BEFORE THE PUBLIC SERVICE COMMISSION
COMMONWEALTH OF KENTUCKY

***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 BATH**	**Case No. 2020-00343**

SBA TOWERS VII, LLC'S PUBLIC COMMENT

In recognition of the fact that the Commission has not yet had an opportunity to rule on the pending Motion to Intervene of SBA Towers VII, LLC ("SBA"), SBA files this interim public comment to respond to Applicants' mischaracterizations of SBA's filings herein.

I. Introduction

To be clear, SBA understands it has not been made a party to this proceeding, and SBA understands that it cannot "force" AT&T Mobility (or any other tenant) to remain on its tower. However, as a long-standing provider of telecommunications infrastructure in the Commonwealth, SBA should be allowed to provide facts and details Applicants are unwilling to provide to ensure that the Commission's regulations are fairly and uniformly enforced and that the public interest is thereby protected.

Indeed, while Applicants routinely go to great lengths to mischaracterize SBA pejoratively as a "monopoly," the fact of the matter is that SBA's existing telecommunications infrastructure was borne of a willingness to invest in the Commonwealth. Particularly in rural Kentucky, SBA invested in telecommunications infrastructure so that rural Kentuckians could receive reliable telecommunications service, at a time when other providers were unwilling to do so. In a proceeding entirely devoted to ensuring that the public interest will be served, SBA's longstanding and historic investment in the Commonwealth is not a justification to exclude critical facts that SBA is uniquely qualified to provide.

II. If the Commission Grants Applicant's Motion, the Application Should be Denied.

In their Motion to Submit their Application on the Existing Evidentiary Record, Applicants request that the Commission refuse to consider the additional facts presented by SBA and grant Applicants the relief they request. In doing so, Applicants seek to turn this proceeding on its head, arguing that the additional facts provided by SBA should not be considered because SBA did not provide such facts when it filed its Motion to Intervene. The burden, however, is upon the Applicants. SBA does not have a duty to provide any facts at any time; conversely, AT&T was required to provide these facts when it filed its Application, but failed to do so. That SBA can help develop evidence showing that Applicants have not met their burden of proof is no basis for exclusion; it is a basis for inclusion.

Kentucky law requires the following:

> To apply for a certificate of public convenience and necessity, a utility proposing to construct a telecommunications antenna tower in an area which is not within the jurisdiction of a planning unit that has adopted planning and zoning administrative regulations in accordance with KRS Chapter 100, shall file with the Public Service Commission the following information:

> (s) A statement that the utility has considered the likely effects of the installation on nearby land uses and values and has concluded that there is no more suitable location reasonably available form which adequate service to the area can be provided, and that there is no reasonably available opportunity to co-locate, including documentation of attempts to co-locate, if any, with supporting radio frequency analysis, where applicable, and a statement indicating that the utility attempted to co-locate on towers designed to host multiple wireless service providers' facilities or existing structures, such as a telecommunications tower, or another suitable structure capable of supporting the utility's facilities.[1]

Contrary to the plain language of the regulation, the Application provided merely:

> [T]here are no reasonably available opportunities to co-locate AT&T Mobility's antennas on an existing structure. When suitable towers or structures exist, AT&T Mobility attempts to co-locate on existing structures such as communications towers or other structures capable of supporting AT&T Mobility's facilities; however, no other suitable or available co-location site was found to be located in the vicinity of the site.[2]

As has been proven by SBA's filings (and subsequently acknowledged by AT&T), there is an existing telecommunications tower in the vicinity of the site. That tower is both suitable and available because AT&T is currently co-located on it. However, AT&T failed to disclose this fact to the Commission and also made no "attempts" to address AT&T's co-location needs prior to filing its Application. It was not SBA's obligation to attempt to negotiate with AT&T – either before or after the filing of AT&T's Application; rather, that burden is squarely on AT&T, as an applicant for a CPCN to construct additional tower infrastructure at its nearby proposed site. It is not difficult or burdensome for AT&T to simply "pick up the phone" and "attempt to co-locate," as the Commission regulations require.

[1] 807 KAR 5:063 Section 1(1)(s) (emphasis added).
[2] Application, at ¶ 12.

Furthermore, while AT&T relies on the Commission's "No Deficiency Letter" as grounds for claiming that Applicants are entitled to relief, the reality is that the Commission's "No Deficiency Letter" was issued based upon misleading statements in its Application and stands only for the proposition that the Application met certain minimum filing requirements, not a reflection of the substantive merits of the Application.[3] It is clear that AT&T failed to provide the Commission will all relevant facts at the time its Application was made. Consequently, if the Commission grants Applicants' Motion, the law requires the Commission to deny the Application for a CPCN. This result derives not from SBA allegedly seeking to complicate or unduly complicate the proceedings; rather, it is a consequence of Applicants' own failure to follow the Commission's applicable regulation.

Indeed, as the Kentucky Supreme Court has recognized:

> An agency must be bound by the regulations it promulgates. Further the regulations adopted by an agency have the force and effect of law. An agency's interpretation of a regulation is valid, however, only if the interpretation complies with the actual language of the regulation. KRS 13A.130 prohibits an administrative body from modifying an administrative regulation by internal policy or another form of action.

Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991) (citations omitted) (emphasis added).

