

**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
RUSSELL**

Case No. 2022-00027

SITE NAME: CLIFTY CREEK ROAD

**SBA TOWERS VII, LLC'S REPLY IN SUPPORT OF
ITS MOTION TO INTERVENE**

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

A. Applicants' Objection to SBA's Request for Intervention is Untimely.

Applicants' Response to SBA's Motion to Intervene was not timely filed and should not be considered by the Commission. SBA electronically filed its Motion to Intervene on March 21, 2022, utilizing the Commission's electronic filing system, which provides notice to all parties of record, including Applicants. *See* 807 KAR 5:001 § 8(a), (b). Pursuant to 807 KAR 5:001 § 5(2), Applicants were required to file a response to SBA's Motion to Intervene no later than March 28, 2022. *See* 807 KAR 5:001 § 5(2) ("Unless the commission orders otherwise, a party to a case shall file a response to a motion no later than seven (7) days from the date of filing of a motion.").

Accordingly, Applicants' Response to SBA's Motion, filed April 7, 2022, is untimely and the Commission should refuse to consider the Response, especially because Applicants failed to request that the Commission enter an order authorizing the untimely filing.

B. All Parties, Including the Commission, Have Already Agreed SBA Satisfies the Standard for Intervention.

Applicants and the Commission have already acknowledged that SBA is a necessary party to this case because SBA is likely to present issues or to develop facts that will assist the Commission in fully considering the matters before it. *See* 807 KAR 5:001 § 4(11)(b). SBA and its affiliated entities recently appealed 13 Commission orders denying SBA's request for intervention on practically identical applications for a CPCN filed by New Cingular Wireless PCS, LLC d/b/a AT&T Mobility and Harmoni Towers. In each of those appeals to the Franklin Circuit Court, Applicants filed a Motion for Intervention, in which they argued the Commission could not adequately represent Applicants' interests for the following reasons:

- “[D]ue to the technical nature of the applications and exhibits, the Movants are uniquely qualified to analyze information and address claims made by SBA during the proceedings. The Movants are experienced in all aspects of the wireless industry”¹
- “SBA’s complaint includes discussion of several factual matters involving the Movants documentation of AT&T’s attempt to co-locate on reasonably available towers and AT&T’s attempts to negotiate with SBA. . . . [T]he Movants are in the best position to discuss and make arguments related to the factual issues discussed in the record based on experiences with SBA on multiple similar towers in multiple jurisdictions.”²

In other words, Applicants have already argued that, due to the technical nature of the Application, the Commission needs assistance from a participant in the wireless industry to fully develop facts and issues related to the Application and that, as the counterparty to the negotiations,

¹ Exhibit 1, New Cingular Wireless PCS, LLC and Harmoni Towers LLC’s Memorandum in Support of Motion to Intervene *SBA Communications Corporation v. Public Service Commission of Kentucky*, Franklin Circuit Court Case No. 22-CI-00140, at 7.

² *Id.* at 8.

SBA is in a position to provide the Commission with facts related to AT&T Mobility’s attempts to co-locate on existing cellular towers (or lack thereof) – as is explicitly required by Commission regulation.

Moreover, the Commission assented to these arguments when it failed to object to Applicants’ Motion to Intervene in the appeals. In fact, at Motion Hour held before the Franklin Circuit Court on March 23, 2022, counsel for SBA explicitly read these portions of the Motion aloud. At no point did the Commission, who was represented by counsel at Motion Hour, object to AT&T Mobility and Harmoni Towers’ request for intervention on this basis, nor did the Commission note any objection to the portions of the Motion read aloud by SBA.

Therefore, Applicants have explicitly argued and acknowledged that (1) due to the technical nature of the Application, the Commission needs assistance in developing issues and facts from a participant in the wireless industry, like SBA; and (2) as a party to the prior negotiation history (or lack thereof), SBA is in the best position to provide the Commission with facts related to the attempts to co-locate. Similarly, the Commission has already agreed with Applicants’ arguments by failing to object, both to the request for intervention in the appeals generally and to the specific portions of the Motion read aloud during Motion Hour at the Franklin Circuit Court on March 23, 2022.

Accordingly, it is clear that due to the technical nature of the Application and the ability of SBA to present facts related to negotiation history with AT&T Mobility that SBA is “likely to present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.” *See* 807 KAR 5:001 § (4)(11)(b). As a result of meeting the standard for intervention – as has been agreed by Applicants and the Commission – the Commission “shall grant . . . leave to intervene.” *Id.* (emphasis added).

