

**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’ RESPONSE AND OBJECTION TO INTERVENERS’  
PURPORTED “APPEAL” AND TO ALL COMMENTS PLACED IN CASE FILE  
OPPOSING FINAL ORDER OF APRIL 7, 2025**

**1.0 INTRODUCTION**

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 file this Applicants’ Response and Objection to Interveners’ purported “*Formal Appeal of PSC Decision in Docket #2024-00284 (Also referencing Docket # 2021-00398).*” Said document was apparently e-mailed to the Public Service Commission (“PSC”) Executive Director on April 24, 2025.

Interveners are entitled to no relief as a result of such document because of: (1)

their failure to properly invoke the jurisdiction of the Public Service Commission (“PSC”); (2) the lack of merit of Interveners’ arguments and (3) the raising of waived arguments which should have been preserved and evidenced prior to the PSC’s Final Order of April 7, 2025. All other written comments included in the case file from persons not parties to this proceeding are likewise irrelevant and justify no amendment, withdrawal or rehearing of the PSC’s Final Order of April 7, 2025.

## **2.0 FORM OF PURPORTED “APPEAL”**

KRS 278.410 only contemplates “appeals” of Orders of the PSC to be made to Franklin Circuit Court. Accordingly, the document e-mailed to the PSC’s Executive Director by the Interveners is plainly not an appeal.

Neither KRS Chapter 278 nor any regulation adopted by the PSC contemplates a pleading in the nature of a motion for general reconsideration or *“request for further review of the facts and circumstances surrounding the case”* as the Interveners request.<sup>1</sup> Interveners’ document further asks *“... the Commission to revisit its decision in Docket #2024-00284, and ... that the matter be reopened for additional review.”* The original application for a Certificate of Public Convenience and Necessity (“CPCN”) for a tower on the Newton property in Grayson County was filed in 2021 with a public hearing before the PSC Commissioners on *July 27, 2023* in Case No. 2021-00398. “Additional review,” as now requested by Interveners, is not by any means warranted at this late date.

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<sup>1</sup> “An administrative body's powers are defined and limited by the agency's enabling statute.” *Kentucky Real Estate Com'n v. Milgrom*, 197 S.W.3d 552, 554 (Ky. App. 2005) (citation omitted)

### **3.0 STATUTORY STANDARD FOR REHEARING**

KRS 278.400 does contemplate an Application for Rehearing under statutory limitations as follows:

“After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined. Service of a commission order is complete three (3) days after the date the order is mailed. The application shall specify the matters on which a rehearing is sought. The commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application. Notice of the hearing shall be given in the same manner as notice of an original hearing. Upon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing. Upon the rehearing, the commission may change, modify, vacate or affirm its former orders, and make and enter such order as it deems necessary.” (Emphasis added).

Applicants object to the April 24, 2025 filing, which does not identify itself as an Application for Rehearing under KRS 278.400, as being considered by the PSC as anything other than a superfluous comment. Interveners seem to contemplate some form of open-ended review of their favored issues. Should the PSC nonetheless treat the e-mailed document as an Application for Rehearing, it still should nonetheless be denied under all applicable law as detailed below.

### **4.0 APPLICATION OF STRICT COMPLIANCE DOCTRINE PREVENTS REHEARING**

The PSC has stated “[w]hen a statute establishes a right of rehearing, there must be strict compliance with the requirements set forth in the statute” and has cited the seminal administrative law precedent of *Board of Adjustments of City of Richmond*

*v. Flood*, 581, S.W.2d 1, 2 (Ky. 1978) in support of such proposition.<sup>2</sup> The strict compliance doctrine of *Flood* has long been applied in connection with parties contesting orders of the PSC before the judiciary in decisions such as *Ky. PSC v. Shadoan*, 325 S.W.3d 360 (Ky. 2010) and *Louisville Gas & Electric Company v. Hardin and Meade County Prop. Owners, ex rel, Co-Location*, 318 S.W.3d 385 (Ky. 2010).

No actual “filing” of the Interveners’ April 24, 2025 document has occurred as evidenced from the docket for this proceeding appearing on the PSC web page. The Interveners only e-mailed the PSC Director on the document. They did not include a Certificate of Service to Applicants’ Counsel at our address of record in the Case file for Docket #2024-00284.<sup>3</sup> Neither did they e-mail counsel of record for Applicants. Moreover, counsel of record for Applicants has not received the document by U.S. Postal Service Mail or any other method except for the PSC e-mail notice of the “posting” of the document under the “Post Case” classification.

