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.: 2021-00065
CONVENIENCE AND NECESSITY TO CONSTRUCT	)	
A WIRELESS COMMUNICATIONS FACILITY	)	
IN THE COMMONWEALTH OF KENTUCKY	)	
IN THE COUNTY OF RUSSELL	)	

SITE NAME: WINDSOR RELO – PINE TOP ROAD

* * * * * * *

APPLICANTS' MOTION TO
SUBMIT APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY FOR DECISION
ON EXISTING EVIDENTIARY RECORD

1.0 INTRODUCTION AND SUMMARY

New Cingular Wireless PCS LLC d/b/a AT&T Mobility ("AT&T") and Uniti Towers LLC [1] ("Uniti") (collectively, "Applicants"), by counsel, hereby file this Motion requesting the Kentucky Public Service Commission ("PSC") to Submit the pending Application for Decision on the Existing Evidentiary Record and promptly issue a Certificate of Public Convenience and Necessity ("Applicants' Motion").

The SBA Communications Corporation ("SBA") September 17, 2021 Public

[1]Uniti 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 February 9, 2021, this Response and Motion shall continue to reference the co-applicant as Uniti Towers LLC in order to avoid any confusion with prior filings.

Comment, as filed by a company which is not a public utility in Kentucky, 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") for construction of a cellular tower. SBA has the temerity to seek an active role in this proceeding beyond mere public comment in circumstances in which it is not a party to this proceeding and in which it has been expressly denied intervention per PSC Order dated September 9, 2021. A "public commenter" is properly more akin to an observer, or the equivalent of an *amicus* in litigation, than a participating party with which the Applicants must conduct negotiations.

SBA's recent Public Comment spotlights that its efforts to precipitate negotiations 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 consideration the PSC has denied SBA intervention in this case, and in others, on the explicit basis that "SBA's only interest was strictly commercial and lies in ensuring that no other facilities are built, which would allow SBA to remain the only tower in the area with no competition to drive down rents."[2]

Given that the PSC has found that SBA has no interest beyond protecting its anticompetitive and exclusive position, SBA should not be allowed to maneuver to cause formal or informal abatement of this proceeding. SBA ignored AT&T's request on August 7, 2018 to reduce rents to competitive rates as demonstrated by the attached **EXHIBIT A**. Consequently, AT&T submitted this pending request for a CPCN. Now, more than three (3) years later, SBA's effort to require negotiations

[2] PSC Order of September 9, 2021 in Case No. 2021-00012, p. 5.

comes long after Applicants have incurred substantial costs in completing engineer-prepared exhibits and preparing the 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. The SBA Public Comment is an untimely and meritless argument for *De Facto* Intervention despite the PSC's unequivocal denial of SBA's request for intervention on September 9, 2021 where it found that SBA's interest is as a competitor with an interest in keeping tower rents high by limiting the number of towers. In addition to being contrary to Commission precedent, SBA's interest is contrary to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition. SBA's interest as a competitor is also contrary to KRS 278.546(4), which states that market-based competition benefits consumers.

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")[3] 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 February 9, 2021.

5. The SBA suggestion of rent reduction does not moot the basis for

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

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."[4] Further proceedings associated with the SBA Public Comment, as filed two hundred and nineteen ("219") days after the Application was deemed complete on February 10, 2021, would delay this proceeding far beyond such standard.

7. SBA's maneuver only addresses *current* rent on the SBA tower in the vicinity. Significantly, the SBA Public 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.[5]

8. The SBA Public 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 previously denied no fewer than thirteen (13) SBA Motions to Intervene in other cellular tower cases[6] 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 the PSC

[4] 47 U.S.C. § 332(c)(7)(B)(ii).

[5] An affidavit of an AT&T manager submitted in connection with Applicants' Motion for Confidential Treatment in this proceeding provides evidentiary support on this issue.

[6] See cases 2020-00300 (Lake City/Luka); 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); and Lake City Luka 2020-00300. In each of these cases the PSC has denied SBA's Motion to Intervene.

to reject all argument in the SBA Public Comment and forthwith proceed to 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.

2.0 RELEVANT FACTUAL BACKGROUND

The proposed "telecommunications antenna tower" which is the subject of the Application for a CPCN pursuant to KRS 278.020, 278.650; 807 K.A.R. 5:063, and other applicable law is a vital element of AT&T's wireless communications network in Russell County, Kentucky, and is necessary to provide service in accordance with the provisions of AT&T's Federal Communications Commission license as stated in the Application and incorporated exhibits. A map included with the Application, as prepared by an AT&T Mobility Radio Frequency Engineer, indicated the Search Area in which the new tower must be located to provide the necessary wireless service. The proposed Uniti tower site is within such Search Area.

The following are the key dates in the processing of the Application for a CPCN in this proceeding:

- Application in within Case 2021-00065 filed on February 9, 2021.
- SBA Motion to Intervene Filed on February 22, 2021 without offer of Rent Reduction.
- Applicants' Response Opposing SBA Motion to Intervene Filed on March 1, 2021.
- SBA Reply Supporting Motion to Intervene filed March 8, 2021 without offer of Rent Reduction.
- Applicants' Memorandum Documenting Cost Savings from Relocating Wireless Communications Facilities from SBA Towers to Uniti Towers filed March 24, 2021.
- No Deficiency Letter issued by PSC Staff on February 10, 2021.
- PSC denial of SBA request to intervene on September 9, 2021
- FCC Shot Clock 150-Day Deadline for PSC Decision – July 10, 2021.

- SBA Public Comment First Offering Rent Reduction filed September 17, 2021, more than three (3) years after AT&T requested rents be reduced to competitive rates on August 7, 2018.
- Pendency of Application in this Case 2021-00065 since Non-Deficient Filing: two hundred and twenty-five (225) Calendar Days.

