

**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 HARMONI TOWERS LLC, A DELAWARE)
LIMITED LIABILITY COMPANY)
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC) CASE NO.: 2022-00062
CONVENIENCE AND NECESSITY TO CONSTRUCT)
A WIRELESS COMMUNICATIONS FACILITY)
IN THE COMMONWEALTH OF KENTUCKY)
IN THE COUNTY OF MCCREARY)

SITE NAME: PARKERS LAKE RELO

* * * * *

**APPLICANTS' RESPONSE TO
SBA INFRASTRUCTURE, LLC'S MOTION TO INTERVENE**

New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility ("AT&T") and Harmoni Towers LLC, a Delaware limited liability company ("Harmoni") (collectively "Applicants"), by counsel, make this Response to the Motion to Intervene filed by SBA Infrastructure, LLC ("SBA").

INTRODUCTION AND SUMMARY

The argument and evidence Applicants provide in their Application for a Certificate of Public Convenience and Necessity ("Application") combined with the fact that it would cost AT&T over two and a half million dollars (\$2,500,000.00) more in rent as a co-location tenant on the SBA-owned tower versus co-locating on the proposed Harmoni tower for the next twenty ("20") years should compel the PSC to deny SBA's Motion to Intervene. Such denial would be in accordance with clear precedent of PSC Case No. 2017-00435

and the recent PSC Case No. 2019-00176, in which a Certificate of Public Convenience and Necessity (“CPCN”) was granted January 21, 2021 after intervention had previously been denied. The grants of CPCNs in both cases are now final and non-appealable. Those grants of CPCNs and denials of intervention are consistent with the PSC’s action in cases: 2020-00300, 2020-00310, 2020-00328, 2020-00343, 2020-00245, 2020-00351, 2020-00354, 2020-00360, 2020-00404, 2021-00012, 2021-00065, 2021-00092, 2021-00145.

SBA, in its Motion, asserts that its existing tower (the “SBA Tower”) is within 0.357 miles from the tower location proposed by Applicants. However, this fact does not address the reasonable availability of the SBA Tower as a co-location opportunity which is dispositive under the PSC’s regulations and the precedent of prior PSC Orders discussed below. SBA’s tower does not provide a “reasonably available opportunity to co-locate,” within the meaning of 807 K.A.R. 5:063-Section 1(s), because SBA does not make its tower available on reasonable terms considering the rent and other terms offered by Harmoni Towers LLC.

The proposed Harmoni tower is more economical because the current rent charged by SBA for AT&T to co-locate on the SBA Tower is over *two times* what Harmoni will charge AT&T to co-locate on the proposed new Harmoni tower.¹ This is the threshold issue in regard to the question of the availability of a co-location alternative, and any other

¹ Rent disparities recognized in PSC Orders in Cases 2017-00435 and 2019-00176 show the rent and other terms for SBA sites are far above market. In such circumstances further efforts at negotiation are futile. SBA has made no representation that it would match rent and other terms offered by Harmoni for this site. Moreover, it is far too late for it to do so now.

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.

In recent years, SBA has repeatedly made similar arguments for intervention in cases with materially equivalent facts in an effort to protect its monopoly position as the owner of the sole tower in a given geographic area (see PSC Case Nos. 2017-00435 and 2019-00176). In each of these cases in which the PSC has ruled on SBA Motions, the PSC has denied SBA's comparable requests for intervention², and precisely the same considerations apply in the present case to support denial of their present Motion. The substantial rent and other business terms disparities identified in these cases provide compelling evidence of the futility of attempts at negotiation with SBA. Exorbitant rents and other terms are systemic with SBA.

SBA's citation to "industry trade articles"³ provides no evidentiary support germane to the PSC's decision on the Motion to Intervene. AT&T Mobility generally wanting to keep tower rents low is consistent with its position in this action that the SBA tower in the vicinity is not reasonably available. Any purported concern of newly permitted towers not being built as alluded to in the "industry trade articles" is not applicable to PSC sites in

² SBA has filed very similar Motions to Intervene in PSC Cases No. 2020-00300, 2020-00310, 2020-00328, 2020-00343, 2020-00245, 2020-00351, 2020-00354, 2020-00360, 2020-00404, 2021-00012, 2021-00065, 2021-00092, 2021-00145, which were ultimately denied. Applicants' Responses to the SBA Motions to Intervene in those cases indicate the rent disparity would amount to millions of dollars per site over twenty years. Thus, in this proceeding, Applicants are now having to repeatedly defend against SBA arguments which have twice been rejected by the PSC in tower CPCN cases and are pending in many other cases.

³SBA Motion to Intervene, p. 3-4.

Kentucky. KRS 278.020(1)(e) in effect requires towers permitted under a CPCN to be built within one year unless very specific circumstances outside the Applicants' control are applicable.