Interveners further did not file the April 24, 2025 document with the PSC electronic filing system and in compliance with its protocols and Orders. In fact, the

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<sup>2</sup> See *PSC Order in the Matter of David I. Dawley, Complainant v. Duke Energy Kentucky, Inc., Defendant*, 2018 Ky. PUC LEXIS 1138 (Dec. 14, 2018) [Case No. 2018-00259].

<sup>3</sup> 807 KAR Chapter 005, Regulation 001 – Section 4(8) provides in pertinent part:

- (a) Unless the commission orders service upon a party and the party’s attorney, service shall be made upon the party’s attorney if the party is represented by an attorney.
- (b) Service upon an attorney or upon a party by the commission shall be made by sending a copy by electronic mail to the electronic mail address listed on papers that the attorney or party has submitted in the case....

PSC's January 7, 2025 Order in the within proceeding plainly directed that "*The Nicolais shall comply with all provisions of the Commission's regulations, 807 KAR 5:001, Section 8, related to the service and electronic filing of documents.*"<sup>4</sup> Said Section 8, at Subsection (3) provides in pertinent part: "*All papers shall be filed with the commission by uploading an electronic version using the commission's e-filing System at <http://psc.ky.gov>.*" Section 8, Subsection 5 goes on to detail further requirements for such filings. Simply sending an e-mail to the PSC Executive Director does not remotely meet the filing requirements of 807 KAR Chapter 005, Regulations 001, Section 8.

Accordingly, the April 24, 2025 document has never actually been timely "filed" with the PSC and no Application for Rehearing or any other form of request for relief has been perfected. Therefore, the PSC now has no jurisdiction to grant Rehearing, considering the 20-day filing deadline of KRS 278.400 has expired prior to the filing of this Response so as to leave no opportunity for an amended filing under *Flood*, *supra*, and its progeny. The short 20-day period for the PSC to make a decision on an Application for Rehearing as established in KRS 278.400 makes proper and timely filing of any Application for Rehearing under the statute all the more important.

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<sup>4</sup> Likewise, the PSC's Order of December 6, 2024 in the within proceeding provided:

"Any party filing a paper with the Commission shall file an electronic copy in accordance with the electronic filing procedures set forth in 807 KAR 5:001, Section 8. Electronic documents shall be in portable document format (PDF), shall be searchable, and shall be appropriately bookmarked. The Commission directs the parties to the Commission's July 22, 2021 Order in Case No. 2020-000852 regarding filings with the Commission.

## 5.0 THERE IS NO SUBSTANTIVE BASIS FOR REHEARING

Regardless of the infirmities in filing of the April 24, 2025 document, the document is substantively without merit under the statutory standard for Rehearing. KRS 278.400 only contemplates evidence being offered in rehearing which “ ... **could not with reasonable diligence have been offered on the former hearing.**” All of the issues raised in the April 24, 2025 document could have been addressed by Interveners long ago going back to the June 27, 2023 public hearing before the PSC Commissioners themselves. Furthermore, the Interveners did not even request a further public hearing as they were allowed to do so through March 5, 2025 by the January 7, 2025 Order of the PSC in Docket #2024-00284. The January 7, 2025 Order also allowed Interveners to offer evidence, which could have included evidence on the issues they now raise, but they failed to do so. Thus, they waived any opportunity to address the issues raised in the April 24, 2025 filing.

Interveners have received their notice and opportunity to be heard which is all that is required in Kentucky administrative agency proceedings before the PSC as governed by KRS Chapter 278, the PSC’s implementing regulations, and appellate precedent.<sup>5</sup> Moreover, as the Court of Appeals explained in *Iola Capital v. Pub. Serv. Com. of Ky.*, 659 S.W.3d 563, “[t]he process that was due the appellants is only that set out in the statutes and regulations governing proceedings before the Commission.”

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<sup>5</sup> See generally *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 590, 42 05 Ky. L. Summary 37 (Ky. 1995); and *Bee’s Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765, 766 (Ky. 1960). See also *Hampson v. Boone County Planning Comm’n*, 460 S.W.3d 912 (Ky. App. 2014)(discussing due process in connection with a hearing on a Uniform Application for permitting a new cellular antenna tower before a planning commission).