3.0 ARGUMENT

All facts, circumstances, and applicable law require the PSC to fully reject the SBA Public Comment and proceed to prompt grant of the CPCN. SBA has presented nothing more than a proverbial Trojan Horse containing further untimely argument in support of *de facto* intervention. The PSC should proceed to complete its deliberations, reject all argument made in the SBA Public Comment, and promptly grant the requested CPCN on all evidence of record.

3.1 Applicants' Compliance with PSC Requirements Compels Grant of the Requested CPCN.

Applicants have met all filing requirements applicable to this proceeding as prescribed by the Kentucky Revised Statutes and the Kentucky Administrative Regulations and as recognized by the PSC Staff in its "No Deficiency" letter of February 10, 2021. Federal precedent under the TCA provides that compliance with the agency's own requirements constitutes substantial evidence.[7] All required exhibits have been provided and required representations have been made. Moreover, consistent with prior PSC Orders in Cases No. 2017-0435 ("Hansen") and No. 2019-0176 ("Dunnville Relo"),

[7] *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 799 (6th Cir. 2012). See also *Cellco Partnership v. Franklin County, et al*, 553 F. Supp. 2d 838, 845 (E.D. Ky. 2008)("The substantial evidence test applies to the locality's own zoning requirements….")

the Applicants have shown the SBA tower in the vicinity was not "reasonably available" in compliance with 807 K.A.R. 5:063 Section 1(s) at the filing of the Application or thereafter.

3.2 The SBA Public Comment is Untimely and Meritless Argument for *De Facto* Intervention.

SBA filed its Motion to Intervene in this proceeding on February 22, 2021. Applicants filed their Response to the SBA Motion to Intervene on March 1, 2021, with SBA's Reply following on March 8, 2021 without offer of rent reduction. The PSC denied SBA's request for intervention on September 9, 2021. The September 17, 2021 SBA Public Comment, as a practical matter, is an effort by SBA to reopen and make new argument in support of intervention. Any requirement of negotiation of a new co-location agreement on the SBA tower would make SBA a *de facto* party to this proceeding after its Motion to Intervene had been expressly denied.

Further, SBA's original Motion to Intervene stated nothing about a proposed rent reduction below that to be charged by Uniti Towers, LLC. Thus, SBA failed to "state precisely the relief requested" as required by 807 KAR Section 5 when filing its Motion in violation of the regulation considering it waited until September 17, 2021 to suggest a reduction of rent. SBA cannot now use the subterfuge of subsequent public comment to request different relief in the form of renegotiation of a tower lease as to an SBA tower in the vicinity.

The PSC regulations further provide for the reply in support of a Motion to Intervene to be "confined to points raised in the responses to which they are addressed…." SBA filed a Reply in support of its Motion to Intervene on March 8, 2021, which Reply also did not suggest the possibility for any reduction in proposed rent. 807 K.A.R. Section 5

forecloses SBA from seeking further relief in the form of rent negotiations when it did not argue such proposal as a basis for its intervention in the first place. The SBA Public Comment, when properly recognized as simply further argument supporting intervention,[8] is untimely and outside the scope of argument allowed by 807 K.A.R. Section 5. Accordingly, the SBA Public Comment should be stricken and/or, in the alternative be rejected, and the PSC should proceed to grant the requested CPCN.

3.3 The Five Precedents Support the PSC Rejecting the SBA Public Comment.

This proceeding is not the first time the PSC has addressed efforts by tower companies to enlist the PSC in forcing FCC-licensed public utility wireless carriers to co-locate on existing towers. Obviously, Applicants have already cited the recent Hansen (2017-00435) and Dunnville Relo (2019-00176) cases involving SBA. However, the PSC's recognition of the issue of delay and need for wireless service over pleas for co-location goes back years earlier to cases not involving SBA. Specifically, the PSC's Orders granting requests for CPCN in each of the Five Precedents[9] 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-

[8] *Greater Cincinnati/Northern Ky. Apt. Ass'n v. Campbell County Fiscal Court*, 479 S.W.3d 603 (Ky. 2015)("When something looks like a duck, walks like a duck, and quacks like a duck, we can be certain of one thing: it *is* a duck"). See also *Erwin v. Cruz*, 423 S.W.3d 234 (Ky. App. 2014)("… Kentucky courts have emphasized that substance prevails over form").

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

> 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, ….

Similar considerations are present in the this proceeding, namely: (1) the long pendency of the case in general as filed February 9, 2021; (2) that every day it is not decided is another day past the July 10, 2021 FCC Shot Clock deadline[10]; (3) that federal law encourages rapid deployment of wireless facilities and requires, by statute[11], for state and local government permitting decisions to be made in a "reasonable time"; and (4) that Kentucky statutory law recognizes the importance of wireless service to its citizens and the inherent value of competition in the industry.[12] On top of all of these considerations, the case for granting of a CPCN in the present case is even more compelling because the rent and other business terms in effect on filing of this proceeding prevent the SBA Tower from being reasonably available for co-location pursuant to 807 K.A.R. 5:063(1)(s).[13]

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[10] 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").

[11] 47 U.S.C. Section 332(c)(7)(B)(ii).

[12] KRS 278.546.

[13] See Applicants' Response to SBA Motion to Intervene indicating co-location on the SBA tower would cost AT&T more than $2,000,000.00 in rent over 20 years than the proposed Uniti tower. See also the Affidavit filed with Applicants' Motion for Confidential Treatment.

