

**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)
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF RUSSELL)

CASE NO.: 2020-00345

SITE NAME: RUSSELL SPRINGS RELO

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**APPLICANTS’ MOTION TO
SUBMIT APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY FOR DECISION
ON EXISTING EVIDENTIARY RECORD**

1.0 INTRODUCTION AND SUMMARY

New Cingular Wireless PCS LLC d/b/a AT&T Mobility (“AT&T”) and Uniti Towers LLC ¹ (“Uniti”) (collectively, “Applicants”), by counsel, hereby file this Motion requesting the Kentucky Public Service Commission (“PSC”) to Submit the pending Application for Decision on the Existing Evidentiary Record (“Applicants’ Motion”). With each passing day AT&T’s current lease term with SBA Communications

¹Uniti Towers LLC has changed its name to Harmoni Towers LLC via filing with the Kentucky Secretary of State on March 22, 2021. Because the Application was filed in the name of co-applicant Uniti Towers LLC on December 11, 2020, this Response and Motion shall continue to reference the co-applicant as Uniti Towers LLC in order to avoid any confusion with prior filings.

Corporation (“SBA”) draws closer to expiration, making construction of the proposed Uniti tower more and more urgent.

The SBA Communications Corporation (“SBA”) February 14, 2021 Motion to Intervene has not been granted by the Public Service Commission (“PSC”) and should have no impact on the long-pending deliberations or decision on the Applicants’ request for a Certificate of Public Convenience and Necessity (“CPCN”) for construction of a cellular tower. The PSC has denied SBA intervention in other proceedings on the basis “[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.”² SBA is not a public utility in Kentucky and intervention would be unduly complicating and disruptive of the proceedings, which is a key basis pursuant to 807 K.A.R. Section 4(11) for denial of the SBA Motion to Intervene. SBA should not be allowed to maneuver to cause formal or informal abatement of this proceeding.

The requested CPCN should be forthwith granted for at least the following reasons:

1. Applicants have complied with PSC filing requirements and such filings constitute substantial evidence supporting issuance of the CPCN.
2. AT&T’s current lease term with SBA expires soon.
3. The PSC has previously recognized that post application efforts to identify purported co-location opportunities should not delay or thwart approval of a pending tower application. In fact, it has granted CPCNs in no less than *five* cellular tower cases (the “Five Precedents”)³ not involving SBA when such issues have arisen.

² PSC Order of March 26, 2018 in Case No. 2017-00435 (“Hansen”), p. 5.

³ See cases 2014-0098 (Alice Lloyd); 2014-0088 (East Point); 2014-0074 (Index);

4. PSC Regulations and Due Process require the Application to be reviewed on facts, circumstances, and applicable law at the time of its filing on December 11, 2020.
5. The federal Telecommunications Act of 1996 (“TCA”) requires state and local governments to make tower permitting decisions in a “reasonable time.”⁴ Further proceedings associated with SBA intervention would delay this proceeding far beyond such standard.
6. The SBA Motion to Intervene further exacerbates the broader problem of SBA’s advocacy for AT&T to remain on existing towers across the Commonwealth which are not reasonably available. The PSC has before it no less than *twelve* pending SBA Motions to Intervene in other cellular tower cases⁵ filed by Applicants in cases that present the same issues as this proceeding.

On all of this reasoning, and as further detailed below, Applicants request the PSC to reject all argument by SBA and forthwith proceed to overrule SBA’s Motion to Intervene, complete deliberations, and grant the requested CPCN as soon as possible so that AT&T can move forward and provide Kentucky wireless communications service users with necessary service. AT&T’s current lease term with SBA expires soon, and construction of the proposed Uniti tower must begin in the near future.

2.0 RELEVANT FACTUAL BACKGROUND

2014-00135 (Nippa); and 2014-0087 (Staffordsville).

⁴ 47 U.S.C. § 332(c)(7)(B)(ii).

