

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

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) CASE NO.: 2021-00327
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF METCALFE)

SITE NAME: SPARKS RELO / WILLIAM JUDD ROAD

* * * * *

**APPLICANTS' MOTION TO
SUBMIT APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY FOR DECISION
ON EXISTING EVIDENTIARY RECORD**

1.0 INTRODUCTION AND SUMMARY

New Cingular Wireless PCS LLC d/b/a AT&T Mobility (“AT&T”) and Uniti Towers LLC ¹ (“Uniti”) (collectively, “Applicants”), by counsel, hereby file this Motion requesting the Kentucky Public Service Commission (“PSC”) to Submit the pending Application for Decision on the Existing Evidentiary Record and promptly issue a Certificate of Public Convenience and Necessity (“Applicants’ Motion”).

The requested CPCN should be granted forthwith for at least the following

¹Uniti Towers LLC has changed its name to Harmoni Towers LLC via filing with the Kentucky Secretary of State on March 22, 2021. Because the Application was filed in the name of co-applicant Uniti Towers LLC on March 29, 2021, this Response and Motion shall continue to reference the co-applicant as Uniti Towers LLC in order to avoid any confusion with prior filings.

reasons:

1. Applicants have complied with PSC filing requirements and such filings constitute substantial evidence supporting issuance of the CPCN.
2. PSC Regulations and Due Process require the Application to be reviewed on facts, circumstances, and applicable law at the time of its filing on August 23, 2021.

On all of this reasoning, and as further detailed below, Applicants request the PSC to forthwith proceed to complete deliberations, and grant the requested CPCN as soon as possible so that AT&T can move forward and provide Kentucky wireless communications service users with necessary service.

2.0 RELEVANT FACTUAL BACKGROUND

The proposed “telecommunications antenna tower” which is the subject of the Application for a CPCN pursuant to KRS 278.020, 278.650; 807 K.A.R. 5:063, and other applicable law is a vital element of AT&T’s wireless communications network in Metcalfe County, Kentucky, and is necessary to provide service in accordance with the provisions of AT&T’s Federal Communications Commission license as stated in the Application and incorporated exhibits. A map included with the Application, as prepared by an AT&T Mobility Radio Frequency Engineer, indicated the Search Area in which the new tower must be located to provide the necessary wireless service. The proposed Uniti tower site is within such Search Area.

The following are the key dates in the processing of the Application for a CPCN in this proceeding:

- Application in within Case 2021-00327 filed on August 23, 2021.
- No Deficiency Letter issued by PSC Staff on August 23, 2021.
- SBA Motion to Intervene Filed on September 17, 2021.
- PSC denial of SBA request to intervene on September 30, 2021

- Applicants filing of Affidavit in Support of Application with Motion for Confidential Treatment filed on October 20, 2021
- FCC Shot Clock 150-Day Deadline for PSC Decision – January 20, 2022.
- Pendency of Application in this Case 2021-00327 since Non-Deficient Filing: one hundred and three (103) Calendar Days.

3.0 ARGUMENT

All facts, circumstances, and applicable law require the PSC to proceed to prompt grant of the CPCN.

3.1 Applicants' Compliance with PSC Requirements Compels Grant of the Requested CPCN.

Applicants have met all filing requirements applicable to this proceeding as prescribed by the Kentucky Revised Statutes and the Kentucky Administrative Regulations and as recognized by the PSC Staff in its “No Deficiency” letter of August 23, 2021. Federal precedent under the TCA provides that compliance with the agency’s own requirements constitutes substantial evidence.² All required exhibits have been provided and required representations have been made. Moreover, consistent with prior PSC Orders in Cases No. 2017-0435 (“Hansen”) and No. 2019-0176 (“Dunnville Relo”), the Applicants have shown the SBA tower in the vicinity was not “reasonably available” in compliance with 807 K.A.R. 5:063 Section 1(s) at the filing of the Application or thereafter.

3.2 The Federal Telecommunications Act of 1996 (“TCA”) Requires State and Local Governments to Make Tower Permitting Decisions in a “Reasonable

²*T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 799 (6th Cir. 2012). See also *Cellco Partnership v. Franklin County, et al*, 553 F. Supp. 2d 838, 845 (E.D. Ky. 2008)(“The substantial evidence test applies to the locality’s own zoning requirements....”)

Time.”³

Further delay in issuance of the requested CPCN could not be consistent with the broader purposes of the TCA. The U.S. Congress in adopting the Telecommunications Act of 1996 in the Act’s preamble recognized the importance of the “... rapid deployment of new telecommunications technologies.”⁴ (Emphasis added).

The Telecommunications Act of 1996 provides in pertinent part:

A state or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. (Emphasis added). 47 USC Section 332(c)(7)(B)(ii).

