

**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 UNITE 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 REPLY IN SUPPORT OF MOTION TO INTERVENE

SBA Towers VII, LLC ("SBA"), by counsel, hereby files its Reply in Support of its Motion to Intervene. In support of this Reply, SBA states as follows.

A. Applicant's Response Shows that SBA's Intervention will Present Issues or Develop Facts that Assist the Commission in Fully Considering this Matter.

1. 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."

2. When determining whether a person should be granted full intervention, the Commission must make a decision that is 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.”).

3. Applicants’ Response to SBA’s Motion to Intervene shows that SBA’s intervention is likely to present issues or develop facts that assist the Commission in fully considering this matter. Indeed, just by seeking intervention SBA has already helped the Commission develop facts that Applicants failed to disclose in their Application.

4. Specifically, Paragraph 12 of the Application states, “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.” *See* Application, at ¶ 12.¹

5. For the first time in its Response, Applicants admit that AT&T is currently co-located on an existing tower only 0.6362 miles from the proposed tower, but claims that the existing tower is not a “reasonably available opportunity to co-locate,” which is a legal conclusion reserved for the Commission.

6. Thus, the Application only provided the Commission with the Applicants’ own legal conclusion, but failed to provide the Commission with any facts attempting to support this legal conclusion, which are necessary for the Commission’s determination as to whether Applicants are entitled to the relief they seek.

7. Accordingly, SBA has already shown that its intervention will assist the Commission in developing facts on pertinent issues. Without SBA’s assistance, for example, the

¹ https://psc.ky.gov/pscecf/2021-00145/cshouse%40pikelegal.com/03292021022623/Camargo_Relo_-_Full_Application.pdf

Commission may never have been presented with information regarding this nearby tower, a fact it is required to consider under 807 KAR 5:063, but which Applicants failed to disclose to the Commission.

8. As a result, it would be unreasonable and unfair to deny SBA's Motion to Intervene, as SBA has already met the legal standard necessary for intervention simply by filing its Motion.

B. Applicants' Response Attempts to Litigate Important Issues Without the Development of Facts or Evidence.

9. Applicants' Response makes repeated attempts to have this Commission reach legal conclusions without placing any evidence in the record, apparently believing the Commission is authorized to make definitive rulings based on Applicants' unsupported legal conclusions made in a Response to a Motion to Intervene.

10. However, Applicants are required to actually present facts and evidence that support their legal conclusions, and SBA has already proven that it has the ability to assist the Commission in developing these facts and evidence.

11. SBA's Response to the Motion to Intervene – which is primarily an advocacy brief asking the Commission to grant a CPCN without taking evidence – includes “due process” arguments that highlight the flawed nature of Applicants' perception of an adjudicative, administrative proceeding.² Specifically, Applicants argue that their “due process” rights are being violated because SBA did not attach the referenced coverage plot analysis or its author. This was merely an example of the type of expertise and facts that SBA can help develop through the introduction of testimony and data requests after being allowed as an Intervenor, not information that is required to be provided with a Motion to Intervene.

² Response to Motion to Intervene, at 11, n.10.

12. While Applicants accuse SBA of asking the Commission to take arbitrary action, if the Commission grants the relief requested based on the Application alone, that decision will be subject to attack as “arbitrary” because Applicants have failed to provide the Commission with any evidence on relevant issues, let alone “substantial evidence,” and, in some instances, Applicants simply cannot provide evidence required by their cited legal authority.

13. For example, while Applicants’ Response argues the merits of whether the existing SBA tower provides a “reasonable” opportunity to co-locate, Applicants do so only by making unsupported factual allegations. Applicants’ entire argument is predicated on its claim that there is not a reasonable opportunity to co-locate due to an alleged discrepancy in rental terms. Applicants suggest that the law allows the Commission to simply assume Applicants’ self-serving legal conclusions are true without the benefit of any factual record to support them.

14. Specifically, Applicants’ allegations related to SBA’s demands for supposedly unfair rental rates and terms are wholly unsupported and unfounded. As a matter of fact, AT&T has made no attempt to negotiate rental rates and terms regarding its existing, nearby co-location with SBA. Thus, not only have Applicants not provided the Commission with evidence related to the terms and conditions “demanded” by SBA, Applicants cannot provide that evidence because no such “demands” exist.

15. Therefore, Applicants do not have the ability to provide the Commission with any evidence related to the terms and conditions that SBA would be willing to offer. Rather, Applicants invite the Commission to commit reversible error by making a legal finding that the public convenience and necessity requires the construction of the proposed wireless tower based on what AT&T assumes would be offered by SBA.

16. Without SBA's intervention the Commission would likely be required to deny the Application because there will be no party in the proceeding that has the ability to provide evidence of what terms SBA is willing to offer AT&T to co-locate on the existing tower.

17. Thus, while AT&T accuses SBA of asking the Commission to reverse its interpretation of "reasonable availability,"³ SBA simply asks the Commission to allow it to intervene. Substantive issues will be decided once the facts are developed. Granting intervenor status to SBA, however, will assist the Commission in developing those facts adequate to inform the Commission's determination of whether the Applicants have carried their substantial burden of proof.