⁵ See cases 2020-00310 (Happy Ridge Relo); 2020-00328 (Wisdom Relo/Dry Fork Road); 2020-00343 (Bethel/Chandler Road); 2020-00345 (Russell Springs Relo); 2020-00351 (Elihu Relo/Rose Hill Road); 2020-00354 (Monticello North Relo); 2020-00300 (Lake City/Luka); 2020-00404 (Steubenville Relo); 2021-00012 (Ringgold Relo/N. Hart Road); 2021-00065 (Windsor Relo/Pinetop Road); 2021-00092 (Sharpsburg) and 2021-00145 (Camargo Relo). In each of these cases SBA has filed a Motion to Intervene which stands submitted for PSC decision.

The proposed “telecommunications antenna tower” which is the subject of the Application for a CPCN pursuant to KRS 278.020, 278.650; 807 K.A.R. 5:063, and other applicable law is a vital element of AT&T’s wireless communications network in Russell County, Kentucky, and is necessary to provide service in accordance with the provisions of AT&T’s Federal Communications Commission license as stated in the Application and incorporated exhibits. A map included with the Application, as prepared by an AT&T Mobility Radio Frequency Engineer, indicated the Search Area in which the new tower must be located to provide the necessary wireless service. The proposed Uniti tower site is within such Search Area.

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

- Application in within Case 2020-00345 filed on December 11, 2020.
- No Deficiency Letter issued by PSC Staff on December 15, 2020.
- SBA Motion to Intervene Filed on February 14, 2021.
- Applicants’ Response Opposing SBA Motion to Intervene Filed on February 19, 2021.
- SBA Reply Supporting Motion to Intervene filed February 26, 2021.
- FCC Shot Clock 150-Day Deadline for PSC Decision – May 14, 2021.
- Applicants’ Memorandum Documenting Cost Savings from Relocating Wireless Communications Facilities from SBA Towers to Uniti Towers filed March 24, 2021.
- Pendency of Application in this Case 2020-00345 since Non-Deficient Filing: 160 Calendar Days.
- AT&T’s current lease term with SBA expires soon.

3.0 ARGUMENT

All facts, circumstances, and applicable law require the PSC to fully reject SBA intervention and proceed to prompt grant of the CPCN. The PSC should proceed to

complete its deliberations, overrule the Motion to Intervene,⁶ and promptly grant the requested CPCN on all evidence of record.

3.1 Applicants' Compliance with PSC Requirements Compels Grant of the Requested CPCN.

Applicants have met all filing requirements applicable to this proceeding as prescribed by the Kentucky Revised Statutes and the Kentucky Administrative Regulations and as recognized by the PSC Staff in its "No Deficiency" letter of December 15, 2020. Federal precedent under the TCA provides that compliance with the agency's own requirements constitutes substantial evidence.⁷ All required exhibits have been provided and required representations have been made. Moreover, consistent with prior PSC Orders in Cases No. 2017-0435 ("Hansen")⁸ and No. 2019-0176 ("Dunnville Relo"), the Applicants have shown the SBA tower in the vicinity was not "reasonably available" in compliance with 807 K.A.R. 5:063 Section 1(s) at the filing of the Application or thereafter.

⁶The PSC has broad discretion to deny a Motion to Intervene. *EnviroPower, LLC v. PSC*, 2007 Ky. App. Unpub. LEXIS 121 (Ky. App. 2007). 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).

⁷*T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 799 (6th Cir. 2012). See also *Cellco Partnership v. Franklin County, et al*, 553 F. Supp. 2d 838, 845 (E.D. Ky. 2008) ("The substantial evidence test applies to the locality's own zoning requirements....")

⁸Hansen is particularly relevant because the PSC's November 1, 2019 Order in such proceeding recognized the unreasonable rental rates of SBA in a 50-mile radius multi-county market. The PSC stated "The data requests revealed that within a 50-mile radius of the site of the proposed wireless communication facility, the rent on towers owned by SBA Properties are 58.7% greater than the rent on wireless communications facilities owned by other companies." *Id.* at p. 2.

