

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION
CASE NO.: 2021-00092**

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
AND UNITI TOWERS LLC, A DELAWARE
LIMITED LIABILITY COMPANY
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO CONSTRUCT
A WIRELESS COMMUNICATIONS FACILITY AT
IN THE COMMONWEALTH OF KENTUCKY
IN THE COUNTY OF BATH

SITE NAME: SHARPSBURG

**SBA INFRASTRUCTURE, LLC’S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO INTERVENE**

Comes SBA Infrastructure, LLC (“SBA”), pursuant to 807 KAR 5:001 Section 4(11), and for its Memorandum of Law in Support of its Motion to Intervene, states as follows:

FACTS

On or about February 24, 2021, New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (“AT&T”) and Uniti Towers LLC (collectively AT&T and Uniti are referred to herein as the “Applicants”), filed their Application for a Certificate of Public convenience and Necessity for Construction of a Wireless Communications Facility in Bath County, Kentucky (the “Application”). In the Application, the Applicants state they request a certificate because the construction of the proposed wireless communications facility (the “Proposed Tower”) will:

[B]ring or improve the AT&T Mobility’s services to an area currently not served or not adequately served by AT&T Mobility by increasing coverage or capacity

and thereby enhancing the public's access to wireless communication services. The WCF will provide a necessary link in AT&T Mobility's communications network that is designed to meet the increasing demands for wireless services in Kentucky's wireless communications service area.¹

However, the Applicants' claims as to the necessity of the Proposed Tower are wholly unsubstantiated. In the Application, the Applicants generically state that there are "no reasonably available opportunities to co-locate AT&T Mobility's antennas on an existing structure."² AT&T further states that the reason for the need for a new tower is that "no other suitable or available co-location site was found to be located in the vicinity of the site."³ Thus, while the parties, SBA and AT&T, have argued about tower rental rates in previous cases, AT&T seems to be arguing that the issue in this case is that there are physically no other towers. AT&T does not mention rental rates in its Application.

Contrary to the assertions made by the Applicants, there is already an existing tower approximately 0.3597 miles from the Proposed Tower. AT&T is currently a tenant on this tower which is owned and operated by SBA (the "SBA Tower"). From its place on the SBA Tower, AT&T can and already does broadcast its wireless signal to the surrounding area in nearly exactly the same manner, and providing essentially the same strong coverage, as it would broadcast off the Proposed Tower. This fact is, and can be, substantiated by SBA, through Coverage Plot Analysis, which has been performed by a Radio Frequency Engineer proving this fact. *See* Exhibit 1. As such, despite AT&T's claims in its Application, the Proposed Tower cannot possibly meet the prerequisite of necessity required in order for AT&T to be given a Certificate of Public Convenience and Necessity by the Commission.

¹ Application for Certificate of Public Convenience and Necessity for Construction of a Wireless Communications Facility, Case No. 2021-00092 (KY PSC February 24, 2021) at ¶ 7.

² *Id.* at ¶ 12.

³ *Id.*

Because SBA has an interest in this matter which not now being adequately represented and SBA can present issues and develop facts that will assist the Commission in fully considering this matter, SBA now requests to intervene in this matter so that it may present the evidence it has already collected concerning the inaccuracies the Application and present additional information that may be of use to the Commission.

ARGUMENT

Pursuant to 807 KAR 5:001 Section 4(11):

(a) A person who wishes to become a party to a case before the commission may, by timely motion, request leave to intervene.

1. The motion shall include the movant's full name, mailing address, and electronic mail address and shall state his or her interest in the case and now intervention is likely to present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.

...

(b) The commission shall grant a person leave to intervene if the commission finds that he or she has made a timely motion for intervention and that he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.

807 KAR 5:001 Section 4(11).

Pursuant to this section, SBA is required to prove only that it has either a special interest which is not adequately represented *or* that it can present issues or develop facts assisting the commission in fully considering the matter, however, SBA believes that it can prove it meets both of these requirements. As such, the PSC should allow SBA to intervene and fully participate in this case.

