

# EXHIBIT 1

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II  
Civil Action 22-CI-00140**

*Filed Electronically*

**SBA COMMUNICATIONS CORPORATION**

**PLAINTIFF**

**V.**

**PUBLIC SERVICE COMMISSION OF KENTUCKY**

**DEFENDANT**

**MEMORANDUM OF NEW CINGULAR WIRELESS PCS, LLC AND HARMONI  
TOWERS LLC IN SUPPORT OF MOTION TO INTERVENE**

**1.0 INTRODUCTION**

Come New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (“AT&T Mobility”) and Harmoni Towers LLC (“Harmoni Towers”)[collectively “Movants”], by counsel, and file this Memorandum in Support of and contemporaneously with their Motion to Intervene in the within proceeding. Such entities are the very parties who applied for the Certificate of Public Convenience and Necessity (“CPCN”) for the construction of a cellular tower<sup>1</sup> which Plaintiff is attempting to vacate. As shown below, CR 24 and all applicable Kentucky law supports grant of these entities’ Motion to Intervene. Movants have further tendered a Joint Answer and Affirmative Defenses for filing upon grant of their Motion. A proposed Order granting their Motion and deeming the tendered Answer and Affirmative Defenses filed has been tendered as well.

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<sup>1</sup> ***Lake City / Luka Site***

## 2.0 FACTUAL BACKGROUND

In compliance with state statutes, regulations and associated case law, the PSC reviews applications to construct wireless communications facilities and issues CPCNs for the construction of wireless communications facilities in areas of Kentucky outside of the jurisdiction of a Planning Commission pursuant to KRS Chapter 278 and its implementing regulations. Beginning in September 2020 and continuing through March 2021, the Movants filed 13 applications for CPCN approval with the PSC. The record before the PSC for the application which is the subject of this action<sup>2</sup> shows the current Movants filed voluminous exhibits with the PSC in compliance with statute and the PSC regulations<sup>3</sup> in support of the request for the CPCN.

The Plaintiff (“SBA”) or its affiliates<sup>4</sup> requested intervention before the PSC in each of these cases and were denied intervention following a thorough review of the issue including numerous motions, replies, and public comments. The PSC granted CPCNs for the CPCN challenged in this action. The Movants seek intervention in this action to protect the interests related to the approved CPCN. The remainder of the 13 applications are also subject to recently filed KRS 278.410 statutory appeals by SBA or its affiliate filed in

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<sup>2</sup> PSC Case Number 2020-00300.

<sup>3</sup> See 807 KAR 5:063. (Filing requirements and procedures for proposals to construct antenna towers or to co-locate antennas on an existing structure for cellular telecommunications services or personal communications services).

<sup>4</sup> SBA Towers VII, LLC, SBA Towers III, LLC, and SBA Infrastructure LLC.

Franklin Circuit Court.<sup>5</sup> Accordingly, Movants request intervention in this action as well as in any action with which it is consolidated.

### 3.0 ARGUMENT

Movants should be parties in this action pursuant to CR 24 and any other applicable doctrines, including as indispensable parties<sup>6</sup> or the real parties in interest. In the simplest terms, it is their CPCN being appealed by SBA. As detailed below, no doctrine of Kentucky law would support Movants remaining on the sidelines of this proceeding against their will.

#### 3.1 The Movants are entitled to intervention by right.

CR 24.01(1) addresses intervention of right upon timely application 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. In a case with closely analogous facts, the Court of Appeals of Kentucky affirmed the Circuit Court's grant of intervention to a utility that had received a favorable ruling from the PSC when a competing company brought an action

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<sup>5</sup>Civil Actions 22-CI-00149, 22-CI-00140, 22-CI-00160, 22-CI-00161, 22-CI-00162, 22-CI-00163, 22-CI-00164, 22-CI-00165, 22-CI-00166, 22-CI-00167, 22-CI-00154, and 22-CI-00157

<sup>6</sup> 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." Likewise, in the present case, the Movants as holders of the CPCN have an interest in the outcome and must be made parties.

against the PSC to contest the Commission's ruling. *Inter-County Rural Elec. Co-operative Corp. v. Pub. Serv. Com*, 407 S.W.2d 127 (Ky. Ct. App. 1966).