3.2 The Five Precedents Support the PSC Rejecting the SBA Motion to Intervene and Grant of CPCN.

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. Obviously, Applicants have already cited the recent Hansen (2017-0435) and Dunnville Relo (2019-0176) cases involving SBA. However, the PSC's recognition of the issue of delay and need for wireless service over pleas for co-location goes back years earlier to cases not involving SBA. Specifically, the PSC's Orders granting requests for CPCN in each of the Five Precedents⁹ 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, namely: (1) AT&T's current lease term with SBA expires soon and construction of the proposed Uniti tower must begin sufficiently in advance of such expiration to avoid SBA's continued

⁹ See cases 2014-0098 (Alice Lloyd); 2014-0088 (East Point); 2014-0074 (Index); 2014-00135 (Nippa); and 2014-0087 (Staffordsville).

imposition of adverse, anti-competitive and economically burdensome lease terms for continued availability of necessary utility infrastructure; (2) the long pendency of the case in general as filed December 11, 2020; (3) that every day it is not decided is another day beyond the calculated May 10, 2021 FCC Shot Clock deadline¹⁰; (4) that federal law encourages rapid deployment of wireless facilities and requires, by statute¹¹, for state and local government permitting decisions to be made in a “reasonable time”; and (5) that Kentucky statutory law recognizes the importance of wireless service to its citizens and the inherent value of competition in the industry.¹² On top of all of these considerations, the case for granting of a CPCN in the present case is even more compelling because the rent and other business terms in effect on filing of this proceeding prevent the SBA Tower from being reasonably available for co-location pursuant to 807 K.A.R. 5:063(1)(s).¹³

The SBA Motion to Intervene is an artifice to prevent the PSC from granting a CPCN for the proposed Uniti tower. SBA’s attempt to intervene should not persuade the PSC to add further steps or otherwise complicate and delay this proceeding to prevent grant of a CPCN to Applicants. Just as with the Five Precedents, the mantra

¹⁰ 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”).

¹¹ 47 U.S.C. Section 332(c)(7)(B)(ii).

¹² KRS 278.546.

¹³ See Applicants’ Response to SBA Motion to Intervene indicating co-location on the SBA tower would cost AT&T more than \$1,000,000.00 in rent over 20 years than the proposed Uniti tower. See also the Affidavit filed with Applicants’ Motion for Confidential Treatment.

of co-location from an entity that is not a party and not a public utility cannot override other important facts, circumstances, and law¹⁴ impacting the rights of Applicants, the responsibilities of the PSC, and consumer need for wireless service. The PSC has previously recognized the self-serving nature of SBA's claims in stating "SBA's only interest is to remain AT&T Mobility's landlord...."¹⁵ AT&T Mobility's interests are much broader as an FCC-licensed wireless carrier and public utility in Kentucky.

3.3 PSC Regulations and Due Process Require the Application to be Reviewed on Facts and Circumstances at the Time of Filing on December 11, 2020.

The PSC, in its January 21, 2021 Order in Case Number 2019-00176¹⁶ recognized "Unreasonable and excessive fees for rent on a tower have the potential to divert resources that could otherwise be used to invest in expanding wireless networks and conducting necessary network upgrades necessary to meet increased demand for wireless voice and broadband services." *Id.* at p. 3. Applicants began their due diligence with a keen awareness of the existence of these circumstances as to the SBA tower in the vicinity based on the rent charged and other terms applied to AT&T Mobility pursuant to an existing agreement. The Application was thereafter reasonably prepared and filed based on facts existing at the time of filing.

¹⁴For 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.

¹⁵ PSC Order of January 21, 2021 in Case No. 2019-00176, p. 2, 2021 KY. PUC LEXIS 28.

¹⁶Also cited as 2021 Ky. PUC Lexis 28.

