BEFORE THE PUBLIC SERVICE COMMISSION
COMMONWEALTH OF KENTUCKY

***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 IN THE COMMONWEALTH OF KENTUCKY IN THE COUNTY OF MONTGOMERY**	**Case No. 2021-00145**

SBA TOWERS VII, LLC'S PUBLIC COMMENT

SBA Towers VII, LLC ("SBA") files this public comment to respond to Applicants' mischaracterization of SBA's filings herein and Applicants' misleading information provided to the Commission regarding AT&T Mobility's alleged attempts to negotiate with SBA.

I. Introduction

To be clear, SBA understands it has not been made a party to this proceeding, and SBA understands that it cannot "force" AT&T Mobility (or any other tenant) to remain on its tower. However, as a long-standing provider of telecommunications infrastructure in the Commonwealth, SBA should be allowed to provide facts and details Applicants are unwilling to provide to ensure that the Commission's regulations are fairly and uniformly enforced and that the public interest is thereby protected.

Applicants' recent Motion to Submit the Application highlights their open disregard for the Commission's regulations and apparent belief that the Commission does not intend to enforce

its regulations as promulgated. Specifically, Applicants allege that AT&T Mobility engaging in negotiations on an existing telecommunications tower prior to construction of a new tower only 0.6362 miles away "would necessarily result in unduly complicating or disrupting the proceedings."[1] Considering that 807 KAR 5:063 § 1(1)(s) requires "a statement indicating that the utility attempted to co-locate on towers designed to host multiple wireless service providers' facilities or existing structures, such as a telecommunications tower, or another structure capable of supporting the utility's facilities," it is difficult to conceive how SBA providing facts bearing on these required attempts can be properly characterized as an "undue complication" or a "disruption."

Throughout numerous proceedings, SBA has highlighted Applicants' apparent strategy of filing misleading applications that do not disclose required information to the Commission. While Applicants continue to raise red herring allegations of "due process," the reality is that the only real threat to due process and the rule of law lies in a failure to apply the Commission's regulations and other applicable law as written.

II. AT&T Mobility's Alleged "Attempt" at Negotiation.

Applicants' *ex post facto* submission of a letter sent to SBA Corporation in January 2019 only highlights exactly why SBA's Motion to Intervene should have been granted by the Commission. First, if AT&T Mobility believes this letter was a valid attempt to co-locate, it should be concerning to the Commission that: (i) this letter was not submitted with the Application; and (ii) AT&T Mobility did not even acknowledge in its Application that it was co-located on an existing tower, thereby concealing any opportunity for the Commission or any other potential

[1] Applicants' Motion to Submit Application for Certificate of Public Convenience and Necessity for Decision on Existing Evidentiary Record, at 2, https://psc.ky.gov/pscecf/2021-00145/cshouse%40pikelegal.com/09232021032133/Camargo_Relo_-_Mtn._to_Submit.pdf .

intervenor to even know to investigate the issue. Moreover, the introduction of this letter in explicit response to SBA's Public Comment[2] only serves to prove that SBA did meet the "likely to present issues or to develop facts that assist the commission in fully considering the matter" prong of 807 KAR 5:001 § 4(11)(b).

Just as important, SBA's participation as a party in this matter was needed by the Commission because AT&T Mobility's introduction of this 2019 letter is misleading, at best. First, while the letter is intended to convey that AT&T Mobility made a good faith attempt to negotiate the terms of this site in January 2019, this letter once more does not provide the Commission with the entire picture. AT&T Mobility omits the added detail that SBA received a similar letter from AT&T Mobility for practically every existing cell tower site across the country on the exact same day. Thus, when viewed in the larger picture, SBA did not believe this was a request for serious negotiation, but mere gamesmanship on the part of AT&T Mobility.

Indeed, if AT&T Mobility were truly attempting to provide notice of its intent to renegotiate the relevant site lease, AT&T Mobility should be expected to address the letter to the entity that actually holds the lease. SBA submits to the Commission that the Lessor is SBA Towers, VII, LLC, not SBA Corporation (to whom the letter was addressed), and that the letter AT&T Mobility provided was not sent to the designated notice address for SBA Towers VII, LLC set forth in the Lease. If AT&T Mobility seriously contends that it is seeking to engage in good-faith lease negotiations (rather than gamesmanship), AT&T Mobility should be expected to comply with the terms of the Lease.

Further solidifying that the January 2019 letter was not a serious request for negotiation, is the fact that AT&T Mobility has actually refused to engage in oral negotiations of leases that are

[2] Motion to Submit on the Evidentiary Record, at 1-2 (arguing that SBA's September 17, 2021 Public Comment should stricken and should have no impact on the Commission's decision).

close to sites where AT&T Mobility ultimately seeks to move its facilities. Site negotiations are typically conducted between SBA and AT&T Mobility's regional site managers. During phone conversations, AT&T Mobility and SBA have openly discussed revising or changing terms of specific site leases. However, when SBA seeks to discuss renegotiation of cell tower leases of sites where AT&T Mobility has ultimately filed an application seeking to move its facilities, AT&T Mobility's regional managers have advised they do not have authority on those leases and refuse to engage in negotiations.

