

**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’ REPLY TO SBA’S
PUBLIC COMMENT ON MAY 26, 2021**

In response to SBA’s Public Comment on May 26, 2021 (“SBA’s Comment”) New Cingular Wireless PCS LLC d/b/a AT&T Mobility (“AT&T”) and Uniti Towers LLC¹ (“Uniti”) (collectively, “Applicants”), by counsel, do hereby incorporate by reference the legal memorandum submitted by Applicants in Case No. 2020-00343 on May 14, 2021. As discussed therein, SBA’s Comment should have no impact on the long-pending Public Service Commission (“PSC”) deliberations or decision on the Applicants’ request for a Certificate of Public Convenience and Necessity (“CPCN”).

¹Uniti Towers LLC has changed its name to Harmoni Towers LLC via filing with the Kentucky Secretary of State on March 22, 2021. Because the Application was filed in the name of co-applicant Uniti Towers LLC on November 3, 2020, this Response and Motion shall continue to reference the co-applicant as Uniti Towers LLC in order to avoid any confusion with prior filings.

SBA's Comment spotlights its efforts to precipitate negotiations that would necessarily result in "... unduly complicating or disrupting the proceedings" which is a key basis pursuant to 807 K.A.R. Section 4(11) for denial of the SBA Motion to Intervene. Moreover, SBA's motivations are suspect in that the PSC has denied SBA intervention in other proceedings on the basis "[t]he 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."²

SBA should not be allowed to maneuver to cause formal or informal abatement of this proceeding. SBA's effort to require negotiations comes long after Applicants have incurred substantial costs in completing site design, engineer-prepared exhibits, other required regulatory filings, and preparing the subject CPCN Application based on facts and circumstances existing at the time of filing of the Application including existing contractual rent on the SBA site in the vicinity. Should the PSC indulge SBA's efforts, it would encourage repetition of similar efforts as to similarly situated applications in circumstances in which towers were not reasonably available for co-location.

The requested CPCN should be granted forthwith for at least the following reasons:

1. Applicants have complied with PSC filing requirements, and such filings constitute substantial evidence supporting issuance of the CPCN.
2. SBA's Comment is an untimely and meritless argument for *De Facto* Intervention over four months after the pleadings on the SBA Motion to Intervene have closed. (The PSC in denying SBA intervention in another case has stated "The Commission is under

² PSC Order of March 26, 2018 in Case No. 2017-00435 ("Hansen"), p. 5.

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." ³).

3. The PSC has previously recognized that post application efforts to identify purported co-location opportunities should not delay or thwart approval of a pending tower application. In fact, it has granted CPCNs in no less than *five* cellular tower cases (the "Five Precedents")⁴ not involving SBA when such issues have arisen.
4. PSC Regulations and Due Process require the Application to be reviewed on facts, circumstances, and applicable law at the time of its filing on December 16, 2020.
5. The SBA suggestion of rent reduction does not render moot the basis for the Application under Kentucky precedent, including the "voluntary cessation" doctrine.
6. The federal Telecommunications Act of 1996 ("TCA") requires state and local governments to make tower permitting decisions in a "reasonable time."⁵ Further proceedings associated with the SBA's Comment, as filed 148 days after the Application was deemed complete, would delay this proceeding far beyond such standard.
7. SBA's maneuver only addresses *current* rent on the SBA tower in the vicinity. Significantly, SBA's Comment mentions nothing about changes to the other egregious terms of the lease on the SBA tower in the vicinity, which are equally important to the SBA Tower not being reasonably available pursuant to 807 K.A.R. 5:063(1)(s). Moreover, these other egregious lease terms make the SBA tower not reasonably available for a co-location lease agreement independent of the egregious current rent but also trigger further unreasonable rent increases in the future as well whenever AT&T seeks to provide improved service with the latest technology.⁶

³ PSC Order of March 26, 2016 in Case No. 2017-00435. See also PSC Order of January 21, 2021 in Case No. 2019-00176 denying intervention and stating SBA "... is a competitor with an interest in keeping tower rents high by limiting the number of towers."

⁴ See cases 2014-0098 (Alice Lloyd); 2014-0088 (East Point); 2014-0074 (Index); 2014-00135 (Nippa); and 2014-0087 (Staffordsville).

⁵ 47 U.S.C. § 332(c)(7)(B)(ii).

⁶ An affidavit of an AT&T manager submitted in connection with Applicants'

8. SBA's Comment further exacerbates the broader problem of SBA's advocacy for AT&T to remain on existing towers across the Commonwealth which are not reasonably available. The PSC has before it no less than *twelve* pending SBA Motions to Intervene in other cellular tower cases⁷ filed by Applicants in cases that present the same issues as this proceeding.

On all of this reasoning, and as further detailed below, Applicants request that the PSC reject all argument in the SBA's Comment and forthwith proceed to overrule SBA's Motion to Intervene, complete deliberations, and grant the requested CPCN as soon as possible so that AT&T can move forward and provide Kentucky wireless communications service users with necessary service.

WHEREFORE, the Applicants, by counsel, request the PSC to grant Applicants the relief requested above and grant Applicants any other relief to which they are entitled.

Respectfully submitted,

David A. Pike

David A. Pike
and

F. Keith Brown

F. Keith Brown
Pike Legal Group, PLLC
1578 Highway 44 East, Suite 6

Motion for Confidential Treatment in this proceeding provides evidentiary support on this issue.

⁷ See cases 2020-00310 (Happy Ridge Relo); 2020-00328 (Wisdom Relo/Dry Fork Road); 2020-00343 (Bethel/Chandler Road); 2020-00345 (Russell Springs Relo); 2020-00351 (Elihu Relo/Rose Hill Road); 2020-00354 (Monticello North Relo); 2020-00360 (Jamestown Relo); 2020-00404 (Steubenville Relo); 2021-00012 (Ringgold Relo/N. Hart Road); 2021-00065 (Windsor Relo/Pinetop Road); 2021-00092 (Sharpsburg) and 2021-00145 (Camargo Relo). In each of these cases SBA has filed a Motion to Intervene which stands submitted for PSC decision.

P. O. Box 369
Shepherdsville, KY 40165-0369
Telephone: (502) 955-4400
Telefax: (502) 543-4410
Email: dpike@pikelegal.com
Attorneys for Applicants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14 day of June, 2021, a true and accurate copy of the foregoing was electronically filed with the PSC and sent by U.S. Postal Service first class mail, postage prepaid, to counsel for non-party SBA at the following address:

Tia J. Combs,
Freeman, Mathis & Gary, LLP,
252 Harrodsburg Road, Suite 500
Lexington, KY 40504

Respectfully submitted,

David A. Pike

David A. Pike
and

F. Keith Brown

F. Keith Brown
F. Keith Brown
Pike Legal Group, PLLC
1578 Highway 44 East, Suite 6
P. O. Box 369
Shepherdsville, KY 40165-0369
Telephone: (502) 955-4400
Telefax: (502) 543-4410
Email: dpike@pikelegal.com
Attorneys for Applicants