18. AT&T's omission of known facts creates the misimpression that there are no other nearby towers available for co-location. AT&T may, of course, advocate for the conclusion that there is no reasonable co-location opportunity available, but the decision remains with the Commission. SBA respectfully suggests that – having notified the Commission of AT&T's critical factual omissions in multiple pending cases – its intervention could assist the Commission in developing these facts that AT&T seems otherwise disinclined to mention.

19. Finally, Applicants' Response on the subject of whether the public interest would be served by the proposed tower confirms that this Application has absolutely nothing to do with the "public interest" or whether Kentucky's citizens are able to receive quality telecommunications services. According to AT&T, the wholly unsupported, alleged discrepancy in the amount of rent that would be owed by AT&T is the "threshold issue"; AT&T claims that "radio frequency coverage and capacity plots and similar information are simply inapposite and merely distracts [*sic*] from the dispositive issue."⁴ Even if AT&T were correct that an alleged rent discrepancy is

³ Response, at 9 ("SBA apparently please for the PSC to reverse how it interpreted "reasonable availability" . . .").

⁴ Response to Motion to Intervene, at 2-3 (emphasis added).

the “threshold issue” (which it is not), then the proper course would still be to allow SBA to intervene so that the issue may be adequately addressed through factual proof provided by those (like SBA) with direct knowledge of that and other issues, including existing coverage and capacity.

20. Applicant’s explicit argument to this Commission is that as long as AT&T is able to increase its profits (without any commitment that its Kentucky customers will see a reduction in the cost of AT&T’s wireless services), the ability of Kentucky citizens living near the proposed tower to receive high-quality telecommunication services is a “distraction” or a “diversion” and not a factor the Commission may consider.⁵

21. AT&T’s astounding claim that coverage, potential interference, and other factors that bear on the service actually provided to Kentucky’s citizens is “distracting,” must also be viewed in conjunction with the notice that AT&T has provided to local government officials in this case (as well as many others). Recognizing that local government officials likely have a great interest in the construction of additional towers in their county, the Commission’s regulations required AT&T to (in this case) provide the Montgomery County Judge-Executive with notice of the planned construction of the proposed tower. Exactly like AT&T’s Application, AT&T omitted any mention that AT&T was already co-locating and providing service from an existing, nearby tower. Rather, AT&T only informed the Judge-Executive that “the facility is needed to provide improved coverage for wireless communications in the area.”⁶

⁵ See *id.* at 2-3 (“...radio frequency coverage and capacity plots and similar information are simply inapposite and merely distract from the dispositive issue”) and 14 (“Applicants do not deny that AT&T is currently co-located on the SBA tower in the vicinity. Seeking to explore coverage comparisons is a diversion . . . [AT&T] has elected to remove its equipment from the SBA tower and proposes a new communications facility in the vicinity.”).

⁶ Exhibit L to the Application, https://psc.ky.gov/pscecf/2021-00145/cshouse%40pikelegal.com/03292021022623/Camargo_Relo_-_Full_Application.pdf.

22. In direct contravention to their letter to the Judge-Executive, Applicants now allege that the coverage area is a “distraction.” Thus, AT&T’s Response now raises additional and considerable questions as to whether its notice to the Montgomery County Judge-Executive was proper or even accurate, given AT&T’s assertions that claims of coverage improvements are somehow a “distracting” “diversion” from the question of whether it should be permitted to construct its own duplicate, over 200 foot tower, nearby.

23. SBA can assist the Commission in developing the facts germane to the question of whether AT&T has met its substantial burden of proof to show that its proposed tower is required by the public convenience and necessity. Accordingly, SBA’s Motion to Intervene should be granted.

C. Allowing SBA to Intervene Promotes Competition.

24. Applicants’ claim that SBA seeks to inhibit competition by seeking status as an intervenor is also misplaced. Indeed, contrary to AT&T’s claims in its Response, nowhere in SBA’s Motion to Intervene does it request that the Commission reach any specific, substantive conclusion in this matter.

25. Rather, allowing SBA to intervene so that it may lend its technical and engineering expertise, as well as assisting in the development of facts regarding AT&T’s attempts to co-locate on existing towers, will only help ensure that the Applicants have met all of the requirements for a CPCN and under 807 KAR 5:063. For example, if two closely situated towers could create unanticipated interference issues, the proposed construction could actually hinder competition; without facts pertaining to that question, however, the Commission will be unable to make that determination on the basis of substantial evidence.

26. Merely allowing SBA to intervene does not inhibit competition. Granting SBA's Motion to Intervene would simply provide the Commission with market, technical, and engineering expertise to evaluate the necessary legal requirements, including the "reasonable opportunity" to co-locate. Indeed, AT&T has been providing services from the existing SBA tower for nearly 10 years, which AT&T believed to be a "reasonable opportunity" to co-locate at the time and when it negotiated an amendment to its agreement with SBA less than four years ago.