SBA's reliance on the holding in *Potts v. Pub. Serv. Comm'n* is both premature and inapposite.⁴ SBA conveniently neglects to mention that the decision in *Potts* is non-final and a motion for discretionary review is still pending before the Kentucky Supreme Court (2021-SC-0580). Furthermore, *Potts* is clearly distinguishable from the present matter. SBA is not an adjoining property owner, but rather a competing tower company who owns a tower in the vicinity where Harmoni's tower is proposed to be constructed.⁵ For these reasons the holding in *Potts* should not persuade the Commission to grant SBA's Motion to Intervene in this case.

Finally, SBA's discussion of negotiations that took place many months ago does not support the argument that their tower is reasonably available for co-location.⁶ Applicants' filed Hardship Affidavit is much more contemporaneous with filings of the within Application and far more relevant. SBA owns the only tower available for co-location in the service need area; as a committed public service utility provider, AT&T is forced to accept SBA's unreasonable and exploitive terms in order to continue providing wireless telecommunications services in this area. The fact that AT&T is compelled to agree to SBA's unreasonable and exploitive terms simply highlights the need for the

⁴ SBA Motion to Intervene, p. 4.

⁵ "While we cannot say that **adjoining property owners** should be allowed to intervene as a matter of right if a motion is timely made, we think it likely that many could demonstrate a special interest in such proceedings..." (emphasis added) *Potts v. Pub. Serv. Comm'n*, No. 2018-CA-1686-MR, 2021 Ky. App. LEXIS 102, at *25 (Ct. App. Sep. 24, 2021)

⁶ SBA Motion to Intervene, p. 8.

proposed Harmoni tower in order to provide the market-based competition that the General Assembly deemed essential under KRS 278.546.

On all of the argument herein, the SBA Motion to Intervene should be denied.

ARGUMENT IN REPSONSE

1. SBA has repeatedly failed on these same arguments for intervention, and its present motion must be denied on the same grounds as res judicata.

SBA filed a Motion for Intervention in Case No. 2017-00435 (“Hansen” case), which case presented material facts that correspond precisely to the present case (i.e., SBA owned a tower within the geographic area that the applicants therein sought to construct a new WCF). The PSC denied the SBA Motion in an Order dated March 26, 2018.⁷ In doing so, the PSC explained:

The Commission is under no illusion that SBA’s request to intervene in this case is anything other than an attempt to protect its monopoly as the owner of the only tower in the area. SBA is not a wireless customer in the area or a property owner. SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers. This runs counter to one of the purposes of the Telecommunications Act of 1996, which is to promote competition. [footnote omitted.] Id. at p. 5.

The Hansen applicants were granted a Certificate of Public Convenience and Necessity by Order of the PSC dated November 1, 2018, and SBA appealed to Franklin Circuit Court. However, their appeal was dismissed with prejudice by the Court via an Order entered January 11, 2019 in Action Number 18-CI-1180, and this final judgment was not further appealed.

⁷The Kentucky Court of Appeals has stated in *Louisville/Jefferson County Metro Gov’t v. TDC Group, LLC*, 283 S.W.3d 657, 661 (Ky. 2009). “We afford deference to an administrative agency’s interpretations of the ... regulations it is charged with implementing.”

In Case No. 2019-00176 (“Dunnville Relo” case), which case also presented material facts that correspond precisely to the present case, the PSC denied an SBA Motion to Intervene by its Order dated October 1, 2019. The PSC reasoned “[t]he Commission does not believe that SBA's stated goal of remaining the only wireless communication facility in the area rises to the level of a special interest that must be protected through intervention.” No timely appeal of this Order to Franklin Circuit Court was filed pursuant to KRS 278.410.

The PSC’s Order dated January 21, 2021 in in Case No. 2019-00176, 2021 Ky. PUC LEXIS 28⁸, grants the requested Certificate of Public Convenience and Necessity and characterizes SBA’s efforts as follows:

“SBA, despite being denied intervenor status, has filed numerous public comments in this case seeking to prevent AT&T Mobility's construction of the proposed tower. SBA Communications owns the tower on which AT&T Mobility currently has its antennae, and which will be moved to the new tower once it is built. SBA's only interest is to remain AT&T Mobility's landlord; however, AT&T Mobility seeks to move to the new tower because the monthly rent is more than \$1,000 less per month than on the SBA Communications tower. Even though SBA recently offered to lower the monthly rent, the proposed rent is still greater than that to be charged on the proposed tower. Based upon this, the Commission finds that AT&T Mobility has met its burden to prove to show that colocation is not reasonable available.

As we noted in our order denying SBA's motion to intervene, SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers. This runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition as well as *KRS 278.546(4)* which states that market-based competition benefits consumers. Unreasonable and excessive fees for rent on a tower have the potential to divert resources that could otherwise be used to invest in expanding wireless networks and conducting necessary network upgrades

⁸ To the extent SBA had any authority to appeal the January 21, 2021 Order to Franklin Circuit Court, it failed to timely do so. Accordingly, the PSC’s January 21, 2021 Order is now final with precedential status. A different decision in any other case where no rational basis distinction is present would amount to arbitrary action.

necessary to meet increased demand for wireless voice and broadband services.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that AT&T Mobility has demonstrated that a facility is necessary to provide adequate utility service and, therefore, a CPCN to construct the proposed facility should be granted.” (Headnotes/Footnotes omitted).

