

**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
PULASKI**

Case No. 2020-00351

SBA TOWERS III LLC's REPLY IN SUPPORT OF MOTION TO INTERVENE

SBA Towers III LLC ("SBA"), by counsel, hereby files its Reply in Support of its Motion to Intervene. In support of this Reply, SBA states as follows.

A. Applicant's Response Shows that SBA's Intervention will Present Issues or Develop Facts that Assist the Commission in Fully Considering this Matter.

1. Pursuant to 807 KAR 5:001 § 4(11)(a), a person moving for full intervention shall be granted such status if the Commission makes either of the following determinations: (i) the movant "has a special interest in the case that is not otherwise adequately represented" or (ii) that the movant's "intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings."

2. When determining whether a person should be granted full intervention, the Commission must make a decision that is reasonable, fair, and supported by sound legal principles. *See Enviropower, LLC v. Pub. Serv. Comm'n*, No. 2005-CA-001792, 2007 Ky. App. Unpub. LEXIS 121, at *8; *Ryan v. Ryan*, 473 S.W.3d 637, 639 (Ky. Ct. App. 2015) ("The test for abuse

of discretion is whether the . . . decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. . . . Abuse of discretion implies arbitrary and capricious action that results in an unreasonable and unfair decision.”).

3. Applicant’s Response to SBA’s Motion to Intervene shows that SBA’s intervention is likely to present issues or develop facts that assist the Commission in fully considering this matter. Indeed, just by seeking intervention SBA has already helped the Commission develop facts that Applicants failed to disclose in their Application.

4. Specifically, Paragraph 12 of the Application states only, “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.” *See* Application, at ¶ 12.¹

5. For the first time in its Response, Applicants admit that AT&T is currently co-located on an existing tower only 786.72 feet from the proposed tower, but claims that the existing tower is not a “reasonably available opportunity to co-locate,” which is a legal conclusion reserved for the Commission.

6. Thus, the Application only provided the Commission with the Applicants’ own legal conclusion, but failed to provide the Commission with any facts attempting to support this legal conclusion, which are necessary for the Commission’s determination as to whether Applicants are entitled to the relief they seek.

7. Accordingly, SBA has already shown that its intervention will assist the Commission in developing facts on pertinent issues. Without SBA’s assistance, for example, the

¹[https://psc.ky.gov/pscecf/2020-00351/cshouse%40pikelegal.com/10272020024120/Elihu_Relo - Rose Hill Road - Full Application.pdf](https://psc.ky.gov/pscecf/2020-00351/cshouse%40pikelegal.com/10272020024120/Elihu_Relo_-_Rose_Hill_Road_-_Full_Application.pdf).

Commission may never have been presented with information regarding this nearby tower, a fact it is required to consider under 807 KAR 5:063, but which Applicants failed to disclose to the Commission.

8. As a result, it would be unreasonable and unfair to deny SBA's Motion to Intervene, as SBA has already met the legal standard necessary for intervention simply by filing its Motion.

B. Applicants' Response Attempts to Litigate Important Issues Without the Development of Facts or Evidence.

9. Applicants' Response makes repeated attempts to have this Commission reach legal conclusions without placing any evidence in the record, apparently believing the Commission is authorized to make definitive rulings based on Applicants' unsupported legal conclusions made in a Response to a Motion to Intervene.

10. However, Applicants are required to actually present facts and evidence that support their legal conclusions, and SBA has already proven that it has the ability to assist the Commission in developing these facts and evidence.

11. Indeed, while Applicants accuse SBA of asking the Commission to take arbitrary action, if the Commission grants the relief requested based on the Application alone, that decision will be subject to attack as "arbitrary" because Applicants have failed to provide the Commission with any evidence on relevant issues, let alone "substantial evidence," and, in some instances, Applicants simply cannot provide evidence required by their cited legal authority.

