

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION
CASE NO.: 2020-00361**

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
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO CONSTRUCT
A WIRELESS COMMUNICATIONS FACILITY AT
IN THE COMMONWEALTH OF KENTUCKY
IN THE COUNTY OF MARSHALL

SITE NAME: MOORS CAMP

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

SBA Towers VII, LLC's ("SBA") 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 ("AT&T" or "the Applicant") largely ignores the requirements for intervention found in 807 KAR 5:001 Section 4(11), which are not even addressed until page 20 of the Response. AT&T's Response likewise attempts to obfuscate the unique facts of this case, which include: (i) that it is not a tenant on the SBA Tower 916 feet away from the Proposed Tower; (ii) that it is has never been a tenant on the SBA Tower; and (iii) although AT&T's vendor, MasTec inquired about space on the SBA Tower for A&T, there was no further inquiry regarding rates after SBA confirmed to MasTec that there was space available on the SBA Tower; and suggest, that "further efforts at negotiation are futile" because all SBA

tower rents in Marshall County are unreasonable. In a making this argument, AT&T ignores the fact that it did not even make an *initial* effort or inquiry about rental rates for the SBA Tower and therefore cannot satisfy co-location requirements.

Furthermore, instead of focusing on the discrete legal issues contained in SBA's Motion to Intervene, the Applicant's response focuses on how a new tower will benefit AT&T monetarily, even going so far as to suggest that SBA's arguments concerning physical similarities and service between the two towers is completely irrelevant. Likewise, AT&T provides no explanation as to how its alleged pecuniary win will materialize or translate into convenience or benefits in rates and services to the local consumers. Instead, the Applicant attempts 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 brazenly 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, including the fact that AT&T has made no effort whatsoever to co-locate on the SBA Tower, and has not even inquired about rental rates for the SBA Tower. 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 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.

A required section of the application mandated by 807 KAR 5:063 is that the Applicant 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 An explanation of co-location further requires the Applicant to address any reason as to why a new tower is needed. As made clear in the Applicant’s Response, it rests the question of whether co-location is available solely and squarely on the issue of rents, while ignoring the fact that it has no evidence regarding rental rates for the SBA Tower because it is not a current tenant, has never been a tenant on the tower, and failed to make even a cursory initial inquiry about rents after SBA confirmed that there was space available for AT&T to co-locate on the SBA Tower.² Because of this, there is no basis for AT&T’s arguments concerning the rents. Nevertheless, and without any evidence, AT&T’s Response alleges that “substantial rents” and “other business term disparities” **in other cases** are “compelling evidence of the futility of attempt[ing] negotiation with SBA.”³ These arguments are disingenuous, and the failure to even inquire about rents (which, according to AT&T is the dispositive factor for assessing co-location) is an issue that SBA alone can provide information about to the PSC which will aid in their decision-making process.

¹ The Applicant also argues that SBA’s RF Coverage Plot Analysis is not relevant 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] [*sic*] the proceedings without addressing the threshold issue of reasonable availability.” Response, KY PSC Case No. 2020-000361, pg. 9-10. 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 See Exhibit 3 to SBA’s Memorandum in Support of its Motion to Intervene.

³ Response, KY PSC Case No. 2020-000361, pg. 4.

Furthermore, if rent rates are to be properly considered when evaluating whether or not the Applicant has attempted to co-locate, there must at least be evidence that the Applicant inquired about rates and has actual knowledge of the rental rates of nearby towers before alleging a rental disparity or building a new tower. 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. It is not sufficient for AT&T to simply say that a 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 the Applicant has not offered anything like this in the Application. 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.⁴ Despite this holding, the Applicant has not even attempted to obtain the information regarding rents needed to support an alleged rental disparity argument – an issue that was not even addressed in the Application.

In addition, the Application is bare of evidence as to actual improvements to consumer rates and services. The Applicant 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 alleged excessive rents (it has no evidence of) on the SBA Tower which it has never been a tenant, somehow "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 916 feet the SBA Tower. There is no argument to be made simply

⁴ Order, KY PSC Case No. 2017-00435, pg. 2.

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.

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). Further, SBA has pointed out that the Applicants did not inquire about rental rates on the SBA Tower, information that might never have come to light had SBA not introduced it.

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 Applicant argues 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 the PSC in the *Hansen* case,⁶ the essential elements of collateral estoppel are simply not met here.

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.

⁶ See SBA Motion to Intervene, KY PSC Case No. 2020-310 (filed October 29, 2020) at 4.

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 because AT&T is not and has never been a tenant on the SBA Tower, and AT&T has never inquired about rental rates. Therefore, there is no "identity of issue," and collateral estoppel fails on the first element.

The Applicant speaks in generalities about the similar issues raised in previous cases but fails to meet its 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, and completely unique technical and coverage aspects that deserve novel attention.

Additionally, as noted above, the Applicant spends a lot of real estate in its Response discussing rent rates without supporting evidence, generalizing that SBA's rental rates are "exorbitant" and "systemic," which it argues justifies building a new tower in all cases. However, rental rates vary by location and tower. In this case, AT&T has not even inquired about rental rates on the SBA 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 gives no indication to SBA or any party of what kind of rent disparity actually justifies building of new towers, it only states that the rent disparity in that case justifies that action. It certainly does not state that failing to obtain evidence regarding rental rates or whether there is a rental disparity justifies building a new tower 916 feet away from an existing tower.

III. The Applicant's 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 Applicant has 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. The Applicant repeats numerous times over the course of its Reply that SBA's alleged unreasonable rental fees (to which it offers no evidence because it is not a tenant and has not inquired about rents) is why the Proposed Tower should be allowed to be built 916 feet away from the existing SBA Tower. The Applicant's focus on its 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 Applicant's arguments regarding its unfounded allegations of "excessive rent" and co-location because AT&T has failed to even take the minimal step of inquiring about rental rates for nearby SBA Tower, its 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 the utter lack of any effort by AT&T to co-locate on the SBA Tower or even inquire about rental rates could be properly presented to the Commission.

CONCLUSION

SBA has shown that it has an interest in this matter that is not currently being represented. The Applicant’s 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). SBA’s exclusive and unique information regarding AT&T’s failure to attempt co-location or even obtain basic information regarding rental rates on the SBA Tower, in addition to the technical engineering information 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

I hereby certify that on January 11, 2021, the foregoing document was served via first class USPS, postage prepaid, upon the following:

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