The same reasoning is applicable in the present proceeding. SBA intervention is unwarranted, would be an exercise in futility and delay, and would have no effect on the ultimate PSC decision on the Application.

Kentucky’s appellate courts and the federal courts have long held in published opinions that an agency’s interpretation of regulations it has adopted is entitled to deference by the judiciary if consistent with applicable statutes. See *Camera Ctr., Inc. v. Revenue Cabinet*, 34 S.W.3d 39 (Ky. 2000); *Commonwealth v. Family Home Care, Inc.*, 98 S.W.3d 524 (Ky. App. 2003); *Tibbs v. Bunneli*, 448 S.W.3d 796 (Ky. 2014) and *Fluor Constructors, Inc. v. Occupational Safety & Health Review Commission*, 861 F.2d 936 (6th Circuit 1988). The January 21, 2021 PSC Order is plainly an interpretation of the “reasonably available” standard in its own regulations which would be entitled to deference by the judiciary in any litigation.

The Kentucky Court of Appeals has explained that “[o]nce having litigated an issue and having failed to avail oneself of the right to appeal, a litigant is estopped to collaterally raise the same issue involving the same parties.” *Ward v. Natural Resources & Environmental Protection Cabinet*, 814 S.W.2d 589, 591 (Ky. App. 1991). Accordingly, SBA is subject to this rule and its Motion should therefore be denied.

The PSC itself has repeatedly rejected efforts by parties to revisit the same claims and issues in successive proceedings that have been thoroughly examined in prior cases.

For example, the PSC's November 26, 1996 Order *In the Matter of West McCracken Water District Application* (1996 Ky. PUC LEXIS 831) cited the *Ward* case in recognizing application of the doctrine of collateral estoppel to PSC proceedings. The PSC's April 8, 2016 Order *In the Matter of Petition of Mountain Water District for Modification of Order in Case No. 2014-00342* (2016 KY. PUC LEXIS 386) explains: "[w]e find the doctrine of res judicata applies to the quasi-judicial acts of the Commission and precludes re-litigation of claims unless a significant change of conditions or circumstances has occurred between two successive administrative hearings." It now follows that application of res judicata precludes SBA's present intervention request in that since the PSC's Orders denying SBA's corresponding requests in the Hansen and Dunnville Relo cases there have been no significant changes in applicable conditions or circumstances. Furthermore, SBA has not identified any material difference in the facts applicable to the present case in comparison to these prior analogous cases.

The PSC's November 16, 2017 Order *In the Matter of Robert David Shouse, Complainant v. Kentucky Utilities Company, Defendant* (2017 Ky. PUC LEXIS 1120) is likewise applicable in concluding "... [t]he doctrine of res judicata, particularly collateral estoppel, bars Mr. Shouse from re-litigating in his Complaint the identical issues that were raised and fully adjudicated in Case No. 2016-00370."

Even in the face of the foregoing precedent, SBA seeks to use the same bases as those raised in the Hansen and Dunnville Relo cases to justify intervention – i.e. that Applicant AT&T Mobility must remain on the SBA tower and pay exorbitant rent far above the new market level established by Harmoni. Artful attempts at re-wording repetitive motions do nothing to show the existing SBA tower is "reasonably available" for co-

location. The third time should not be a charm for SBA. These efforts only show SBA's determination to advance the "pecuniary" interest the PSC recognized in the aforementioned orders. SBA should be bound by the previous Orders of the PSC, and its current Motion should be denied within the PSC's ample discretion. SBA should not be allowed to continue to advance rejected arguments in further cases as a means to harass and delay applicants seeking to provide wireless service.

SBA's efforts to revisit the same legal issues on which it was previously denied intervention on multiple occasions implicate issue preclusion, administrative res judicata, and collateral estoppel. As stated in *Godbey, et al v. University Hospital, et al*, 975 S.W.2d 104, 105 (Ky. App. 1998), "Kentucky has for many years followed the rule that the decisions of administrative agencies acting in a judicial capacity are entitled to the same res judicata effect as judgments of a court."⁹ (Emphasis added.) The above-referenced PSC Orders of March 26, 2018 and October 1, 2019 clearly rejected SBA's arguments for intervention on the merits in prior WCF CPCN proceedings so as to make the rule in *Godbey* squarely applicable in the present case. SBA's Motion presents the specter of the PSC and applicants for CPCNs having to address the same rejected legal arguments over and over in future cases. The PSC should not facilitate such misuse of the administrative process and should deny SBA's Motion.