SBA's plea by Public Comment for the PSC to consider a suggested new rent on an SBA tower in the vicinity – a rent reduction proposed two hundred twenty four ("224") days after a PSC Staff No-Deficiency Letter on the Application Filing - should not persuade the PSC to add further steps or otherwise complicate and delay this proceeding to prevent grant of a CPCN to Applicants. Just as with the Five Precedents, the mantra of co-location combined with a late stage proposal for rent reduction from an entity that is not a party and not a public utility cannot override other important facts, circumstances, and law[14] impacting the rights of Applicants, the responsibilities of the PSC, and consumer need for wireless service. The PSC has previously recognized the self-serving nature of SBA's claims in stating "SBA's only interest is to remain AT&T Mobility's landlord…."[15] AT&T Mobility's interests are much broader as an FCC-licensed wireless carrier and public utility in Kentucky.

3.4 PSC Regulations and Due Process Require the Application to be Reviewed on Facts and Circumstances at the Time of Filing on February 9, 2021.

The PSC, in its January 21, 2021 Order in Case Number 2019-00176[16] recognized "Unreasonable and excessive fees for rent on a tower have the potential to divert resources that could otherwise be used to invest in expanding wireless networks and

[14] For example, the Kentucky General Assembly recognizes that consumers benefit from market-based competition, which offers consumers of telecommunications services the most innovative and economical services. KRS 278.546. Accordingly, co-location is not the preeminent criterion for wireless permitting in the Commonwealth. Competition between tower companies is not disfavored.

[15] PSC Order of January 21, 2021 in Case No. 2019-00176, p. 2, 2021 KY. PUC LEXIS 28.

[16] Also cited as 2021 Ky. PUC Lexis 28.

conducting necessary network upgrades necessary to meet increased demand for wireless voice and broadband services." *Id*. at p. 3. Applicants began their due diligence with a keen awareness of the existence of these circumstances as to the SBA tower in the vicinity based on the rent charged and other terms applied to AT&T Mobility pursuant to an existing agreement. The Application was thereafter reasonably prepared and filed based on facts existing at the time of filing.

The SBA suggestion of rent reduction is untimely in that AT&T evaluated the SBA tower in connection with due diligence on the proposed Uniti Towers LLC tower. In fact, SBA's maneuver is a calculated attempt to prejudice the good faith efforts of Applicants to assess circumstances at the time of the filing of the Application and propose a solution in the public interest. AT&T found the rent and other terms of subleasing on the SBA Tower to be unreasonable. 807 K.A.R. 5:063 Section 1(s) speaks in terms of an applicant's statement that "… there is no reasonably available opportunity to co-locate…." (Emphasis added). The regulation does not require the applicants to represent there never could be a reasonably available opportunity to co-locate in the future. This is an important temporal consideration which SBA is trying to circumvent.

Allowing the relevant rent to be a moving target deprives Applicants of substantive[17]

[17]Substantive due process prohibits certain "governmental deprivations of life, liberty, or property" irrespective of their procedural fairness. *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007). It functions to shield citizens from unrestrained and arbitrary government acts which lack a "reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998); *see also Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988) (… "Substantive due process, a much more ephemeral concept [than procedural due process], protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action."); *Miller*

and procedural due process and could lead to an arbitrary decision[18] by the PSC if it gives credence to the whims of SBA in deciding what rent it might charge in the future and at what point in the PSC proceeding it will reveal a suggested future rent on its tower in the vicinity. Such ad hoc approach to tower permitting further raises the specter of discrimination between wireless carriers in regulatory proceedings in violation of the TCA[19] because objective standards across such proceedings would not control the outcome if post-filing actions or proposals of an interloping tower company such as SBA could impact whether a CPCN is granted. Kentucky's appellate courts have held land use proceedings with ad hoc outcomes unrelated to objective standards to be unconstitutional. *Hardin County v. Jost*, 897 S.W.2d 592 (Ky. App. 1995).

At great effort in time and out-of-pocket expenses in the tens of thousands of

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[v. Johnson Controls, Inc.], 296 S.W.3d [392,] 397 [(Ky. 2009)] (noting … "substantive due process. . . is based on the idea that some rights are so fundamental that the government must have an exceedingly important reason to regulate them, if at all . . . ."). Allowing SBA to manipulate the tower permitting process by deciding when or if it will offer rent reduction depending on its perceived advantage cannot be consistent with Applicants' rights to substantive due process.

[18] "The rule is well established that municipal ordinances, placing restrictions upon lawful conduct or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply." *City of Monticello v. Bates*, 169 Ky. 258, 183 S.W. 555, 558 (Ky. 1916); *see also Turner v. Peters*, 327 S.W.2d 958 (Ky. 1959); *Motor Vehicle Commission v. The Hertz Corporation*, 767 S.W.2d 1, 3 (Ky. App. 1989).

[19]The TCA, as codified in 47 U.S.C. Section 332(c)(7) provides in pertinent part in (7)(B) Limitations (i) The regulation of the placement, construction, and modification of personal wireless service facilities by an State or local government or instrumentality thereof: … (II) shall not unreasonably discriminate among providers of functionally equivalent services…."

dollars, AT&T Mobility and Uniti Towers LLC have identified a suitable location for a new tower site, completed an option/lease with the landowner, completed a tower lease between them, had extensive exhibits prepared by in-house and outside contractor professionals, and have filed the within Application with the PSC as well as made permitting filings with other agencies.

Consideration of SBA's September 17, 2021 suggestion of rent reduction, which comes seven (7) months after filing of the Application, is wholly inconsistent with 807 K.A.R. 5:063 Section 1(s), which requires an applicant to engage in *pre-filing* efforts to identify and explore a "reasonably available opportunity to co-locate...." This regulation does not allow a competitor with a financial stake to delay Applications by purporting to create a *post-filing* co-location alternative.