AT&T evaluated the SBA tower in connection with due diligence on the proposed Uniti Towers LLC tower. In fact, SBA's maneuver to intervene in this proceeding is a calculated attempt to prejudice the good faith efforts of Applicants to assess circumstances at the time of the filing of the Application and propose a solution in the public interest. AT&T 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 applicants 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.

Allowing a competing tower company, such as SBA, to intervene in this proceeding in an effort to impose its high rental rates and other non-competitive lease terms deprives Applicants of substantive¹⁷ and procedural due process and could lead to an arbitrary decision¹⁸ by the PSC if it gives credence to the whims of SBA in deciding what

¹⁷Substantive due process prohibits certain "governmental deprivations of life, liberty, or property" irrespective of their procedural fairness. *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007). It functions to shield citizens from unrestrained and arbitrary government acts which lack a "reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998); see also *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988) (... "Substantive due process, a much more ephemeral concept [than procedural due process], protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action."); *Miller [v. Johnson Controls, Inc.]*, 296 S.W.3d [392,] 397 [(Ky. 2009)] (noting ... "substantive due process. . . is based on the idea that some rights are so fundamental that the government must have an exceedingly important reason to regulate them, if at all . . ."). Allowing SBA to manipulate the tower permitting process by deciding when or if it will offer rent reduction depending on its perceived advantage cannot be consistent with Applicants' rights to substantive due process.

¹⁸ "The rule is well established that municipal ordinances, placing restrictions upon lawful conduct or the lawful use of property, must, in order to be valid, specify the rules

unreasonable rent it might charge on its tower in the vicinity. Such an ad hoc approach to tower permitting further raises the specter of discrimination between wireless carriers in regulatory proceedings in violation of the TCA¹⁹ because objective standards across such proceedings would not control the outcome if post-filing actions or proposals of an interloping tower company such as SBA could impact whether a CPCN is granted. Kentucky's appellate courts have held land use proceedings with ad hoc outcomes unrelated to objective standards to be unconstitutional. *Hardin County v. Jost*, 897 S.W.2d 592 (Ky. App. 1995).

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.

807 K.A.R. 5:063 - Section 1 begins by identifying the documentation required in order to file an application for a CPCN to construct a tower. Thus, an applicant

and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply." *City of Monticello v. Bates*, 169 Ky. 258, 183 S.W. 555, 558 (Ky. 1916); see also *Turner v. Peters*, 327 S.W.2d 958 (Ky. 1959); *Motor Vehicle Commission v. The Hertz Corporation*, 767 S.W.2d 1, 3 (Ky. App. 1989).

¹⁹The TCA, as codified in 47 U.S.C. Section 332(c)(7) provides in pertinent part in (7)(B) Limitations (i) The regulation of the placement, construction, and modification of personal wireless service facilities by an State or local government or instrumentality thereof: ... (II) shall not unreasonably discriminate among providers of functionally equivalent services...."

conducts due diligence and properly obtains the required information well before filing the Application, just as Applicants have done in the present case and in other cases in which SBA has sought intervention.

Proceeding on to 807 K.A.R. 5:063 - Section 1(s), the regulation requires that an applicant "has considered" certain land use and value 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*. Applicants are not required to make a showing of any such conditions or facts at later dates. Furthermore, Applicants' 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 lease terms memorialized in an existing fully executed tower co-location sublease on the SBA Tower in the vicinity. Pursuant to substantive due process and all other applicable law, Applicants were entitled to rely of the existing SBA rent and other terms as a benchmark in selecting a new site and submitting a new tower application.

Additionally, AT&T provides a service that is constantly evolving in terms of technological advancements, and its needs in terms of the deployment of antennas and other equipment located on towers is continually subject to change. Accordingly, while an accommodation in rent may offer relief for the status quo installations, this equipment is subject to change as technologies and network usage patterns advance and evolve.

Administrative agency decisions are to be based on objective criteria²⁰ in order to be founded on substantial evidence and to survive arbitrariness review. SBA's maneuvering has great potential of drawing the PSC into violation of such fundamental standards for agency review.