The PSC has often stated that **“Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the Original Order.”**<sup>6</sup> Property valuation issues were addressed by written filings and testimony in the June 27, 2023 public hearing.<sup>7</sup> Furthermore, the PSC’s Order of April 7, 2025 explained why the agency could not deny the application for a CPCN based on argument and filings of Interveners as to property valuation issues.

The PSC has further recognized that **“new arguments”** do not provide a basis for rehearing.<sup>8</sup> However, Interveners’ protests as to “the future of agriculture in Kentucky”, an alleged conflict of interest of a PSC Commissioner, and as to KRS 411.530, are all such new arguments not previously raised in the administrative record or prior public hearing or otherwise preserved. In addition, Interveners’ claim that the “... additional cell tower was never proven to be necessary....” is preposterous in light of the filed and uncontroverted expert testimony of Radio Frequency Engineer Sherri Lewis.<sup>9</sup> It is far too

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<sup>6</sup> See PSC Orders: *In the Matter of Lesley Vowels, Complainant v. Louisville Gas and Electric Company, Defendant*, 2023 KY. PUC LEXIS 985 (December 21, 2023) [Case No. 2023-00288]; *In the Matter of Electronic Application of Kentucky Power Company for a CPCN*, 2018 KY. PUC LEXIS 1040 (November 14, 2018) [Case No. 2017-00328]

<sup>7</sup> The April 24, 2025 filing of Interveners alleges the applicants’ property valuation expert witness who testified at the July 27, 2023 hearing was *“found to have provided false statements and manipulated data in his written testimony.”* No such findings were made in any Order of the PSC. Such allegation is patently false. The PSC is requested to strike this allegation from the record and/or point out the absence of any such adverse finding in its ruling on Interveners’ filing.

<sup>8</sup> See PSC Order: *In the Matter of David L. Dawley, Complainant v. Duke Energy Kentucky, Inc., Defendant*, 2018 Ky. PUC LEXIS 1138 (December 14, 2018) [Case No. 2018-00259].

<sup>9</sup> 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

late to now raise such issues. No rehearing should be granted on any such basis.

The doctrine of waiver is deeply embedded in Kentucky administrative law and must be applied to deny any request for relief identified in the April 24, 2025 document. See *Wilson v. Kentucky Unemployment Ins. Com'n*, 270 S.W.3d 915, 917 (Ky. App. 2008) and *Urella v. Kentucky Bd. of Medical Licensure*, 939 S.W.2d 869 (Ky. 1997). Allowing Interveners to protract this proceeding with new issues would violate the waiver doctrine, KRS 278.400, and Applicants' rights to substantive due process. Moreover, it would create the type of Orwellian tower permitting process inconsistent with the federal Telecommunications Act as explained in decisions such as *Masterpage Communications v. Town of Olive*, 418 F.Supp. 2d 66, 77 (N.D. New York 2005).

In closing on the merits of Interveners' April 24, 2025 document, Applicants must state that Interveners show no appreciation of the importance of *burden of proof* and offering of actual *evidence* in advancing claims to contest or seek rehearing of a Final Order of the PSC. Rehearing is in the discretion of the PSC, not a matter of right. A Court may vacate or set aside an Order of the PSC only if it is unlawful or unreasonable. KRS 278.410; See *Commonwealth ex rel. Stephens v. South Cent. Bell Tel. Co.*, 545 S.W. 2d 927, 931 (Ky. 1976). A PSC Order is unlawful if it violates a state or federal statute or constitutional provision. *National-Southwire Aluminum Co. v. Big River Elec. Co.*, 785 S.W.2d 503, 510 (Ky. Ct. App. 1990). A Commission order is unreasonable "only when it is determined that the evidence presented leaves no room for difference of opinion among reasonable minds." *Id.* (citing *Energy Regulatory Comm'n v. Ky. Power Co.*, 605 S.W.2d

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service should the proposed tower be approved and constructed. (Said Report was also included in Applicants' Rebuttal Testimony herein filed February 28, 2025).



46, 50 (Ky. Ct. App. 1980)). Moreover, pursuant to KRS 278.430, any party seeking to set aside a determination of the Commission bears the burden of proof to show by clear and satisfactory evidence that the Commission's determination is unlawful or unreasonable.

