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 TILLMAN INFRASTRUCTURE LLC, A DELAWARE	)	
LIMITED LIABILITY COMPANY	)	
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC	)	CASE NO.: 2021-00398
CONVENIENCE AND NECESSITY TO CONSTRUCT	)	
A WIRELESS COMMUNICATIONS FACILITY	)	
IN THE COMMONWEALTH OF KENTUCKY	)	
IN THE COUNTY OF GRAYSON	)	

SITE NAME: FALLING BRANCH

* * * * * * *

APPLICANTS' NOTICE OF COMPLIANCE WITH SCHEDULING ORDER AND REQUEST FOR IMMEDIATE DECISION ON EXISTING RECORD

1.0 INTRODUCTION AND SUMMARY

New Cingular Wireless PCS LLC d/b/a AT&T Mobility ("AT&T") and Tillman Infrastructure LLC, a Delaware limited liability company ("Tillman") (collectively, "Applicants"), by counsel, hereby file this Notice to the Kentucky Public Service Commission ("PSC") confirming the Parties have complied with the scheduling order of August 18, 2022. This matter is ready for decision as requested in the Applicants' previously filed Motion for Immediate Decision on the Existing Evidentiary Record filed on April 13, 2022, and the Applicants respectfully request that the PSC issue a Certificate of Public Convenience and Necessity ("CPCN") on the existing record without further delay. With due respect to the PSC, the application for a CPCN in this matter was filed well over one year ago, on October 18, 2021. Further delay in this

long pending proceeding is unwarranted and only serves to prevent AT&T from providing essential wireless service to this area of Grayson County.

Adjoining landowners Roger and Janelle Nicolai ("Nicolais") were granted intervention by the Public Service Commission ("PSC") on February 24, 2022. The Nicolais have had ample opportunity to file arguments and supporting evidence into the record. To date, the only testimony and filings the Nicolais have made consist of claims related to property value or unjustifiable assertions that AT&T should either move the site location or co-locate their equipment outside of the designated search area. The Nicolais have only raised issues that could be raised by adjoining landowners opposing tower placement at any location. Under federal law, a denial of a request for tower placement must be justified by substantial evidence,[1] and the Nicolais have not presented the substantial evidence required to justify rejection of an application for construction of a wireless facility. Additionally, their filings under the procedure established in the PSC's order on August 18, 2022 have been either repetitive of their previous claims or wholly irrelevant to the PSC's review of this application.

2.0 RELEVANT FACTUAL BACKGROUND

The proposed wireless communications facility ("WCF") is like dozens of others approved by the PSC in recent years. The Applicants filed an application for a CPCN in compliance with 807 KAR 5:063 with accompanying regulations and statutes. The PSC confirmed compliance with filing requirements by issuing a No Deficiency Letter on October 25, 2021.

[1] 47 U.S.C. § 332(c)(7)(B)(iii).

The Nicolais requested intervention on November 16, 2021, and the PSC granted the Nicolais intervention request on February 24, 2022. Since being granted intervention, the Nicolais' opposition has centered exclusively on typical "Not in My Back Yard" (NIMBY) objections in various filings and a public hearing. Specifically, the Nicolais harbor a belief that the proposed facility will negatively impact their property value, and they want the tower moved to a new location on the proposed site parcel or co-located outside of the search area. In a filing on April 18, 2022, the Nicolais went so far as to say "This case has been, and will continue to be, solely a matter of property value." While property value arguments are the primary driver of the Nicolai's opposition, the Nicolais, at various points over the past year, have also raised the issues of tower visibility, service need, and co-location on structures outside of the search area.

There is nothing unique about this case which would necessitate protracted delay in decision beyond the over 400 days that this case has been under the PSC's review. In fact, a neighboring landowner for any of the WCFs approved by the PSC every year could make all of the arguments set forth by the Nicolais over the course of the last 14 months. Moreover, every point raised by the Nicolais has been addressed on multiple occasions by the Applicants as discussed further below. Consequently, there is no basis for further delay in the long-pending deliberations or decision on the Applicants' request for a Certificate of Public Convenience and Necessity ("CPCN") for construction of a cellular tower.

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

1. Applicants have complied with the PSC filing requirements and such filings constitute substantial evidence supporting issuance of the CPCN.

2. The federal Telecommunications Act of 1996 ("TCA") requires state and local governments to make tower permitting decisions in a "reasonable time."[2] The application has been pending for far longer than a "reasonable time" and further proceedings related to the Nicolais' intervention would further delay the Applicants' attempt to resolve the coverage gap in this area.

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 Grayson County wireless communications service users with necessary service.

