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 TILLMAN INFRASTRUCTURE LLC, A DELAWARE	)	
LIMITED LIABILITY COMPANY	)	
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC	)	CASE NO.: 2024-00284
CONVENIENCE AND NECESSITY TO CONSTRUCT	)	
A WIRELESS COMMUNICATIONS FACILITY	)	
IN THE COMMONWEALTH OF KENTUCKY	)	
IN THE COUNTY OF GRAYSON	)	

SITE NAME: FALLING BRANCH

* * * * * * *

APPLICANTS' REQUEST FOR "ON THE RECORD" FINAL DECISION

New Cingular Wireless PCS LLC d/b/a AT&T Mobility ("AT&T") and Tillman Infrastructure LLC, a Delaware limited liability company ("Tillman") (collectively, "Applicants"), by counsel, hereby timely file this Request for an "On the Record" Final Decision in this proceeding without further public hearing.[1]

Public Hearing is Duplicative. The Public Service Commission of Kentucky ("PSC") has only held full in-person public hearings on a miniscule number of requests for Certificates of Public Convenience and Necessity ("CPCNs") for the construction

[1] The Procedural Schedule incorporated in the PSC's Order entered January 7, 2025 in the within proceeding provides for the parties to either request a hearing or "on the record" decision on the Application by March 5, 2025.

of cellular antenna towers since adoption of KRS 278.650. Moreover, the PSC has already held a public hearing on the proposal for a cellular antenna tower on the property of Terry and Kimberly Newton ("Newton Property') on July 27, 2023 in Case No 2021-00398 and compiled a full record which has been incorporated into this proceeding.[2]

The within proceeding likewise involves a proposed cellular tower on the Newton property, with the difference being that the tower site has been moved approximately 240 feet further away from the Interveners' residence as a compromise in good faith to attempt to alleviate any concerns of Interveners.[3] Conducting a new public hearing in these circumstances would be duplicative and provide no new information which would assist the PSC's deliberations on the Application.

Prolonging this proceeding filed November 20, 2024 for a hearing months down the road from today is further inconsistent with the FCC 150-day "Shot Clock"[4] and the federal Telecommunications Act's requirement for state or local permitting authorities to act in a reasonable time.[5]

Interveners have No Water Rights on Newton Property. The Interveners have attempted to raise an issue of potential interference with purported water rights due

[2] See PSC Order entered January 7, 2025 in the within proceeding.

[3] As stated in the Application filed in this proceeding, "the proposed site location is approximately 240 feet further from the Intervenors' residence than the original site location."

[4] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv*. ("2018 Third Report and Order"), 33 F.C.C. Rcd. 9088, ¶ 104 (2018).

[5] 47 USC Section 332(c)(7)(B)(ii).

to the location of the proposed tower and its access path via their recently filed Rebuttal Testimony. To start with, Interveners have made a highly speculative and premature allegation and are attempting to entwine the PSC into issues outside its jurisdiction.[6] Moreover, Interveners' argument arises from a false assumption that they have any water rights at all on the property of Terry and Kimberly Newton.

The Interveners' September 13, 2016 deed to the property on which their residence is located, as recorded in Deed Book 452, Page 205 in the office of the Grayson County Clerk[7], expressly references a Plat recorded in Plat Book 2, Page 600 in the Office of the Grayson County Clerk ("Plat") on October 27, 2015.[8] The Plat states in pertinent part:

> **"There is an easement for the use repair/replace for the spring shown hereon and the service lines to the house located on Lot 1. If the house is ceases use of said spring, this easement is dissolved."**

Dickerson v. Stephens, 2007 Ky. App. Unpub. LEXIS 661 illustrates the import of the Plat:

> "We further agree with the trial court that restrictions can be placed upon property by a recorded plat. When lots are sold in reference to the recorded plat, the restrictions become one with the deeds and with the chain of titles and constitute constructive public notice. *Parrish v, Newbury*, 279 S.W.2d 229, 232 (Ky. 1955)."

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[6] The PSC's jurisdiction arises from KRS 278.040. See also KRS 278.650 and the PSC's regulations and 807 KAR Section 5: Regulation 063. None of those enactments contemplate the PSC making determinations as to whether to grant a CPCN on the basis of potential violation of disputed easement rights of any kind. See also *PSC vs. Jackson County RECC*, 50 S.W.3d 764 (Ky. App. 2001) as to jurisdiction of the PSC.

[7] A copy of said Deed was attached as Exhibit E to Interveners' Response to Requests for Information filed herein on February 21, 2025.

[8] A copy of said Plat is included in Applicants' Rebuttal Testimony filed herein on February 28, 2025.

In accord is *Studer v. Jackson*, 2010 Ky. App. Unpub. LEXIS 354 (… [T]here are plats recording the existence of the easement, and it is therefore established by express written grant.")

