

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**  
**CASE NO.: 2020-00300**  
*Electronically Filed*

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 CONVENIENCE AND NECESSITY  
TO CONSTRUCT A WIRELESS COMMUNICATIONS FACILITY IN THE  
COMMONWEALTH OF KENTUCKY  
IN THE COUNTY OF LIVINGSTON

**SBA COMMUNICATIONS CORPORATION'S**  
**REPLY IN SUPPORT OF ITS AMENDED MOTION TO INTERVENE**

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Comes SBA Communications Corporation and for its Reply in Support of its Amended Motion to Intervene, states as follows:

In responding to SBA's Motion to Intervene, New Cingular Wireless PCS, LLC, a Delaware Limited Liability Company d/b/a AT&T Mobility and Uniti Towers LLC (collectively the "Applicants") ignore the requirements for intervention found in 807 KAR 5:001 Section 4(11). SBA has established that it meets the requirements for intervention found in this section by demonstrating that it can present issues and develop facts which are necessary to the Public Service Commission's consideration of this matter which are not currently being presented by the Applicants.

Instead of focusing on the discrete legal issues contained in SBA's Motion to Intervene, the Applicants focus on how a new tower will benefit AT&T monetarily, even going so far as to argue that this is the "dispositive issue." Notably, AT&T provides no explanation as to how their pecuniary win will materialize in convenience or benefits in rates and services to the local

consumers. Instead, the Applicants attempt to muddy the waters by arguing that SBA's Motion is barred by res judicata. AT&T goes on to argue that SBA's proprietary interests preclude it from intervening in this matter while brazenly asserting that its own proprietary interests are actually "dispositive." These arguments are unavailing and distract from the issue before the Commission.

Because SBA has presented evidence that it meets the requirements of 807 KAR 5:001 Section 4(11), it should now be allowed to intervene in this matter.

**I. The issue before the Commission is whether SBA is likely to present issues or to develop facts that assist the commission in fully considering AT&T's Application.**

The Application is bare of evidence as to actual improvements to consumer rates and services. The Applicants only vaguely state that building a new tower (the "Proposed Tower") will allow AT&T to "increase[e] coverage or capacity." This statement is so generic that it provides almost no information at all.

The Applicant's cagey explanations are particularly unhelpful when the Public Service Commission considers the particular application at issue here. In this matter, the Applicants seek to build their Proposed Tower only *slightly over one tenth of a mile* from the SBA Tower and it is very similar in structure to the SBA Tower. There is no argument to be made simply having a new tower in the area will do anything to "increase[e] coverage or capacity" as the physical location and structure of the two towers is too similar to make this plausible. If the Applicants wish to cogently make an argument that a new tower is needed to provide some additional coverage when another physically similar tower is already located in nearly the exact same space, more is required.

While the Application is devoid of this information, SBA can assist the PSC in assessing whether the Proposed Tower will provide any benefit in rates and service. SBA will "present issues or develop facts that will assist the commission in fully considering the matter" as required

by 807 KAR 5:001 Section 4(11). SBA can provide additional evidence and testimony, and any other resources that could fill in the gaps in the Application related to actual convenience or necessity for the public.

In addition, it is not clear how presenting this information could in anyway complicate or disrupt proceedings. In fact, the opposite appears to be true as the quick furnishing of information to the PSC by SBA can only aid in streamlining the decision-making process.

**II. SBA's arguments are not precluded by res judicata or collateral estoppel.**

The Applicants argue that SBA should not even be permitted to bring its Motion because it is barred by collateral estoppel. However, the essential elements of collateral estoppel are (i) identity of issue; (ii) a final decision or judgment on the merits; (iii) a necessary issue which the estopped party was given a full and fair opportunity to litigate; and (iv) a prior losing litigant. *Moore v. Cabinet for Health and Family Services*, 954 S.W.2d 317, 319 (Ky. 1997). These are not satisfied here as the issues are not identical.

As an example of the legal position that identical issues that have been previously adjudicated should not be re-litigated, the Applicants cite *In the Matter of Robert David Shouse v. Kentucky Utilities Company* (2017 Ky. PUC Lexis 1120). That case involved exact rates and a single individual espousing the identical argument that the PSC had previously heard from said individual regarding exact same rates in the prior case. *Id.* In contrast, not only does SBA's Motion to Intervene contain novel arguments from all previous cases cited by Applicants, but the situation and circumstances are different in numerous ways and illustrates how the argument that collateral estoppel applies here fails on the first element.

Applicants speak in generalities about the similar issues raised in previous cases, but never meet the burden of showing how the situation and circumstances are identical in any way. Unlike

in *Shouse*, this Motion to Intervene involves an entirely different location, entirely different local population with their own needs, and completely unique technical and coverage aspects that deserve novel attention. *Id.* Applicants reply makes no mention of the potential for intervention to present issues or develop facts under 807 KAR 5:001 Section 4(11), nor does it cite to any opinion that has spoken on this issue under similar circumstances.

**III. Applicants' purely proprietary interest is directly at odds with the public's interest to have all relevant issues and facts available to the PSC before a determination as to public convenience and necessity is made.**

The Applicants have painted SBA's request to intervene in the present matter as purely proprietary while in the same response fully admitting that their own interest is actually proprietary. In the very first paragraph of the Response's Introduction, Applicants state 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." Applicants further note that it is not reasonable to continue co-location on the existing SBA structure because the rent charged "is over two times what Uniti will charge AT&T to co-locate on the proposed new Uniti tower[,]" and that pursuant to an agreement with Uniti, its annual rent increases will be less than the rent increases charged by SBA. According to Applicants, "[a]t the current rate of rent increases, over the next twenty (20) years, it would cost AT&T well over \$1,000,00.00 more in rent as a co-location tenant on the SBA Tower versus co-locating on the proposed Uniti tower." The Applicants claim that these monetary interests are "the dispositive issue." The Applicants' focus on their own pecuniary interests is directly contrasted by the utter lack of evidence or factual grounding for any way in which its application will actually benefit consumers' rates and services.

Additionally, there is no mention as to how a hypothetical lowering of Applicants' rate on the Proposed Tower rent ties into necessity or even marginal benefit to those who live and work

in Livingston County or surrounding areas. Applicants' Response seems to conflate public convenience and necessity with benefit to their own bottom-line. There is no information in the Response as to how the public is being inconvenienced if the Proposed Tower is not built. If the "advanced technologies" that Applicants claim require a new tower for some undisclosed reason are in any way beneficial to consumers, it is inexplicable that the Application and Response are empty of any testimony or studies from experts that would at least hint at these supposed benefits.

Furthermore, the Applicants have gone to great lengths to show how blocking the issues and facts that intervention would present serves their corporate proprietary interest, but fail to provide anything more than lip-service and vague inference when it comes to showing how blocking intervention could help the public in any way. Notably, the Applicants do not mention any monetary benefits which will flow through to consumers.

### **CONCLUSION**

SBA has shown that it has an interest in this matter that is not currently being represented. The Applicants response to the Motion to Intervene fails to address why SBA's presentation of issues and development of relevant facts is not appropriate in this case and under 807 KAR 5:001 Section 4(11). The technical engineering information and the unique information at co-location and Applicants' attempts to co-locate will only assist this Commission as well as the general public. As such, SBA requests that it be allowed in this matter so that it may present this evidence to fill in information gaps and resolve potential inaccuracies in the Application.

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*s/ Tia J. Combs*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this the 15<sup>th</sup> day of October 2020, a true and accurate copy of the foregoing document was served via email and first-class USPS, postage prepaid, upon the following:

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