3.0 ARGUMENT

All facts, circumstances, and applicable law require the PSC to proceed to promptly grant the CPCN. After more than one year of deliberation, no new issues have been raised by the Intervenors for several months. All issues raised by the Intervenors have been addressed by the Applicants at least once, and often on numerous occasions. Recent filings by the Intervenors are irrelevant to the PSC's review and/or repetitive of previous arguments. The PSC should proceed to complete its deliberations, and promptly grant the requested CPCN on all evidence of record.

3.1 Intervenors' Object to the Tower's Location.

The Intervenors' primary argument is that they want the proposed tower location moved farther from their home. This argument is completely unsupported by existing law. There are no local planning and zoning regulations in Grayson County dictating specific

[2] 47 U.S.C. § 332(c)(7)(B)(ii).

tower placement standards, nor is there any local law, state statute or regulation, federal law or regulation, or any other applicable law which requires WCFs to be setback a specific distance from property lines or existing residences. In furtherance of their demand to have the tower moved, the Intervenors have raised the arguments discussed below.

3.1.a – Intervenors assert that the tower will negatively affect their property's value.

The Intervenors assert that their property value will be diminished by construction of the WCF at the proposed location. The Applicants filed a report rebutting that assertion on November 30, 2021. The report was prepared by Glen Katz, a well-qualified appraiser with over 25 years of experience and clearly delineated qualifications listed in the report. The report states unequivocally that "this type of tower facility has not, and does not, negatively impact surrounding property, and supports the positive influences on value and demand for real estate due to expansion of public utilities, which includes wireless telecommunications tower infrastructure."

While over a year has passed since the Applicants' response, the Intervenors have still been unable to produce evidence rebutting the findings of Mr. Katz' report. Instead, the Intervenors have filed academic papers. As it relates to this specific location, the authors of these studies submitted short letters with heavily qualified statements speculating about the value of the property in Grayson County.

Even if the Intervenors had filed proof that the tower will diminish the value of their property, any negative effect on property value is not substantial evidence to justify rejection of a proposed tower location. There is no existing law at the local, state, or federal level that prohibits tower placement based on a reduction in property value. On

information and belief, the PSC has never denied a wireless communications facility CPCN application on claims of reductions of neighbors' property values. To do so now would violate Equal Protection and the non-discrimination provisions of Section 704 of the Telecommunications Act.

To the extent that property values are discussed in this context in state regulations, the Applicants are required to make 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.[3]

The Applicants completed the required analysis and made the required statement at paragraph 12 of the CPCN application filed more than one year ago on October 18, 2021. Although not required by any local, state or federal law, the Applicants revealed the specific of their site selection process via a filing on September 13, 2022 in a response to Initial Requests for Information from the Intervenors and the PSC. Specifically, Annie Zocco of Tillman Infrastructure executed an affidavit further confirming that co-location was explored and no existing tower is suitable for co-location to resolve the existing coverage gap. Further, Ms. Zocco's affidavit confirms that the landowners of the proposed site parcel are the only landowners in the search area that both own a parcel appropriate for tower placement and are willing to lease space for tower placement. Finally, Ms. Zocco confirms that the site parcel owners are only willing to lease space at the proposed site location. In line with state law,[4] the owners of the site parcel are willing to lease space on non-tillable land while preserving the rest of the parcel for agricultural use.

[3] 807 Ky. Admin. Regs 5:063 Section 1(1) Paragraph (s)

[4] KRS 413.072(1): It is the declared policy of the Commonwealth to conserve, protect, and

To the extent that property value complaints by the Intervenors serve as a proxy for aesthetic complaints, the United States Court of Appeals in the Sixth Circuit has found that generalized expressions of concerns with aesthetics are not substantial evidence, and the same objection could be made by any resident in an area near a proposed tower.[5]

In sum, the issue of property values has been thoroughly discussed (often in a highly repetitive manner) in the record for this application. The Intervenors have had multiple opportunities to file documentation and arguments regarding property values into the record, and the Intervenors' filings offer no substantial evidence to support the rejection of the proposed CPCN application. Further delay is damaging to the Applicants and citizens in this portion of Grayson County, who require the services offered by AT&T. There is no legal justification to extend the PSC's review of this matter merely to appease the Intervenors.

3.1.b – Intervenors demand tower placement at an alternate location

The Intervenors contend that they are willing to offer an "olive branch" by allowing tower placement at another location on the site parcel. The Intervenor's assumption that they have a basis to dictate tower placement is not supported by any local, state, or federal law. As discussed immediately above and in Ms. Zocco's affidavit filed on September 13, 2022, the site parcel owners are the only landowners in the search area who are willing to lease space on a parcel suitable for tower placement. The site parcel owners are only willing to lease the proposed location because tower placement elsewhere on this parcel will interfere with agricultural operations on the parcel.

encourage the development and improvement of its agricultural land and silvicultural land for the production of food, timber, and other agricultural and silvicultural products.