807 K.A.R. 5:063 – Section 14(1) states in pertinent part: *"Each application … shall contain fully the facts on which the application is based…."* Significantly, the regulation does not require an application to be justified in relation to subsequent actions by a non-party in the nature of a suggestion for rent reduction or otherwise. Section 15 of the same regulation requires an "… application for a certificate that the present or future public convenience and necessity requires…" certain construction. (Emphasis added). An applicant for a Certificate of Public Convenience and Necessity pursuant to such regulation must also "… submit with its application: (a) the facts relied upon to show that the proposed construction or extension is or will be required by public convenience or necessity." (Emphasis added). All of these provisions contemplate the applicant being able to meet its burden of proof *at the time of initial filing*, not based on the shifting sands of subsequent proposals by non-parties

to alter rent under existing agreements.

807 K.A.R. 5:063 - Section 1 begins by identifying the documentation required in order to file an application for a CPCN to construct a tower. Thus, an applicant conducts due diligence and properly obtains the required information well before filing the Application, just as Applicants have done in the present case and in other cases in which SBA has sought intervention.

Proceeding on to 807 K.A.R. 5:063 - Section 1(s), the regulation requires that an applicant "has considered" certain land use and value effects and "has concluded" there is no more suitable location "reasonably available." Significantly, the burden on the applicant is to make such statements *upon filing the application*. Applicants are not required to make a showing of any such conditions or facts at later dates. Furthermore, Applicants' conclusion is as to there being no more suitable location "reasonably available" rather than conceivably available, or possibly to become available in the future, or that might be available if a tower owner later reverses its original lease terms memorialized in an existing fully executed tower co-location sublease on the SBA Tower in the vicinity. Pursuant to substantive due process and all other applicable law, Applicants were entitled to rely of the existing SBA rent and other terms as a benchmark in selecting a new site and submitting a new tower application.

Additionally, AT&T provides a service that is constantly evolving in terms of technological advancements, and its needs in terms of the deployment of antennas and other equipment located on towers is continually subject to change. Accordingly, while an accommodation in rent may offer relief for the status quo installations, this

equipment is subject to change as technologies and network usage patterns advance and evolve.

Applicants have no crystal ball allowing them to assess expectancies such as the future rent to be proposed by SBA after it calculates which way the wind might be blowing in the proceeding. Administrative agency decisions are to be based on objective criteria[20] in order to be founded on substantial evidence and to survive arbitrariness review. SBA's maneuvering has great potential of drawing the PSC into violation of such fundamental standards for agency review if it grants credence to SBA's untimely and suspect rent reduction proposal.

The PSC regulation does not rigidly require AT&T to co-locate merely because another tower is present in the area. Instead, it logically contemplates AT&T *attempting to co-locate*, understanding that for various reasons, not all such attempts will be successful. As shown by the facts of the present case, co-location could not be accomplished because of the lack of "reasonable availability."

In addition, the regulation does not contemplate repeated and ongoing attempts to co-locate after an Application is filed. Otherwise, a tower owner whose sole motivation is to leverage its exclusive position as the owner of the sole tower in a given geographic area, like SBA, could make strategic attempts to delay the Commission's action on an Application by reversing prior positions or otherwise asserting speculative reasons why co-location might become reasonable in the

[20] See *Hardin County v. Jost*, 897 S.W.2d 592 (Ky. App. 1995) finding a local government permitting process based on subjective criteria to be arbitrary and unconstitutional.

purported “near future.” Instead, the regulation requires an attempt to co-locate prior to filing an Application. Applicants have complied with this mandate, and nothing more is required. The PSC should - and must - reject any attempt by SBA to interpret the plain language of this regulation as requiring otherwise.[21]

Applicants should not be subject to the moving target of the SBA strategic negotiating position once an application for a CPCN has been filed and more than three (3) years after refusing AT&T’s request to reduce rents to competitive rates. Nothing prevented SBA from making a rent reduction proposal upon filing of its Motion to Intervene on February 22, 2021 rather than waiting two hundred and seven (“207”) days until September 17, 2021. Moreover, nothing prevented SBA from offering market rent and other terms prior to the Application being filed. In fact, SBA had full knowledge and notice that this is an ongoing and recurring issue, since SBA’s above-market rent making its tower not “reasonably available” was precisely the same issue that was before the PSC in Dunnville Relo (Case No. 2019-00176) and Hansen (Case No. 2017-00435) and in thirteen other cases pending before the PSC where the exact same issues have arisen. SBA’s ill-fated initial Request to Intervene in Hansen, with the signature of a Vice President of the company, was filed with the PSC on December 27, 2017. Accordingly, these same frivolous grounds have been

[21] In J*. Randolph Lewis v. Jackson Energy Cooperative Corporation, et al*, 189 S.W.3d 87 (Ky. 2005) the Kentucky Supreme Court stated: “It is a primary rule of statutory construction that the enumeration of particular things excludes ideas of something else not mentioned…. The use of extrinsic justifications for expanding the statute was error. Where a statute is unambiguous, there is no need to use extrinsic evidence of legislative intent and public policy which the statute is intended to effect. A reviewing court cannot amend it by means of a so-called interpretation contrary to plain meaning.” *Id*. at 92-94.

repeatedly raised by SBA in multiple cases over the course of 3 ½ years.