The PSC regulation does not rigidly require AT&T to collocate merely because another tower is present in the area. Instead, it logically contemplates AT&T "attempting to collocate," understanding that for various reasons, not all such attempts will be successful. As shown by the facts of the present case, co-location could not be accomplished because of the lack of "reasonable availability."

As explained herein, numerous other cases are pending in which Applicants have filed CPCN applications based on SBA towers involving above-market rent and other egregious lease terms and SBA has sought intervention in such cases at substantial cost to Applicants in terms of application exhibit preparation and involving substantial delay in deployment. The PSC should not facilitate the SBA strategy by failing to reach a final decision on the merits of the Application at the time of filing.

3.4 The Federal Telecommunications Act of 1996 ("TCA") Requires State and Local Governments to Make Tower Permitting Decisions in a "Reasonable Time."²¹

Further proceedings associated with the SBA Motion to Intervene would delay this proceeding, which was filed December 11, 2020, far beyond the TCA "reasonable

²⁰ See *Hardin County v. Jost*, 897 S.W.2d 592 (Ky. App. 1995) finding a local government permitting process based on subjective criteria to be arbitrary and unconstitutional.

²¹47 U.S.C. § 332(c)(7)(B)(ii).

time” standard.²² 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.”²³ (Emphasis added).

The Telecommunications Act of 1996 provides in pertinent part:

A state or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. (Emphasis added). 47 USC Section 332(c)(7)(B)(ii).

Federal courts have recognized “*Congress implemented the “reasonable period of time” provision of the TCA to “stop local authorities from keeping wireless providers tied up in the hearing process’ through invocation of state procedures, moratoria, or gimmicks.*”(emphasis added)²⁴ Of course, SBA is attempting to manipulate and delay the

²² 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 this proceeding filed on December 11, 2020 remains pending. The SBA approach of raising the new issue of rent reduction 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 Public Comment to push PSC deliberations and decision beyond five months.

²³ 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.))

²⁴ *Masterpage Communications v. Town of Olive*, 481 F.Supp. 2d 66, 77 (N.D. New York 2005).

decision process far beyond the FCC Shot Clock²⁵ deadline by Motion to Intervene, to prevent grant of a CPCN in a reasonable period of time.

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 (6th 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 T-Mobile search for alternatives indefinitely. *Id.* at 808.

Federal district courts in the Sixth Circuit have relied upon *T-Mobile Central* and found the permitting authority failed to reasonably act in the one hundred fifty (“150”) day deadline of the FCC Shot Clock where nothing in the agency regulations justified the delay in decision on a complete application. *American Towers, Inc. v. Wilson County*, 2014 U.S. Dist. LEXIS 131, 59 Comm. Reg. (P &F) 878 (M.D. of Tennessee, Nashville Division 2014)(“Wilson County violated the TCA by failing to act on ATI’s second set of applications within a reasonable time”).

Outside of the Sixth Circuit, a federal district court in the Northern District of New York, cited *American Towers* and explained “Under the provisions of the TCA and FCC Orders, the local municipality has 150 days in which to promptly review an

²⁵ The TCA requires state and local governments to “act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed. . . .” 47 U.S.C. § 332(c)(7)(B)(ii). The FCC defines “a reasonable period of time” in terms of a “shot clock.” See *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.* (“2018 Third Report and Order”), 33 F.C.C. Rcd. 9088, ¶ 104 (2018)

application and make its final determination, consistent with local law, the TCA and federal rules and regulations.” *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 315 (N.D.N.Y. 2017). Failure of the permitting authority to make a decision after 175 days led the District Court to conclude the permitting authority had “... failed to rebut the presumption that their delay was unreasonable and their actions constitute a failure to act or unreasonably delay in violation of the TCA.” *Id.* at 316.

The decisions of the federal courts leave no doubt the PSC should make every effort to avoid being drawn into the morass of unreasonable and unjustified delay which SBA seeks to engineer. All precedent requires the PSC to proceed to final decision on the Application.

