COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION
CASE NO.: 2020-00345

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 RUSSELL

SITE NAME: RUSSELL SPRINGS RELO

SBA INFRASTRUCTURE, LLC'S
REPLY IN SUPPORT OF ITS MOTION TO INTERVENE

Comes SBA Infrastructure, LLC's and for its Reply in Support of its 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") largely ignore the requirements for intervention found in 807 KAR 5:001 Section 4(11). These elements are not even addressed by the Applicants' Response until page 21.

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 the rental rate is now the only issue that matters at all and arguing that SBA's arguments concerning physical similarities between the two towers is completely irrelevant. Likewise, AT&T provides no explanation as to how their pecuniary win will materialize or translate into

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, and further argue that SBA's proprietary interests preclude it from intervening in this matter while also asserting its own monetary interests. These arguments are unavailing and distract from the issue before the Commission.

The requirements for intervention found in 807 KAR 5:001 Section 4(11) are at the heart of SBA's filings and 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. 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 the Application.

SBA has unique evidence concerning the lack of attempt by AT&T to meaningfully attempt to co-locate which is essential to the consideration of the Application. This addition of necessary information meets the burden for intervention established in 807 KAR 5:001 Section 4(11), and SBA should now be permitted to intervene in this matter.

The Applicants argue in their Response that their Application is complete as evidenced by the PSC's issuance of the "No Deficiency Letter." However, a required section of the application mandated by 807 KAR 5:063 is that the Applicants state "that there is no reasonably available opportunity to co-locate, *including documentation of attempts to co-locate, if any*." 807 KAR 5:063 Section 1(1)(s).[1] As made clear in the Applicants' Response, they rest the question of

[1] Applicants also argue that SBA's RF Coverage Plot Analysis "is a diversion from the issue of whether the SBA tower is a reasonably available opportunity to co-locate[,]" and that "[a]ny 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[s]

whether co-location is available solely and squarely on the issue of rents. The Applicants now go so far as to say that this is the only issue that matters. However, the Application was so evasive on the issue of co-location that no reasonable person reviewing it could have known that rental rates were the issue at all. This issue was not mentioned in the Application and would likely not have come up at all had SBA not moved to intervene.

The Applicants' citation to SBA's Public Comment in Case No. 2020-351 does not contradict this argument. If allegedly high rents are the issue that makes co-location impossible in AT&T's eyes, the fact that rent, and not geographical location as the Application seems to suggest, should at least be mentioned. SBA's recognition of this discrepancy is not contradictory to SBA's right to enforce the confidentiality provisions of its currently existing and past leases.

Furthermore, how SBA might negotiate with AT&T for continued co-location is the main topic that the Applicants fail to and cannot address because they have not attempted to renegotiate the rent at this location. A true explanation of attempted co-location requires the Applicants to address any reason as to why a new tower is needed rather than attempting to negotiate with SBA as to rental rates on the SBA Tower. In its Response to SBA's Motion to Intervene, AT&T now alleges that "exorbitant rents" and "other business terms disparities" are "compelling evidence of the futility of attempt[ing] negotiation with SBA."[2] This explanation is disingenuous, and the lack of a real attempt at co-location is an issue that SBA can provide information about to the PSC which will aid in their decision-making process.

[*sic*] the proceedings without addressing the threshold issue of availability." Response, KY PSC Case No. 2020-000360, pg. 11. These arguments ignore the plain language of Section 1(s) which provides and requires: "[a] statement that [it] … has concluded that there is no more suitable location reasonably available ***from 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." (emphasis added).

[2] Response, KY PSC Case No. 2020-000345, pg. 4.

Additionally, if rent rates are to be properly considered when evaluating whether or not the Applicants have made a fair attempt to co-locate, rates must be evaluated at each tower site, including what rates SBA might be willing to offer if AT&T attempted to negotiate in a true attempt to continue co-locating. Rents and other fees are different at each SBA site and, presumably, at towers held by other companies. Thus, the issue of co-location cannot be evaluated without this information about future rents. It is not sufficient for AT&T to simply say that a new tower in the vicinity of an SBA Tower will always be a lower rent or on better terms, as there is no evidence of record to substantiate this and cannot provide it as they have not requested to renegotiate with SBA. In the *Hansen* case, the PSC stated that it was the applicant's "burden" to prove that co-location was not reasonably available because of rent disparity.[3] Despite this holding, the Applicants had not even admitted that rent disparity was at issue until their Response.