⁹Federal decisions such as *Drummond v. Commissioner of Social Security*, 126 F.3d 837, 840 (6th Cir. 1997) are persuasive in stating: "Res judicata and the related concept of collateral estoppel (which refers to issue preclusion) are intended to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." [internal quote from *Cromwell v. County of Sac.*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876)]. The Sixth Circuit's *Drummond* Opinion further recognized "Courts have traditionally applied the concept of res judicata to decisions by administrative agencies when a final judgment has been reached." *Id.*

2. SBA Advocates Arbitrary Agency Action.

SBA apparently pleads for the PSC to reverse how it interpreted “reasonable availability” pursuant to 807 K.A.R. 5:063-Section 1(s) in the Hansen and Dunnville Relo cases in order to grant intervention in the present proceeding. SBA provides no rational basis, new regulation, statute or case precedent to support such a distinction. Of course, Section 2 of the Kentucky Constitution prevents arbitrary action by government agencies. *Bunch v. Personnel Bd., Commonwealth*, 719 S.W.2d 1986 (Ky. Ct. App. 1986). Reaching different results on the same legal issue in different cases would be a conscious violation of the principle of uniformity in violation of Section 2. *Standard Oil Co. v. Boone County Board of Supervisors*, 562 S.W.2d 83 (Ky. 1978). Applicants request the PSC to decline the unwarranted invitation to arbitrarily reverse its prior interpretation of its own regulation.

3. SBA’s interest in this proceeding is purely proprietary and has nothing to do with public convenience and necessity.

SBA’s effort to intervene in this action is no different from its failed efforts at intervention in both the Hansen and Dunnville Relo cases. The PSC’s March 26, 2018 Order in the Hansen case (Case No. 2017-00435) explained: “[t]he Commission is under no illusion that SBA’s request to intervene in this case is anything other than an attempt to protect its monopoly as the owner of the only tower in the area.”

4. SBA’s motion wholly fails to recognize that competition is a desired outcome as to wireless facilities.

The current rent charged by SBA for AT&T to co-locate on the SBA Tower is over two times what Harmoni will charge AT&T to co-locate on the proposed new Harmoni

tower. Pursuant to the agreement between AT&T and Harmoni, annual rent increases are less than the annual rent increases charged by SBA. At the current rate of rent increases, over the next twenty (“20”) years, it would cost AT&T over two and a half million dollars (\$2,500,000.00) more in rent as a co-location tenant on the SBA Tower versus co-locating on the proposed Harmoni tower.

The PSC reviewed the implications of an analogous rent disparity in the Hansen case (Case No. 2017-00435), and in its March 26, 2018 Order the Commission clearly articulated its finding that such discrepancy was a valid basis for a wireless communications provider not to co-locate, as follows:

The Request to Intervene does state that SBA does not believe that the proposed facility will improve wireless service in the area because AT&T is already providing service from SBA’s tower and SBA’s tower has room for more tenants. However, as the Applicants point out in the Applicants’ Response to Public Comment filed by SBA Communications Corporation, the competition engendered in having more than one tower is likely to improve co-location opportunities for other telecommunications providers in the area. This is likely to lead to expanded availability of advanced wireless services. [footnote omitted].

... SBA is not a wireless customer in the area or a property owner. SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers. This runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition. [footnote omitted]. *Id.* at p. 5.

SBA’s Motion ignores the PSC’s concern that SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers, and its request to intervene runs counter to the mission of the PSC in promoting competition in the wireless industry as reflected in the federal Telecommunications Act and Kentucky law.

5. SBA’s Motion regarding wireless service from its tower are not relevant.

At page 6 of its Motion, SBA discuss a “Coverage Plot Analysis” but does not attach

a copy of that document.¹⁰ 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 from the issue of whether the SBA tower is a reasonably available opportunity to co-locate. Any effort by SBA to produce evidence as to how its tower might provide the needed wireless service from a technical perspective only complicates and disrupts the proceedings without addressing the threshold issue of reasonable availability.

6. “Reasonable Availability”

Where, as here, the proposed tower will meet the objectives for improved wireless service, the only issue is the relative reasonable availability of the alternative locations. As AT&T previously explained, SBA’s tower does not provide that “reasonably available opportunity to co-locate,” within the meaning of 807 K.A.R. 5:063-Section 1(s), because SBA does not make its tower available on reasonable terms considering the rent and other terms offered by Harmoni Towers LLC. Significantly, SBA conspicuously fails to address the “reasonably available opportunity to co-locate” issue in its Motion, particularly the import of material rent disparities.

7. AT&T is committed to providing state-of-the-art telecommunications services at competitive prices, consistent with both Kentucky and Telecommunications Act policies.

¹⁰Applicants object to reference to the “comparison of coverage performance for the area” without its attachment and identification of its author on grounds of due process. It is also impossible to determine whether the author is a qualified expert or lay person without identification of the author by name and address. Such unattributed documentation could not be considered substantial evidence. Moreover, if facts and circumstances and posture of this proceeding led to Applicants having the right to subpoena the preparer of such Analysis, Applicants could not do so in absence of identification of such person. Accordingly, Applicants request the PSC give no weight to the unattributed and unfiled Analysis in these circumstances and deny the Motion to Intervene as a result.

The General Assembly recognizes that consumers benefit from market-based competition, which offers consumers of telecommunications services the most innovative and economical services (see KRS 278.546). Similarly, the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Telecommunications Act"), establishes a national policy to "make available, so far as possible, to all people of the United States, without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151 (emphasis added).

8. Construction of the proposed tower is in the public interest as facilitating the development and deployment of advanced wireless and broadband connectivity without duplication of service.

