

**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
MARSHALL**

Case No. 2022-00306

SITE NAME: CALVERT CITY

SBA PROPERTIES, LLC’S MOTION TO INTERVENE

SBA Properties, LLC (“SBA”), a Delaware limited liability company, by counsel and pursuant to 807 KAR 5:001 § 4(11), hereby moves the Public Service Commission of the Commonwealth of Kentucky (the “Commission”) for full intervention in this matter.

1. The full name and address of SBA Properties, LLC is 8051 Congress Avenue, Boca Raton, Florida 33487-1307, eroach@sbsite.com.

I. Standard for Full Intervention.

2. Pursuant to 807 KAR 5:001 § 4(11)(a), a person moving for full intervention shall be granted such status if the Commission makes either of the following determinations: (i) the movant “has a special interest in the case that is not otherwise adequately represented” or (ii) the movant’s “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.”

3. The Commission retains discretion whether to allow a party to intervene in a Commission proceeding, which requires that the Commission’s decision on a Motion to Intervene be reasonable, fair, and supported by sound legal principles. *See Enviropower, LLC v. Pub. Serv. Comm’n*, No. 2005-CA-001792, 2007 Ky. App. Unpub. LEXIS 121, at *8; *Ryan v. Ryan*, 473 S.W.3d 637, 639 (Ky. Ct. App. 2015) (“The test for abuse of discretion is whether the . . . decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. . . . Abuse of discretion implies arbitrary and capricious action that results in an unreasonable and unfair decision.”).

4. SBA’s full intervention and involvement will not unduly complicate or disrupt the proceedings, and SBA does not seek a specific ruling on Applicants’ Certificate of Public Convenience and Necessity (CPCN). SBA merely seeks to ensure that laws and regulations are fairly and uniformly applied and that the Commission enters a final order based upon presentation of all evidence required by its own regulation. SBA has a special interest in this proceeding and, given its expertise in matters pertaining to wireless communications structures, it is uniquely qualified to assist in the development of the required evidence.

II. SBA Has a Special Interest In This Proceeding that Is Not Otherwise Adequately Represented.

5. SBA owns an existing tower located at 1243 U.S. Highway 95, Calvert City, KY, 42029 (the “SBA Tower”), which is situated approximately 0.2 miles from the tower proposed to be constructed by New Cingular Wireless PCS, LLC (“AT&T”) and Harmoni Towers LLC (“Harmoni”) in this proceeding (the “Proposed Tower”).¹

¹ AT&T is currently a tenant on the SBA Tower.

6. As trade industry articles have noted, AT&T representatives have frequently made public comments noting it would seek to construct new towers as a method to cut costs, not to in any way improve coverage.

AT&T has made no secret of its desire to reduce the rent it pays to tower companies. . . . [N]ew research into the tower sector indicates that AT&T's negotiating tactics – which include the threat of building a new, cheaper tower next to an existing, expensive tower – may be mostly hot air. . . . AT&T's Susan Johnson essentially reiterated the operator's threat during a recent appearance at the Connect (X) trade show.²

7. Indeed, Exhibit I to the Application is an “Option and Lease Agreement,” which grants Harmoni Towers the option to lease the property. This Agreement was not effective until the date of the last signature – August 22, 2022 – meaning the Application was filed mere days into the Option period and no evidence has been provided that the Option has actually been exercised, committing to construction of the Proposed Tower. *See* Exhibit I to the Application.

8. The interests of nearby property owners, other members of the community, the general public, and owners of telecommunications infrastructure (who have a special interest in ensuring the Commission's regulations are uniformly and consistently applied) are not adequately represented in this proceeding, as is demonstrated by Applicants' prior arguments that technical ability, wasteful duplication, and issues bearing on the quality of services that Marshall County residents can expect to receive should not be considered by the Commission. Instead, according to Applicants, the only issue for Commission consideration is AT&T's alleged cost savings. *Compare with Ky. Utils. Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885, 890 (Ky. 1952) (“We think

² *Tower Trouble: AT&T Keeps Pushing Cell Tower Landlords to Reduce Rent*, Mike Dano, LightReading.com, June 10, 2019 (emphasis added), available at: <https://www.lightreading.com/mobile/tower-trouble-atandt-keeps-pushing-cell-tower-landlords-to-reduce-rent/d/d-id/751925>; see also *AT&T: We moved hundreds of tower sites in 2019 to get better deals*, Mike Dano, LightReading.com, June 3, 2020 (“AT&T said it continues to negotiate with cell tower owners in order to reduce spending on tower space. And the company is boasting about the results its hardball negotiating tactics are generating.” (emphasis added)), available at: <https://www.lightreading.com/4g-3g-wifi/atandt-we-moved-hundreds-of-tower-sites-in-2019-to-get-better-deals/d/d-id/761466>.

