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' SUR-REPLY TO
SBA INFRASTRUCTURE, LLC'S REPLY TO APPLICANTS' RESPONSE TO
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, file this Sur-Reply to the Motion to Intervene filed by SBA Infrastructure, LLC ("SBA").[1] Sur-Reply is warranted due to SBA

[1]SBA's Reply protests the timeliness of Applicants' Response to their Motion to Intervene. SBA cites no authority for the seven-day period to be jurisdictional such that a Response filed after more than seven days must be stricken or ignored. The PSC issued no advance directive indicating the seven-day period would be strictly construed so as to place parties on notice. Moreover, the PSC has ample discretion to consider the Applicants' Response which was filed only a few weeks after the expiration of the seven-day period. Further, SBA identifies no harm resulting from such immaterial delay, and in addition, SBA's protest is disingenuous considering it is repeatedly filing motions to intervene when its

raising new arguments in its Reply.

SBA violated a fundamental tenant of reply memoranda in raising new arguments on reply in maintaining "Applicants and the Commission have already acknowledged that SBA is a necessary party to this case…."[2] Kentucky's appellate courts have explained that the raising of new arguments in a reply brief is normally improper. *Milby v. Mears*, 580 S.W.2d 724 (Ky. App. 1979); *Commonwealth v. Jones*, 283 S.W.3d 665, 669 (Ky. 2009); *Indian Ridge Properties v. Schwartz*, *LLC No. 1*, 2011 Ky. App. LEXIS 223, Footnote #2 (Ky. App. 2011); review denied by *Indian Ridge Props. v. Schwartz, LLC No. 1*, 2012 Ky. LEXIS 277 (Ky., Sept. 12, 2012). See CR 76.12(4)(e). Thus, the new argument by SBA as to purported "acknowledgment that SBA is a necessary party…" should not be considered in the PSC's deliberations on the pending Motion to Intervene.

In the alternative, if the PSC is to entertain the SBA argument as to "acknowledgement", an analysis of applicable law makes it clear that there has been no such acknowledgment which would support SBA's intervention. The standards for intervention before a court and before the Public Service Commission are not identical. In fact, it is an "apples vs. oranges" comparison. Grant of intervention before a circuit court for one party does not imply that another party is entitled to intervention before the PSC in a *different case*. Comparision of the specific language in the Civil Rules to the PSC regulation on intervention is informative.

---

requests for intervention have been turned down over and over by the PSC in numerous tower cases. SBA is the entity which is the source of delay in a sweeping number of tower cases. Finally, SBA cites no examples of the PSC failing to consider or striking an applicant's response to a motion which is filed less than a month beyond the seven-day response period. There is no basis in law or the facts of this proceeding which justifies the PSC taking a new approach in the present case as to a nominally late filing.

[2] SBA Reply to Applicants' Response to Motion to Intervene, p. 2.

Kentucky Rules of Civil Procedure 24.01 and 24.02, as applicable before the judiciary, provide in pertinent parts:

> 24.01(1). Intervention of Right.
>
> "Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties." (Emphasis added).
>
> 24.02. Permissive Intervention.
>
> "Upon timely application anyone may be permitted to intervene in an action:
>
> (a) when a statute confers a conditional right to intervenor; (b) when an applicant's claim or defense and the main action have a question of law or fact in common.… In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." (Emphasis added).
>
> In contrast, 807 K.A.R. 5:001 Section 4(11)(b), as applicable to the PSC, provides:
>
> "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 he or she has a special interest in the case that is not otherwise adequately represented or 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." (Emphasis added).

Even a cursory comparison of the two standards for intervention shows the PSC regulation applies a more stringent standard. CR 24.01 provides for "Intervention of Right" on a movant *claiming* an interest. CR 24.02 speaks of "anyone" being permitted to intervene with a threshold of the applicant only needing to have a "question or law or fact in common" with the existing claims while the PSC regulation speaks of required PSC findings of a movant having a "special interest" or that intervention is "… likely to present

issues or to develop facts" which "assist the commission" "without unduly complicating … the proceedings." Moreover, except as to the Attorney General, there is no "Intervention of Right" before the PSC. Thus, the judicial and PSC proceeding standards for intervention are not analogous.