27. Instead, the clear and indisputable fact is that Applicants seek to prevent their own perceived competitor from engaging in the regulatory process and providing market information and specialized expertise that the Commission does not generally possess and that Applicants intentionally seek to exclude, as that information and expertise does not fit the Applicants' narrative. SBA, through its long history and deep expertise in the industry, is uniquely qualified to help develop important facts that are vital to the proper consideration of the Application. Considering that Applicants were there ones whose Application omitted any mention of the existing tower a mere 0.6362 miles from the location of Applicants' proposed new tower, it is the relegation of SBA to "public commenter" unable to participate fully in the discovery process and other aspects of the case – as Applicants advocate – that will harm competition.

28. For example, even though AT&T's Application explicitly states that both "Applicants," not solely Uniti Towers, will be responsible for constructing and operating the tower,⁷ AT&T claims SBA "twisted"⁸ the Application by raising questions as to whether AT&T is a co-owner of the proposed tower. SBA merely quoted from Applicants own Application; but nevertheless, AT&T claims that development of facts on this issue is not warranted because – the

⁷ Application, at ¶2 ("Applicants propose construction . . ."); ¶8 ("Applicants propose to construct . . ."); at 9 (claiming that "Applicants' will operate the WCF").

⁸ Response, at 4 ("SBA has twisted the co-applicant status of Uniti and AT&T Mobility . . .").

Application does not already provide the documentation that would be necessary to determine that relationship.⁹

29. Assisting the Commission develop facts and issues omitted from the Application is part of the exact legal standard for intervention, and it is AT&T's unwillingness to fully disclose all facts to the Commission – such as already being co-located in this area of Montgomery County – that justifies SBA's intervention here.

30. Moreover, Applicants' arguments that "res judicata" and "collateral estoppel" apply are incorrect. Essentially, Applicants argue that because the Commission found in one case that intervention was not warranted, under no circumstances can SBA ever be granted status as an intervenor, despite the fact that the cases all involve disparate sets of facts and issues. Under Applicants' mistaken theory of "res judicata" and "collateral estoppel," being found not liable on one claim of negligence would make a party immune from being sued for a different claim of negligence ever again, and it would prevent SBA from ever seeking to put the Commission on notice that Applicants filed an Application without disclosing relevant facts to the Commission (as occurred here).

31. If the Commission were to accept AT&T's argument – that there should be a blanket rule that SBA can never intervene in any case no matter the circumstances – the Commission's orders would clearly be subject to appeal, as wholly failing to consider the facts presented could not withstand even a minimal level of review.

32. SBA acknowledges that if, after full development of the facts, the Commission finds that construction of a second wireless tower merely 0.6362 miles from an existing and suitable tower meets the appropriate legal standard and will not, for example, result in "wasteful

⁹ Response, at 4 ("No documentation of record indicates AT&T Mobility is an owner of the tower. . . . (emphasis added)).

duplication” or an “unnecessary multiplicity of physical properties,”¹⁰ Applicants will be free to construct their wireless facility.

33. SBA offers (at no cost) to provide the Commission with market, technical, and engineering expertise that the Commission does not possess and that will assist the Commission in developing facts vital to the evaluation of whether Applicants’ proposed construction is in the public interest and otherwise satisfies the standard for a CPCN under applicable Kentucky law. If Applicants cannot make this showing, that is not a result of SBA preventing competition; it is a result of Applicants failing to meet their burden under Kentucky law.

34. Thus, permitting a wireless infrastructure provider, like SBA, to intervene in the regulatory process does not stifle competition. Rather, it ensures that an applicant seeking a CPCN will take action that truly benefits the public and that the facts underlying that overarching consideration are thoroughly and skillfully evaluated with the benefit of relevant market, technical, and engineering expertise available to the Commission (as SBA offers). This outcome benefits Kentucky citizens, which is exactly what competition is designed to promote.

¹⁰ See *In the Matter of: The Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main*, Ky. PSC Case No. 2007-00134, 2008 Ky. PUC LEXIS 494, at *49-50 (Apr. 25, 2008), (“To obtain such Certificate, the utility must demonstrate a need for such facilities and an absence of wasteful duplication. . . . ‘Wasteful duplication’ is defined as ‘an excess of capacity over need’ and an ‘excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties.’”).

WHEREFORE, SBA Towers VII, LLC respectfully requests that the Commission grant its Motion to Intervene.

This the 23rd day of April, 2021.

Respectfully submitted,

/s/ Edward T. Depp

Edward T. Depp

R. Brooks Herrick

DINSMORE & SHOHL LLP

101 S. Fifth St., Suite 2500

Louisville, KY 40202

tip.depp@dinsmore.com

brooks.herrick@dinsmore.com

Telephone: (502) 540-2300

Facsimile: (502) 585-2207

Counsel to SBA Towers VII, LLC

Certification

I hereby certify that the electronic version of this filing made with the Commission on April 23, 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
Counsel to SBA Towers VII, LLC

21475309.2