Competitive, market-based infrastructure is needed to provide innovative and economical telecommunications services, and investment in such telecommunications infrastructure is a necessary and critical component of AT&T's mission to provide affordable, advanced communication services to Kentucky businesses and residents. By allowing competition to increase in the provision of towers to wireless companies like AT&T, tower rents are likely to decrease and the options to enhance and expand the availability of advanced wireless services will improve. SBA is attempting to prevent that competition and preserve its power to charge high rates for leasing space on its tower, which can only have the effect of slowing deployment of new or expanded wireless services. While foreclosing competition may be in SBA's narrow commercial interest, it is

not in the interests of the public.

Any implication in SBA's Motion that the proposed tower would involve duplication of service is in error. SBA is not a public utility in the Commonwealth of Kentucky. Removing antennas and equipment from an SBA tower and installing new antennas and equipment on a Harmoni tower does not duplicate installations of any public utility. Appellate decisions discussing duplication of services from long ago involve very different types of utilities and methods of providing service so as to be fully distinguishable from the present case.¹¹ For example, the circumstances of one public utility constructing a new electrical plant and providing service that was previously provided by another public utility from a different plant raises very different considerations than the present case. Frankly, the PSC has no role in protecting a non-utility, such as SBA, from the effects of competition. Moreover, as we show below, Kentucky statutory law encourages competition.

9. SBA's Exploitation of its "Only Tower" in the Area Status.

SBA represents it owns or controls a tower in the vicinity of the proposed tower on which AT&T is co-located. AT&T has equipment located on that SBA tower, but it has elected to remove its equipment from the SBA tower and proposes a new communications facility in the vicinity. SBA is attempting to exploit the fact that it has the only tower in the area by demanding unreasonable terms for the co-location of antennas on its tower. This impedes AT&T's ability to provide innovative and economical services to Kentucky

¹¹ SBA's Memorandum in Support of its Motion, at page 4, cites *Ky. Utils. Co. v. Pub. Serv. Com.*, 252 S.W.2d 885, 889 (Ky. 1952) on its specious duplication of service argument. The holding in this ancient decision was not that the PSC has a responsibility to consider duplication of service issues in any dispute between a public utility and an entity that is not a public utility.

citizens. AT&T should not be forced to pay excessive financial terms demanded by SBA for co-location on its tower when a competitor is willing and able to (i) build a tower that accommodates AT&T's specific needs and future projected requirements and (ii) offer terms and conditions to AT&T that are substantially more attractive than those offered by SBA. Of course, SBA failed in its efforts at intervention in the Hansen and Dunnville Relo cases on facts analogous to the present case. AT&T's proposal to co-locate on a new Harmoni Towers LLC tower should be treated the same as the prior proposals, including preserving AT&T's and Harmoni Towers LLC's rights to due process and equal protection.

10. Excessive SBA Rent Diverts Funds from Utility Service.

Unreasonable and excessive fees charged by SBA divert resources that could otherwise be used to invest in expanding wireless networks and the availability of wireless services to all Kentuckians as recognized in the above-quoted excerpt of the PSC's January 21, 2021 Order granting the requested CPCN in Dunnville Relo (2019-00176). Such fees also frustrate upgrades and make it more difficult to deploy new advanced technologies that require the installation of new equipment. In response to SBA's refusal to charge reasonable rates and facilitate AT&T's deployment of advanced technologies, AT&T has submitted the within Application to construct additional telecommunications infrastructure in McCreary County so that it may continue to offer the innovative and economical wireless services promoted as a specific policy goal of the General Assembly at KRS 278.546(4).

11. SBA Motion Prevents Competition.

The intent of SBA's Motion is to prevent competition and perpetuate its position as the sole provider of a tower in the subject geographic area. However, the General

Assembly's mission for the PSC with respect to telecommunications is set forth in KRS 278.546, which provides among other things that "[s]tate-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000," and "[c]onsumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical services" (emphasis added). SBA's attempt to protect its grip on having the sole tower in the area undermines both of these goals.

12. Encouraging Competition and the Public Convenience and Necessity are Consistent Goals.

Contrary to the SBA Motion, the tower proposed by Applicants is necessary to increase competition among telecommunications infrastructure providers so that AT&T can continue to furnish adequate, efficient and reasonable telecommunications services to residents and others using wireless services in McCreary County. See *Bardstown v. Louisville Gas & Electric Co.*, 383 S.W.2d 918, 1964 KY. LEXIS 68 (Ky. 1964). Denial of the requested Certificate of Public Convenience and Necessity ("CPCN") would immunize SBA from competition, which is contrary to the interests of Kentuckians. KRS 278.650 authorizes the PSC to approve construction of new cellular towers in the interest of the "public convenience and necessity." This statutory standard is inconsistent with allowing an existing tower owner to hide behind general principals of co-location to demand unreasonable above-market compensation from wireless carrier utilities without regard to competing lower cost site alternatives in the vicinity.

13. Co-location Opportunities for Additional Wireless Carriers is Promoted

by the Proposed Tower.

