

**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.: 2020-00351  
CONVENIENCE AND NECESSITY TO CONSTRUCT )  
A WIRELESS COMMUNICATIONS FACILITY )  
IN THE COMMONWEALTH OF KENTUCKY )  
IN THE COUNTY OF PULASKI )

SITE NAME: ELIHU RELO – ROSE HILL ROAD

\* \* \* \* \*

**APPLICANTS’ RESPONSE TO  
SBA TOWERS III LLC ’S PUBLIC COMMENT  
OF FEBRUARY 8, 2021**

New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility (“AT&T”) and Uniti Towers LLC, a Delaware limited liability company (“Applicants”), by counsel, make this Response to the Public Comment of February 8, 2021 (“SBA Public Comment”) filed by SBA Towers III LLC (“SBA”)¹. Applicants have no duty to respond to SBA which has not been granted intervention and which is not a consumer of wireless services which would be offered from the proposed tower. Moreover, expiration of the 150-day FCC Shot Clock period is looming in that it has been *one hundred forty-one (“141”) days* since the PSC Staff issued a “No Deficiency” letter on

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¹ Significantly, SBA holds no Kentucky Utility I.D. Number and is not designated a public utility by the Public Service Commission (“PSC”).

the CPCN Application in this proceeding. However, in these circumstances, Applicants cannot let the misguided SBA Public Comment go unanswered.

Background. The SBA Public Comment contests the Motion for Confidential Treatment filed by Applicants on grounds it may be subject to a confidentiality clause in a contract to which the PSC is not a party and speculates on what may be contained in Applicants' Motion. This is just the kind of ancillary argument unrelated to public convenience and necessity which illustrates why a person or entity seeking intervention must state "... 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." 807 KAR 5:0001 – Section 11. The SBA Public Comment seeks to move this proceeding toward complication and disruption rather than toward the public's need for wireless service.

As recognized by a March 18, 2018 Order in PSC Case Number 2017-00435 and reiterated in a January 21, 2021 Order in 2019-00176:

"The [Public Service] 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."

Of course, the within case is not the only CPCN proceeding for a new tower where SBA is seeking to protect its pecuniary interest in an existing tower. In fact, it has a "baker's dozen"<sup>2</sup> of Motions to Intervene pending in CPCN cases in which Applicants are seeking to construct new towers.

The SBA Public Comment of February 8, 2021 was filed long after it had filed a

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<sup>2</sup>PSC Case Numbers: 2020-00300; 2020-00310; 2020-00328; 2020-00343; 2020-00345; 2020-00351; 2020-00354; 2020-00360; 2020-00404; 2021-00012, 2021-00049; 2021-00065; 2021-00092.

Motion to Intervene on December 28, 2020. Applicants had timely filed a Response to the Motion to Intervene, and SBA had timely filed a Reply. Further argument supporting intervention at this stage is untimely pursuant to such regulation - 807 KAR 5:001 – Section 5. The SBA Public Comment is properly and substantively characterized not as public comment on the merits of the request for CPCN, but as further advocacy of the Motion to Intervene. Thus, the SBA Public Comment is untimely when properly viewed as argument on intervention and should not now be considered.

Applicants nonetheless now directly respond to the SBA Comment in order to make sure the record before the PSC is clear as to the relevant facts and circumstances.

SBA Misconception as to Confidential Filing. Contrary to the suggestion of SBA, the Applicants' Motion for Confidential Treatment and associated filing in this proceeding do not include any lease or other contract between any Applicant and any SBA affiliate. Consequently, there is no issue of disclosure of information subject to any confidentiality clause. The filing for which Applicants request Confidential Treatment includes no more specific reference to disparity between the SBA lease rent and the Uniti Towers, LLC lease rent than is in the Applicants' Response to the Motion to Intervene included in the public record. No specific dollar amount of existing rent is stated in any materials submitted with a Motion for Confidential Treatment.

No Basis for Non-Party to Object to Evidentiary Submissions. SBA has no basis to object to what information the Applicants may submit or the PSC may or may not consider in determining whether to grant a Certificate of Public Convenience and Necessity.

PSC regulations require a *party* opposing a Request for Confidential Treatment to

do so within “... seven (7) days after the motion is filed with the commission.” 807 KAR 5:0001 – Section 13 (“Confidential Material”). SBA, as a *non-party*, apparently seeks to effectively circumvent such requirement by filing Public Comment. Applicants had filed their Request for Confidential Treatment on January 11, 2021 and, of course, the SBA Public Comment was not filed until February 8, 2021. Even if not directly applicable, the aforementioned regulation illustrates the PSC has long considered prompt response to a Request for Confidential Treatment to be important. Of further significance is that the detailed provisions of 807 KAR 5:0001 Section 13 never contemplate a non-party having any participation in proceedings involving a Request for Confidential Treatment.

SBA seeks application of stringent evidentiary standards on what the PSC may consider in the form of confidential submissions and advocates that it must be allowed to intervene and review and respond to any such information submitted to the PSC. KRS 278.310, however, provides the PSC “... shall not be bound by the technical rules of legal evidence.” (Emphasis added). The PSC has explained in its Order of August 6, 2018 in Case Number 2015-00283<sup>3</sup>:

“... The Rules of Civil Procedure and the Rules of Evidence are advisory in nature to the proceedings of the Commission. The Commission retains discretion in determining the level of the application of the Rules, if at all. *Inter-County Rural Elec. Co-op Corp. v. Public Service Commission*, 407 S.W.2d 127, 130 (Ky. 1966).”

