

**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 HARMONI 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  
METCALFE**

Case No. 2021-00327

**SITE NAME: SPARKS RELO /  
WILLIAM JUDD ROAD**

**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 as an entity with a real property interest to whom Applicants were required to give notice under 807 KAR 5:063 § 1(1)(l) and (m). Specifically, in Exhibit J of the Application, Applicants specifically acknowledged mailing notice to 8051 Congress Ave., Boca Raton, FL 33487, which is SBA’s address. Accordingly, SBA seeks to assert its special interest as a party with a real property interest in nearby property, who can also help develop facts through its technical expertise and industry experience. As grounds for its intervention, SBA states as follows.

1. The full name and address of SBA Towers VII, LLC is 8051 Congress Avenue, Boca Raton, FL 33487-1307, [eroach@sbsite.com](mailto:eroach@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.**

**A. Contiguous Property Owner.**

4. SBA has a real property interest in the property located at 1441 William Judd Road, Edmonton, KY 42129, and received notice of the filing of this application from Applicants, as is demonstrated by Exhibit J thereto.

5. SBA owns an existing tower (the “SBA Tower”) at the William Judd Road property that is located approximately 0.2352 miles from the tower proposed to be constructed by New Cingular Wireless PCS, LLC (“AT&T”) in this proceeding (the “Proposed Tower”).

6. AT&T is the sole tenant on the SBA Tower.

7. As is recognized by the fact that Applicants served notice upon SBA at its address in Boca Raton, Florida, SBA has a real property interest in nearby property. *See* Exhibit J to the Application.

8. The interests of nearby property owners and other members of the community are not adequately represented in this proceeding, as is demonstrated by Applicants’ prior arguments that technical ability, wasteful duplication, and issues bearing on the quality of services that Metcalfe County residents can expect to receive should not be considered by the Commission. Instead, according to Applicants, the only issue for Commission consideration is AT&T’s cost savings.<sup>1</sup>

9. Because in similar past proceedings Applicants have argued that the only relevant issue is the cost savings that would allegedly be afforded to AT&T, the only interest currently represented is the profit margin of Applicants. Indeed, representatives of AT&T have made public comments regarding AT&T’s attempts to increase its profits through tower proliferation. As was noted in one trade article:

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

---

<sup>1</sup> PSC Case No. 2021-00145, Applicant’s Response to SBA Towers VII, LLC’s Motion to Intervene, at 2-3 (arguing that the rental rate was the “threshold issue” and that “technical capacity or physical suitability of the SBA Tower or even radio frequency coverage and capacity plots and similar information are simply inapposite and merely distracts from the dispositive issue.”), available at [https://psc.ky.gov/pscecf/2021-00145/cshouse%40pikelegal.com/04202021040051/Camargo\\_Relo\\_-\\_Uniti\\_Response\\_to\\_SBA\\_Motion\\_to\\_Intervene.pdf](https://psc.ky.gov/pscecf/2021-00145/cshouse%40pikelegal.com/04202021040051/Camargo_Relo_-_Uniti_Response_to_SBA_Motion_to_Intervene.pdf); *see also* *Ky. Utils. Co. v. Pub. Serv. Comm’n*, 252 S.W.2d 885, 88 (“[A] determination of public convenience and necessity requires both a finding of the need for a new service system or facility from the standpoint of service requirements, and an absence of wasteful duplication resulting from the construction of the new system or facility.”).

– 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.<sup>2</sup>

10. Accordingly, the interests of nearby property owners are not currently represented in this proceeding, and SBA should be authorized to represent the interests of property owners and Metcalfe County residents to ensure Applicants’ proposed construction serves the public’s interest.

**B. Interest in Protecting Land Uses & Value.**

11. 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.

12. Further, SBA, through a Radio Frequency Engineer, has performed a study showing the likelihood of radio signal interference as a result of placing two telecommunications towers in such close proximity.

13. Based upon the study, placing the Proposed Tower only 0.2352 miles from SBA’s existing tower is likely to lead to signal interference, which may impair the ability of SBA’s 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.

---

<sup>2</sup> *Tower Trouble: AT&T Keeps Pushing Cell Tower Landlords to Reduce Rent*, Mike Dano, LightReading.com, June 10, 2019 (emphasis added), available at: <https://www.lightreading.com/mobile/tower-trouble-atandt-keeps-pushing-cell-tower-landlords-to-reduce-rent/d/d-id/751925>; see also *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>.

14. 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.

15. Simply put, SBA's special interest is not as a competitor. It is to ensure that SBA's ability to promote competition in the wireless telecommunications market through an existing tower with adequate existing and future capacity is preserved and that Kentucky citizens in the area can continue to receive high quality access to telecommunication networks without the need for unnecessary and wastefully duplicative towers.

16. 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.

17. 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.**

18. 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.

19. 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.

20. 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.

21. Indeed, this year alone, AT&T has sought a CPCN to construct over twenty (20) new wireless towers across the Commonwealth, and in none of those cases is SBA aware that another entity in the telecommunications industry or the Attorney General of the Commonwealth of Kentucky sought intervention.

22. 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.

23. 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.

24. 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."<sup>3</sup> 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 purported commercial interests, just as the Commission routinely does when it grants full intervention to industry trade organizations in rate cases.

25. 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.").

26. 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

---

<sup>3</sup> 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).

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 (currently provided by locating on the existing SBA Tower a mere 0.2352 miles away).

27. 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 0.2352 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 § 1(1)(s) specifically requires AT&T to provide information related to its attempts to co-locate, "including documentation," yet none is provided with the Application.

28. 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).

29. Thus, because AT&T has failed to provide any evidence of its attempts to co-locate on an existing tower only 0.2352 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 § 1(1)(s), but which AT&T has omitted.

30. In fact, while AT&T made no effort to attempt to negotiate with SBA related to the terms of the existing lease prior to filing this application – which is required by Commission regulation and which the Commission is bound to follow – upon learning that AT&T was dissatisfied with the rental rates through the filing of the pending application, SBA offered to



modify the monthly rent currently charged to AT&T Mobility to continue to co-locate on the existing SBA tower to match the monthly rent offered by Harmoni Towers LLC, less \$10.00.

31. SBA can assist the Commission in developing facts related to this offer, which bears directly on the Commission's determination under 807 KAR 5:063 § 1(1)(s).<sup>4</sup>

32. 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.

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

This the 17th day of September, 2021.

Respectfully submitted,

/s/ R. Brooks Herrick  
Edward T. Depp  
R. Brooks Herrick  
Felix H. Sharpe II  
DINSMORE & SHOHL LLP  
101 S. Fifth St., Suite 2500  
Louisville, KY 40202  
[tip.depp@dinsmore.com](mailto:tip.depp@dinsmore.com)  
[brooks.herrick@dinsmore.com](mailto:brooks.herrick@dinsmore.com)  
[felix.sharpe@dinsmore.com](mailto:felix.sharpe@dinsmore.com)  
Telephone: (502) 540-2300  
Facsimile: (502) 585-2207

*Counsel to SBA Towers VII, LLC*

---

<sup>4</sup> 807 KAR 5:063 § 1(1)(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 from 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.").

**Certification**

I hereby certify that a copy of this Motion to Intervene 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.

/s/ R. Brooks Herrick  
*Counsel to SBA Towers VII, LLC*