12. For example, Applicants allege "the public convenience and necessity require the construction of the proposed wireless communications facility ("WCF") to bring or improve AT&T Mobility's services to an area currently not served or not adequately served by AT&T by

increasing coverage or capacity and thereby enhancing the public's access to innovative and competitive wireless communications services.” Response, at 2.²

13. As noted in SBA's Motion, the area is already served, and SBA has the engineering expertise to help the Commission determine whether the proposed tower will actually increase coverage to Kentucky's citizens (it will not). Likewise, there is no evidence in the record that the proposed tower will increase “capacity,” as there is no information related to the amount of space that AT&T will occupy on the proposed tower as compared to the amount of space AT&T currently occupies approximately 786 feet away. Thus, SBA should be granted intervention to lend its technical and engineering expertise to assist the Commission in determining whether “the public convenience and necessity” truly “require” the construction of the proposed tower as Applicants allege.

14. Further, while Applicants' attempts to litigate in the Response to a Motion to Intervene whether the existing SBA tower provides a “reasonable” opportunity to co-locate is improper, Applicants do so only by making unsupported factual allegations. Applicants' entire argument is predicated on its claim that there is not a reasonable opportunity to co-locate due to an alleged discrepancy in rental terms. However, Applicants have not sought to provide any evidence related to the alleged price discrepancy and whether or how it might make co-location opportunities “reasonable.” Instead, Applicants suggest that the law allows the Commission to simply assume Applicants' self-serving legal conclusions are true without the benefit of any facts to support them.

15. Moreover, Applicants' allegations related to SBA's demands for supposedly unfair rental rates and terms are wholly unsupported and unfounded. As a matter of fact, AT&T has made

² https://psc.ky.gov/pscecf/2020-00351/cshouse%40pikelegal.com/12282020042217/Eilihu_Relo_-_Rose_Hill_Road_-_Uniti_Response_to_SBA_Motion_to_Intervene.pdf .

no attempt to negotiate rental rates and terms with SBA since the relevant lease for the existing tower only 786.72 feet away from the proposed tower was amended on February 13, 2019. Thus, not only have Applicants not provided the Commission with evidence related to the terms and conditions “demanded” by SBA, Applicants cannot provide that evidence because no such “demands” exist.

16. Indeed, in prior cases, AT&T has sought to deny SBA intervention by arguing negotiation would be “futile” by relying upon its bulk and generic request to lower rental rates on almost every cellular tower leased by AT&T with SBA across the entire country.³ However, here, the relevant lease was amended after that bulk request, and AT&T has made no attempts to renegotiate its lease terms since SBA agreed to an amendment of the existing lease, which occurred less than two years ago.

17. Therefore, Applicants do not have the ability to provide the Commission with any evidence related to the terms and conditions that SBA would be willing to offer. Rather, Applicants invite the Commission to commit reversible error by making a legal finding that the public convenience and necessity requires the construction of the proposed wireless tower based on what AT&T assumes would be offered by SBA.

18. Without SBA’s intervention the Commission would likely be required to deny the Application because there will be no party in the proceeding that has the ability to provide evidence of what terms SBA is willing to offer AT&T to co-locate on the existing tower.

³ See *In the Matter of: Application of Vertical Bridge Development, LLC and New Cingular Wireless, PSC LLC d/b/a AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility at State Route 2194W, Hickory, Graves County, Kentucky 42051*, PSC Case No. 2020-00270, Response to SBA’s Communications Corporation Motion to Intervene, at 4 (“SBA further provides contradictory evidence on page 7 of its Motion by stating in the last line of paragraph c, ‘AT&T has not contacted SBA specifically concerning the rents on the SBA tower.’ But then goes on to provide the following statement in footnote 8, “SBA does admit that it received a bulk request from AT&T to lower rents and make changes to lease agreements . . .”).

19. The Applicants cannot provide this necessary evidence because AT&T has not requested such terms and conditions from SBA. Without this evidence it will be impossible for the Commission to reach the legal conclusion required by the Commission's prior precedent regarding what constitutes a "reasonable" co-location opportunity.

20. Accordingly, SBA's Motion to Intervene should be granted because it is the only party with the capability of introducing evidence of SBA's terms and conditions for co-location on the existing tower only 786.82 feet away.

C. Allowing SBA to Intervene Promotes Competition.

21. Applicants' claim that SBA seeks to inhibit competition by seeking status as an intervenor is misplaced. Indeed, contrary to AT&T's claims in its Response, nowhere in SBA's Motion to Intervene does it request that the Commission reach any specific conclusion or ask the Commission for an Order that "AT&T Mobility must remain on the SBA tower."

