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	)	
AND UNITI TOWERS LLC, A DELAWARE	)	
LIMITED LIABILITY COMPANY	)	
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC	)	CASE NO.: 2020-00300
CONVENIENCE AND NECESSITY TO CONSTRUCT	)	
A WIRELESS COMMUNICATIONS FACILITY	)	
IN THE COMMONWEALTH OF KENTUCKY	)	
IN THE COUNTY OF LIVINGSTON	)	

SITE NAME: LAKE CITY / LUKA

* * * * * * *

APPLICANTS' RESPONSE TO
SBA COMMUNICATIONS CORPORATION'S AMENDED MOTION TO INTERVENE

New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility ("AT&T") and Uniti Tower LLC, a Delaware limited liability company ("Applicants"), by counsel, make this Response to SBA Communications Corporation's Amended Motion to Intervene filed by SBA Communications Corporation d/b/a SBA Towers III ("SBA").

INTRODUCTION AND SUMMARY

The issues SBA attempts to raise in its Motion have been addressed by Applicants in their application, and the fact that it would cost AT&T well over $1,000,000.00 more in rent as a co-location tenant on an SBA-owned tower versus co-locating on the proposed Uniti tower dictates that the PSC must deny SBA's Motion in accordance with clear standing precedent.

As set forth in their application requesting issuance of a Certificate of Public Convenience and Necessity ("CPCN") filed in this matter, the public convenience and necessity require the construction of the proposed wireless communications facility ("WCF") to bring or improve AT&T Mobility's services to an area currently not served or not adequately served by AT&T Mobility by increasing coverage or capacity and thereby enhancing the public's access to innovative and competitive wireless communications services. Applicants have considered the likely effects of the installation of the proposed WCF on nearby land uses and values and have concluded that there is no more suitable location reasonably available from which adequate services can be provided, and that there are no reasonably available opportunities to co-locate AT&T's antennas on an existing structure. SBA, in its Motion, asserts that an existing tower (the "SBA Tower") is a co-location opportunity based on the mere fact of its location within AT&T's search area, and attempts to support its assertion based upon "technical engineering information." However, this argument misses the point and does not address the availability of the SBA Tower as a co-location opportunity.

The current rent charged by SBA for AT&T to co-locate on the SBA Tower is over two times what Uniti will charge AT&T to co-locate on the proposed new Uniti tower. Pursuant to the agreement between AT&T and Uniti, annual rent increases are less than the annual rent increases charged by SBA. At the current rate of rent increases, over the next twenty (20) years, it would cost AT&T well over $1,000,000.00 more in rent as a co-location tenant on the SBA Tower versus co-locating on the proposed Uniti tower. This is the threshold issue in regard to the question of the availability of a co-location alternative, and any other issues raised as to the technical capacity or physical suitability

of the SBA Tower are simply inapposite and merely distractions from the dispositive issue.

In recent years, SBA has repeatedly made similar arguments for intervention in cases with materially equivalent facts in an effort to protect its monopoly position as the owner of the sole tower in a given geographic area (see PSC Case Nos. 2017-00435 and 2019-00176). In each of these cases, the PSC has denied SBA's comparable requests for intervention, and precisely the same considerations apply in the present case to support denial of their present Motion.

SBA's focus in its Motion on structural capacity of the SBA Tower and hypothetical radio frequency coverage availability from various locations is wholly irrelevant to the availability of the SBA Tower as a co-location opportunity and is a distraction from the fact that the SBA tower is not an available co-location opportunity on the very same basis previously examined by the PSC comprehensively and definitively in Case Nos. 2017-00435 and 2019-00176 wherein SBA was appropriately denied intervention.

ARGUMENT IN REPSONSE

1. SBA has repeatedly failed on these same arguments for intervention, and its present motion must be denied on the same grounds as res judicata.

SBA filed a Motion for Intervention in Case No. 2017-00435 ("Hansen" case), which case presented material facts that correspond precisely to the present case (i.e., SBA owned a tower within the geographic area that the applicants therein sought to construct a new WCF). The PSC denied the SBA Motion in an Order dated March 26, 2018. In doing so, the PSC explained:

> 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. 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.

The Hansen applicants were granted a Certificate of Public Convenience and Necessity by Order of the PSC dated November 1, 2018, and SBA appealed to Franklin Circuit Court. However, their appeal was dismissed with prejudice by the Court via an Order entered January 11, 2019 in Action Number 18-CC-1180, and this final judgment was not further appealed.

