

**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 UNIFI 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 MOTION TO INTERVENE

SBA Towers VII, LLC (“SBA”), by counsel and pursuant to 807 KAR 5:001 § 4(11), hereby moves the Public Service Commission of the Commonwealth of Kentucky (the “Commission”) for full intervention in this matter.

1. The full name and address of SBA Towers VII, LLC is 8051 Congress Avenue, Boca Raton, FL 33487-1307, vweidenthaler@sbsite.com.

I. Standard for Full Intervention.

2. Pursuant to 807 KAR 5:001 § 4(11)(a), a person moving for full intervention shall be granted such status if the Commission makes either of the following determinations: (i) the movant “has a special interest in the case that is not otherwise adequately represented” or (ii) that the movant’s “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.”

3. The Commission retains discretion whether to allow a party to intervene in a Commission proceeding, which requires that the Commission's decision on a Motion to Intervene be reasonable, fair, and supported by sound legal principles. *See Enviropower, LLC v. Pub. Serv. Comm'n*, No. 2005-CA-001792, 2007 Ky. App. Unpub. LEXIS 121, at *8; *Ryan v. Ryan*, 473 S.W.3d 637, 639 (Ky. Ct. App. 2015) (“The test for abuse of discretion is whether the . . . decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. . . . Abuse of discretion implies arbitrary and capricious action that results in an unreasonable and unfair decision.”).

II. SBA Has a Special Interest In This Proceeding that Is Not Otherwise Adequately Represented.

4. SBA owns an existing tower (the “SBA Tower”) at 3997 McCormick Road, Mt. Sterling, KY 40353 that is located 0.6362 miles from the tower proposed to be constructed by New Cingular Wireless PCS, LLC (“AT&T”) in this proceeding (the “Proposed Tower”).

5. AT&T, as well as, two additional telecommunications providers are currently tenants on the SBA Tower.

6. SBA has conducted a Coverage Plot Analysis, performed by a Radio Frequency Engineer, which shows that the wireless signal AT&T currently broadcasts from the SBA Tower covers practically the exact same area that will be broadcast from the Proposed Tower. Thus, the Proposed Tower will not allow AT&T to provide services to a currently unserved part of Kentucky.

7. Further, SBA, through a Radio Frequency Engineer, has performed a study showing the likelihood of coverage overlap as a result of placing two telecommunications towers in such close proximity.

8. Based upon the study, placing the Proposed Tower only 0.6362 miles from SBA's existing tower could lead to signal interference, which will impair the ability of SBA's current and

future tenants to provide quality service to its customers and impair the ability of citizens in the surrounding area to receive high quality telecommunications services.

9. Therefore, SBA has a special interest in this proceeding that is not currently represented because it seeks to provide information that will ensure the Commission's order entered in this proceeding will allow telecommunications providers in the area of the Proposed Tower to continue providing high quality service and for the customers in the surrounding area to receive high quality service.

10. As no other party, including the Attorney General, a private citizen, or a competing telecommunications service provider, has sought to intervene in this matter, these interests are not currently represented in this proceeding.

11. Accordingly, SBA respectfully requests to be granted intervention in this matter so that it may provide the Commission with copies of the studies, as well as to provide a witness to thoroughly explain each of the studies, which will ensure that the Commission has information necessary to determine what impact the construction of the Proposed Tower will have on the ability of telecommunications providers to provide high quality services and for the residents in the surrounding areas to receive such service.

III. SBA Has the Ability to Develop Facts that Assist the Commission in Fully Considering Whether Applicants Have Satisfied 807 KAR 5:063 Without Unduly Complicating or Disrupting the Proceedings.

12. In addition to representing a special interest not already represented in this proceeding, SBA has the ability to help develop facts that will assist the Commission in determining whether AT&T has met all of the requirements of 807 KAR 5:063.

13. As noted above, SBA has conducted studies and analyses related to the impact that the construction of Applicants' Proposed Tower so close to the existing SBA Tower will have on telecommunications service in that area, and the impact on Kentucky residents in that area.

