

**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.: 2020-00404
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF WAYNE)

SITE NAME: STEUBENVILLE RELO

* * * * *

APPLICANTS' RESPONSE TO REQUESTS FOR LOCAL HEARING

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 (“Applicants”), by counsel, timely makes this Response to the Requests for Local Hearing filed by Shawn Gossage, Sharon Dishman, Gordon T. Germain, Carol Jeffries, and Alick Cooley (collectively “Requests for Hearing”).

The COVID-19 pandemic has greatly impacted the operation of Kentucky state government. 2020 Senate Bill 150 as signed by the Governor and effective on March 30, 2020 provides in pertinent part: “Notwithstanding KRS 61.826, a public agency may conduct any meeting including its regular meeting, by live audio or live video teleconference during the period of the state of emergency....” See also March 31, 2020

Kentucky Attorney General Advisory: Open Meetings Act and Open Records Act Changes during the COVID-19 Public Health Emergency.

Kentucky Public Service Commission (“PSC”) Order entered March 16, 2020 in Case No. 2020-00085 styled “Electronic Emergency Docket Related to the Novel Coronavirus COVID-19” provides “Any conference or meeting that was scheduled to be held at the Commission’s offices will be conducted by teleconference or videoconference.” Presumably, if the PSC is exercising such level of caution as to meetings at the PSC offices in Frankfort, it would do the same for any meeting or public hearing it would otherwise conduct outside of its Frankfort offices. Consequently, should the PCS grant the Request for Hearing in this proceeding, such hearing should be by teleconference or video conference.

Thousands of applications for a Certificate of Public Convenience and Necessity (“CPCN”) for construction of a new cellular towers have been decided by the PSC without public hearing. Thus, the cryptic Requests for Hearing in this action are unusual at best. Moreover, even without public hearing, citizens have the right to submit comments of all kinds into the administrative record for consideration of the PSC, thus ensuring their voices will be heard regardless of the merits of their claims.

In summary, Applicants object to the scheduling of an in-person public hearing in Frankfort or in Wayne County on its Application for a Certificate of Public Convenience and Necessity (“CPCN”) to construct a new cellular tower (the “Application”). In the alternative, should a public hearing be scheduled, AT&T requests it be conducted by videoconference or teleconference and that at least the parameters set forth below be imposed by pre-hearing Order of the PSC in the interest of the appropriate jurisdiction of

the agency under Kentucky statutes and implementing regulations as well as in the interest of compliance with the federal Telecommunications Act of 1996 (“TCA”). Even if KRS 278.650 is interpreted to require scheduling of a public hearing on three appropriate requests, the scope and procedures applicable to any such hearing remains within the broad discretion of the PSC consistent with KRS Chapter 278 and 807 K.A.R. Chapter 5.

Applicants respectfully state as follows:

1. No Stated Basis for Public Hearing. The Requests for Hearing provide no indication of the bases for such requests or the argument and evidence the requesters seek to present to the PSC in public hearing or why they could not provide any relevant information through public comment. For example, any effort to advance “Not in My Back Yard” (“NIMBY”) considerations outside the jurisdiction of the PSC would make such public hearing an exercise in futility. If the PSC is at all inclined to schedule a public hearing, it should first require the persons requesting a hearing to identify specifically the issues they intend to raise and how those issues are within the PSC’s mandate to consider wireless service issues or are otherwise within PSC jurisdiction under statute or implementing regulations.

Any plea for a public hearing based simply on a desire for AT&T to remain a collocating carrier on the existing SBA tower, with no proffer of evidence of superior wireless service, and no proffer of evidence that the SBA tower is “reasonably available” in comparison to the proposed Uniti Towers, LLC facility within the meaning of 807 K.A.R. 5:063-Section 1(s), would simply be a waste of public resources. Tower opponents could not possibly prevail in such a proceeding under applicable law. In addition, scheduling such a public hearing would be inconsistent with the substance of the PSC’s course of

action in Case No. 2017-00435.¹

2. Discretion of PSC to Consider Certain Factors. KRS 278.650 states in pertinent part: “In reviewing the application, the commission may take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values.” (Emphasis added). KRS 446.010 provides in pertinent part: “As used in the statute laws of this state, unless the context requires otherwise: ... (26) [the word] may is permissive.” (Emphasis added). Also, the PSC implementing regulations do not bind the agency to consider such factors in its decision. Consequently, the PSC has the discretion to narrow the scope of any scheduled public hearing. TCA limitations weigh in favor of the PSC narrowing the scope of any hearing to foreclose consideration of aesthetic issues.

3. Risk of Prohibition of Service in Violation of TCA. A prohibition of service in violation of Section 704 of the TCA occurs when a permit is denied notwithstanding the wireless carrier showing a significant gap in its own service and that it has made a good faith effort in considering feasible and available alternatives. *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 804 (6th Cir. 2012). Based on the positions taken by the PSC in its March 26 and November 1, 2018 Orders in Case No. 2017-00436, as well as on Applicants’ compliance with filing requirements,² Applicants

¹ Applicants move that the PSC’s Orders dated March 26, 2018, July 2, 2018, and November 1, 2018 in Case No. 2017-00435 (“Hansen”) be incorporated by reference in this proceeding. 807 K.A.R. 5:001 – Section 11(5). Applicants further move the PSC’s Order dated January 21, 2021 in Case No. 2019-00176 (“Dunnville Relo”) be incorporated by reference in this proceeding.