**A. The Movants have made timely motion for intervention.**

The timeliness of a request for intervention is a question of fact. *Ambassador Coll. V. Combs*, 636 S.W.2d 305, 307 (Ky. 1982). The Kentucky Court of Appeals has acknowledged that intervention requests prior to trial or other disposition of the case is presumptively timely. *Gov't Emples. Ins. Co. v. Winsett*, 153 S.W.3d 862, 865 (Ky. Ct. App. 2004). The Kentucky Court of Appeals has also applied a five-factor test to their analysis of timeliness in the context of intervention. *Carter v. Smith*, 170 S.W.3d 402, 408-09 (Ky. Ct. App. 2004). The factors are:

(1) The point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Id.* at 408 (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6<sup>th</sup> Cir. 1989)).

In the present case, the Movants have the benefit of the presumption discussed in *Gov't Emples. Ins. Co. v. Winsett* because the trial in this matter has not begun. In fact, an "on the record" statutory appeal is involved, the administrative record has not yet been filed and no briefing schedule on the merits has been set. Moreover, the Complaint at issue was filed less than a month ago and the deadline for Answer by the PSC has not yet even been reached.

The five-factor analysis discussed in *Carter, supra*, also favors the Movants because (1) the suit has not progressed passed early pleading; (2) the purpose of the

intervention is to protect the Movants approval, which is central to the case itself; (3) the Movants filed this motion promptly after being notified of the case; (4) the original parties will suffer no prejudice and likely expected the Movants to intervene based on the Movants' significant interest in the case; and (5) the militating factor for intervention is the extraordinary level of interest and involvement the Movants had as the sole *Applicants* in the underlying PSC action and the extraordinarily high level of interest in the Movants have in the present case based on their interest in protecting their CPCN approval.

**B. The Movants have an interest relating to the property or transaction which is the subject of the action.**

The Kentucky Supreme Court has found that “in order to intervene, the party's interest relating to the transaction must be a ‘present substantial interest in the subject matter of the lawsuit,’ rather than an expectancy or contingent interest.” *Baker v. Webb*, 127 S.W.3d 622, 624 (Ky. 2004) (quoting, in part, *Gayner v. Packaging Service Corp. of Ky.*, Ky. App., 636 S.W.2d 658, 659 (1982)). Harmoni's lease/option with the fee simple property owner for location of a cellular tower as referenced and documented in the administrative record of the PSC proceeding below is just such an interest.

The CPCNs issued by the PSC in these 13 cases are prerequisites to construction of wireless communications facilities and therefore represent a “present substantial interest” to the Movants. Not only have the Movants invested significant resources to obtain the CPCNs, they have also invested in obtaining the appropriate land interests and obtaining other required regulatory approvals to construct facilities of this type.

Moreover, the Movants present substantial interest is in the **rapid** deployment of state-of-the-art wireless facilities to serve Kentucky citizens. The U.S. Congress has

recognized this interest of wireless service providers.<sup>7</sup> As the administrative record of the PSC proceeding at issue reflects, SBA has employed a continuing pattern of imposing lengthy review periods prior to approving AT&T equipment upgrades on existing SBA towers. Further, structural upgrades to the existing towers are sometimes required prior to adding upgraded equipment, which results in more lengthy delays. In the interim, AT&T is prevented from rapidly deploying new equipment and forced to continue using the existing technology instead of state-of-the-art technology.

**C. The Movants are so situated that the disposition of the action may as a practical matter impair or impede the Movants' ability to protect that interest.**

Like the intervenors in *Inter-County Rural Elec. Co-operative Corp. v. Pub. Serv. Com.*, the Movants would be bound by this Court's judgment. Specifically, the Movants interest as discussed above will be central to this proceeding because SBA's prayer for relief requests, in part, that the PSC orders granting the CPCNs be vacated and an injunction enjoining enforcement of the CPCN be issued. Review of these issues without the Movants as a party will entirely foreclose the Movants ability to protect their substantial interest in the issued CPCNs.