In addition to promoting competition among telecommunications infrastructure providers, approval of the requested CPCN will improve co-location opportunities for other telecommunication providers in this area under business terms that are moderated by competition. The tower proposed by Applicants is designed to accommodate antennas for AT&T and *three additional service providers*, which is a key to opening up competition (see Exhibit B to the Application – Sheet C4).

14. Judicial Concerns as to Excessive Tower Rent.

SBA's tower, however, is not in the long term a viable and reasonable co-location alternative for AT&T or other providers within the meaning of case precedent and the PSC's own regulations at 807 KAR 5:063. See *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987, 998 (9th Cir. 2009); 2009 U.S. App. LEXIS 15924 and *T-Mobile Cent. LLC v. Charter Twp. Of West Bloomfield*, 691 F. 3d 794, 2012 U.S. App. LEXIS 17534, 2012 FED App. 0275P (6th Cir.). Excessive rental rates render the tower “not feasible or available” under the *Anacortes* standard and prevent it from being a “reasonably available opportunity to co-locate” pursuant to 807 K.A.R. 5:063-Section 1(s).

A particularly cogent explanation of the importance of the tower rent issue in permitting is *Sun State Towers LLC v. City of Coconino*, 2017 U.S. Dist. LEXIS 176541 (D. Arizona 2017) in which the District Court explained:

Cost can and should be taken into account as a factor in determining whether there is an available alternative. Just as an excessive delay with an alternative site might render it effectively unavailable, so to could a prohibitively high cost render an alternative site unavailable. Refusing to consider cost also allows the owners of potential alternative sites to act as monopolists, which is expressly counter to the goals of the TCA. *Anacortes*, 572 F.3d at 991. Without considering cost at all, the owners of the alternative sites could ask for exorbitant prices. *Id.*

Unlike the wireless carrier plaintiff in *Sun State Towers*, Applicants herein proceed in a different context in that 807 K.A.R. 5:063-Secton 1(s) expressly makes the reasonable availability of a collocation a threshold standard and other Kentucky statutory law cited below affirmatively encourages competition in the telecommunications industry. There is also evidence in this proceeding referenced from other previously cited PSC cases supporting systemic rent disparities on SBA sites so as to show the futility of negotiations with SBA. Accordingly, the *Sun State Towers* Opinion is persuasive in describing the failure to consider costs as being "... counter to the goals of the TCA", but the ultimate outcome in such litigation turned on different law and facts than are present in this proceeding.

Forcing Applicants to remain on the SBA Tower would violate the TCA as a prohibition of service because such co-location would not be feasible and effectively available. Intervention should not be granted to allow such argument to be entertained and to delay the grant of a CPCN.

15. Aesthetic Considerations Fail to Support Intervention.

Further, to the extent SBA's argument is intended to suggest that a tower (other than SBA's, presumably) would be unaesthetic, such generalized concerns do not provide any basis for intervention or denial of the application. SBA hints at an implied aesthetic argument in pleading.¹² Similar arguments based upon unsupported lay opinions regarding the siting of WCF towers were rejected by the PSC in Case No. 2017-00368, 2017-00435 2020-00300, 2020-00310, 2020-00328, 2020-00343, 2020-00245, 2020-00351, 2020-

¹² SBA Motion to Intervene, p. 4-5.

00354, 2020-00360, 2020-00404, 2021-00012, 2021-00065, 2021-00092, 2021-00145.

The proposed facility has been designed, configured, and located in such a manner that it will prevent or limit potential adverse effects on surrounding properties. The requested CPCN is for a proposed land use that is consistent with the existing tower owned by SBA. Since the proposed tower is a compatible land use given the existing tower in the area, and since the tower is designed to minimize visual impact, aesthetic objections cannot support a denial of the requested CPCN.

16. Judicial Precedent Rejects Aesthetic Arguments.

The U.S. Court of Appeals for the Sixth Circuit has affirmed that lay opinion or generalized aesthetic concerns are not substantial evidence that would justify rejection of a new tower application. Under federal law, any decision rendered by state or local authorities regarding the placement of wireless facilities must be in writing and supported by substantial evidence in a written record. 47 U.S.C. § 332(c)(7)(B)(iii). Generalized aesthetic concerns based on lay opinion, such as what any resident in any area in which any tower is placed might make, do not constitute substantial evidence. See *Cellco Partnership v. Franklin Co.*, KY, 553 F. Supp. 2d 838, 845-846 (E.D. Ky. 2008); *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 804 (6th Cir. 2012). Neither the PSC enabling statutes, nor its implementing regulations establish any specific objective standards for aesthetic considerations in rulings on a request for a CPCN for a new tower. Accordingly, the PSC should not consider aesthetic issues in deciding the SBA Motion or the within Application.