Simply put, Applicants invite the Commission to violate Kentucky law by deciding this matter without documentation of AT&T's "attempts to co-locate" and indeed in the very face of uncontested information from SBA that AT&T, in fact, made no such attempt, including at its

[3] *See, e.g., In the Matter of Application of Big Sandy Rural Electric Cooperative Corporation for Authorization to Borrow $778,702.55 from Cobank and Execute Necessary Notes and to Repay Cooperative Financing Corporation Notes in the Same Amount*, No. 2012-00456, 2012 Ky. PUC LEXIS 924, at *1 (Ky. PSC Nov. 15, 2012) ("[A]pplication was rejected as deficient because it did not include the information necessary to satisfy certain filing requirements."); *In the Matter of: Application of Owen Electric Cooperative, Inc. for an Order Pursuant to KRS 278.300 and 807 KAR 5:001, Section 11 and Related Sections, Authorizing the Cooperative to Obtain a Loan Under the RUS/Cobank Co-Lending Program Not to Exceed $28,083,000 at Any One Time from Rural Utilities Service and CoBank*, No. 2009-00010, 2009 Ky. PUC LEXIS 830, at *1 (Ky. PSC Aug. 5, 2009) ("Because the application failed to meet certain filing requirements, the Commission issued a deficiency letter . . . indicating that the application had been rejected for filing.").

current co-location site on the nearby SBA tower. Commission regulation plainly requires that AT&T provide "documentation of attempts to co-locate" and a "statement that the utility attempted to co-locate." In fact, AT&T has now admitted that "the regulation requires an attempt to co-locate prior filing an Application";[4] while simultaneously conceding AT&T engaged in no such attempt prior to filing the Application.[5]

Thus, the Commission cannot grant the relief requested by Applicants on the "evidence submitted" as requested by Applicants because it would effectively result in the Commission modifying its own regulation without formal action, which the law forbids.

III. Alternatively, the Commission Should Grant SBA's Motion to Intervene and Issue a Procedural Order to Fully Develop the Facts.

While denial of the Application is appropriate in light of the Applicants' own admissions, the basis for that denial warrants additional caution on the part of the Commission when dealing with Applicants' telecommunications tower CPCN applications. In multiple cases, now, SBA has identified a continuing strategy of Applicants to attempt circumvention of the "attempt to co-locate" element of their applications by (i) failing to disclose nearby towers where AT&T is currently co-located and providing service; and (ii) including statements that AT&T "attempted to co-locate" when that is patently untrue. Surely, the Commission's requirement that an applicant include a "statement that the utility attempted to co-locate" includes a requirement that the statement also be true, in fact. Because SBA is AT&T's current co-location provider in the area to be served, allowing SBA to intervene in future matters would clearly assist the Commission in developing the facts necessary to evaluate whether Applicants have met their burden.

[4] Motion to Submit Application on Existing Evidentiary Record, at 16 (emphasis added)
[5] *Id.* at 15 ("Applicants were entitled to rely of [sic] the existing SBA rent and other terms …").

Indeed, further development of the facts in future cases is warranted, not only because the Application (like others) omits certain relevant facts, but because Applicants also continue to raise "red herring" arguments in an effort to distract the Commission from the real issues. For example, Applicants request that the Commission move quickly "so that AT&T can move forward and provide Kentucky wireless communications service users with necessary service."[6] As AT&T has conceded by admitting it is currently co-located on an existing telecommunications tower, AT&T's customers are already receiving service, and the new proposed tower will not impact the services they receive. For that reason, the cases cited by Applicants regarding delay, in which there were no existing telecommunications towers and no additional information was needed from the applicant (as is opposite of the case here), are inapposite to the facts at hand.[7] Indeed, Applicants have already spent months advocating that this case is only about AT&T's allegation of a rent disparity, not the coverage provided from the existing telecommunications tower.

Accordingly, SBA encourages the Commission to accept its offer to help develop facts regarding AT&T's otherwise untested allegations regarding rental discrepancy, possible frequency interference, and coverage area, as well as those facts regarding the nature of the relationship between Applicants and ownership of the proposed tower. As SBA has maintained throughout this proceeding, it merely seeks to provide its expertise to ensure the public interest will be served through the grant of a CPCN to Applicants. If after full development of the facts, Applicants have

[6] Motion to Submit Application on Existing Evidentiary Record, at 4.

[7] *See T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987 (9th Cir. 2009) (finding that the denial of an application was supported by substantial evidence, but requiring the city to grant the application because the denial had "the effect of prohibiting the provision of personal wireless services" due to no other alternative location for a nearby tower); *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 315 (N.D.N.Y. 2017) (determining that there were "no less intrusive means to fill the significant gap in coverage other than to construct and operate a wireless facility at the Site" (emphasis added)); *Am. Towers, Inc. v. Wilson Cnty.*, No. 3:10-cv-1196, 2014 U.S. Dist. LEXIS 131, at *1-2 (M.D. Tenn. 2014) ("AT&T Wireless . . . sought to improve its service network after determining that a significant coverage gap existed." (emphasis added)); *Masterpage Commn's, Inc. v. Town of Olive*, 418 F. Supp. 2d 66, 77 (N.D.N.Y. 2005) ("Olive has no wireless telecommunication facility and radio frequency tests revealed large gaps in wireless and cellular coverage." (emphasis added)).

met their burden, the Commission would be required to grant the relief requested. To the extent there is any "complication or disruption" in this proceeding, it is the fact that Applicants have failed to engage in the "attempt to co-locate" required by Commission regulation.

This the 19th day of May, 2021.

Respectfully submitted,

s/ Tia J. Combs

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Certification

I hereby certify that the electronic version of this filing made with the Commission on May 19th, 2021, is a true and accurate copy of the paper document that will be submitted to the Commission within 30 days of the Governor lifting the state of the emergency pursuant to the Commission's Orders in Case No. 2020-00085, and the electronic version of the filing has been transmitted to the Commission. A copy of this filing has been served electronically on all parties of record for whom an email address is given in the online Service List for this proceeding, and there are currently no parties that the Commission has excused from participation by electronic means.

s/ Tia J. Combs
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