In Case No. 2019-00176 ("Dunnville Relo" case), which case also presented material facts that correspond precisely to the present case, the PSC denied an SBA Motion to Intervene by its Order dated October 1, 2019. The PSC reasoned "[t]he Commission does not believe that SBA's stated goal of remaining the only wireless communication facility in the area rises to the level of a special interest that must be protected through intervention." No timely appeal of this Order to Franklin Circuit Court was filed pursuant to KRS 278.410.

The Kentucky Court of Appeals has explained that "[o]nce having litigated an issue and having failed to avail oneself of the right to appeal, a litigant is estopped to collaterally raise the same issue involving the same parties." *Ward v. Natural Resources & Environmental Protection Cabinet*, 814 S.W.2d 589, 591 (Ky. App. 1991). Accordingly, SBA is subject to this rule and its Motion should therefore be denied.

The PSC itself has repeatedly rejected efforts by parties to revisit the same claims and issues in successive proceedings that have been thoroughly examined in prior cases. For example, the PSC's November 26, 1996 Order *In the Matter of West McCracken Water District Application* (1996 Ky. PUC LEXIS 831) cited the *Ward* case in recognizing

application of the doctrine of collateral estoppel to PSC proceedings. The PSC's April 8, 2016 Order *In the Matter of Petition of Mountain Water District for Modification of Order in Case No. 2014-00342* (2016 KY. PUC LEXIS 386) explains: "[w]e find the doctrine of res judicata applies to the quasi-judicial acts of the Commission and precludes re-litigation of claims unless a significant change of conditions or circumstances has occurred between two successive administrative hearings." It now follows that application of res judicata precludes SBA's present intervention request in that since the PSC's Orders denying SBA's corresponding requests in the Hansen and Dunnville Relo cases there have been no significant changes in applicable conditions or circumstances. Furthermore, SBA has not identified any material difference in the facts applicable to the present case in comparison to these prior analogous cases.

The PSC's November 16, 2017 Order *In the Matter of Robert David Shouse, Complainant v. Kentucky Utilities Company, Defendant* (2017 Ky. PUC LEXIS 1120) is likewise applicable in concluding "… [t]he doctrine of res judicata, particularly collateral estoppel, bars Mr. Shouse from re-litigating in his Complaint the identical issues that were raised and fully adjudicated in Case No. 2016-00370."

Even in the face of the foregoing precedent, SBA seeks to use the same bases as those raised in the Hansen and Dunnville Relo cases to justify intervention. The third time should not be a charm for SBA. These efforts only show SBA's determination to advance the "pecuniary" interest the PSC recognized in the aforementioned orders. SBA should be bound by the previous Orders of the PSC, and its current Motion should be denied within the PSC's ample discretion. SBA should not be allowed to continue to advance rejected arguments in further cases as a means to harass and delay applicants

seeking to provide wireless service.

SBA's efforts to revisit the same legal issues on which it was previously denied intervention on multiple occasions implicate issue preclusion, administrative res judicata, and collateral estoppel. As stated in *Godbey, et al v. University Hospital, et al*, 975 S.W.2d 104, 105 (Ky. App. 1998), "Kentucky has for many years followed the rule that the decisions of administrative agencies acting in a judicial capacity are entitled to the same res judicata effect as judgments of a court." The above-referenced PSC Orders of March 26, 2018 and October 1, 2019 clearly rejected SBA's arguments for intervention on the merits in prior WCF CPCN proceedings so as to make the rule in *Godbey* squarely applicable in the present case. SBA's Motion presents the specter of the PSC and applicants for CPCNs having to address the same rejected legal arguments over and over in future cases. The PSC should not facilitate such misuse of the administrative process and should deny SBA's Motion.

2. SBA's interest in this proceeding is purely proprietary and has nothing to do with public convenience and necessity.

SBA acknowledges in its motion that the PSC has already determined that its ownership of a tower in the area of the Proposed Tower is not a proper special interest under 807 KAR 5:001 Section 4(11) that justifies intervention in this proceeding. SBA's effort to intervene in this action is no different from its failed efforts at intervention in both the Hansen and Dunnville Relo cases. The PSC's March 26, 2018 Order in the Hansen case (Case No. 2017-00435) explained: "[t]he 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."

3. SBA's motion wholly fails to recognize that competition is a desired outcome as to wireless facilities.

The current rent charged by SBA for AT&T to co-locate on the SBA Tower is over two times what Uniti will charge AT&T to co-locate on the proposed new Uniti tower. Pursuant to the agreement between AT&T and Uniti, annual rent increases are less than the annual rent increases charged by SBA. At the current rate of rent increases, over the next twenty (20) years, it would cost AT&T well over $1,000,000.00 more in rent as a co-location tenant on the SBA Tower versus co-locating on the proposed Uniti tower.