22. Rather, allowing SBA to intervene so that it may lend its technical and engineering expertise, as well as assisting in the development of facts regarding AT&T's attempts to co-locate on existing towers, will only ensure that the Applicants have met all of the requirements for a CPCN and under 807 KAR 5:063. For example, if two closely situated towers could create unanticipated interference issues, the proposed construction could actually hinder competition; without facts pertaining to that question, however, the Commission will be unable to make that determination on the basis of substantial evidence.

23. Merely allowing SBA to intervene does not inhibit competition. Granting SBA's Motion to Intervene would simply provide the Commission with market, technical, and engineering expertise to evaluate the necessary legal requirements, including the "reasonable opportunity" to co-locate. Indeed, AT&T has been providing services from the existing SBA tower

for nearly 10 years, which AT&T believed to be a “reasonable opportunity” to co-locate at the time and when it negotiated an amendment to its agreement with SBA less than two years ago.

24. Instead, the clear and indisputable fact is that Applicants seek to prevent their competitor from engaging in the regulatory process and providing market information and specialized expertise that the Commission does not generally possess and that Applicants intentionally seek to exclude, as that information and expertise does not fit the Applicants’ narrative. SBA, through its long history and deep expertise in the industry, is uniquely qualified to help develop important facts that are vital to the proper consideration of the Application. Considering that Applicants were there ones whose Application omitted any mention of the existing tower a mere 786.72 feet from the location of Applicants’ proposed new tower, it is the relegation of SBA to “public commenter” unable to participate fully in the discovery process and other aspects of the case – as Applicants advocate – that will harm competition.⁴

25. That it is Applicants that seek to stifle competition is best exhibited by their argument that “res judicata” and “collateral estoppel” apply. Essentially, Applicants argue that because the Commission found in one instance that intervention was not warranted, under no circumstances can SBA ever be granted status as an intervenor, despite the fact that the cases all involve disparate sets of facts and issues. Under Applicants’ mistaken theory of “res judicata” and “collateral estoppel,” being found not liable on one claim of negligence would make a party immune from being sued for negligence ever again, and it would prevent SBA from ever seeking to put the Commission on notice that Applicants filed an Application without disclosing relevant facts to the Commission (as occurred here).

⁴ Applicants allege that “the construction of the WCF will bring or improve AT&T Mobility’s services to an area currently not served or not adequately served by AT&T Mobility by increasing coverage or capacity and thereby enhancing the public’s access to innovative and competitive wireless communications services.” Application, at ¶ 7 (emphasis added).

26. SBA acknowledges that if, after full development of the facts, the Commission finds that construction of a second wireless tower merely roughly 786.72 feet from an existing and suitable tower meets the appropriate legal standard and will not, for example, result in “wasteful duplication” or an “unnecessary multiplicity of physical properties,”⁵ Applicants will be free to construct their wireless facility.

27. SBA offers (at no cost) to provide the Commission with market, technical, and engineering expertise that the Commission does not possess and that will assist the Commission in developing facts vital to the evaluation of whether Applicants’ proposed construction is in the public interest and otherwise satisfies the standard for a CPCN under applicable Kentucky law. If Applicants cannot make this showing, that is not a result of SBA preventing competition; it is a result of Applicants failing to meet their burden under Kentucky law.

28. Thus, permitting a competitor to intervene in the regulatory process does not stifle competition. Rather, it ensures that an applicant seeking a CPCN will take action that truly benefits the public and that the facts underlying that overarching consideration are thoroughly and skillfully evaluated with the benefit of relevant market, technical, and engineering expertise like what SBA offers. This outcome benefits Kentucky citizens, which is exactly what competition is designed to promote.

⁵ See *In the Matter of: The Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main*, Ky. PSC Case No. 2007-00134, 2008 Ky. PUC LEXIS 494, at *49-50 (Apr. 25, 2008), (“To obtain such Certificate, the utility must demonstrate a need for such facilities and an absence of wasteful duplication. . . . ‘Wasteful duplication’ is defined as ‘an excess of capacity over need’ and an ‘excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties.’”).

WHEREFORE, SBA Towers III LLC respectfully requests that the Commission grant its Motion to Intervene.

This the 8th day of January, 2021.

Respectfully submitted,

/s/ Edward T. Depp

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Certification

I hereby certify that the electronic version of this filing made with the Commission on January 8, 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.

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