SBA's Public Comment identifies no change in "on the ground" physical circumstances, technology, or customer needs subsequent to the filing of the Application which merit further scrutiny by the PSC late in deliberations. Instead, SBA is merely identifying a calculated change in negotiating position based on pecuniary interests similar to that which resulted in a CPCN being granted this year to Uniti and AT&T in Case No. 2019-00176 (a/k/a "Dunnville Relo") notwithstanding a similar belated and dilatory offer of rent reduction made five hundred and twenty-six (526) days after SBA sought intervention in that case.[22] The PSC should not indulge SBA's commercially motivated efforts to maintain its status as the only existing tower in the vicinity by halting deliberations and making efforts to compel settlement negotiations.[23]

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[22] The PSC's denial of the SBA Motion to Intervene in Case No. 2019-00176 ("Dunnville Relo") by Order of October 1, 2019, which is now final and non-appealable, characterized SBA as follows:

> SBA argues in its Memo that its status as the only tower in the area is a special interest that it must be allowed to protect through intervention. It asserts that the KRS 278.020 "protects SBA's interest by disallowing the building of new facilities unless they are a public necessity. [footnote omitted]. However, KRS 278.020 safeguards the interest of the public, not that of SBA. The public's interest lies in ensuring that there is a public necessity for any new facilities built. SBA's interest is strictly commercial and lies in ensuring that no other facilities are built, allowing them to remain the only tower in the area with no competition to drive down rents. SBA's interest in this matter does not coincide with the interest of the public.

[23] Considering SBA is not a party to this proceeding and the proceeding is before the PSC rather than the judiciary, the Kentucky Rules of Civil Procedure are not applicable. However, SBA's Public Comment is analogous to a party in civil litigation shortly before decision on motion for summary judgment attempting to entirely change its defensive strategy reflected in its answer and other filings. Courts are often

Laches and waiver also attach to prevent SBA from transforming its prior argument supporting intervention based on proximity of the existing and proposed tower into a case for *de facto* intervention and settlement negotiations under a new rent proposal over seven months after filing its Motion to Intervene. *Urella v. Kentucky Board of Medical Licensure*, 939 S.W.2d 869, 873 (Ky. 1997) and similar precedent[24] shows laches and waiver are applicable to administrative proceedings in the Commonwealth and should be applied in this proceeding.

3.5 The SBA Suggestion of Rent Reduction Fails to Moot the Basis for the Application.

The SBA suggestion of rent reduction at this late date is an artifice to prevent the PSC from granting a CPCN for the proposed Uniti tower. Such maneuver in no way moots the basis for the Application under Kentucky appellate precedent. Actually, the SBA strategy squarely creates circumstances in which the matter could be repeated but would ultimately evade review by the PSC should a late stage rent reduction offer be deemed dispositive to deny an application for CPCN. Applicants have detailed many arguments above as to their good faith efforts in filing a CPCN request based on existing circumstances. Understanding this background, the PSC should not be persuaded that a dilatory post-application offer of rent reduction is sufficient to moot the original basis for an application.

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unsympathetic to such dilatory efforts to prevent judgment. The PSC should act no differently.

[24]See also *O'Dea v. Clark*, 883 S.W.2d 888, 891-892 (Ky. Ct. App. 1994); *Kupper v. Kentucky Board of Pharmacy*, 666 S.W.2d 729, 730 (Ky. 1983); *Personnel Board v. Heck*, 725 S.W.2d 13, 17 (Ky. Ct. App. 1986); *Cumberland Valley Rural Electric Cooperative Corp. v. Public Service Commission*, 433 S.W.2d 103, 105 (Ky. 1968).

The Kentucky judiciary has long recognized a case is not moot if it is capable of repetition while evading review, particularly if it is a matter which involves the public interest.[25] The Kentucky Supreme Court's Opinion in *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014)[26] provides directly applicable authority:

> Another exception to the general mootness rule is the "voluntary cessation" exception. *United States v. W.T. Grant Co*., 345 U.S. 629, 73 S. Ct. 894, 97 L. Ed. 1303 (1953). Under that exception, an appeal may proceed notwithstanding the defendant's "voluntary cessation of the challenged action, a primary concern being that a dismissal in those circumstances leaves the defendant "free to return to his old ways." 345 U.S. at 632. *See also Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty*., 301 S.W.3d 196 (Tenn. 2009) (collecting state cases applying or considering the voluntary cessation exception). A related concern is that parties should not be free to manipulate mootness so as to frustrate, after the investment of significant judicial resources, the "public interest in having the legality of the[ir] practices settled." *W.T. Grant*, 345 U.S. at 632. *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *City of Erie v. Pap's A.M*., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). *And see*, Matthew I. Hall, *The Partially Prudential Doctrine Of Mootness*, 77 Geo. Wash. L. Rev. 562, 596-98 (2009) (discussing this aspect of the voluntary cessation exception). In light of this concern, this Court has issued opinions notwithstanding eleventh-hour settlements rendering, and often deliberately meant to render, the cases moot.
>
> More often, however, exceptions have been recognized for cases which, although moot, concern alleged injuries or violations which are "capable of repetition, yet evading review," *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983) or which concern a "question [that] is of public interest." *Brown v. Baumer*, 301 Ky. 315, 191 S.W.2d 235 (1945). Although our cases have tended to conflate these two exceptions and to refer to both of them under the "capable of repetition" rubric, they have distinct, *albeit* overlapping, elements and should be distinguished.

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[25] Issues involving an FCC-licensed wireless carrier and designated public utility in Kentucky and the permitting of its service facilities by the PSC via grant of CPCNs inherently involve the public interest.

[26] See also *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983); *Brown v. Baumer*, 301 Ky. 315, 191 S.W.2d 235 (1945); *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992); and *Riley v. Gibson*, 338 S.W.3d 230 (Ky. 2011).

> The exception for cases "capable of repetition, yet evading review," has two elements: (1) the challenged action must be too short in duration to be fully litigated prior to its cessation or expiration, and (2) there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992). In *Meigs*, for example, the trial court, prior to trial of a criminal case that had attracted a great deal of public attention, issued an order excluding the press from voir dire. Several newspapers brought suit challenging the order, but before their challenge could be fully litigated it was rendered moot by the completion of jury selection. Rejecting the contention that the case should be dismissed on that ground, this Court invoked the "capable of repetition" exception. *Id*. at 99-100.