Accordingly, much like the Application, AT&T Mobility continues to provide the Commission with only the facts most favorable to it, and AT&T Mobility's own behavior makes evident that assistance is needed for the Commission to fully develop the facts and issues in this proceeding.

III. If the Commission Grants Applicant's Motion, the Application Should be Denied.

In their Motion to Submit their Application on the Existing Evidentiary Record, Applicants request that the Commission refuse to consider the additional facts presented by SBA and grant Applicants the relief they request. In doing so, Applicants seek to turn this proceeding on its head, arguing that the additional facts provided by SBA should not be considered because SBA did not provide such facts when it filed its Motion to Intervene. The burden, however, is upon the Applicants. SBA does not have a duty to provide any facts at any time; conversely, AT&T was required to provide these facts when it filed its Application, but failed to do so. That SBA can help develop evidence showing that Applicants have not met their burden of proof is no basis for exclusion; it is a basis for inclusion.

Kentucky law requires the following:

> To apply for a certificate of public convenience and necessity, a utility proposing to construct a telecommunications antenna tower in an area which is not within the

> jurisdiction of a planning unit that has adopted planning and zoning administrative regulations in accordance with KRS Chapter 100, shall file with the Public Service Commission the following information:
>
> > (s) A statement that the utility has considered the likely effects of the installation on nearby land uses and values and has concluded that there is no more suitable location reasonably available form which adequate service to the area can be provided, and that there is no reasonably available opportunity to co-locate, including documentation of attempts to co-locate, if any, with supporting radio frequency analysis, where applicable, and a statement indicating that the utility attempted to co-locate on towers designed to host multiple wireless service providers' facilities or existing structures, such as a telecommunications tower, or another suitable structure capable of supporting the utility's facilities.[3]
>
> Contrary to the plain language of the regulation, the Application provided merely:
>
> [T]here are no reasonably available opportunities to co-locate AT&T Mobility's antennas on an existing structure. When suitable towers or structures exist, AT&T Mobility attempts to co-locate on existing structures such as communications towers or other structures capable of supporting AT&T Mobility's facilities; however, no other suitable or available co-location site was found to be located in the vicinity of the site.[4]

As has been proven by SBA's filings (and as subsequently acknowledged by AT&T), there is an existing telecommunications tower in the close vicinity of the site. That tower is both suitable and available because AT&T is currently co-located on it. However, AT&T failed to disclose this fact to the Commission and also made no "attempts" to address AT&T's co-location needs prior to filing its Application. It was not SBA's obligation to attempt to negotiate with AT&T – either before or after the filing of AT&T's Application; rather, that burden is squarely on AT&T, as an applicant for a CPCN to construct additional tower infrastructure at its nearby proposed site. It is not difficult or burdensome for AT&T to simply "pick up the phone" and "attempt to co-locate," as the Commission regulations require (and, as is explained above, AT&T's introduction of the 2019 letter fails to provide the entire picture, which only SBA can help clarify).

[3] 807 KAR 5:063 Section 1(1)(s) (emphasis added).
[4] Application, at ¶ 12.

Furthermore, while AT&T relies on the Commission's "No Deficiency Letter" as grounds for claiming that Applicants are entitled to relief, the reality is that the Commission's "No Deficiency Letter" was issued based upon misleading statements in its Application and stands only for the proposition that the Application met certain minimum filing requirements, not a reflection of the substantive merits of the Application.[5] It is clear that AT&T failed to provide the Commission with all relevant facts at the time its Application was made. Consequently, if the Commission grants Applicants' Motion, the law requires the Commission to deny the Application for a CPCN. This result derives not from SBA allegedly seeking to disrupt or unduly complicate the proceedings; rather, it is a consequence of Applicants' own failure to follow the Commission's applicable regulation.

Indeed, as the Kentucky Supreme Court has recognized:

> An agency must be bound by the regulations it promulgates. Further the regulations adopted by an agency have the force and effect of law. An agency's interpretation of a regulation is valid, however, only if the interpretation complies with the actual language of the regulation. KRS 13A.130 prohibits an administrative body from modifying an administrative regulation by internal policy or another form of action.

Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991) (citations omitted) (emphasis added).

Simply put, Applicants invite the Commission to violate Kentucky law by deciding this matter without documentation of AT&T's "attempts to co-locate" and without the benefit of any testimony from SBA, who is offering to provide the Commission testimony regarding AT&T's