² Of record correspondence from PSC Staff dated December 30, 2020 confirms the Application meets minimum filing requirements.

are confident of a gap in coverage and a good faith effort in considering “reasonably available” collocation opportunities within the meaning of 807 K.A.R. 5:063-Section 1(s). AT&T cannot be forced to collocate on a tower under unreasonable lease terms, even one within a search ring, when a lower cost option is available to provide needed service. Thus, a denial of the Application would violate Section 704 of the TCA. Persons requesting a public hearing in this context are only trying to lure the PSC into violating the TCA.

4. Compliance with “Reasonably Available” Standard. Should a public hearing be scheduled, persons making such request should be required to file a pre-hearing expert report detailing any proof they plan to introduce into hearing evidence purportedly showing the existing SBA tower is “reasonably available” for collocation within the meaning of 807 K.A.R. 5:063-Section 1(s) and the PSC’s March 26 and November 1, 2018 Orders in Case No. 2017-00436. Such a pre-hearing report from tower opponents would provide AT&T adequate due process opportunity to respond within the administrative record of this proceeding and provide the PSC with evidence crucial to the validity of its ultimate decision.

5. Need Expert Witness Testimony on any Proof by Tower Opponents. Any reports filed in connection with any public hearing should be prepared and signed by an *expert* witness in that the U.S. Court of Appeals for the Sixth Circuit does not consider lay testimony to be probative in opposition to “substantial evidence” or “prohibition of service” claims for violation of Section 704 of the TCA. *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794 (6th Cir. 2012).

6. Aesthetic Considerations Fail to Justify a Public Hearing. The Requests for Hearing do not evidence any recognition of the TCA's limitation on aesthetic considerations as a basis for denial of a proposal for a new tower. *Cellco Partnership v. Franklin Co.*, KY, 553 F. Supp. 2d 838, 849, 851-851 (E.D. Ky. 2008). The U.S. Court of Appeals for the Sixth Circuit in *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 804, 804 (6th Cir. 2012). Federal courts have found that unsupported opinion is not substantial evidence. *Cellco Partnership* at 849. Generalized expressions of concerns with "aesthetics" are not substantial evidence. *Cellco Partnership* at 851. Claims the tower is unsightly are generalized expressions of aesthetical concerns and the same objection could be made by any resident in any area in which a tower is placed. *Cellco Partnership* at 852. General concerns that the tower is ugly or unwanted near an individual's residence are not enough to meet the 6th Circuit substantial evidence test. *T-Mobile Central* at 800. Finally, anyone who opposes a tower in their backyard can claim it would be bad for the community, not aesthetically pleasing, or is otherwise objectionable, but such claims would not constitute substantial evidence. *T-Mobile Central* at 801.

In summary, any effort by tower opponents to thwart AT&T's proposal for a new tower based on purported aesthetic issues arising from alleged tower proliferation is ineffectual as a matter of law. Consequently, a hearing should not be scheduled to evaluate such issues and persons requesting a hearing should be informed well in advance of this state of the law. As the PSC's Order of March 26, 2019 in Case No. 2017-00435 confirmed, arguments against tower proliferation are "not permissible under federal law." *Id.* at p. 3. Should a public hearing be scheduled, AT&T requests an appropriate

pre-hearing Order of the PSC exclude consideration of aesthetic issues, including issues of purported tower proliferation.

7. Increased Competition among Infrastructure Providers is in the Interest of the Public Convenience and Necessity. AT&T is committed to providing state-of-the-art telecommunications services at competitive prices throughout the Commonwealth of Kentucky. The General Assembly recognizes that consumers benefit from market-based competition, which offers consumers of telecommunications services the most innovative and economical services. See KRS 278.546.

The PSC's March 26, 2018 Order in Case No. 2017-00435 recognized the importance of competition among wireless infrastructure providers as does the PSC's January 21, 2021 Order in Case No. 2019-00176. Competitive, market-based infrastructure is needed to provide innovative and economical telecommunications services, and investment in such telecommunications infrastructure is a necessary and critical component of AT&T's mission to provide affordable communication services to Kentucky businesses and residents. The tower proposed by Applicants is necessary to increase competition among telecommunications infrastructure providers so that AT&T can continue to furnish adequate, efficient and reasonable telecommunications services to residents of Wayne County. See *Bardstown v. Louisville Gas & Electric Co.*, 383 S.W.2d 918, 1964 KY. LEXIS 68 (Ky. 1964). Denial of the requested CPCN would reinforce a localized anticompetitive monopoly on telecommunications infrastructure, which is particularly egregious and contrary to consumer interests where SBA is not subject to rate-regulation as to tower operations and leasing of vertical real estate.