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*, Applicants have complied with the requirements of KRS Chapter 278 and implementing regulations resulting in a No-Deficiency letter issued by PSC Staff on December 15, 2020. Furthermore, AT&T 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, beyond the FCC Shot Clock benchmark, and make a travesty out of the 807 K.A.R. Section 4(11) standard for intervention of not “unduly complicating or disrupting the proceedings.”

Whether the PSC conducts further inquiry or hearing as a result of the SBA Motion to

Intervene 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 attempt to intervene in this proceeding. Moreover, the 150-day FCC Shot Clock, which expired May 14, 2021 in this proceeding, is very persuasive on how long administrative review of a cellular tower application should take. On the merits of the issues raised, and in the interest of compliance with the TCA “reasonable time” standard, the PSC should deny the SBA Motion to Intervene and then promptly move to final decision on the Application without regard to the SBA Comment.

3.5 SBA’s Unreasonable Lease Administration Practices in an Environment of Changing Technology that Requires Periodic Equipment Upgrade.

There are a number of key lease terms which prevent the SBA tower from being reasonably available. SBA has also repeatedly claimed before the PSC that tower lease provisions are subject to confidentiality provisions in such instruments. Such argument attempts to keep the unreasonable nature of many of such lease provisions from consideration by the PSC.

The FCC has increasingly recognized that the TCA protects wireless carriers from state and local government requirements which materially limit competition or the upgrade of a network. Of course, SBA is intent on drawing the PSC into exactly such practices. The following excerpt from *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.* (“2018 Third Report and Order”),

33 F.C.C. Rcd. 9088, Paragraph 104 (2018)²⁶ is persuasive:

35. In this Declaratory Ruling, we first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in *California Payphone*²⁷, namely, that a state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."

...

37. As explained in *California Payphone* and reaffirmed here, a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities.

Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways--not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.

The PSC should not facilitate SBA's objectives by preventing Applicants from constructing a new tower in circumstances where the existing SBA tower is not reasonably available both in regard to current rent and egregious lease administration practices. The PSC has, in fact, wisely recognized the link between unreasonable rent and ultimate availability of service: "Unreasonable and excessive fees for rent on

²⁶*Affirmed in pertinent part, City of Portland v. United States, 969 F.3d 1020, 1038, (9th Cir. Aug. 12, 2020), en banc review denied by City of Portland v. FCC, Case No 18-72689 (9th Cir. Oct 22, 2020).*

²⁷12 FCC Rcd 14191 (1997)

a tower have the potential to divert resources that could otherwise be used to invest in expanding wireless networks and conducting necessary network upgrades necessary to meet increased demand for wireless voice and broadband services.” PSC Order of January 21, 2021 in Case No. 2019-0176.²⁸

A co-location 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.

KRS 367.170 is persuasive in providing: “Unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” (Emphasis added). For the purposes of KRS 367.170 the Kentucky Legislature has determined “unfair shall be construed to mean unconscionable.” (Emphasis added). The PSC has itself recognized in other proceedings “SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers” and that “[t]his runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition²⁹ as well as KRS 278.546(4), which states that market-based competition benefits consumers.”³⁰

²⁸Also cited as 2021 KY. PUC LEXIS 28, p. 3.

²⁹ *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 897, 991 (9th Cir. 2009).

³⁰ PSC Order in Case No. 2019-0176 (Dunnville Relo), p. 3, 2021 Ky. PUC LEXIS 28.

3.6 SBA's Comprehensive Effort to Confine AT&T to Existing Towers.

The PSC has before it no less than *twelve – a full dozen* - pending SBA Motions to Intervene in other cellular tower cases³¹ filed with the PSC by Applicants. The result is multi-site delay across the Commonwealth and complication if the PSC does not timely complete deliberations to thwart such efforts of an actor whose "... only interest is to remain AT&T Mobility's landlord..."³² and to leverage unfairly its position as the owner of the sole tower within a geographic area.