[5] *See, e.g., In the Matter of Application of Big Sandy Rural Electric Cooperative Corporation for Authorization to Borrow $778,702.55 from Cobank and Execute Necessary Notes and to Repay Cooperative Financing Corporation Notes in the Same Amount*, No. 2012-00456, 2012 Ky. PUC LEXIS 924, at *1 (Ky. PSC Nov. 15, 2012) ("[A]pplication was rejected as deficient because it did not include the information necessary to satisfy certain filing requirements."); *In the Matter of: Application of Owen Electric Cooperative, Inc. for an Order Pursuant to KRS 278.300 and 807 KAR 5:001, Section 11 and Related Sections, Authorizing the Cooperative to Obtain a Loan Under the RUS/Cobank Co-Lending Program Not to Exceed $28,083,000 at Any One Time from Rural Utilities Service and CoBank*, No. 2009-00010, 2009 Ky. PUC LEXIS 830, at *1 (Ky. PSC Aug. 5, 2009) ("Because the application failed to meet certain filing requirements, the Commission issued a deficiency letter . . . indicating that the application had been rejected for filing.").

purported attempts to co-locate. Commission regulation plainly requires that AT&T provide "documentation of attempts to co-locate" and a "statement that the utility attempted to co-locate." In fact, AT&T Mobility has now admitted that "the regulation requires an attempt to co-locate prior filing an Application,"[6] yet AT&T Mobility made no effort to comply with this requirement when filing its Application.

Thus, the Commission cannot grant the relief requested by Applicants on the "evidence submitted" as requested by Applicants because it would effectively result in the Commission modifying its own regulation without formal action, which the law forbids.

III. Alternatively, the Commission Should Reverse its Order Denying SBA's Motion to Intervene and Issue a Procedural Order to Fully Develop the Facts.

While denial of the Application is appropriate in light of the Applicants' own admissions, the basis for that denial warrants additional caution on the part of the Commission when dealing with Applicants' telecommunications tower CPCN applications. In multiple cases, now, SBA has identified a continuing strategy of Applicants to attempt circumvention of the "attempt to co-locate" element of their applications by (i) failing to disclose nearby towers where AT&T is currently co-located and providing service; and (ii) including statements that AT&T "attempted to co-locate" when that is patently untrue. Surely, the Commission's requirement that an applicant include a "statement that the utility attempted to co-locate" includes a requirement that the statement also be true, in fact. Because SBA is AT&T's current co-location provider in the area to be served, allowing SBA to intervene in this and future matters would clearly assist the Commission in developing the facts necessary to evaluate whether Applicants have met their burden.

[6] Motion to Submit Application on Existing Evidentiary Record, at 165 (emphasis added).

Indeed, further development of the facts in future cases is warranted, not only because the Application (like others) omits certain relevant facts, but because Applicants also continue to raise "red herring" arguments in an effort to distract the Commission from the real issues. For example, Applicants request that the Commission move quickly "so that AT&T can move forward and provide Kentucky wireless communications service users with necessary service."[7] As AT&T has conceded by admitting it is currently co-located on an existing telecommunications tower, AT&T's customers are already receiving service, and the new proposed tower will not impact the services they receive. For that reason, the cases cited by Applicants regarding delay, in which there were no existing telecommunications towers and no additional information was needed from the applicant (as is opposite of the case here), are inapposite to the facts at hand.[8] Indeed, Applicants have already spent months advocating that this case is only about AT&T's allegation of a rent disparity, not the coverage provided from the existing telecommunications tower.

Accordingly, SBA encourages the Commission to consider whether it should *sua sponte* take SBA up on its offer to help develop facts regarding AT&T's otherwise untested allegations regarding rental discrepancy, possible frequency interference, and coverage area, as well as those facts regarding the nature of the relationship between Applicants and ownership of the proposed tower. As SBA has maintained throughout this proceeding, it merely seeks to provide its expertise to ensure the public interest will be served through the grant of a CPCN to Applicants. If after full

[7] Motion to Submit Application on Existing Evidentiary Record, at 5.

[8] *See T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987 (9th Cir. 2009) (finding that the denial of an application was supported by substantial evidence, but requiring the city to grant the application because the denial had "the effect of prohibiting the provision of personal wireless services" due to no other alternative location for a nearby tower); *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 315 (N.D.N.Y. 2017) (determining that there were "no less intrusive means to fill the significant gap in coverage other than to construct and operate a wireless facility at the Site" (emphasis added)); *Am. Towers, Inc. v. Wilson Cnty.*, No. 3:10-cv-1196, 2014 U.S. Dist. LEXIS 131, at *1-2 (M.D. Tenn. 2014) ("AT&T Wireless . . . sought to improve its service network after determining that a significant coverage gap existed." (emphasis added)); *Masterpage Commn's, Inc. v. Town of Olive*, 418 F. Supp. 2d 66, 77 (N.D.N.Y. 2005) ("Olive has no wireless telecommunication facility and radio frequency tests revealed large gaps in wireless and cellular coverage." (emphasis added)).

development of the facts, Applicants have met their burden, the Commission would be required to grant the relief requested. To the extent there is any "complication or disruption" in this proceeding, it is the fact that Applicants have failed to engage in the "attempt to co-locate" required by Commission regulation.

This the 30th day of September, 2021.

Respectfully submitted,

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Certification

I hereby certify that a copy of this Public Comment has been served electronically on all parties of record through the use of the Commission's electronic filing system, and there are currently no parties that the Commission has excused from participation by electronic means. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, a paper copy of this filing has not been transmitted to the Commission.

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