it obvious that the establishment of convenience and necessity for a new service system or new service facility requires first a showing of a substantial inadequacy of existing service. . . . The above two factors have relation to the *need* of particular customers for service. However, our concept of the meaning of ‘public convenience and necessity,’ as expressed in our decisions in previous cases, embodies the element of absence of wasteful duplication, as well as a need for service.”).

9. Furthermore, in similar past proceedings, Applicants have argued that rural Kentuckians have no “reasonable expectation of input into the . . . impact a proposed land use will have on their property.”³ However, KRS 278.650 provides that “the commission may take into account . . . the likely effects of the installation on nearby land uses and value.”

10. Simply put, SBA’s special interest is not as a competitor. It is to ensure that SBA’s ability to promote competition in the wireless telecommunications market through an existing tower with adequate existing and future capacity and coverage is preserved; that the applicable statutes and regulations are followed and applied fairly and uniformly; and that Kentucky citizens in the area can continue to receive high quality access to telecommunication networks without the need for unnecessary and wastefully duplicative towers that a coverage comparison shows will provide a similar quality of coverage.

11. As no other party, including the Attorney General, a private citizen, or a competing telecommunications service provider, has sought to intervene in this matter, these interests are not currently represented in this proceeding.

12. Accordingly, SBA respectfully requests to be granted intervention in this matter so that it may provide the Commission with required evidence not provided with the Application,

³ PSC Case No. 2020-00310, Applicants’ Response to Comments from Area Residents, at 2.

which will ensure that the Commission has the required information necessary to determine what impact the construction of the Proposed Tower will have on the ability of telecommunications providers to provide high quality services and for the residents in the surrounding areas to receive such service.

III. SBA Has the Ability to Develop Facts that will Assist the Commission in Fully Considering Whether Applicants Have Satisfied 807 KAR 5:063 Without Unduly Complicating or Disrupting the Proceedings.

13. In addition to representing a special interest not already represented in this proceeding, SBA has the ability to help develop facts that will assist the Commission in determining whether AT&T has met all the requirements of 807 KAR 5:063 and to ensure the applicable statutes and regulations are fairly and uniformly applied.

14. While the Application acknowledges that AT&T is currently co-located on the SBA Tower, the Application does not include the information required by 807 KAR 5:063 § 1(1)(s). Specifically, the Application does not provide “documentation of attempts to co-locate,” nor does the Application provide “supporting radio frequency analysis.”

15. SBA has conducted a Coverage Plot Analysis, performed by a Radio Frequency Engineer, which shows that the wireless signal AT&T currently broadcasts from the SBA Tower only 0.2 miles away covers the same area that will be broadcast from the Proposed Tower. Thus, the Proposed Tower will not allow AT&T to provide services to a currently unserved part of Kentucky and will result in wasteful duplication. This is contrary to the public notices provided by AT&T in this proceeding.

16. SBA has conducted the required coverage analysis and seeks to provide it in this proceeding – which is evidence explicitly required by 807 KAR 5:063. *See Potts v. Pub. Serv. Comm’n*, 643 S.W.3d 83, 94 (Ky. App. 2021) (“It is inappropriate for the Commission to simply

‘rubber stamp’ all requests for a CPCN through a streamlined process that might be possible when requests for intervention are habitually denied without appropriate consideration. When either prong of 807 KAR 5:001 Section 4(11)(b) is established, the Commission ‘shall’ grant the person leave to intervene.” (emphasis added)).

17. Further, placing the Proposed Tower only 0.2 miles from the existing SBA Tower may lead to signal interference, which may impair the ability of SBA’s other existing or future tenants to provide quality service to their customers and impair the ability of citizens in the surrounding area to receive high quality telecommunications services. Additionally, as noted above, a comparison of coverage performance for the area shows that the Proposed Tower would provide comparable coverage and amount to an unnecessary overbuild of telecommunications towers in the area.

18. In fact, on the existing SBA Tower, AT&T leases space for antennas at 213 feet. Based upon a review of the Application, it appears AT&T is proposing to place an antenna array at 215 feet at the Proposed Tower. Thus, there are significant questions as to whether the proposed tower will actually offer any new service at all.