A further critical distinction between the AT&T Mobility and Harmoni Towers LLC motions to intervene in the Franklin Circuit Court cases and the SBA Motion to Intervene in the present PSC decision is that AT&T Mobility and Harmoni Towers LLC were the *Applicants* in the Certificate of Public Convenience and Necessity ("CPCN") proceedings before the PSC.[3] Their interests in the issues at hand eclipse any alleged interest of SBA in this PSC proceeding, which interest is nothing more than that of a disgruntled competitor of Applicants. SBA's quotations from the Motion to Intervene are taken out of context in that the quotations arise within the context of Applicants in the CPCN proceedings seeking intervention.

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.

---

3 See *Liquor World of Corbin, LLC v. Commonwealth Dept of Alcoholic Beverage Control*, 458 S.W.3d 814 (Ky. App. 2014) in which a plaintiff's claim was dismissed for lack of jurisdiction where it challenged liquor licenses granted to other entities but did not name them as parties to the action. The Court of Appeals explained, "[i]t is inconceivable to us that the Three Licensees would not have an interest in the outcome of this case." *See also Inter-County Rural Elec. Co-operative Corp. v. Pub. Serv. Com*, 407 S.W.2d 127 (Ky. Ct. App. 1966).

Inter-County Rural Elec. Co-Op. Corp. v. Public Service Commission, 407 S.W.2d 127, 130 (Ky. 1966). Thus, no argument of SBA compels the PSC to grant its Motion to Intervene.

Finally, even if it were to be determined that Harmoni and AT&T Mobility were taking inconsistent positions on intervention before the Circuit Court and the PSC in separate cases, such determination would not support finding of a binding admission against interest. Kentucky law has only required consistency when addressing different proceedings in the same court. A party is free to address proceedings in a circuit court inconsistently from its approach and argument on an issue before an administrative agency.

SBA's Reply, at page 6, references and submits FCC records "… of cellular towers available for co-location in Russell County, which are owned by many different entities." The PSC is well aware the only relevant "area" is the search area (a/k/a "search ring") as established by a radio frequency engineer, in that individual cellular towers serve areas much smaller than an entire county. The search area attached as **EXHBIT N** of the Application in this proceeding shows the area in which AT&T must place its equipment in order to meet its coverage/capacity objective for this area. A search of the FCC's database for registered towers within this area shows only one existing tower of sufficient height, which is, of course, owned by SBA. A copy of the FCC's search results for the search area is attached as **EXHIBIT 1**.[4] Arguing that documentation of all the towers in

[4] As shown on **EXHIBIT 1**, there are two additional existing registered structures in this area that are not owned by SBA. One is a water tower and the other is a railway communications tower. Neither of these structures are tall enough to meet AT&T's RF coverage/capacity objectives. Therefore, co-location on either of these structures is not a viable solution even if they were capable of supporting AT&T's equipment.

McCreary County justifies intervention to assess “all opportunities for co-location” beyond just the existing SBA tower is an improper new argument in a Reply and, in addition, is nonsensical as a practical matter. Furthermore, such an expansive inquiry at this point would “unduly complicate the proceedings” so as to provide grounds for denial of the Motion to Intervene pursuant to 807 K.A.R. 5:001 Section 4(11)(b)

REQUEST FOR RELIEF

WHEREFORE, there being no ground for intervention by SBA and SBA having improperly made new arguments and tendered new evidence in a Reply, Applicants respectfully request the Kentucky Public Service Commission:

(a) Accept this Sur-Reply for filing;

(b) Deny the Motion to Intervene;

(c) Strike from the case record SBA's Reply as raising new argument not permitted in a reply memorandum;

(d) Grant the requested CPCN; and

(c) Grant Applicants any other relief to which they are entitled.

Respectfully submitted,

David A. Pike

_____

David A. Pike
And

F. Keith Brown

_____

F. Keith Brown
Pike Legal Group, PLLC
1578 Highway 44 East, Suite 6
P. O. Box 369
Shepherdsville, KY 40165-0369
Telephone: (502) 955-4400
Telefax: (502) 543-4410
Email: dpike@pikelegal.com
Attorneys for Applicants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th 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:

R. Brooks Herrick
Edward T. Depp
David N. Giesel
Dinsmore & Shohl LLP
101 S. Fifth Street, Suite 2500
Louisville, KY 40202

Respectfully submitted,

David A. Pike

_____
David A. Pike
And

F. Keith Brown

_____
F. Keith Brown
Attorneys for Applicants