14. This participation will be crucial to the development of facts that will assist the Commission in evaluating the sufficiency and credibility of the Applicants' evidence, as well as in otherwise determining whether the proposed CPCN should be granted. Given SBA's expertise in the field, it could also help present other issues that may merit consideration as the Commission evaluates the application.

15. Indeed, AT&T has repeatedly sought a CPCN from the Commission to construct new wireless towers across the Commonwealth, and, typically, no other entity in the telecommunications industry or the Attorney General of the Commonwealth of Kentucky seek intervention.

16. Thus, in all of those cases the Commission has been required to (or likely will be required to) issue its order without the benefit of an intervening party possessing the industry knowledge and expertise to assist the Commission in developing facts relevant to the determination of whether AT&T has met all requirements of 807 KAR 5:063 and whether Kentuckians will be best served by the construction of an additional wireless communications facility.

17. While the Commission has historically, on occasion, granted intervenor status to individual property owners who own land near a proposed tower, it is unlikely that these individual landowners owners have the expertise to provide information that would assist the Commission in its determination on issues related to coverage area and interference.

18. Moreover, SBA recognizes that the Commission has previously denied SBA's intervention in similar proceedings, claiming that SBA has asserted only an interest that is "strictly

commercial.”¹ However, as noted herein, SBA seeks to both provide and test the sufficiency of technical information that will assist the Commission in making its determination, and the Commission is well-suited to weigh any evidence presented in light of SBA’s commercial interests, just as the Commission routinely does when it grants full intervention to industry trade organizations in rate cases.

19. Consistent with prior practice, it is anticipated that AT&T will object to SBA’s attempt to intervene in this proceeding. Furthermore, AT&T’s prior objections to SBA’s attempts to intervene reveal that AT&T’s desire to construct the Proposed Tower is motivated by its own commercial interests. *See Applicants’ Response to Motion to Intervene*, PSC Case No. 2020-00343, at 1 (“The fact that it would cost AT&T over five million dollars (\$5,000,000) more in rent as a co-location tenant on an SBA-owned tower versus co-locating on the Uniti tower for the new twenty (“20”) years should compel the PSC to deny SBA’s Motion in accordance with clear standing precedent.”).

20. In fact, industry trade articles highlight that AT&T’s frequent filings before the Commission are just attempts to utilize Commission resources to gain AT&T negotiating leverage.² AT&T’s own public comments show that it is simply trying to increase its own profits,

¹ *See In the Matter of: Application of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility 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 Casey*, PSC Case No. 2019-00176, Order at 4 (Oct. 1, 2019).

² *See AT&T: We moved hundreds of tower sites in 2019 to get better deals*, Mike Dano, LightReading.com, June 3, 2020 (“AT&T said it continues to negotiate with cell tower owners in order to reduce spending on tower space. And the company is boasting about the results its hardball negotiating tactics are generating.” (emphasis added)), available at: <https://www.lightreading.com/4g-3g-wifi/atandt-we-moved-hundreds-of-tower-sites-in-2019-to-get-better-deals/d/d-id/761466>; *Tower Trouble: AT&T Keeps Pushing Cell Tower Landlords to Reduce Rent*, Mike Dano, LightReading.com, June 10, 2019 (“AT&T has made no secret of its desire to reduce the rent it pays to tower companies. . . . [N]ew research into the tower sector indicates that AT&T’s negotiating tactics – which include the threat of building a new, cheaper tower next to an existing, expensive tower – may be mostly hot air. . . . AT&T’s Susan Johnson essentially reiterated the operator’s threat during a recent appearance at the Connect (X) trade show . . . Johnson noted AT&T is working with Verizon identifying where they both need a site.” (emphasis added)), available at: <https://www.lightreading.com/mobile/tower-trouble-atandt-keeps-pushing-cell-tower-landlords-to-reduce-rent/d/d-id/751925>.

and make AT&T's claims about better coverage or service for Kentucky's citizens ring hollow. Allowing SBA to participate in this matter and assist the Commission in developing facts may encourage AT&T to actually attempt to negotiate with SBA prior to filing its Applications (which would already appear to be required by the Commission's regulations that require documentation of attempts to co-locate on existing towers) and avoid the threat of Commission relief being used as a negotiating tool.