Likewise in the present case, for the PSC to allow the offer of rent reduction to prevent the grant of the CPCN for a new Uniti tower would only serve to reward SBA for originally setting a rent structure on its tower which does not make it "reasonably available" as required under PSC regulations. A tower company with "its hand in the proverbial cookie jar" should not be rewarded in a CPCN proceeding by offering current rent reduction to AT&T only after all other efforts to thwart, delay and frustrate AT&T's plan to ensure continuous and uninterrupted service to Kentucky wireless services users have been attempted.

As explained herein, numerous other cases are pending in which Applicants have filed CPCN applications based on SBA towers involving above-market rent and other egregious lease terms and SBA has sought intervention in such cases at substantial cost to Applicants in terms of application exhibit preparation and involving substantial delay in deployment. The PSC should not facilitate the SBA strategy by failing to reach a final decision on the merits of the Application at the time of filing.

3.6 The Federal Telecommunications Act of 1996 ("TCA") Requires State and Local Governments to Make Tower Permitting Decisions in a "Reasonable

Time."[27]

Further proceedings associated with the SBA Comment would delay this proceeding, which was filed February 9, 2021, far beyond the TCA "reasonable time" standard.[28] Moreover, such delay could not be consistent with the broader purposes of the TCA. The U.S. Congress in adopting the Telecommunications Act of 1996 in the Act's preamble recognized the importance of the "… rapid deployment of new telecommunications technologies."[29] (Emphasis added).

The Telecommunications Act of 1996 provides in pertinent part:

> A state or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. (Emphasis added). 47 USC Section 332(c)(7)(B)(ii).

Federal courts have recognized "*Congress implemented the 'reasonable period of time' provision of the TCA to "stop local authorities from keeping wireless providers tied*

[27] 47 U.S.C. § 332(c)(7)(B)(ii).

[28] Although not controlling on the PSC, KRS 100.987(4)(c) provides local planning commissions in Kentucky considering Uniform Applications for construction of a cellular tower to make their decision within *sixty* days of receipt of a complete application. This requirement calls into question why a planning commission can and is required to reach decision in sixty days, while this proceeding filed on February 9, 2021 remains pending. The SBA approach of raising the new issue of rent reduction at this late date heightens the disparity in the two types of cellular tower proceedings in the Commonwealth. A reasonable time for a PSC decision may be longer than the sixty days applicable to a planning commission but is surely not reasonable to allow the SBA Public Comment to push PSC deliberations and decision beyond seven months.

[29] 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.))

up in the hearing process' through invocation of state procedures, moratoria, or gimmicks."[30] Of course, SBA is attempting to manipulate and delay the decision process despite the July 10, 2021 FCC Shot Clock [31] deadline by using a gimmick of late stage offer of rent reduction, long after its February 22, 2021 Motion to Intervene, to prevent grant of a CPCN in a reasonable period of time.

The U.S. Court of Appeals for the Sixth Circuit in its *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794 (6th Cir. 2012) Opinion rejected permitting standards which unreasonably extend the decision process:

> We agree with Judge Cudahay and adopt the "least intrusive" standard from the Second, Third, and Ninth Circuits. It is considerably more flexible than the "no viable alternatives standard", as a carrier could endlessly have to search for different marginally better alternatives. Indeed, in this case the Township would have had T-Mobile search for alternatives indefinitely. *Id*. at 808.

SBA advocates such an endless process for Applicants in which the PSC abates the proceeding or more actively presides over a process of negotiations over lease terms until, at some point in an uncertain future, perhaps a new lease is negotiated on the existing tower and the within Application is withdrawn. Of course, whether any new co-location agreement would result is an expectancy with no objective criteria determining the outcome or length of the proceedings.

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[30] *Masterpage Communications v. Town of Olive*, 481 F.Supp. 2d 66, 77 (N.D. New York 2005).

[31] The TCA requires state and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed. . . ." 47 U.S.C. § 332(c)(7)(B)(ii). The FCC defines "a reasonable period of time" in terms of a "shot clock." *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv*. ("2018 Third Report and Order"), 33 F.C.C. Rcd. 9088, ¶ 104 (2018)

Federal district courts in the Sixth Circuit have relied upon *T-Mobile Central* and found the permitting authority failed to reasonably act in the one hundred fifty ("150") day deadline of the FCC Shot Clock where nothing in the agency regulations justified the delay in decision on a complete application. *American Towers, Inc. v. Wilson County*, 2014 U.S. Dist. LEXIS 131, 59 Comm. Reg. (P &F) 878 (M.D. of Tennessee, Nashville Division 2014)("Wilson County violated the TCA by failing to act on ATI's second set of applications within a reasonable time").

Outside of the Sixth Circuit, a federal district court in the Northern District of New York, cited *American Towers* and explained "Under the provisions of the TCA and FCC Orders, the local municipality has 150 days in which to promptly review an application and make its final determination, consistent with local law, the TCA and federal rules and regulations." *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 315 (N.D.N.Y. 2017). Failure of the permitting authority to make a decision after 175 days led the District Court to conclude the permitting authority had "… failed to rebut the presumption that their delay was unreasonable and their actions constitute a failure to act or unreasonably delay in violation of the TCA." *Id*. at 316.

The decisions of the federal courts leave no doubt the PSC should make every effort to avoid being drawn into the morass of unreasonable and unjustified delay which SBA seeks to engineer. All precedent requires the PSC to proceed to final decision on the Application.