Applicants tendered a Request for Information to Interveners stating:

> **"13. Has there been any period since purchase of your property in Grayson County during which you have used water from a spring on the property of Terry and Kimberly Newton for service to a residence on your property?**

Interveners answered such Request in pertinent part as follows in a Response to Applicants' Requests for Information filed with the PSC in this proceeding on February 20, 2025:

> **"However, to answer your question, we have not used water from the spring since we purchased the property in the summer of 2016. This is not due to lack of desire, as the availability of spring water was a significant factor in our decision to buy this farm and be as self-sufficient as possible.**
>
> **… Unfortunately, we have not yet had the extra funds needed to tap into the spring. In the meantime, we have relied on the county water connection that the seller provided in the closing of the sale; we have also utilized rainwater collection. We fully intend to access the spring as soon as we have the necessary funds for the project."**

The Plat does not contemplate the "*desire*" or the "*intent*" of the property owner seeking to use purported water rights. As shown above, the Plat plainly states that if the property owner (i.e. the Interveners herein) ceases to use the water rights the easement is *dissolved*. *Sawyers v. Beller*, 384 S.W.3d 107 (Ky. 2012) illustrates why the plain language of the Plat is critical to the issue of water rights:

> In the case of an express easement, such as is present in the instant case, the terms of the conveyance determine the rights and liabilities of the parties. *See Texas E. Transmission Corp. v. Carman*, 314 S.W.2d 684, 687 (Ky. 1958) (citing *Puckett v. Hatcher*, 307 Ky. 160, 209 S.W.2d 742, 744

> (Ky. 1948)). If the language is unambiguous, the intent of the parties at the time the easement agreement was executed must be determined from the context of the agreement itself. (Emphasis added). *Id*.

The Interveners' argument that the PSC should further consider purported water rights is wholly discredited as a result of the Plat. There is no basis for the PSC to conduct a further public hearing as to what impact the proposed tower might have on Intervener water rights because *the Interveners have no such rights due to admitted nonuse of the easement*. Final decision on the record is appropriate in this context.

Easements may not be enlarged on or extended so as to increase the burden on or interfere with the servient estate (i.e. the Newton Property). *City of Williamstown v. Ruby,* Ky., 336 S.W.2d 544 (1960). However, that is exactly what Interveners are trying to assert in seeking to overcome the express language in the easement which dissolves the right if there is no continuous use of the stream. Interveners should not be allowed to overreach the scope and very existence of a water rights easement in order to shoehorn such issue into a proceeding for grant of a CPCN to the extent of requiring a public hearing. No public hearing is warranted on Interveners' water rights claims.

Interveners' Property Valuation Articles/Studies Fail to Justify a Public Hearing. Interveners have referenced in this proceeding the same property valuation articles they referenced in PSC Case No 2021-00398. Applicants made a Motion in such case to exclude such testimony for failure of Interveners to include authors of such articles in their Witness List on grounds of due process rights of Applicants to cross-examination. Said Motion, as filed July 24, 2023, was not ruled upon. Applicants incorporate said Motion by reference in this filing and reiterate and restate it to the extent any public hearing

is scheduled.

The right to cross-examine witnesses offering evidence has often been found essential to due process in administrative hearings. As the Kentucky Supreme Court explained in *Kaelin v. Louisville*, 643 S.W.2d 590, 592 (Ky. 1982), "[w]e hold that, in a trial-type adjudicatory hearing before an administrative body, the right of cross-examination is required by due process of law."

Considering the right to cross-examination, Applicants request that should the PSC schedule a public hearing, that Interveners be required produce authors of any articles/studies they attempt to rely upon as evidence to be cross-examined under oath by counsel for Applicants at such public hearing. In the absence of the presence of such Interveners' witnesses, no public hearing should be scheduled and this proceeding should be decided "on the record."

Applicants' Expert Radio Frequency Engineering Testimony is Uncontroverted.

Applicants filed a Supplemental 2024 Radio Frequency Engineering Statement in Support of Application for Certificate of Public Convenience and Necessity by Radio Frequency Engineer Sherri Lewis in this proceeding on December 12, 2024. This Report documents the significant gap in coverage in the area and the alleviation of that gap in service should the proposed tower be approved and constructed. (Said Report was also included in Applicants' Rebuttal Testimony herein filed February 28, 2025.) This Report constitutes expert testimony in support of the application on the critical radio frequency engineering issues.

In addition, Applicants' Response to Interveners' Requests For Information was filed January 22, 2025 in the within proceeding and included an incorporated Affidavit of Sherri

Lewis addressing collocation inquiries raised by Interveners. The lay Interveners have filed no contradictory *evidence* rebutting such Report or Affidavit.[9] Thus, with the Report being uncontroverted, there can be no radio frequency need or purported collocation issue which should be addressed in a public hearing.

CONCLUSION

WHEREFORE, the Applicants, by counsel, request the PSC to accept this request for filing, grant their request for an "On the Record" Final Decision, and/or grant Applicants any other relief to which they are entitled.

Respectfully submitted,

David A. Pike

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and

F. Keith Brown

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[9] As the PSC is well aware, lay testimony cannot be relied upon by the PSC on radio frequency need or alternative site radio frequency engineering feasibility issues so as to contradict expert testimony offered by Applicants. See *Cellco Partnership vs. Franklin County, Ky., et al*, *553 F. Supp. 2d 838* (E.D. Ky. 2008) and *T-Mobile vs. Charter Township of West Bloomfield*, *691 F.3d 794 (6th Cir. 2012).*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of March, 2025, a true and accurate copy of the foregoing was emailed to Janelle, electronically filed with the PSC, and sent by U.S. Postal Service first class mail, postage prepaid, to the Intervening Parties at the following address:

Roger and Janelle Nicolai
2663 Blue Bird Road
Falls of Rough, KY 40119

Respectfully submitted,

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