

**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
WAYNE**

Case No. 2022-00279

**SITE NAME: WEST HIGHWAY 90 /
ZULA RELO**

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

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

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

Applicants and the Public Service Commission of the Commonwealth of Kentucky (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 (“AT&T Mobility”) and Harmoni Towers LLC (“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, 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

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.

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).

B. AT&T Mobility’s Introduction of its July 2019 Letter Proves that SBA’s Participation is Needed.

Not only does the introduction of new evidence in response to SBA’s Motion to Intervene prove that SBA can assist the Commission develop necessary facts and issues (because SBA already did it), AT&T Mobility’s attempt to convince the Commission that the letter represents an attempt to co-locate highlights exactly why SBA’s assistance to correct the misleading representations from AT&T Mobility is necessary in this action.

First, the July 11, 2019 letter attached to the Response to the Motion to Intervene is addressed to “SBA TOWERS INC.” Attached hereto as Exhibit 2 is the publicly-available information for SBA Towers Inc. maintained by the Florida Secretary of State. That information shows that “SBA Towers Inc.” has not been an entity in existence since June 30, 2011. Further, the last principal address of SBA Towers Inc. was 5900 Broken Sound Pkwy NW, Boca Raton, FL 33487, which is not the address where AT&T Mobility sent the letter. Thus, AT&T Mobility attempts to convince the Commission that it engaged in good faith attempt to co-locate on the existing SBA Tower by sending a letter to a corporation that had not existed for eight years at an incorrect address.

Second, AT&T Mobility was well-aware SBA Towers Inc. was not the correct party because AT&T Mobility had successfully renegotiated and executed Lease Amendments with the correct legal entity in 2012, 2013, and 2018. The 2018 Lease Amendment explicitly amended and revised the Notice address for SBA Towers VII, LLC – the actual entity with whom AT&T Mobility has a lease arrangement. Even ignoring the incorrect entity name, the 2019 Letter does not comply with the Notice requirements under the Lease.

Next, AT&T Mobility fails to inform the Commission that AT&T Mobility sent similar letters (most of which also did not comply with the notice requirements in the leases) to SBA for practically every existing cell tower site across the entire United States. Thus, when viewed in the larger picture, AT&T Mobility’s alleged “attempts at co-location” cannot be considered an attempt at serious negotiation, but was mere gamesmanship on the part of AT&T Mobility – which is demonstrated by the fact that AT&T Mobility could not even be bothered to send the letters to an entity that was actually in existence, let alone the entity with whom AT&T Mobility had a leasing relationship.

Finally, further solidifying that the 2019 letter was not a serious attempt at co-location is that AT&T Mobility has previously refused to engage in oral negotiations of other leases that are close to sites where AT&T Mobility ultimately sought to move its facilities. Site negotiations are typically conducted between SBA and AT&T Mobility's regional site managers. During phone conversations, AT&T Mobility and SBA frequently discuss possible revisions to certain site leases. However, in certain instances, when SBA seeks to discuss renegotiation of cell tower leases of sites where AT&T Mobility has ultimately filed an application seeking to move its facilities, AT&T Mobility's regional managers have advised they do not have authority on those leases and refuse to engage in negotiations.

Accordingly, much like the Application, AT&T Mobility continues to provide the Commission with only the facts most favorable to it, and AT&T Mobility's own behavior makes evident that assistance is needed for the Commission to fully develop the facts and issues in this proceeding. In fact, just as AT&T Mobility itself has previously argued, "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 [AT&T Mobility] on multiple similar towers in multiple jurisdictions."³

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, Applicants 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 the first time in a Response brief to a Motion to Intervene, Applicants now purport to provide evidence that AT&T Mobility made attempts to co-

³ 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 8.

located on the existing SBA facility, as is required by Commission regulation. *See* 807 KAR 5:063 § 1(1)(s). However, as is explained above, this is not evidence of such an attempt and only further highlights why SBA's involvement to assist the Commission with the development of facts and issues is needed. Nevertheless, simply by filing its Motion to Intervene, SBA has once again helped the Commission develop facts and issues, as in yet another proceeding AT&T Mobility has withheld required evidence from the Commission until a third-party noted the error.

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 in the area, publicly available documents from the FCC's website disclose otherwise. Attached hereto as Exhibit 3 is the FCC's records of cellular towers currently available for co-location in Wayne County. The records reflect multiple wireless communication facilities, 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.").

D. SBA Has Sought to Negotiate with AT&T Mobility.

While the burden of attempting to co-locate on existing cellular towers and providing documentation of such attempts to co-locate falls squarely on AT&T Mobility, SBA can also provide the Commission with additional facts directly bearing on SBA's attempts to negotiate with AT&T Mobility. Specifically, SBA hereby notifies the Commission that it has offered to modify the monthly rent currently charged to AT&T Mobility to match the rent to be charged by Harmoni Towers, less \$10.00. The offer was communicated by SBA to AT&T Mobility through its representative, Ronnie T. Cheek, AT&T Area Manager Site Acquisition for NC/TN/KY.

Accordingly, SBA's offer to AT&T is an additional fact that this Commission should consider in rendering its decision (and a fact that might have been presented earlier had AT&T Mobility sought to renegotiate its tower rent for this particular tower, as the Commission regulations require).

This the 6th day of September, 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, and there are no parties who have been excused from the use of electronic filing procedures.

/s/ R. Brooks Herrick
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