Federal courts have recognized “*Congress implemented the ‘reasonable period of time’ provision of the TCA to “stop local authorities from keeping wireless providers tied up in the hearing process’ through invocation of state procedures, moratoria, or gimmicks.”*⁵

The U.S. Court of Appeals for the Sixth Circuit in its *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794 (6th Cir. 2012) Opinion rejected permitting standards which unreasonably extend the decision process:

We agree with Judge Cudahay and adopt the “least intrusive” standard from the Second, Third, and Ninth Circuits. It is considerably more flexible than the “no viable alternatives standard”, as a carrier could endlessly have to search for different marginally better alternatives.

³47 U.S.C. § 332(c)(7)(B)(ii).

⁴See 1996 Federal Telecommunications Act Preamble, 110 Stat. 56 (“An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies” (Emphasis added.))

⁵ *Masterpage Communications v. Town of Olive*, 481 F.Supp. 2d 66, 77 (N.D. New York 2005).

Indeed, in this case the Township would have had T-Mobile search for alternatives indefinitely. *Id.* at 808.

Federal district courts in the Sixth Circuit have relied upon *T-Mobile Central* and found the permitting authority failed to reasonably act in the one hundred fifty (“150”) day deadline of the FCC Shot Clock where nothing in the agency regulations justified the delay in decision on a complete application. *American Towers, Inc. v. Wilson County*, 2014 U.S. Dist. LEXIS 131, 59 Comm. Reg. (P &F) 878 (M.D. of Tennessee, Nashville Division 2014)(“Wilson County violated the TCA by failing to act on ATI’s second set of applications within a reasonable time”).

Outside of the Sixth Circuit, a federal district court in the Northern District of New York, cited *American Towers* and explained “Under the provisions of the TCA and FCC Orders, the local municipality has 150 days in which to promptly review an application and make its final determination, consistent with local law, the TCA and federal rules and regulations.” *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 315 (N.D.N.Y. 2017). Failure of the permitting authority to make a decision after 175 days led the District Court to conclude the permitting authority had “... failed to rebut the presumption that their delay was unreasonable and their actions constitute a failure to act or unreasonably delay in violation of the TCA.” *Id.* at 316.

The decisions of the federal courts leave no doubt the PSC should make every effort to avoid being drawn into the morass of unreasonable and unjustified delay which SBA seeks to engineer. All precedent requires the PSC to proceed to final decision on the Application.

Neither Kentucky law nor the TCA contemplate open-ended proceedings before the PSC prior to it making its decision on the CPCN Application. Consistent

with *T-Mobile Central*, Applicants have complied with the requirements of KRS Chapter 278 and implementing regulations resulting in a No-Deficiency letter issued by PSC Staff on August 23, 2021. Furthermore, AT&T has considered alternative locations in good faith, including ruling out the existing SBA Tower as not being reasonably available per 807 K.A.R. 5:063 Section 1(s). Nothing more is required. Acceding to the wishes of non-party SBA in complicating and extending this long-pending proceeding would take its disposition far beyond a reasonable time, beyond the FCC Shot Clock benchmark on January 20, 2022, and make a travesty out of the 807 K.A.R. Section 4(11) standard for intervention of not “unduly complicating or disrupting the proceedings.”

Whether the PSC conducts further inquiry or hearing is within the discretion of the PSC per KRS 278.020(1). See also *Kentucky Public Service Commission Commonwealth ex rel. Conway*, 324 S.W.3d 373, 379 (Ky. 2010) explaining “Hearings are not necessarily required to resolve the complaint.” Moreover, the 150-day FCC Shot Clock, that will expire January 20, 2022 in this proceeding, is very persuasive on how long administrative review of a cellular tower application should take. On the merits of the issues raised, and in the interest of compliance with the TCA “reasonable time” standard, the PSC should promptly move to final decision on the Application.

4.0 CONCLUSION

The Application was originally filed with the PSC on August 23, 2021, was found to be Non-Deficient by PSC Staff Letter on August 23, 2021 and has been pending before the PSC for one hundred and three (103) days from the Staff’s Letter to the making of this

Motion by Applicants. The one hundred fifty (150) day FCC Shot Clock for PSC decision in this matter will expire on January 20, 2022.

All factual background and argument set forth in this Motion supports Applicants' request for:

(1) submission of this long pending case for decision on the request for CPCN;

(2) and ultimate grant of the CPCN as requested in the Application.

All such requested action by the PSC is in protection of Applicants' rights pursuant to KRS Chapter 278; PSC implementing regulations; Kentucky appellate precedent on exceptions to mootness including the "voluntary cessation" doctrine; the TCA and case precedent thereunder; Section 2 of the Kentucky Constitution; and constitutional guarantees of substantive and procedural due process.

WHEREFORE, the Applicants, by counsel, request the PSC to grant Applicants the relief requested above and grant Applicants any other relief to which they are entitled.

Respectfully submitted,

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