

**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 TILLMAN INFRASTRUCTURE  
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  
BALLARD**

Case No. 2022-00414

**SITE NAME: KEVIL RELO**

**TV6 HOLDINGS LLC’S REPLY IN SUPPORT OF  
MOTION TO INTERVENE**

TV6 Holdings LLC (“TV6”), by counsel, hereby files its Reply in Support of its Motion to Intervene. In support of its Reply, TV6 states as follows.

**1. New Cingular Wireless PCS, LLC Has Argued in Prior Proceedings that TV6 Satisfies the Standard for Intervention.**

New Cingular Wireless PCS, LLC (“AT&T”) and the Public Service Commission of Kentucky (the “Commission”) have acknowledged in similar proceedings that a party in the position of TV6 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.” *See* 807 KAR 5:001 § 11(b). In the consolidated appeal from 14 Commission orders denying an existing tower owner’s request for intervention, AT&T sought intervention in the appeal. AT&T explicitly argued

that the Commission could not adequately represent the Commission's own interests in upholding its orders without assistance from AT&T. Specifically, AT&T argued:

- [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 and have defended similar approvals from challenges by SBA across multiple jurisdictions. . . . In addition to all of the above interests which the PSC cannot adequately represent . . . .<sup>1</sup>
- SBA's complaint includes discussion of several factual matters involving the Movants including documentation of AT&T's attempts to co-locate on reasonably available towers and AT&T's attempts to negotiate with SBA. . . . 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.<sup>2</sup>

In other words, AT&T has already argued in similar proceedings 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, TV6 is in a position to provide the Commission with facts related to AT&T's attempts (or lack thereof) to co-locate on existing cellular towers, as is explicitly required by Commission regulation.

The Commission assented to these arguments when it failed to object to the Motion to Intervene in the appeals. In fact, at Motion Hour held before the Franklin Circuit Court on March 23, 2022, counsel for the appellants explicitly read these portions of the Motion aloud. At no point did the Commission, who was represented by counsel at Motion Hour, object to AT&T's request for intervention on this basis, nor did the Commission note any objection to the portions of the motion read aloud by counsel for the appellants.

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<sup>1</sup> 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 (emphasis added).

<sup>2</sup> *Id.* at 8 (emphasis added).

Therefore, AT&T has 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 TV6; and (2) as a party to the prior negotiation history (or lack thereof), TV6 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 AT&T's 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 (including coverage issues raised in the Application) and the ability of TV6 to present facts related to negotiation history with AT&T, TV6 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).

## **2. TV6 Has Already Proven its Participation Will Help Develop Facts and Issues.**

Merely by filing a Motion to Intervene, TV6 has proven that it will help develop facts and issues that will assist the Commission. 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 argue that “any other 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 is simply inapposite and merely distracts from the dispositive issue.”<sup>3</sup>

However, this argument is directly contrary to the representations made in the Application and the public notices sent to local officials and citizens of Ballard County.

- “The WCF is an integral link in AT&T Mobility’s network design that must be in place to provide adequate coverage to the service area.”<sup>4</sup>
- “This facility is needed to provide improved coverage for wireless communications in the area.”<sup>5</sup>

Accordingly, merely by filing a Motion to Intervene, TV6 has clearly shown that it will assist in the development of facts and issues to assist the Commission, as substantial questions have now been raised as to whether construction of a new facility is actually needed for improved coverage to the service area – despite Applicants representations to the Commission, public officials, and citizens of Ballard County that the proposed tower is needed for improved coverage.

Moreover, Applicants allege a rental disparity without presenting any specific evidence relating thereto. As Lessor at the nearby tower where AT&T is currently collocated, TV6 has the ability to provide the Commission with facts that will allow the Commission to determine whether the factual assumptions made to arrive at the alleged rental disparity are reasonable. In order for the Commission to make a determination that the existing tower is not “reasonably available” due to a rental disparity, as alleged by Applicants, the Commission will need the information that can be provided by TV6 to test the veracity of Applicants’ proffered legal conclusion, which is supported by absolutely no evidence of record.

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<sup>3</sup> Applicants’ Response to Motion to Intervene, at 2-3.

<sup>4</sup> Application, at ¶ 7 (emphasis added).

<sup>5</sup> Application, at Exhibit K; Exhibit L (emphasis added).

TV6's intervention is also necessary to further develop facts and issues related to AT&T's attempts to co-locate on other towers in the area. AT&T's Response notably fails to allege that it sought to co-locate on the existing tower prior to filing the Application, claiming that "efforts at negotiation are futile."<sup>6</sup> However, AT&T claims to know that TV6 Holdings LLC is a subsidiary of SBA Communications Corporation.<sup>7</sup> As the Commission is well-aware, other subsidiaries of SBA Communications Corporation have expressly offered to actually beat alternative rental terms offered to AT&T, which has been well-documented through multiple Commission proceedings. AT&T has never accepted any of those offers, opting instead to pay more. In the face of numerous, well-documented examples of SBA subsidiaries attempting to negotiate with AT&T, the Commission should not countenance claims of "futility" to satisfy the legal requirements contained in the regulations promulgated by the Commission.

Finally, while Applicants' Response attempts to convince the Commission that TV6's only interest lies in remaining the "only" tower owner in the area, publicly available documents from the FCC's website disclose otherwise. Attached hereto as Exhibit 2 is the FCC's records of cellular towers currently available for co-location in Ballard County. The records reflect multiple wireless communication facilities, which are owned by numerous different entities. Thus, TV6 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 TV6 tower on which AT&T 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

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<sup>6</sup> Response to Motion to Intervene, at 2 n.1.

<sup>7</sup> *Id.* at 1.

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.”).

**3. Applicants Seek to Litigate Critical Facts and Issues Without the Development of Facts and Evidence.**

In seeking to prevent intervention by TV6 to assist the Commission with testing the veracity of factual representations made by Applicants, Applicants repeatedly seek to have the Commission reach legal conclusions without any evidence – and explicitly ask that TV6 not be allowed to intervene to provide or help develop such evidence. However, the Commission may not make legal conclusions based upon unsupported assertions made for the first time in response to a Motion to Intervene.

SBA can assist the Commission in developing facts and issues germane to the question of whether Applicants have met their burden of proof to show that the proposed tower is required by the public convenience and necessity – including whether the alleged rental disparity was calculated in a reasonable manner based upon justifiable, historical actions of AT&T and whether coverage would actually be improved by the proposed tower, as was explicitly alleged in the Application and legally required public notices.

**WHEREFORE**, TV6 Holdings LLC respectfully requests that the Commission grant its Motion to Intervene.

This the 22nd day of December, 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  
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