Thus, stringent evidentiary and procedure standards are inapplicable to this proceeding, particularly when the advocate for such standards is a not even a party.

KRS Chapter 278 and PSC regulations at 807 K.A.R. 5:063 provide authority for

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<sup>3</sup> *In the Matter of: Application of Windstream Communications, Inc. for a Declaratory Order Affirming that the Interconnection Regimes under KRS 278.530 and 47 U.S.C. Section 251 are Technology Neutral*, 2018 Ky. PUC LEXIS 747.

Applicants to submit a variety of evidence to support their case. Substantive and procedural due process rights further support the Applicants' rights to submit supporting evidence to the PSC as decision-maker. 807 K.A.R. 5:001 – Section 13 - provides a procedure for the PSC, not an interloper, which has not even been granted intervention, to determine whether information may be deemed confidential. The PSC has broad discretion on how it conducts its proceedings and the extent of any hearing allowed.<sup>4</sup> SBA is by no means a private attorney general on these matters.

Confidentiality of Entire Submission Properly Requested. Applicants expressly requested their entire submission to be granted confidential treatment. The PSC can properly make its decision on such request without granting intervention to SBA. The circumstances are distinguishable from PSC Case No. 93-367, 1993 Ky. PUC LEXIS 249, as cited by SBA, which involved an entire contract in circumstances where it was reasonable to include that not every provision was suitable for confidential treatment. In the present case, Applicants have submitted an Affidavit with targeted discussion of AT&T Mobility's experience with negotiations with SBA. It is precisely the type of evidence which should be protected as confidential.

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<sup>4</sup> 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 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).

Whether any public hearing for the offering of evidence is held is within the discretion of the PSC per KRS 278.020(1). See *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 proof does not mandate intervention be granted or that any hearing take place.

Sufficient Due Process Granted to Non-Party. SBA's public comment reflects an expansive view of due process which is not reflected in Kentucky law. SBA is only entitled an opportunity to be heard on its Motion to Intervene, particularly as a non-party. *Hampson v. Boone County Planning Commission*, 460 S.W.3d 912, 917 (Ky. App. 2014)(“... the hallmarks of procedural due process are notice and an opportunity to be heard.”). The SBA Motion to Intervene and public comments reflect that SBA has taken advantage of its right to be heard. SBA is not entitled to demand the PSC's entire consideration of the Application be contorted to allow SBA a maximum level of participation as an intervener. This is an administrative proceeding in which Applicants seek a Certificate of Public Convenience and Necessity be granted by the PSC. SBA does not have the rights of a defendant in a civil action. Accordingly, its Public Comment of February 8, 2020<sup>1</sup> should be fully discounted.

FCC Shot Clock Considerations. The Application for CPCN was filed with the PSC on October 27, 2020, with PSC Staff issuing a “No-Deficiency Letter” on October 28, 2020. The FCC applies a 150-day Shot Clock to applications for new cellular towers.<sup>5</sup> *One hundred forty- one (“141”) days* have passed between the “No Deficiency Letter” on the CPCN Application and the within filing. Thus, expiration of the FCC Shot Clock is looming.

The PSC has repeatedly recognized the need to make decisions on CPCN Applications within the period of the FCC Shot Clock. See Kentucky PSC cases 2014-0098 (Alice Lloyd); 2014-0088 (East Point); 2014-0074 (Index); 2014-00135 (Nippa); and

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<sup>5</sup> 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”).

2014-0087 (Staffordsville)(collectively the “Five Precedents”). The PSC’s Orders granting requests for CPCN in each of the Five Precedents 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, ....” (Emphasis added).

Similar considerations are present in the this proceeding considering: (1) the long pendency of the case in general going back to the October 28, 2020 “No Deficiency Letter from PSC Staff; (2) that every day it is not decided is another day approaching or soon beyond the FCC Shot Clock deadline; (3) that federal law encourages rapid deployment of wireless facilities<sup>6</sup> and requires state and local government permitting decisions to be made in a reasonable time<sup>7</sup>; and (4) that Kentucky statutory law recognizes the importance of wireless service to its citizens and the inherent value of competition in the

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<sup>6</sup> 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.))

<sup>7</sup>47 U.S.C. § 332(c)(7)(B)(ii).

industry.<sup>8</sup> On top of all of those considerations, the case for grant of a CPCN in the present case is even more compelling because the rent and other business terms prevent the SBA Tower from being reasonably available for collocation pursuant to 807 K.A.R. 5:063(1)(s).

### **CONCLUSION**

SBA's concerns expressed in its Public Comment are insignificant when weighed against all of the foregoing argument. Accordingly, the PSC should deny the SBA Motion to Intervene, entertain no further hearings, inquiry or other delay as a result of the SBA Comment, and forthwith grant the requested CPCN.

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<sup>8</sup> See Applicants' Response to SBA Motion to Intervene addressing these issues in depth.



## REQUEST FOR RELIEF

**WHEREFORE**, there being no ground for intervention by SBA or for the PSC to alter the process of considering the Application, Applicants respectfully request the Kentucky Public Service Commission:

- (a) Accept this Response to Public Comment for filing;
- (b) Deny the Motion to Intervene;
- (c) Grant the request for a CPCN; and
- (d) Grant Applicants any other relief to which they are entitled.

Respectfully submitted,

*/s/ David A. Pike*

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David A. Pike  
And

*/s/ F. Keith Brown*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 18th day of March 2021, a true and accurate copy of the foregoing was electronically filed; and sent by U.S. Postal Service first class mail, postage prepaid, to:

Edward T. Depp  
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Respectfully submitted,

*/s/ David A. Pike*

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