The PSC reviewed the implications of an analogous rent disparity in the Hansen case (Case No. 2017-00435), and in its March 26, 2018 Order the Commission clearly articulated its finding that such discrepancy was a valid basis for a wireless communications provider not to co-locate, as follows:

> 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.

SBA's Motion ignores the PSC's concern that SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers, and its request to intervene runs counter to the mission of the PSC in promoting competition in the wireless industry

as reflected in the federal Telecommunications Act and Kentucky law.

4. SBA's Motion and attachments regarding wireless service from its tower are not relevant.

SBA has attached to its motion a document purporting to be a radio frequency ("RF") coverage plot analysis prepared by an unidentified person stating only that "… the existing and proposed sites provide comparable coverage…" Applicant does not deny that it is currently co-located on the SBA tower in the vicinity, and seeking to explore coverage comparisons is a diversion from the issue of whether the SBA tower is a reasonably available opportunity to co-locate. Any effort by SBA to produce evidence as to how its tower might provide the needed wireless service from a technical perspective only complicates and disrupt the proceedings without addressing the threshold issue of availability.

5. "Reasonable Availability"

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. As AT&T previously explained, SBA's tower does not provide that "reasonably available opportunity to co-locate," 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. Significantly, SBA conspicuously fails to address the "reasonably available opportunity to co-locate" issue in its Motion, particularly the import of material rent disparities.

6. AT&T is committed to providing state-of-the-art telecommunications services at competitive prices, consistent with both Kentucky and

Telecommunications Act policies.

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 ("Telecommunications 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).

7. 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, 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, it is not in the interests of the public.

8. SBA's Exploitation of its "Only Tower" in the Area Status.

SBA represents it owns or controls a tower in the vicinity of the proposed tower on which AT&T is co-located. 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 is willing and able to (i) build a tower that accommodates AT&T's specific needs and future projected requirements and (ii) offer terms and conditions to AT&T that are substantially more attractive than those offered by SBA. Of course, SBA failed in its efforts at intervention in the Hansen and Dunnville Relo cases on facts analogous to the present case. AT&T's proposal to co-locate on a new Uniti Towers LLC tower should be treated the same as the prior proposals, including preserving AT&T's and Uniti Towers LLC's rights to due process and equal protection.

9. Excessive SBA Rent Diverts Funds from Utility Service.

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. They also 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 an address of 880 Reed Road, Grand Rivers, KY 42045 (37° 03' 29.38" North latitude, 88° 14' 10.91" West longitude) so that it may continue to offer the innovative and economical wireless services promoted as a specific policy goal of the General Assembly at KRS 278.546(4).

10. SBA Motion Prevents Competition.

The intent of SBA's Motion 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" (emphasis added). SBA's attempt to protect its grip on having the sole tower in the area undermines both of these goals.

11. Encouraging Competition and the Public Convenience and Necessity are Consistent Goals.

Contrary to the SBA Motion, the tower proposed by Applicants is necessary to increase competition among 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 Livingston 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 an existing tower owner to hide behind general principals of co-location to demand unreasonable above-market compensation from wireless carrier utilities without regard to competing lower cost site alternatives in the vicinity.

12. Co-location Opportunities for Additional Wireless Carriers is Promoted by the Proposed Tower.

In addition to promoting competition among 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, which is a key to opening up competition (see Exhibit B to the Application).

13. Judicial Concerns as to Excessive Tower Rent.

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 (9th 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 (6th 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 co-locate" pursuant to 807 K.A.R. 5:063-Section 1(s).

14. Aesthetic Arguments Fail to Support Intervention.

Further, to the extent SBA's argument is intended to suggest that a tower (other than SBA's, presumably) would be unaesthetic, such generalized concerns do not provide any basis for intervention or denial of the application. Similar arguments based upon unsupported lay opinions regarding the siting of WCF towers were rejected by the PSC in Case No. 2017-00368 and in Case No. 2017-00435. 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 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.

15. Judicial Precedent Rejects Aesthetic Arguments.

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 a new tower 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 (6th Cir. 2012).

Of course, that kind of vague objection to “unchained proliferation” is all that SBA proffers 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.

16. Public Convenience Versus Pecuniary Interest of SBA.

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[1] 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 complies 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.

17. The Proposed Uniti Towers LLC Rent Establishes a New Market Rent.

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. Accordingly, the proposed Uniti Towers LLC tower establishes a new market rent benchmark. SBA’s intervention would not change these critical facts and would only complicate and disrupt the proceedings.

[1] 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."

18. 807 K.A.R. 5:063 – Section 1(s) is Dispositive on SBA Motion.