Should the PSC Order a public hearing in this proceeding, a PSC pre-hearing Order should make clear that increased competition among telecommunications infrastructure providers is in the interest of the public convenience and necessity as a matter of law and not a matter to be contested in any scheduled hearing.

8. Improvement in Collocation Opportunities Moderated by Competition is in the Interest of the Public Convenience and Necessity. In addition to promoting competition between telecommunications infrastructure providers, approval of the requested Certificate of Public Convenience and Necessity (“CPCN”) will improve collocation opportunities for other telecommunication providers in this area under business terms that are moderated by competition. The tower proposed by Applicants is designed to accommodate antennas for AT&T and two additional service providers. See Exhibit B of the Application. Should the PSC Order a public hearing in this proceeding, a PSC pre-hearing Order should state that improvement in collocation opportunities moderated by competition is in the public convenience and necessity as a matter of law and not a matter to be contested in any public hearing.

9. Persons Requesting Public Hearing are Not Interveners and Do Not Have Rights of Interveners. The Requests for Hearing do not incorporate any Motions for Intervention pursuant to 807 K.A.R. 5:001 Section 4(11). Moreover, were any such Motions to be filed, AT&T preserves all rights to object. In this context, should the PSC schedule a public hearing in this matter, each of the persons requesting such public hearing, should be prohibited by pre-hearing Order or otherwise from taking actions which are only within the authority of an intervener. For example, 807 K.A.R. 5:001 Section 4(11) only allows parties, such as natural persons or entities granted status as

interveners, to make Requests for Information of another party. Any pre-hearing Order should make clear that only a *party* to the case may make Requests for Information, subpoena witnesses,³ or cross-examine⁴ any witnesses Applicants produce at any public hearing.

The PSC regulation on intervention call out the folly of scheduling a public hearing for the benefit of persons who have not achieved the status of interveners. Such persons have the opportunity to make public comment to make their views known even without intervener status or a public hearing. In such context, any public hearing merely becomes a burden on both the Applicants and the PSC, which has the authority to obtain any needed information from Applicant whether a public hearing is scheduled or not.

10. Preservation of Objection to any Effort by Non-Parties to Seek Judicial Review. Applicants reserve all rights to object to the non-parties requesting hearing to obtain judicial review if they seek to challenge any order of the PSC. Pursuant to KRS 278.410(1), judicial review is only available to a “party to a commission proceeding or any utility affected by an order of the commission....” (Emphasis added). See *Bee’s Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765, 766 (Ky. 1960).

11. Preservation of Rights Pursuant to FCC Shot Clock. Applicants are concerned that persons requesting a public hearing in this proceeding may seek to delay

³ 807 K.A.R. 5.001 – Section 4(6) provides in pertinent part: “Witnesses and subpoenas. (a) Upon the written request of a party to a proceeding or commission staff, subpoenas requiring the attendance of witnesses for the purpose of taking testimony may be signed and issued by a member of the commission.” (Emphasis added).

⁴ Kentucky’s general provisions on administrative hearings even allow an *intervener’s* use of cross-examination to be limited “... to promote the orderly and prompt conduct of the proceedings.” KRS 13B.060(3)(b). No right of cross-examination by *non-parties* in such proceedings is recognized.

“... the rapid deployment of wireless facilities” by drawing out any hearing proceedings which are scheduled in contrast to the intent of the TCA.⁵ Consequently, Applicants reserve all rights under the TCA and FCC 150-day “Shot Clock” to ensure timely resolution of this proceeding.⁶ The PSC Staff issued a “No-Deficiency” letter for the within Application on December 30, 2020. Thus, the clock is running on the expiration of the FCC Shot Clock. The PSC has repeatedly recognized the need to make Certificate of Public Convenience and Necessity decisions prior to the expiration of the FCC Shot Clock.⁷ It should do so in the present proceeding and not allow the requests for local hearing received by the PSC over a month after the No Deficiency determination to delay its decision on the Application.

⁵See *Pi Telecom Infrastructure V, LLC v. Georgetown-Scott County Planning Comm'n*, 234 F. Supp. 3d 856 (E.D. Ky. 2017) (“Congress enacted the TCA to promote competition between service providers that would inspire the creation of higher quality telecommunications services and to encourage the rapid deployment of new telecommunications technologies.”).

⁶See *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”).

⁷ See Kentucky PSC cases 2014-0098 (Alice Lloyd); 2014-0088 (East Point); 2014-0074 (Index); 2014-00135 (Nippa); and 2014-0087 (Staffordsville).

WHEREFORE, there being no basis for a public hearing or ground for denial of the subject Application and there being substantial evidence in support of the requested CPCN, Applicants respectfully requests the Kentucky Public Service Commission:

- (a) Accept this Response for filing;
- (b) Deny the Requests for Local Public Hearing; or, in the alternative, conduct any hearing by video teleconference consistent with enacted SB 150 and Orders of the PSC in Case Number 2020-0085;
- (c) Issue a Certificate of Public Convenience and Necessity to construct and operate the WCF at the location set forth herein without further delay; and
- (d) 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 2nd day of February 2021, a true and accurate copy of the foregoing was filed electronically with the PSC and sent by U.S.

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