21. Thus, it is apparent that AT&T's application is primarily made for reasons that are "strictly commercial," and SBA should be permitted to intervene to provide knowledge and information to assist the Commission in its efforts to determine whether the public would be best served by AT&T constructing the Proposed Tower, which would advance AT&T's commercial interests and will have little to no impact on AT&T's ability to provide high quality services in Kentucky, which are currently provided by locating on the existing SBA Tower less than one mile away.

22. SBA can also provide testimony related to AT&T's attempts to co-locate on the SBA Tower. Indeed, despite the fact that AT&T is currently located on the SBA Tower only 0.6362 miles away from the Proposed Tower, AT&T's application provides the Commission with no information related to its attempts to co-locate. 807 KAR 5:063(s) specifically requires AT&T to provide information related to its attempts to co-locate, "including documentation," yet none is provided with the Application.

23. In fact, despite SBA's prior filings before the Commission alerting the Commission that AT&T was filing Applications for a CPCN without disclosing relevant facts – specifically, that AT&T was already providing service in the practically identical service area on an existing

tower – AT&T has once again filed an Application before this Commission without informing the Commission that it is currently co-located on an existing tower less than a mile away.

24. Moreover, AT&T has once again failed to make any attempt to continue co-locating on the existing SBA Tower, including by seeking to negotiate the rental rates, with rental rates being the sole reason AT&T has claimed existing SBA Towers are not a “reasonable” co-location opportunity.

25. When considering the alleged rental rate disparity, AT&T’s failure to even attempt to negotiate with SBA, and AT&T’s apparent desire to litter Kentucky’s landscape with additional cell towers that serve practically identical service areas, the Commission should not lose sight of the fact that the Application suggests that AT&T and Uniti will jointly construct, own, and operate the tower.³ Thus, if AT&T has an interest in the tower other than just as a “co-locator,” that interest could explain the alleged rent disparity in prior proceedings and may give AT&T an additional “strictly commercial” interest in future co-location rents from other carriers that AT&T it is trying to protect by seeking to prevent SBA from assisting the Commission in developing facts on these subjects and others.

26. Thus, because AT&T has failed to provide any evidence of its attempts to co-locate on an existing tower only 0.6362 miles away from the Proposed Tower, SBA should be allowed to intervene to provide the Commission with facts that it is required to consider by 807 KAR 5:063(s), but which AT&T has omitted.

³ See Application, at ¶ 2 (“Applicants propose construction of an antenna tower for communications services . . .”); ¶ 8 (“Applicants propose to construct . . .”); Application, at 9 (jointly requesting a CPCN for both Applicants to “operate the WCF”); *see also* 807 KAR 5:063 Section 1(1) (placing obligations on the entity proposing to construct a telecommunications antenna tower); Application, at ¶ 22 (“Applicants have notified . . .”); Application, at ¶ 23 (“Applicants have notified . . .”).

27. Finally, granting intervention to SBA will not unduly disrupt or overcomplicate this proceeding. SBA is committed to complying with all orders of the Commission, including all scheduling deadlines, and SBA will not unduly complicate or disrupt these proceedings. Instead, introduction of studies and testimony from a party with industry knowledge and expertise will facilitate the Commission's development of all necessary facts and consideration of all relevant issues.

28. Accordingly, the Commission should grant SBA's motion for full intervention.

This the 13th day of April, 2021.

Respectfully submitted,

/s/ Edward T. Depp
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Certification

I hereby certify that the electronic version of this filing made with the Commission on April 13, 2021, is a true and accurate copy of the paper document that will be submitted to the Commission within 30 days of the Governor lifting the state of the emergency pursuant to the Commission's Orders in Case No. 2020-00085, and the electronic version of the filing has been transmitted to the Commission. A copy of this filing has been served electronically on all parties of record for whom an email address is given in the online Service List for this proceeding, and there are currently no parties that the Commission has excused from participation by electronic means.

/s/ Edward T. Depp
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