In addition, 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. Similarly, its response to SBA's Motion to Intervene offers only self-supporting assertions and vague suggestions that excessive rents "frustrate upgrades" and have slowed AT&T's improvement and expansion of services.

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 0.4027 miles from 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 of the two towers is too similar to make this a plausible argument. In

[3] Order, KY PSC Case No. 2017-00435, pg. 2.

addition, AT&T now admits that it plans to simply remove its equipment from the SBA Tower and place it on the Proposed Tower.[4] If the Applicants wish to cogently make an argument that a new tower is needed to provide some additional coverage when another tower is already located in nearly the exact same space and while admitting that AT&T plans to merely move its equipment from one tower to another, 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 has already begun to help shed light on this issue by providing a radio frequency study showing that the frequencies that can be broadcast off the two towers would be essentially the same, which are relevant to co-location requirement articulated in 807 KAR 5:063 Section 1(1)(s).

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 res judicata or collateral estoppel.[5] Setting aside the fact that SBA has been sensitive to the prior rulings of the PSC by refraining from repeating the arguments already decided on by

[4] Response, KY PSC Case No. 2020-000345, pg. 13.

[5] Applicants fail to distinguish res judicata and collateral estoppel, which are similar but distinct doctrines. "[U]nder the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit on the same cause of action[; whereas] [u]nder the doctrine of collateral estoppel, … such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Louisville v. Louisville Professional Firefighters Assn., Local Union No. 345*, 813 S.W.2d 804, 807 (Ky. 1991). Because each Application is a distinct and new cause of action, res judicata is inapplicable. This is supported by the *Shouse* decision, discussed above.

the PSC in the *Hansen* case,[6] the essential elements of collateral estoppel are simply not met here. The elements include: (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). The standard is not satisfied in this case because the issues and underlying facts 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.*

Additionally, as noted above, the Applicants spend a lot of real estate in their Response discussing rent rates and generalizing that SBA's rental rates are much higher than the Applicants' rates that this justifies building a new tower in all cases. However, rental rates vary by location

[6] *See* SBA Motion to Intervene, KY PSC Case No. 2020-345 (filed February 14, 2021) at 4.

and tower. This is yet another way in which this case, and every case, differs from past cases and justifies new consideration of the unique facts at issue by the PSC prior to the granting of a CPCN. Furthermore, the *Hansen* case nor the PSC's decision in the recent Casey County Case No. 2019-00176 gives no indication to SBA or any party of what rent disparity actually justifies building of new towers, it only states that the rent disparity in that case justifies that action.

III. The 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 AT&T would save $1,000,000.00 in rents in the next 20 years if the Proposed Tower is built. The Applicants repeat numerous times over the course of their Reply that reduction in AT&T's rental fees are the reason why the Proposed Tower should be allowed. 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.

Further, and without delving too much into the merits of the Applicants' arguments regarding allegations of "excessive rent" and co-location, their reliance on *Sun State Towers LLC v. City of Coconino*, 2017 U.S. Dist. LEXIS 176541, *20 (D. Ariz. Oct 25, 2017) is misstated and unavailing. In that case, the Court ruled that "an alternative site is not made unavailable simply because it is more expensive than the providers' preferred choice. The cost of the alternative site ***must, in conjunction with other factors***, make the site effectively unavailable." *Id.* at *20. (emphasis added). The same is true under 807 KAR 5:063 Section 1 (1)(s).

The *Sun State Towers* court also observed that "there was no evidence put forward by the plaintiff "that would allow the board to determine that the lease rate of the NTUA site was unreasonable because the record contains no evidence of any actual negotiation of such rates when the NTUA indicated that its rates were negotiable." *Id.* If SBA is granted leave to intervene, evidence regarding negotiations could be properly presented to the Commission.

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 Russell County or surrounding areas. Applicants' Response seems to conflate public convenience and necessity with benefit to AT&T's 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 Proposed Tower will specifically benefit consumers through better rates or service, it is inexplicable that the Application and Response are devoid 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 interests, 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.

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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 1st day of March 2021, 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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