**D. The Movants interest is not adequately represented by the existing parties.**

The PSC has an interest in performing its statutory duties. However, the Movants have a unique interest in deploying up-to-date wireless infrastructure as quickly as possible. AT&T Mobility is in fact a registered utility with the PSC<sup>8</sup> and holds a Federal

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<sup>7</sup>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.))

<sup>8</sup> Kentucky Utility ID Number 4202400.

Communications Commission license to provide wireless service in connection with the proposed tower as the record before the PSC reflects. The Movants applied to the PSC for approval to construct the subject tower over a year ago, and the urgency to deploy updated equipment has continued while SBA has delayed the PSC's review and approval.

Additionally, due 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 and have defended similar approvals from challenges by SBA across multiple jurisdictions. Again, the present situation is analogous to the facts reviewed by the Kentucky Court of Appeals in *Inter-County Rural Elec. Co-operative Corp. v. Pub. Serv. Com.*

The "inadequacy" of representation envisioned by CR 24.01 includes the type of situation we have at bar. It is true that the Commission was properly named as defendant in the court proceeding. KRS 278.410(1). The volume of appeals to the court, along with the technical nature of the matters involved, would make it impracticable for the Commission to "adequately" afford representation in such appeals. *Inter-County Rural Elec. Co-operative Corp. v. Pub. Serv. Com.*, 407 S.W.2d 127, 130 (Ky. 1966)

In addition to all of the above interests which the PSC cannot adequately represent, Movants are private companies and have substantial proprietary interests in the cellular site which support intervention as well. Those interests involve already sunk costs, as well as expenditures and income arising from the approved tower site. Movants must be able to defend those interests in the face of Plaintiff SBA's efforts to have the CPCN vacated.

### **3.2. Permissive Intervention is also Fully Justified.**



As required by CR 24.02, the motion for intervention is timely as discussed previously in this Memorandum. Additionally, the Movant's claim or defense and the main action have common questions of law or fact<sup>9</sup> and the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

Specifically, the Movant's intervention is based on the status of the approved CPCNs. The applicable questions of law and fact addressed by Movants would directly counter the issues and claims raised in SBA's complaint. Further, the Movant's presence in this case will not unduly delay or prejudice either party.

SBA's complaint includes discussion of several factual matters involving the Movants including documentation of AT&T's attempt to co-locate on reasonably available towers and AT&T's attempts to negotiate with SBA. Further, the complaint raises questions of law involving the Movants, most notably, alleged deficiencies in the Movants' applications. While the PSC thoroughly reviewed the records before approving the CPCN, the 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. Additionally, the Movants are uniquely motivated to defend against factual and legal allegations and mischaracterizations made by SBA as the Movants' motive and practices have been called into question by the complaint.

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<sup>9</sup> As the Kentucky Supreme Court explained in *Bailey v. Bertram*, 471 S.W.2d 687 (Ky. 2015), "Permissive intervention requires that the intervenor have an interest or claim in common with the litigants in the underlying action." All parties and Movants have claims directly related to the CPCN in question in the present action.

#### 4.0 TENDERED JOINT ANSWER AND AFFIRMATIVE DEFENSES

Movants have contemporaneously tendered a Joint Answer and Affirmative Defenses for consideration by the Court to be deemed filed or separately filed upon grant of intervention. Such tendered pleading further evidences why it is imperative Movants be allowed to intervene to contest the allegations of Plaintiffs' Complaint given all the facts, circumstances, and law applicable to the Complaint.

#### 5.0 CONCLUSION

For all of the reasons stated herein, the Court is requested to grant AT&T Mobility and Harmoni Tower's Motion to Intervene as Defendants in this action, or to grant them any other relief to which they are entitled. Movants also request the Court accept Movants' tendered Joint Answer and Affirmative Defenses for filing in the within action.

Respectfully submitted,

*/s/ David A. Pike*

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## 6.0 CERTIFICATE OF SERVICE

We hereby certify that on this the 16th day of March, 2022, the foregoing Memorandum was filed electronically with the Court and copies served through the Court's electronic filing system and via First Class U.S. Mail, postage prepaid, to the following:

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