C. SBA Has Already Proven its Participation Will Help Develop Facts and Issues.

Merely by filing a Motion to Intervene, SBA has proven that it will help develop facts and issues. As has been pointed out on multiple occasions, AT&T Mobility and Harmoni Towers have a pattern and practice of refusing to provide the Commission with information required by regulation until a third party prompts that information to be provided. For example, here, the Application again fails to inform the Commission that AT&T Mobility is currently co-located on an existing cellular tower, which AT&T Mobility now admits in its Response for the first time.³ This is a fact that has been developed solely by SBA's involvement in this proceeding.

Additionally, as a result of failing to disclose AT&T Mobility was currently co-located on an existing cellular antenna, Applicants likewise failed to provide any evidence of AT&T Mobility's attempts to co-locate on an existing facility, as is required by Commission regulation. *See* 807 KAR 5:063 § 1(1)(s). Only after SBA's request for intervention did Applicants seek to allegedly provide any information related to negotiations, but requested to do so entirely under seal in violation of all known Commission regulations and precedent. *See* 807 KAR 5:001 § 13(1); *Id.* at § 13(2)(a)(3)(a) ("Text pages or portions thereof that do not contain confidential information shall not be included in this identification."); *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval to Modify its MRSM Tariff, Cease Deferring Depreciation Expenses, Establish Regulation Assets, Amortize Regulatory Assets, and Other Appropriate Relief*, Case No. 2020-00064, Order at 7, ¶ 8 (Ky. PSC June 30, 2020) (denying a Motion for Confidential Treatment because the information designated as confidential "contains information . . . that should be denied confidential information based upon principles of transparency regarding the evidence the Commission relies upon in rendering its determinations.").

³ Response to Motion to Intervene, at 12-13 ("Applicants do not deny that AT&T is currently co-located on the SBA tower in the vicinity.").

Further, in Paragraph 7 of the Application, Applicants state, “The WCF is an integral link in AT&T Mobility’s network design that must be in place to provide adequate coverage to the service area.”⁴ Similarly, in the required notice to local landowners and the County Judge-Executive, Applicants advised, “This facility is needed to provide improved coverage for wireless communications in the area.”⁵ Conversely, in their Response to SBA’s Motion to Intervene, Applicants advise that “the current rent charged by SBA for AT&T to co-locate on the SBA Tower . . . is the threshold issue in regard to the question of the availability of a co-location alternative, and any other issues raised as to the 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.”⁶ Thus, simply by filing its Motion to Intervene, SBA has helped the Commission develop issues, as it appears clarification is warranted as to the “public necessity” that will be satisfied through the request for a CPCN. Applicants advised the public and the Commission that the proposed facility was required to improve coverage, only to then claim that coverage was a “diversion” after the Commission was advised Applicants had failed to disclose that AT&T Mobility was currently co-located on an existing tower. Once again, this issue was developed solely as a result of SBA’s involvement in this proceeding.

Finally, while AT&T Mobility has now admitted that there is an existing SBA tower in the area and purported to provide evidence of negotiations entirely under seal as it relates to SBA, SBA’s intervention is necessary to further develop facts and issues related to AT&T Mobility’s attempts to co-locate on other towers in the area. The reality is that while Applicants’ Response attempts to convince the Commission that SBA’s only interest is remaining the “only” tower owner

⁴ Application, at ¶ 7.

⁵ Exhibit K to the Application; Exhibit L to the Application.

⁶ Response to the Motion to Intervene, at 2-3.

in the area, publicly available documents from the FCC’s website disclose otherwise. Attached hereto as Exhibit 2 is the FCC’s records of cellular towers available for co-location in Russell County, which are owned by numerous different entities. Thus, SBA can assist the Commission in developing facts and issues related to all opportunities for co-location, not just the failure to attempt to co-locate on the existing SBA tower on which AT&T Mobility is currently co-located.

Accordingly, SBA has met the burden for intervention set forth in 807 KAR 5:001 § 4(11) and the Commission “shall” grant intervention. *See* 807 KAR 5:001 § (4)(11)(b) (“The commission shall grant a person leave to intervene if the commission finds that he or she has made a timely motion for intervention and . . . that his or her 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.”).

This the 12th day of April, 2022.

Respectfully submitted,

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Certification

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. I hereby certify that a copy of this Reply in Support of Motion to Intervene has been served electronically on all parties of record for whom an e-mail address is given in the online Service List for this proceeding through use of the Commission's electronic filing system.

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