Neither Kentucky law nor the TCA contemplate open-ended proceedings before the PSC prior to it making its decision on the CPCN Application. Consistent with *T-Mobile Central*, Applicants have complied with the requirements of KRS

Chapter 278 and implementing regulations resulting in a No-Deficiency letter issued by PSC Staff on February 10, 2021. Furthermore, AT&T has considered alternative locations in good faith, including ruling out the existing SBA Tower as not being reasonably available per 807 K.A.R. 5:063 Section 1(s). Nothing more is required. Acceding to the wishes of non-party SBA in complicating and extending this long-pending proceeding would take its disposition far beyond a reasonable time, beyond the FCC Shot Clock benchmark on July 10, 2021, and make a travesty out of the 807 K.A.R. Section 4(11) standard for intervention of not "unduly complicating or disrupting the proceedings."

Whether the PSC conducts further inquiry or hearing as a result of the SBA Comment is within the discretion of the PSC per KRS 278.020(1). See also *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 by no means has any right to further consideration or action on its Public Comment. Moreover, the fact that the 150-day FCC Shot Clock expired July 10, 2021 is very persuasive on how long administrative review of a cellular tower application should take. On the merits of the issues raised, and in the interest of compliance with the TCA "reasonable time" standard, the PSC should promptly move to final decision on the Application without regard to the SBA Comment.

3.7 SBA's Maneuver Ignores Unreasonable Lease Administration Practices in an Environment of Changing Technology that Requires Periodic Equipment Upgrade.

There are a number of lease terms key to reasonable availability which SBA has

failed to address by the simple suggestion of rent reduction. Such provisions prevent the SBA tower from being reasonably available even if rent is reduced. The rent reduction proposal is typical of SBA's strategy of stretching out administrative proceedings and keeping unreasonable terms in place for inclusion in any new tower co-location lease involving reduction of current rent. SBA has also repeatedly claimed before the PSC that tower lease provisions are subject to confidentiality provisions in such instruments. Such argument attempts to keep the unreasonable nature of many of such lease provisions from consideration by the PSC.

The FCC has increasingly recognized that the TCA protects wireless carriers from state and local government requirements which materially limit competition or the densifying of a network. Of course, SBA is intent on drawing the PSC into exactly such practices. The following excerpt from *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv*. ("2018 Third Report and Order"), 33 F.C.C. Rcd. 9088, Paragraph 104 (2018)[32] is persuasive:

> 35. In this Declaratory Ruling, we first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in *California Payphone*[33], namely, that a state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."
>
> …
>
> 37. As explained in *California Payphone* and reaffirmed here, a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such

[32] *Affirmed in pertinent part, City of Portland v. United States, 969 F.3d 1020, 1038, (9th Cir. Aug. 12, 2020), en banc review denied by City of Portland v. FCC, Case No 18-72689 (9th Cir. Oct 22, 2020)*.

[33] 12 FCC Rcd 14191 (1997)

> services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities.
>
> Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways--not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.

The PSC should not facilitate SBA's objectives by preventing Applicants from constructing a new tower in circumstances of the existing SBA tower not being reasonably available both in regard to current rent and egregious lease administration practices. The PSC has, in fact, wisely recognized the link between unreasonable rent and ultimate availability of service: "Unreasonable and excessive fees for rent on a tower have the potential to divert resources that could otherwise be used to invest in expanding wireless networks and conducting necessary network upgrades necessary to meet increased demand for wireless voice and broadband services." PSC Order of January 21, 2021 in Case No. 2019-0176.[34]

A co-location agreement is necessarily very detailed. Such agreements may be subject to extended negotiations on many points. Issues can arise as to a variety of indemnifications, insurance, environmental issues, length of term, termination rights, ground space rights, replacement/adding of antennas and appurtenances, regulatory compliance, commencement of and amount of rent and escalation thereof, etc. Also,

[34]Also cited as 2021 KY. PUC LEXIS 28, p. 3.

rights and responsibilities as to expensive tower modifications associated with structural loading may come into play.

A mere suggestion of rent reduction as found in the SBA Public Comment does not resolve these other issues, including all considerations referenced in the Affidavit provided with Applicants' March 10, 2021 Motion for Confidential Treatment, particularly Paragraphs 6, 10, 12, 15 and 16, which independently prevent the SBA Tower in the vicinity from being reasonably available, regardless of a suggestion of reduction in current rent. In light of these circumstances, no evidentiary or legal issues prevent grant of the CPCN.

KRS 367.170 is persuasive in providing: "Unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." (Emphasis added). For the purposes of KRS 367.170 the Kentucky Legislature has determined "unfair shall be construed to mean unconscionable." (Emphasis added). Applicants see SBA's efforts to leverage and manipulate rent on its existing tower to prevent Applicants from receiving a CPCN for a new tower as unfair and unconscionable. The PSC has itself recognized in other proceedings "SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers" and that "[t]his runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition[35] as well as KRS 278.546(4), which states that market-based competition benefits consumers."[36]

[35] T-*Mobile USA Inc. v. City of Anacortes*, 572 F.3d 897, 991 (9th Cir. 2009).

[36] PSC Order in Case No. 2019-0176 (Dunnville Relo), p. 3, 2021 Ky. PUC LEXIS 28.

3.8 The SBA Public Comment Further Exacerbates the Broader Problem of SBA's Comprehensive Effort to Confine AT&T to Existing Towers.

The PSC has denied no less than *thirteen – a full baker's dozen* - SBA Motions to Intervene in other cellular tower cases[37] filed with the PSC by Applicants. The SBA Public Comment in the present case is plainly part of a corporate strategy duplicated in the other cases. The result is multi-site delay across the Commonwealth and complication if the PSC does not timely complete deliberations to thwart such efforts of an actor whose "… only interest is to remain AT&T Mobility's landlord…"[38] and to leverage unfairly its position as the owner of the sole tower within a geographic area.

The specter of SBA making suggestions of rent reduction late in proceedings in one tower CPCN case after another, at the time of its choosing in each case and without resolving the reasonable availability issue, including the issues of egregious delay and cost increase in connection with ongoing equipment upgrades, is antithetical to the role of the PSC in tower permitting in the Commonwealth.

