA's Motion states that AT&T has failed to address any attempt to co-locate on the existing tower. AT&T is currently co-located on the existing SBA tower. SBA is attempting to exploit the fact that it has the only tower in the area by demanding unreasonable terms for the collocation of antennas and equipment. Under 807 KAR 5:063 Section 1(s) a statement is required regarding the Applicants attempt to co-locate, "...no reasonably available opportunity to co-locate..." (Emphasis added). SBA's tower does not provide that reasonably available opportunity to co-locate within the meaning of 807 KAR 5:063 Section 1(s) because SBA does not make its tower available on reasonable terms considering the rent and other terms offered by the proposed Vertical Bridge Development, LLC tower. Unreasonable and excessive fees charged by SBA divert resources that could otherwise be used by AT&T to invest in expanding wireless networks and availability of wireless services to all Kentuckians, hinder upgrades, and make it less likely that funds are available to deploy new advanced technologies that require the installation of new equipment. SBA further provides contradictory evidence on page 7 of its Motion by stating in the last line of paragraph c, "AT&T has not contacted SBA specifically concerning the rents on the SBA tower." But then goes on to provide the following statement in footnote 8, "SBA does admit that it received a bulk request from AT&T to lower rents and make changes to lease agreements..."

4. Motion to Intervene should be denied based on SBA's failure to meet the standards for Intervention and precedent set by previous Commission Orders to similar requests. SBA has failed to meet the standards for intervention. SBA does not have an interest in the rates or services of a utility. The Commission denied SBA's prior Motions for Intervention in two (2) prior cases that were based on similar arguments. Direct participation in this case by SBA as an intervenor would not add to the Commission's analysis or its decision on the request for a Certificate of Public Convenience and Necessity. The Commission has previously recognized that if SBA is permitted to intervene, this intervention would unduly complicate the proceeding. SBA's goal of

remaining the only wireless communication facility in the area does not rise to the level of a special interest that must be protected through intervention.

WHEREFORE, there being no grounds for intervention by SBA, Applicant respectfully request the Kentucky Public Service Commission:

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

Respectfully submitted,

Todd R. Briggs
Briggs Law Office, PSC
10200 Forest Green Blvd
Suite 112
Louisville, KY 40223
Telephone (844) 331-3402
Counsel for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2020, a true and accurate copy of the foregoing was sent by USPS first-class mail, postage prepaid, to the following:

Casey C. Stansbury &
Tia J. Combs
FREEMAN MATHIS & GARY, LLP
2525 Harrodsburg Road, Suite 500
Lexington, KY 40504-3359

s/ Todd R. Briggs

Todd R. Briggs
Counsel for Applicant