17. Public Convenience Versus Pecuniary Interest of SBA.

Ultimately, the Public Service Commission's decision in the proceeding must be based on the public convenience and necessity rather than the pecuniary interests of SBA. KRS 278.020 (1); 807 KAR 5:063. Allowing SBA to thwart the building of a new tower that will foster competition and the provision of new wireless installations necessary to provide wireless technology to retail and business customers and emergency service providers¹³ would not be consonant with any rational basis or statute, regulation, or written policy of the PSC. Wireless carriers should not be made subject to the whims of SBA in its attempts to extract the highest compensation from them. Applicants' proposal for a new tower complies with all requirements of relevant PSC regulations and other applicable law, and results from a "good faith effort" to evaluate alternatives. *T-Mobile Central LLC, supra* at 808.

18. The Proposed Harmoni Towers LLC Rent Establishes a New Market Rent.

The approximate rental cost to provide service from the SBA tower is more than two times the rent AT&T has been offered on the proposed tower, including both capital cost and ground rent. Accordingly, the proposed Harmoni Towers LLC facility establishes a new market rent benchmark. SBA's intervention would not change these critical facts and would only complicate and disrupt the proceedings.

19. 807 K.A.R. 5:063 – Section 1(s) is Dispositive on SBA Motion.

In consideration of all of the foregoing facts, law, and circumstances, SBA's tower does not provide a "reasonably available opportunity to co-locate," within the meaning of 807 K.A.R. 5:063-Section 1(s), because SBA does not make its tower available on

¹³ A Federal Communications Commission Consumer Guide (October 29, 2014) states: "It is estimated that about 70% of 911 calls are placed from wireless phones and that percentage is growing."

reasonable terms considering the new market rent established by the Harmoni Towers LLC site. SBA has not offered to stipulate to the rent and other terms agreed to by Harmoni. The PSC should not facilitate SBA's efforts to maintain market exclusivity for the sole purpose of extracting onerous financial terms when the proposed new tower on other property meets service needs and all applicable law.

20. PSC Staff Review More Effectively Meets Standards for Agency Review than Adversarial Intervention Proceedings by a Competitor.

If any further inquiry as to cost differential between the SBA site and the proposed tower is necessary, inquiry by the PSC Staff, with appropriate confidentiality protections, will confirm the overwhelming cost advantage of the proposed tower and allow the PSC to timely move forward with its decision on the requested CPCN. Such an approach is consistent with the federal Telecommunications Act's encouragement of the rapid deployment of wireless communications facilities,¹⁴ and would be far more likely to resolve this dispute over reasonable availability within the time frames of the FCC's Shot Clock Ruling¹⁵ and the PSC's normal time frame for processing cellular tower applications. This approach also would be consistent with the General Assembly's mission for the PSC for telecommunications as set forth in KRS 278.546, which provides among other things that

¹⁴See *PI Telecom Infrastructure V, LLC v. Georgetown-Scott County Planning Comm'n*, 234 F. Supp. 3d 856 (E.D. Ky. 2017) ("Congress enacted the TCA to promote competition between service providers that would inspire the creation of higher quality telecommunications services and to encourage the rapid deployment of new telecommunications technologies.")

¹⁵See *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 F.C.C. Rcd. 13994, 14013 (2009)(a/k/a "FCC Shot Clock Ruling").

“[s]tate-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000,” and “[c]onsumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical services.”

21. SBA Fails to Meet Standards for Intervention.

KRS 278.650 requires an applicant seeking to construct a WCF in areas such as unincorporated McCreary County to apply to the PSC for a CPCN pursuant to KRS 278.020(1). KRS 278.020(1) provides in pertinent part that:

Upon the filing of an application for a certificate, and after any public hearing which the commission may in its discretion¹⁶ conduct for all interested parties, the commission may issue or refuse to issue the certificate, or issue it in part and refuse it in part (Emphases added.) *Id.* at KRS 278.020(1).

Kentucky Public Service Commission implementing regulations at 807 KAR 5:001 provide in pertinent part for a movant to (among other things) “state his or her interest in the case and how intervention 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.” Further, in order to intervene, a would-be intervenor must have “a special interest in the case that is not otherwise adequately represented,” or “his or her intervention is likely to present issues or to develop facts that assist the commission in

¹⁶ Whether any public hearing for the offering of evidence is held 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.” SBA’s desire to offer proof does not mandate its Motion be granted or that any hearing take place.

fully considering the matter without unduly complicating or disrupting the proceedings” (emphasis added). *Id.* at 807 KAR 5:001. SBA’s Motion to Intervene fails to satisfy these standards. The PSC and its Staff are well-qualified to examine the facts surrounding Applicants’ proposed tower in connection with their statutory and regulatory obligations. Direct participation in the case by SBA as an intervenor would not add to the PSC’s analysis and its ultimate decision on the request for a CPCN.

The SBA Motion does not even detail “facts” that would assist the Commission beyond SBA’s desire to thwart competition in the provision of wireless service. Applicants have not denied AT&T currently provides service from the SBA Tower. The issue is whether such co-location is “reasonably available” and SBA has made no showing or proffer it could provide substantial evidence to such effect and convince the PSC on such issue. The PSC recognized in its March 26, 2018 Order in PSC Case No. 2017-00435 denying intervention to SBA that “[i]t is likely that if the Commission permitted SBA to intervene, this intervention would unduly complicate this proceeding.” The PSC should reach the same conclusion in the present case.