I. SBA has a special interest in this matter that is not otherwise adequately represented.

SBA is mindful that the PSC has previously stated that SBA's interest in owning a tower in the immediate vicinity of the Proposed Tower is not a proper special interest under 807 KAR 5:001 Section 4(11).⁴ With due regard to that holding, and while SBA does not abandon those arguments and incorporates them here as if fully rewritten,⁵ in the interest of saving space and time, SBA will not reiterate those arguments here.

II. If allowed to intervene, SBA can present issues and develop facts that will assist the Commission in fully considering this matter.

In its past orders, the PSC has never addressed the fact that SBA could intervene for the purposes of providing the PSC with additional information which would be relevant to its determination of whether an applicant has a public convenience or necessity. The PSC is required to give "proper consideration to the essential elements that enter into the matter of convenience and necessity." *Ky. Utils. Co. v. Pub. Serv. Com.*, 252 S.W.2d 885, 889 (Ky. 1952). The Court of Appeals of Kentucky has stated:

The manifest purpose of a public service commission is to require fair and uniform rates, prevent unjust discrimination and unnecessary duplication of plants, facilities and service and to prevent ruinous competition. The courts generally deny the right of utilities to duplicate service.

Olive Hill v. Pub. Serv. Com., 203 S.W.2d 68, 71 (1947).

Many facts which are needed for the Commission to fully develop these elements are not listed in the Application. SBA can assist the Commission in the process of finding and evaluating these facts and therefore seeks to intervene in this matter. For example, SBA has provided the radio

⁴ Order, Case No. 2019-00176 (KY PSC October 1, 2019).

⁵ SBA Communications Corporation's Motion to Intervene, Case No. 2019-00176 (KY PSC June 25, 2019), and SBA Communications Corporation's Reply in Support of Motion to Intervene, Case No. 2019-00176 (KY PSC July 8, 2019).

frequency coverage analysis showing the nearly identical coverage and close proximity of the two towers and that the Proposed Tower would be an “overbuild” given the coverage overlap. *See* Exhibit 1.

a. The Application does not specifically detail how an additional tower will benefit consumers.

In the past, the Commission has denied SBA intervention because the purpose of the Telecommunications Act of 1996 and KRS § 278.040 are to promote market-based competition that benefits consumers. However, it is unclear from the Application how the Proposed Tower will benefit consumers at all. And it is difficult to imagine that this could be the case when the two towers will be right next to one another.

The Application states that the Proposed Tower is necessary because it will improve services “by increasing coverage or capacity and thereby enhancing the public’s access to innovative and competitive wireless communications services.”⁶ Other than restating language from KRS § 278.546(4), the Application is devoid of any facts or exhibits that lend themselves to this nebulous claim that a new tower constructed in such close proximity to the SBA Tower will have any benefit to consumers. Despite unsubstantiated claims of “necessity” and an “integral link,” the Applicants do not offer any insight into how the new tower will provide more economical services. The Application is similarly without any reasoning to support the claim that the area is “currently not served or not adequately served.”⁷ Again, the Proposed Tower is 0.3597 miles from the SBA Tower.

AT&T consistently references the Proposed Tower as being “necessary to AT&T,” but fails entirely to offer facts that show any increase in services and rates to the consumer as required

⁶ Application, KYPSC Case No. 2021-00092 at ¶ 7.

⁷ *Id.*

under KRS § 278.020. These facts and issues related to unsubstantiated claims of benefit to consumers elucidate the import of intervention as SBA is uniquely situated to “present issues or develop facts that will assist the commission in fully considering the matter.” 807 KAR 5:001 Section 4(11).