Intervenors should not be able to make a generalized and gratuitous request for some further review by the PSC and expect the PSC to ignore the high legal standards which apply to any challenge to a Final Order of the PSC. Ultimately, no sound basis for alteration of the April 7, 2025 Order of the PSC or for further evidentiary rehearing has been advanced by either the Intervenors or non-parties recently offering public comment.

## **6.0 REHEARING WOULD RESULT IN AN FCC “SHOT CLOCK” VIOLATION**

The within Application for a CPCN for a new tower in Grayson County was filed November 20, 2024, with a “no deficiency” letter being issued by PSC Staff on November 22, 2024. The FCC “Shot Clock”<sup>10</sup> requires state and local governments to make final decisions on new tower permitting applications within one hundred and fifty (“150”) days of filing. Such 150 days for the pending application expired no later than April 19, 2025. At this point, any Rehearing would necessarily push the final decision of the PSC well beyond the “Shot Clock” deadline. *New Cingular Wireless PCS, LLC v. Town of Stoddard*, 853 F. Supp. 2d 198 (D. N. H. 2012) is persuasive in explaining why a rehearing process does not allow a permitting authority to escape application of the 150-day “Shot Clock.”<sup>11</sup>

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<sup>10</sup> 24 F.C.C.R. 13994, 13996. See *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863, 11-1545, 2013 WL 2149789 (U.S. May 20, 2013) upholding FCC “Shot Clock.” See also Wireless Infrastructure Report and Order, FCC 14-153 (October, 2014) stating “Shot Clock” runs from initial submission of application.

<sup>11</sup> The U.S. District's Court for New Hampshire well explained the interplay between the “Shot Clock” and procedures for reconsideration/rehearing as follows:

“While this court's interpretation of the Telecommunications Act and the [FCC “Shot Clock”] Ruling is based on their language, it is also

The only basis for the PSC to justify failure to comply with the “Shot Clock” deadline is to show the delay is “reasonable” so as to rebut applicable presumptions. Interveners have failed to meet jurisdictional requirements for filing a timely Application for Rehearing pursuant to KRS 278.400 and have wholly failed to meet the substantive requirements for such an Application. Moreover, they are largely advocating further proceedings on matters that have been waived by their failure to raise them earlier when they had ample opportunity to do so. No federal court could find delay in a final decision beyond the “Shot Clock” deadline to be “reasonable” under such unpersuasive facts, circumstances, and circumvention of applicable law. Consequently, the PSC should not allow the Interveners to persuade it to violate the federal “Shot Clock” deadline with no rational basis for doing so.

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buttressed by practical considerations. To conclude that a rehearing under New Hampshire law is exempt from the Shot Clock Ruling's deadlines would encourage great mischief. A local zoning board of adjustment, acting in concert with the board of selectmen or other party authorized to move for rehearing under N.H. Rev. Stat. Ann. § 677:2, could easily avoid the Shot Clock Ruling by voting to approve an application within the deadline—which, under the Town's interpretation, is all the ruling requires—and then grant rehearing. Because New Hampshire law imposes no time limits on rehearings, once rehearing had been granted, the zoning board would be free to take as long as it wished to address the application. This would render the deadline set forth in the Shot Clock Ruling a dead letter, and undermine the Shot Clock Ruling's stated goal of "encourag[ing] the expeditious deployment of wireless broadband services." Shot Clock Ruling, 24 FCC Rcd. at 14005, ¶ 32. These considerations, though they would not lead this court to ignore clear statutory or regulatory language to the contrary, illustrate the dangers inherent in the Town's construction of the Act and the Shot Clock Ruling." [footnotes/citations omitted].

## 7.0 CONCLUSION

WHEREFORE, the Applicants, by counsel, request the PSC to deny any relief requested by Interveners in their April 24, 2025 filing, whether construed as an Application for Rehearing, or as any other plea for relief. Applicants further request no relief be granted to non-party persons whose public comments have recently been included in the case file. The PSC is further requested to grant CPCN Applicants New Cingular Wireless PCS, LLC and Tillman Infrastructure, LLC 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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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of May, 2025, a true and accurate copy of the foregoing was emailed to Janelle Nicolai (Janelle.nicolai@gmail.com), electronically filed with the PSC, and sent by U.S. Postal Service first class mail, postage prepaid, to the Interveners at the following address:

Roger and Janelle Nicolai  
2663 Blue Bird Road  
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Respectfully submitted,

*David A. Pike*

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