22. Courts have Upheld Denials of Intervention.

Kentucky’s appellate courts have upheld PSC denials of requests for intervention in CPCN cases. For example, in *EnviroPower, LLC v. PSC*, 2007 Ky. App. Unpub. LEXIS 121 (Ky. App. 2007), the Kentucky Court of Appeals upheld the PSC’s denial of a motion to intervene in a CPCN proceeding which had been upheld by the Circuit Court. The Court of Appeals noted that a PSC decision to deny intervention is reviewed only for an abuse of discretion, and found that the PSC did not abuse that discretion in denying intervention to a person seeking intervention (EnviroPower) that did not “have an interest in the ‘rates’

or ‘service’ of a utility” seeking a CPCN, but that instead was merely a competitor. While EnviroPower held permits under which it had expected to construct the facility that the CPCN authorized the utility to self-construct instead, the Court agreed that this was insufficient to give EnviroPower a right to intervene, as it “had a mere expectancy and no fundamental property right.” The PSC relied on *EnviroPower* in its denial of SBA’s Motion to Intervene in PSC Case No. 2017-00435 at pages 3 and 5 and should likewise do so in this proceeding.

23. Parallels to *EnviroPower*.

SBA claims no interest in AT&T’s rates or services, but instead is merely a competitor that would prefer to prevent AT&T from using the proposed tower. SBA may have some expectancy that wireless carriers will use its tower, but that does not equate to any fundamental property right to compel wireless carriers to use SBA’s tower or to prevent the construction of competing infrastructure. Just as in *EnviroPower*, SBA is attempting to advance its pecuniary interests rather than public issues regarding rates and service. Consistent with the PSC’s decision as upheld by the Court of Appeals in *EnviroPower*, SBA’s Motion to Intervene should be denied.

24. The PSC has Denied Intervention in Many Cases.

Critical to the PSC’s many denials of requested intervention have been factors such as the potential intervenors being “unlikely to present issues or develop facts that will assist the Commission in considering the matter” or that the party requesting intervention is not a customer of the applicant, does not receive services from the applicant and/or does not pay any rates charged by the applicant. All of these same factors warrant denial of SBA’s Motion. 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 Graves (Case No. 2017-00368), 2017 Ky. PUC LEXIS 1148 (November 30, 2017); *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 Butler* (Case No. 2017-00369), 2017 Ky. PUC LEXIS 1167 (December 30, 2017); *In the Matter of: Tariff Filing of East Kentucky Power Cooperative, Inc. and its Member Distribution Cooperatives for Approval of Proposed Changes to their Qualified Cogeneration and Small Power Production Facilities Tariffs and the Implementation of Separate Tariffs for Power Purchases from Solar Generation Qualifying Facilities* (Case No. 2017-00212), 2017 Ky. PUC LEXIS 967 (September 22, 2017); *In the Matter of: Electronic Application of Kentucky Power Company* (Case No. 2017-00179), 2017 Ky. PUC LEXIS 833 (August 16, 2017); *In the Matter of the Joint Application of PNG Companies LLC ... for Approval of an Acquisition of Ownership* (Case No. 2017-00125), 2017 Ky. PUC LEXIS 412 (April 20, 2017); *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 ...* (Case No. 2018-00031 – Order of June 1, 2018); *In the Matter of Application of East Kentucky Network, LLC D/B/A Appalachian Wireless....* (Case No. 2018-00095 – Order of September 7, 2018).

25. Opportunity to File Comments in Absence of Intervention.

In all of the above-referenced denials of intervention the PSC has pointed out that, even with denial of intervention, the requesting person or entity may still file comments in

the record of the case and review the progress of the proceedings via the PSC's online docket. Nothing prevents SBA from filing the purported studies vaguely referenced in its Motion as "public comment" without regard to it obtaining intervenor status. Thus, intervention is not essential to allow any person or entity to be heard in a PSC proceeding.

26. SBA has No Right to Intervene.

SBA has only a right to *request* intervention in PSC proceedings pursuant to applicable regulations. 807 KAR 5:063 Section 1(1)(n)3; 807 KRS 5:120 Section 2(5)(c) ("interested persons have right to *request* to intervene"). See also *Bee's Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765, 766 (Ky. 1960) ("limitation [on individual participation in Commission proceedings] was not in violation of the Constitution, and ... deprives no one of his rights"). Intervention is in the "sound discretion" of the PSC. *Inter-County Rural Elec. Co-Op. Corp. v. Public Service Commission*, 407 S.W.2d 127, 130 (Ky. 1966). That discretion should be exercised to deny the SBA Motion to Intervene on all of the foregoing grounds.

REQUEST FOR RELIEF

WHEREFORE, there being no ground for intervention by SBA, Applicants respectfully request the Kentucky Public Service Commission:

- (a) Accept this Response for filing;
- (b) Deny the Motion to Intervene;
- (c) Grant the requested CPCN; and
- (c) Grant Applicants any other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of April 2022, a true and accurate copy of the foregoing was electronically filed; and sent by U.S. Postal Service first class mail, postage prepaid, to:

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