Even if any practical innovation or increase in services to the consumer can be inferred from the Application, it is nevertheless devoid of any evidence or expert opinion of the alleged benefits of the Proposed Tower. In fact, it is not apparent from the face of the Application if there is any possible or technical way in which the new tower in such proximity will bring about any increase in services or benefits to the consumer. While it is the onus of the Applicants to show necessity and a benefit to consumers, SBA’s intervention is appropriate and necessary here in order to present issues and develop facts that illustrate the absence of a benefit to the rates and services.

b. SBA has special knowledge of the service that can be had from the SBA Tower compared to the Proposed Tower.

In this case, SBA has already commissioned a study concerning the radio frequency coverage that can be broadcast from both the SBA Tower and the Proposed Tower. Exhibit 1. As shown in that study, there is little or no additional coverage to be gained by building the Proposed Tower. If a wireless operator had an antenna on the SBA Tower and then installed on the Proposed Tower, this would be duplicative and considered an “overbuild.” Exhibit 1. If SBA is permitted to intervene in this matter, it would be glad to bring its engineer to testify before the Commission to further explain his findings and the similarity of the radio frequency broadcasts from the SBA Tower and the Proposed Tower.

c. SBA has information concerning AT&T’s attempts to co-locate.

When requesting to build a new wireless tower, AT&T is required, by KRS § 278.020 and 807 KAR 5:063 Section 1(s), to present evidence concerning attempts to co-locate on existing

structures, such as the nearby SBA Tower. AT&T addresses this issue in the Application at ¶ 12. However, AT&T does not even bother to mention that it is currently co-locating on the SBA Tower *which .359 miles away*. From its spot on the SBA Tower, AT&T already broadcasts its radio frequency in exactly the same manner as it will be able to broadcast from the Proposed Tower. As SBA is the owner of the tower on which AT&T is required to consider co-locating, SBA has unique information concerning this issue and others which, as of yet, are wholly unaddressed in these proceedings.

For example, SBA has not been contacted by AT&T specifically concerning any deficiency with the SBA Tower which would make it unsuitable for co-location. SBA has no reason to believe that the SBA Tower is not suitable for AT&T's needs.

d. SBA's special knowledge concerns "service" pursuant to KRS § 278.040.

The PSC has previously relied on KRS § 278.040 and *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Construction of a 278 MW (nominal) Circulating Fluidized Bed Coal-Fired Unit in Mason County, Kentucky*, Case No. 2004-00423, (KY PSC Apr. 18, 2005) to deny SBA intervention because SBA did not have an interest in "rates and service."⁸ However, the information SBA can provide does concern service as defined in this statute.

The term "service," as used in KRS § 278.040, is defined by KRS § 278.010(13):

"Service" includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service;

⁸ Order, Case No. 2019-00176 (KY PSC October 1, 2019).

Thus, the signal AT&T or any other broadcasts is “service.” As shown above, SBA’s intent is to provide the PSC with information relating to this service.

e. Allowing SBA’s intervention will not unduly complicate or disrupt these proceedings.

As noted above and seen in Exhibit 1, SBA has already commissioned a report from an expert who can testify as to the lack of necessity for the Proposed Tower. SBA’s staff is similarly ready to testify concerning AT&T’s alleged attempt to continue co-locating on the SBA Tower. As SBA is already ready to present its evidence, its intervention in this matter will not delay this matter in any way. Furthermore, SBA is happy to tailor its involvement in this matter to the PSC’s wishes and provide information, to the extent not proprietary or confidential, as the PSC requests or deems helpful.

CONCLUSION

SBA has an interest in this matter which not now being adequately represented. Moreover, SBA has and can present issues and develop facts that will assist the commission in fully considering this matter. In particular, SBA can provide technical engineering information concerning the radio frequency that can be broadcast from the Proposed Tower (which is nearly identical to what can be broadcast from the existing SBA Tower) and information concerning AT&T’s co-location on the SBA Tower. As such, SBA now requests that it be allowed to intervene in this matter so that it may present the evidence it has already collected concerning the inaccuracies in the Application.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2021, the foregoing document was served via first class USPS, postage prepaid, upon the following:

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