The SBA strategy as playing out in full view is inconsistent with the comprehensive regulatory scheme of KRS Chapter 278 and 807 K.A.R. 5:063 governing proposed cellular towers in areas within the jurisdiction of the PSC. The Kentucky General Assembly's mission for the PSC with respect to telecommunications is set forth in KRS

[37] See cases 2020-00300 (Lake City/Luka); 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 the PSC has denied.

[38] PSC Order in Case No. 2019-0176, p. 2, 2021 Ky. PUC LEXIS 28.

278.546, which provides among other things that "[s]tate-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000," and "[c]onsumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical services." (Emphasis added). SBA's attempt to protect its grip on having the sole tower in many areas of the Commonwealth requiring and deserving of wireless service undermines all of these goals.

Of significance is that in this proceeding and in all of the proceedings in which SBA is seeking intervention and/or suggesting rent reduction, the proposed Uniti tower is designed for co-location of multiple carriers.[39] Consequently, such towers have the potential of not only freeing AT&T Mobility from unreasonable rent, but for other wireless carriers as well. The PSC has recognized "… the competition engendered in having more than one tower is likely to improve co-location opportunities for other telecommunications providers in the area" and "[t]his is likely to lead to the expanded availability of advanced wireless services."[40]

Absent PSC action to bring CPCN proceedings to a close, SBA could sequence requests for intervention and late stage offers of rent reduction over many cases with the result of maximizing delay and complication of proceedings. The PSC has previously recognized in denying the SBA Motion to Intervene in Case Number 2019-

[39]For example, see Exhibit B to within Application, specifically showing ground space and tower space for additional co-locators.

[40] PSC Order of March 26, 2018 in Case No. 2017-0435, p. 5.

0176 that "… SBA's interest is not in rates and services, but instead is a pecuniary interest…."[41] In recognition of all of the specifics of the Russell County site in this proceeding and of the global facts and circumstances of other pending cases, the PSC should not abate, complicate or otherwise delay this proceeding any further in response to the SBA Comment. SBA's efforts should not further delay grant of the CPCN.

4.0 CONCLUSION

SBA's efforts to obfuscate the real issues in this proceeding by advancing the suggestion of rent reduction for the first time over seven months after the Application was filed and more than three (3) years after refusing AT&T's request to reduce rents to competitive rates, and only after its Motion to Intervene was denied, should not distract the PSC from the dispositive facts and applicable law in this proceeding.

The Application was originally filed with the PSC on February 9, 2021, was found to be Non-Deficient by PSC Staff Letter on February 10, 2021 and has been pending before the PSC for two hundred and twenty-five (225) days from the Staff's Letter to the making of this Motion by Applicants. The one hundred fifty (150) day FCC Shot Clock for PSC decision in this matter expired on July 10, 2021.

All factual background and argument set forth in this Motion supports Applicants' request for:

(1) rejection of the SBA Public Comment;

(2) submission of this long pending case for decision on the request for CPCN;

[41] PSC Order of October 1, 2019 in Case No. 2017-0435, p. 2.

(3) and ultimate grant of the CPCN as requested in the Application.

All such requested action by the PSC is in protection of Applicants' rights pursuant to KRS Chapter 278; PSC implementing regulations; Kentucky appellate precedent on exceptions to mootness including the "voluntary cessation" doctrine; the TCA and case precedent thereunder; Section 2 of the Kentucky Constitution; and constitutional guarantees of substantive and procedural due process.

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

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23 day of September, 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,
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Respectfully submitted,

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EXHIBIT A

August 7, 2018

SBA Corporation
8051 Congress Avenue
Baca Raton, FL 33487-1310

Re: AT&T Cell Site Lease |FA: **10115668**|Site Name: AL5165 Windsor

Dear SBA Corporation,

AT&T is in a very competitive space and we need to ensure that our lease terms and conditions are supportive of our current and future needs. AT&T has the option to either extend or terminate the above referenced lease ("Lease") in approximately three years. AT&T is instituting a new program to evaluate terms and conditions of all leases coming up for renewal, explore advance renegotiation options and consider possible alternative site locations. Our first choice is to create a new agreement that serves both parties well. Conditions we desire to implement in all new "go forward" leases include:

- "Real Estate Rights": In its simplest form, a lease right to utilize the entire RAD center without any "per touch" rent upcharges.
- Rents reduced to competitive rates.
- Reduced or no annual escalators (depending on other terms of the overall new deal).
- "Fair" early termination rights.

As you know, it takes time to negotiate, plan and execute a site relocation. That is why AT&T's review process is starting now. Please review the specifics of our Lease agreement and advise if you are willing to enter into discussions regarding a new, modified contract. For new terms consistent with the above, AT&T will in turn consider additional term extensions.

AT&T will appreciate a reply within 60 days of receipt of this letter. A "no" or non-response will trigger AT&T's review of alternate locations. A positive response will be appreciated, but satisfactory terms and conditions must be negotiated within 90 days or AT&T will continue to evaluate alternative site locations. Responses may be sent via email, standard mail, or called in as designated below. Please reference FA number 10080336-71822 in your response so that AT&T may ensure your response is documented accordingly. AT&T values its association with you and looks forward to continuing this relationship for the long term.

Sincerely,

Gregory D. Ohmer

Greg Ohmer
Director – Network Planning

Email Responses to: g03998@att.com with a Subject line of **Partnership** - FA 10115668

Mail Responses to AT&T Cell Site Partnership 1347 (FA 10115668)

1025 Lenox Park Blvd NE
Atlanta, GA 30319

Telephone Number: **888-517-1212** (8am to 5pm PDT)