[5] *Cellco P'ship v. Franklin Cty.*, 553 F. Supp. 2d 838, 851-852 (E.D. Ky. 2008).

Even if the site parcel owners were willing to lease space on another portion of their parcel, the Applicants are under no obligation to move the site to appease the Intervenors by moving the site closer to other adjoining properties. As discussed in Ms. Zocco's affidavit, dense residential development is present to the north, south, and southeast of the site parcel. No local, state, or federal law requires the Applicant to endlessly move proposed tower locations (at great costs in both time lost and funds) until identifying a location that is completely unopposed by adjoining landowners, and the U.S. Court of Appeals for the Sixth Circuit has specifically rejected a standard that would require carriers to endlessly search for different marginally better alternatives.[6]

Further, site selection is not a frivolous process. Conversely, each site undergoes a time-consuming process requiring review and approvals from both state and federal boards related to historic preservation, airspace, subsurface conditions, and other factors. A new site location on the same parcel would require the entire process to return to "square one" and significantly delay the deployment of critical wireless infrastructure. Additionally, any new site has the potential to generate a NIMBY opponent similar to the Nicolais, thus leaving the Applicants in essentially the same position they are in today. Moving the site based on the wishes of an adjoining landowner with absolutely no justification under existing law is not practical.

3.1.c – Intervenors assert that existing coverage is adequate

In various filings over the last year and specifically at the public hearing for this site, the Intervenors have asserted that existing coverage is adequate and/or existing coverage provided by other carriers is adequate.

[6] *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 808 (6th Cir. 2012).

These assertions have been made via a combination of lay testimony and documents downloaded from various publicly available websites. No Radio Frequency Engineers or similarly qualified experts in radio frequency propagation have appeared on the Intervenors' behalf either in person or via a written filing. Lay testimony is not substantial evidence to support rejection of proposed tower construction.[7]

Conversely, the Applicants have thoroughly documented the coverage need in this area beginning at paragraph 26 of the CPCN application filed on October 18, 2021. An AT&T Radio Frequency Engineer prepared a report further documenting the coverage need in this area and explaining the process used to resolve the coverage gap. The Radio Frequency Engineer Statement was filed into the record on October 4, 2022.

Federal law gives state authorities decision-making authority on proposals for tower placement, but this power is limited to the extent that state authorities cannot prohibit or have the effect of prohibiting the provision of wireless services.[8] Additionally, any assertion that a competing carrier is adequate in this area is completely irrelevant under express precedent of the Sixth Appellate Circuit:

> "…."significant gap" refers only to a carrier's *own* service, not that of any carrier. *T-Mobile Cent. LLC v. City of Fraser*, 675 F. Supp. 2d 721, 729 (E.D. Mich. 2009) (noting that "the Sixth Circuit has not spoken on this issue," but acknowledging the Declaratory Ruling and concluding that "the Court is not required to consider whether other carriers provide service in the area of the gap"). In light of the FCC's endorsement of the standards used by the First and Ninth Circuits, we now adopt this approach." (emphasis in original) *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 807 (6th Cir. 2012).

The available coverage of a competing carrier is irrelevant, and a denial of this application

[7] *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 804 (6th Cir. 2012), *Cellco P'ship v. Franklin Cty.*, 553 F. Supp. 2d 838, 849 (E.D. Ky. 2008).

[8] 47 U.S.C. § 332(c)(7)(B).

based on the availability of coverage from a competing carrier would be a contravention of the Federal Telecommunications Act.

3.1.d – Intervenors suggest co-location on existing towers located outside of the search area

In recent months, the Intervenors have suggested co-location as a viable method of resolving the coverage gap in this area. Every co-location alternative suggested by the Intervenors has been located outside of the search area.

The Applicants addressed this matter more than one year ago in paragraphs 12 and 26 of the CPCN application. Paragraph 12 plainly states that AT&T attempts co-location when suitable existing infrastructure exists, and there are no reasonably available opportunities to co-locate in this instance. Paragraph 26 describes the process for designing the search area and the important role the search area plays in site selection. A copy of the search area was filed as Exhibit N of the CPCN application. The Radio Frequency Engineer Statement filed into the record on October 4, 2022 further confirms that "locations outside the search area would not provide for adequate service and would not position the site appropriately for integration into AT&T's network."

The Intervenors continue to assert that co-location on an existing tower outside of the search area is a more suitable location. While the Intervenors appear unwilling to accept the fact that the Applicants' equipment must be located within the search area, the Intervenors have also been unable to produce any evidence to rebut the evidence submitted by the Applicants. The Intervenors assertion regarding co-location on other structures is based on speculation and is unsupported by any personal knowledge of the subject matter or evidence in support of the Intervenors' assertion. The Intervenors have presented no evidence confirming that antennas located on any existing tower will resolve

the coverage gap in this area. The Intervenors have not even presented evidence that any of the co-location alternatives suggested are capable of supporting AT&T's proposed equipment or that the towers are even available for co-location. In sum, the Intervenors have not introduced substantial evidence to support denial of an application for tower construction.