In consideration of all of the foregoing facts, law, and circumstances, SBA's tower does not provide a "reasonably available opportunity to co-locate," 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 new market rent established by the Uniti Towers LLC site. The PSC should not facilitate SBA's efforts to maintain market exclusivity for the sole purpose of extracting onerous financial terms when the proposed new tower on other property meets service needs and all applicable law.

19. PSC Staff Review More Effectively Meets Standards for Agency Review than Adversarial Intervention Proceedings by a Competitor.

If any further inquiry as to 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 timely to move forward with its decision on the requested CPCN. Such an approach is consistent with the federal Telecommunications Act's encouragement of the rapid deployment of wireless communications facilities,[2] and would be far more likely to resolve this dispute over reasonable availability within the time frames of the FCC's Shot Clock Ruling[3] and the PSC's normal time frame for processing cellular tower applications. This approach also would be consistent with the General Assembly's mission for the PSC for

[2]See *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.")

[3]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").

telecommunications as 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."

20. SBA Fails to Meet Standards for Intervention.

KRS 278.650 requires an applicant seeking to construct a WCF in areas such as unincorporated Livingston County to apply to the PSC for a CPCN pursuant to KRS 278.020(1). KRS 278.020(1) provides in pertinent part that:

> Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion[4] conduct for all interested parties, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part …. (Emphases added.) *Id*. at KRS 278.020(1).

Kentucky Public Service Commission implementing regulations at 807 KAR 5:001 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

4 The SBA Motion to Intervene repeatedly offers to present evidence if it is granted Intervention. *Id*. at pages 2, 5, and 6. Whether any public hearing for the offering of evidence is held 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's desire to offer or take proof does not mandate its Motion be granted or that any hearing take place.

fully considering the matter without unduly complicating or disrupting the proceedings" (emphasis added). *Id.* at 807 KAR 5:001. SBA's Motion to Intervene fails to satisfy these standards. The PSC and its Staff are well-qualified to examine the facts surrounding Applicants' proposed tower in connection with their statutory and regulatory obligations. Direct participation in the case by SBA as an intervenor would not add to the PSC's analysis and its ultimate decision on the request for a CPCN. 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.

21. Courts have Upheld Denials of Intervention.

Kentucky's appellate courts have upheld PSC denials of requests for intervention in CPCN cases. For example, in *EnviroPower, LLC v. PSC*, 2007 Ky. App. Unpub. LEXIS 121 (Ky. App. 2007), the Kentucky Court of Appeals upheld the PSC's denial of a motion to intervene in a CPCN proceeding which had been upheld by the Circuit Court. The Court of Appeals noted that a PSC decision to deny intervention is reviewed only for an abuse of discretion, and found that the PSC did not abuse that discretion in denying intervention to a person seeking intervention (EnviroPower) that did not "have an interest in the 'rates' or 'service' of a utility" seeking a CPCN, but that instead was merely a competitor. While EnviroPower held permits under which it had expected to construct the facility that the CPCN authorized the utility to self-construct instead, the Court agreed that this was insufficient to give EnviroPower a right to intervene, as it "had a mere expectancy and no fundamental property right." The PSC relied on *EnviroPower* is its denial of SBA's Motion

to Intervene in PSC Case No. 2017-00435 at pages 3 and 5 and should likewise do so in this proceeding.

22. Parallels to *EnviroPower*.

SBA claims no interest in AT&T's rates or services, but instead is merely a competitor that would prefer to prevent AT&T from using the proposed tower. SBA may have some expectancy that wireless carriers will use its tower, but that does not equate to any fundamental property right to compel wireless carriers to use SBA's tower or to prevent the construction of competing infrastructure. Just as in *EnviroPower*, SBA is attempting to advance its pecuniary interests rather than public issues regarding rates and service. Consistent with the PSC's decision as upheld by the Court of Appeals in *EnviroPower,* SBA's Motion to Intervene should be denied.

23. 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 intervenors 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 SBA's 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 Butle*r (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).

24. Opportunity to File Comments in Absence of Intervention.

In all of the 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 person or entity to be heard in a PSC proceeding.

25. SBA has No Right to Intervene.

SBA has only a right to *request* intervention in PSC 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 ground for intervention by SBA, Applicants respectfully request the Kentucky Public Service Commission:

(a) Accept this Response for filing;

(b) Deny the Motion to Intervene; and

(c) Grant Applicants any other relief to which they are entitled.

Respectfully submitted,

David A. Pike

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David A. Pike
And

F. Keith Brown

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9 day of October 2020, a true and accurate copy of the foregoing was sent by U.S. Postal Service first class mail, postage prepaid, to:

Casey C. Stansbury & Tia J. Combs
Freeman, Mathis & Gary, LLP
2525 Harrodsburg Road, Suite 500
Lexington, KY 40504

Respectfully submitted,

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