19. Consequently, SBA’s participation will be crucial to the development of required facts that will assist the Commission in evaluating the sufficiency and credibility of the Applicants’ evidence or lack thereof, as well as in otherwise determining whether the proposed CPCN should be granted. Given SBA’s expertise in the field, it will also help present other issues that may merit consideration as the Commission evaluates the Application, which were absent from the Application and not presently before the Commission.

20. Indeed, since 2020, AT&T has sought a CPCN to construct at least thirty-six (36) new wireless towers across the Commonwealth, and in none of those cases is SBA aware that

another entity in the telecommunications industry or the Attorney General of the Commonwealth of Kentucky sought intervention.

21. Moreover, in most, if not all, of those proceedings, the Commission has entered a final order without a single data request to the Applicants from Commission staff.

22. Thus, in all of those cases the Commission has been required to (or likely will be required to) issue its order without the benefit of an intervening party possessing the industry knowledge and expertise to assist the Commission in developing facts relevant to the determination of whether AT&T has met all requirements of 807 KAR 5:063 and whether Kentuckians will be best served by the construction of an additional wireless communications facility.

23. While the Commission has historically, on occasion, granted intervenor status to individual property owners who own land near a proposed tower, it is unlikely that these individual landowners have the expertise to provide information that would assist the Commission in its determination on issues related to coverage area and interference.

24. In addition to providing the required radio frequency analysis, SBA can also provide testimony related to AT&T's attempts to co-locate on the SBA Tower. Indeed, despite the fact that AT&T is currently located on the SBA Tower only 0.2 miles away from the Proposed Tower, AT&T's Application provides the Commission with no information related to its attempts to co-locate. 807 KAR 5:063 § 1(1)(s) specifically requires AT&T to provide information related to its attempts to co-locate, "including documentation," yet none is provided with the Application.

25. AT&T has successfully completed multiple lease renegotiations on the existing tower, and the day before filing its Notice of Intent in this case, allowed the existing tower lease to renew for an additional term without any attempt at negotiation with SBA.

26. SBA can assist the Commission in developing facts related to negotiation history, which bears directly on the Commission's determination under 807 KAR 5:063 § 1(1)(s).⁴

27. Thus, because AT&T has failed to provide any evidence of its attempts to co-locate on an existing tower only 0.2 miles away from the Proposed Tower, or provide a radio frequency analysis and signal comparison to show that the Proposed Tower will provide substantially similar coverage to a substantially similar area, SBA should be allowed to intervene to provide the Commission with facts that it is required to consider by 807 KAR 5:063 § 1(1)(s), but which AT&T has omitted.

28. Additionally, the Application makes multiple wholly unsupported claims related to the SBA Tower and its "reasonable" availability for co-location. The Application makes clear that SBA is a necessary party to this proceeding and SBA should be given an opportunity to refute the misleading, derogatory statements directly levied at SBA. Indeed, SBA is the only party that has access to the facts necessary for the Commission to consider when determining the veracity of the allegation that the existing SBA Tower does not provide a reasonable co-location opportunity.

29. Finally, granting intervention to SBA will not unduly disrupt or overcomplicate this proceeding. SBA is committed to complying with all orders of the Commission, including all scheduling deadlines, and SBA will not unduly complicate or disrupt these proceedings. Instead, introduction of studies and testimony from a party with industry knowledge and expertise will facilitate the Commission's development of all necessary facts and consideration of all relevant issues.

⁴ 807 KAR 5:063 § 1(1)(s) ("A statement that the utility has considered the likely effects of the installation on nearby land uses and values and has concluded that there is no more suitable location reasonably available from which adequate service to the area can be provided, and that there is no reasonably available opportunity to co-locate, including documentation of attempts to co-locate, if any, with supporting radio frequency analysis, where applicable, and a statement indicating that the utility attempted to co-locate on towers designed to host multiple wireless service providers' facilities or existing structures, such as a telecommunications tower, or another suitable structure capable of supporting the utility's facilities.").

30. Accordingly, the Commission should grant SBA's motion for full intervention.

This the 15th day of September, 2022.

Respectfully submitted,

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Certification

I hereby certify that a copy of this Motion to Intervene has been served electronically on all parties of record through the use of the Commission's electronic filing system, and there are currently no parties that the Commission has excused from participation by electronic means. 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.

/s/ R. Brooks Herrick
Counsel to SBA Properties, LLC