3.2 The Federal Telecommunications Act of 1996 ("TCA") Requires State and Local Governments to Make Tower Permitting Decisions in a "Reasonable Time."[9]

The proposed site in this case has long since surpassed the "reasonable time" to complete review of an application of this type. 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).

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."[10] (Emphasis added).

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

[9] 47 U.S.C. § 332(c)(7)(B)(ii).

[10] See 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.))

gimmicks." (emphasis added).[11]

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. 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 reasonably to 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

[11] *Masterpage Communications v. Town of Olive*, 418 F.Supp. 2d 66, 77 (N.D. New York 2005).

"… 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. 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. Applicants have complied with the requirements of KRS Chapter 278 and implementing regulations resulting in a No-Deficiency letter issued by PSC Staff on October 25, 2021. Furthermore, AT&T has considered alternative locations in good faith and determined that this is the best available location within the Search Area. Nothing more is required. Further delay associated with this long-pending proceeding would take its disposition far beyond a reasonable time, beyond the FCC Shot Clock benchmark, and make a travesty of the 807 K.A.R. 5:001 Section 4(11) standard for intervention of not "unduly complicating or disrupting the proceedings."

Whether the PSC conducts further inquiry or hearing subsequent to the filing of the CPCN application as a result of the Nicolais' protests is within the discretion of the PSC per KRS 278.020(1) as limited by the time constraints of the FCC Shot Clock. 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, which expired March 24, 2022 in this proceeding, is authoritative as to how long administrative review of a cellular tower application should take. The Nicolais' evident desire perpetually to make new filings

repeating the same unpersuasive and non-determinative arguments should not lead to hindering PSC deliberations. 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.

Finally, we would urge the PSC to heed the express direction of the Kentucky General Assembly in regard to avoiding prolonged review of local land use issues, as illustrated by KRS 100.987(4)(c). Although not controlling on the PSC, KRS 100.987(4)(c) expressly requires local planning commissions in Kentucky considering Uniform Applications for construction of a cellular tower to make their decision within 60 days of receipt of a complete application. This express 60-day limitation placed on local regulatory bodies specifically empowered to review the likely effects of development proposals on nearby land uses and values stands in stark contrast compared to this proceeding filed on October 18, 2021, which remains pending decision. While a reasonable time for a PSC decision may be longer than the 60 days applicable to a planning commission, it is surely not reasonable to allow an intervening party to push PSC deliberations and decision to exceed more than six times the required duration for review placed on local bodies expressly charged with review of the likely effects of like proposals on land use and values.

Further delay associated with this proceeding, which was filed more than 400 days ago on October 18, 2021, would push this proceeding far beyond the TCA "reasonable time" standard, and the standard set by the FCC Shot Clock. Moreover, such delay could not be consistent with the broader purposes of the TCA.

4.0 CONCLUSION

The PSC should not lose sight of the dispositive facts and applicable law in this proceeding. The Application was originally filed with the PSC on October 18, 2021, was found to be Non-Deficient by PSC Staff Letter on October 25, 2021 and has been pending before the PSC for 409 days from the Staff's Letter to the making of this Motion by Applicants. It further has been pending for 280 days since the March 3, 2022 local public hearing. The one hundred fifty (150) day FCC Shot Clock for PSC decision in this matter expired on March 24, 2022. The Intervenors filings since the local public hearing have not developed any new issues that were not addressed by the Applicants at the time of the hearing. The search area has not changed, the AT&T coverage gap in this area has not changed, and arguments related to property values have not changed. At this time, it is a certainty that allowing the Intervenors additional opportunities to delay this proposal will only result in more unconvincing arguments related to the same issues or assertions that raise issues already addressed in the Applicants' previous filings.

The property valuation allegations at the heart of the Nicolais' protests have, to the Applicants' knowledge, never served as a basis for denial of an application for a CPCN for construction of a new wireless communications facility. Equal Protection as well as the non-discrimination, substantial evidence and prohibition of service requirements of the TCA should prevent these Applicants' from being singled out for unjustified delay in decision due to the Nicolais' NIMBY opposition.

All factual background and arguments set forth in this Motion supports Applicants' request for immediate grant of the CPCN as requested in the Application. Such requested action by the PSC is in protection of Applicants' rights pursuant to

KRS Chapter 278; PSC implementing regulations; 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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and

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of December, 2022, a true and accurate copy of the foregoing was electronically filed with the PSC and sent by U.S. Postal Service first class mail, postage prepaid, to the Intervening Party at the following address:

Roger and Janelle Nicolai
2663 Blue Bird Road
Falls of Rough, Kentucky 40119

Respectfully submitted,

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