The SBA strategy as playing out in full view is inconsistent with the comprehensive regulatory scheme of KRS Chapter 278 and 807 K.A.R. 5:063 governing proposed cellular towers in areas within the jurisdiction of the PSC. The Kentucky 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 many areas of the Commonwealth requiring and deserving of wireless service

³¹ See cases 2020-00310 (Happy Ridge Relo); 2020-00328 (Wisdom Relo/Dry Fork Road); 2020-00343 (Bethel/Chandler Road); 2020-00345 (Russell Springs Relo); 2020-00351(Elihu Relo/Rose Hill Road); 2020-00354 (Monticello North Relo); 2020-00360 (Jamestown Relo); 2020-00404 (Steubenville Relo); 2021-00012 (Ringgold Relo/N. Hart Road); 2021-00065 (Windsor Relo/Pinetop Road); 2021-00092 (Sharpsburg) and 2021-00145 (Camargo Relo). In each of these cases SBA has filed a Motion to Intervene which stands submitted for PSC decision.

³² PSC Order in Case No. 2019-0176, p. 2, 2021 Ky. PUC LEXIS 28.

undermines all of these goals.

It is significant that in this proceeding and in all of the proceedings in which SBA is seeking intervention, the proposed Uniti tower is designed for co-location of multiple carriers.³³ Consequently, such towers have the potential of not only freeing AT&T Mobility from unreasonable rent and other lease terms, but for other wireless carriers as well. The PSC has recognized "... the competition engendered in having more than one tower is likely to improve co-location opportunities for other telecommunications providers in the area" and "[t]his is likely to lead to the expanded availability of advanced wireless services."³⁴

Absent PSC action to bring CPCN proceedings to a close, SBA could sequence requests for intervention over many cases with the result of maximizing delay and complication of proceedings. The PSC has previously recognized in denying the SBA Motion to Intervene in Case Number 2019-0176 that "... SBA's interest is not in rates and services, but instead is a pecuniary interest..."³⁵ In recognition of all of the specifics of the Russell County site in this proceeding and of the global facts and circumstances of other pending cases, the PSC should not abate, complicate or otherwise delay this proceeding any further in response to the SBA Motion to Intervene. SBA's efforts should not further delay grant of the CPCN.

4.0 CONCLUSION

³³For example, see Exhibit B to within Application, specifically showing ground space and tower space for additional co-locators.

³⁴ PSC Order of March 26, 2018 in Case No. 2017-0435, p. 5.

³⁵ PSC Order of October 1, 2019 in Case No. 2017-0435, p. 2.

AT&T's current lease term with SBA expires soon and construction of the proposed Uniti tower must begin sufficiently in advance of such expiration to avoid SBA's continued imposition of adverse, anti-competitive and economically burdensome lease terms for continued availability of necessary utility infrastructure. SBA's efforts to obfuscate the real issues in this proceeding through its efforts to intervene should not distract the PSC from the dispositive facts and applicable law in this proceeding. The Application was originally filed with the PSC on December 11, 2020, was found to be Non-Deficient by PSC Staff Letter on December 15, 2020 and has been pending before the PSC for 160 days from the Staff's Letter to the making of this Motion by Applicants. The one hundred fifty ("150") day FCC Shot Clock for PSC decision in this matter expired on May 14, 2021.

All factual background and argument set forth in this Motion supports Applicants' request for:

- (1) denial of the SBA Motion to Intervene on the merits;
- (2) submission of this long pending case for decision on the request for CPCN;
- (3) and ultimate grant of the CPCN as requested in the Application.

All such requested action by the PSC is in protection of Applicants' rights pursuant to KRS Chapter 278; PSC implementing regulations; the TCA and case precedent thereunder; Section 2 of the Kentucky Constitution; and constitutional guarantees of substantive and procedural due process.

WHEREFORE, the Applicants, by counsel, request the PSC to grant Applicants the relief requested above and grant Applicants any other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of May, 2021, 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 counsel for non-party SBA at the following address:

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