

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| APPLICATION OF NEW CINGULAR WIRELESS |) | |
| PCS, LLC FOR ISSUANCE OF A CERTIFICATE OF |) | |
| PUBLIC CONVENIENCE AND NECESSITY TO |) | |
| CONSTRUCT A WIRELESS COMMUNICATIONS |) | CASE NO. |
| FACILITY IN THE COMMONWEALTH OF |) | 2014-00088 |
| KENTUCKY IN THE COUNTY OF FLOYD |) | |
| |) | |
| SITE NAME: EAST POINT |) | |

ORDER

On April 10, 2014, New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (“New Cingular Wireless”), filed an application seeking a Certificate of Public Convenience and Necessity to construct and operate a wireless telecommunications facility. The proposed facility consists of a self-supporting antenna tower not to exceed 265 feet in height, with attached antenna, to be located at 613 Ford’s Gap Road, Auxier, Floyd County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 44’ 4.76” by West Longitude 82° 46’ 27.89”.

New Cingular Wireless has provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility. Based upon the information contained in the application, the design of the tower and foundation conforms to applicable nationally recognized building standards, and a Licensed Professional Engineer has certified the plans.

Pursuant to 807 KAR 5:063, New Cingular Wireless has notified the County Judge/Executive of the proposed construction and filed evidence of the appropriate

notices provided pursuant to 807 KAR 5:063. The notices solicited comments and informed the recipients of their right to request intervention. To date, no public comments or other filings have been filed with the Commission, with the exception of those by East Kentucky Network, LLC d/b/a Appalachian Wireless (“Appalachian Wireless”), as discussed below.

New Cingular Wireless has filed applications with the Federal Aviation Administration and the Kentucky Airport Zoning Commission seeking approval for the construction and operation of the proposed facility. Both applications have been approved.

On April 28, 2014, Appalachian Wireless, the owner and operator of a cellular tower located adjacent to New Cingular Wireless’s proposed cellular tower site, filed a motion for an extension of time to file a response or to file a motion to intervene in this case. As a basis for its motion, Appalachian Wireless stated that the parties were in discussions regarding a possible co-location agreement. New Cingular Wireless filed its objection to the motion on May 2, 2014, reiterating, as set forth in the application, that New Cingular Wireless approached Appalachian Wireless regarding co-location on an existing tower owned by Appalachian Wireless and that Appalachian Wireless’s Manager of Technical Operations, Michael Johnson, rejected New Cingular Wireless’s request based upon potential future modifications to the site. Further, New Cingular Wireless denied that the parties were in current discussions regarding possible co-location at this site. On May 20, 2014, Appalachian Wireless filed a motion to intervene, asserting that New Cingular Wireless, in its application, improperly concluded that there was no reasonable opportunity to co-locate its proposed cellular equipment and facilities

on Appalachian Wireless's tower. In support of its assertion, Appalachian Wireless filed the Affidavit of Michael Johnson, who stated that he was contacted by New Cingular Wireless in 2011 regarding co-location on a different cell tower and that he could not recall any other contact with New Cingular Wireless regarding co-location since that date.

On June 4, 2014, New Cingular Wireless filed an objection to Appalachian Wireless's motion to intervene. In support of its objection, New Cingular Wireless attached documents that demonstrated that Appalachian Wireless had previously rebuffed requests to co-locate. New Cingular Wireless attached to its objection a certified letter, dated June 20, 2013, sent to Mr. Johnson describing multiple in-person and telephonic attempts to discuss co-location with Appalachian Wireless, and requesting a response to the correspondence.¹ In a July 1, 2013 e-mail, attached to New Cingular Wireless's motion, Mr. Johnson rejected New Cingular Wireless's request for co-location, stating that all potential co-locates were on hold due to network modifications.²

On June 23, 2014, Appalachian Wireless filed notice of withdrawal of its motion to intervene, stating that it remained committed to the timely consideration of future co-location opportunities. The Commission will treat Appalachian Wireless's notice of withdrawal as a motion to withdraw the motion to intervene.

¹ Case No. 2013-00427, Application of New Cingular Wireless Pcs, LLC 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 Knott, Site Name: Hindman, AT&T Mobility's Response and Objection to Appalachian Wireless's Motion to Intervene, Exhibit A (Ky. PSC filed June 2, 2014).

² *Id.*

Pursuant to 807 KAR 5:063, Section 1(s), to apply for a certificate of public convenience and necessity to construct a wireless telecommunications facility, a utility must state that the utility attempted to co-locate on an existing structure and that there is no reasonably available opportunity to co-locate. The record reflects that New Cingular Wireless pursued co-location on an existing tower owned by Appalachian Wireless and that Appalachian Wireless denied that request for co-location. Thus, as an initial matter, New Cingular Wireless met the requirement of the regulation when the application was filed.

Appalachian Wireless subsequently raised the possibility of co-location in a procedurally circuitous manner 30 days after New Cingular Wireless filed its application. New Cingular Wireless's responses to Appalachian Wireless's request to intervene and pursue co-location, and Appalachian Wireless's subsequent withdrawal of its request to intervene, have caused an unusual delay in the review of this application. Federal law requires the Commission to act upon a siting application for a wireless facility, such as this case, within 150 days of its being duly filed.³ The application was deemed filed on April 10, 2014; therefore, the Commission must rule on this application by September 8, 2014, to meet the 150-day statutory deadline.⁴

The Commission has long encouraged co-location as the preferred method in expanding telecommunication networks in underserved areas. However, in this matter,

³ 47 U.S.C. § 332(c)(7)(B)(ii) requires state or local government to act upon a wireless facility siting application within a "reasonable" period of time. The Federal Communications Commission issued a declaratory ruling defining the time frame as 150 days. *See, In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, FCC 09-99 (Nov. 18, 2009).

⁴ 150 calendar days after April 10, 2014, is Sunday, September 7, 2014. Per federal and Commission rules of procedure, when a deadline falls on a Sunday, the deadline is computed on the next business day.

due to the delays arising from Appalachian Wireless's initial denial of New Cingular Wireless's co-location request, followed by Appalachian Wireless's subsequent request to intervene to pursue co-location, and concluding with Appalachian Wireless's withdrawal of its request, the Commission must balance its preference for co-location against the Federal statutory deadline for action and the need to improve Kentucky's wireless network without undue delay. In this case, the Commission concludes that it is not feasible to pursue co-location and meet the federal statutory deadline by which the Commission must rule on New Cingular Wireless's application. Based upon the facts presented in this case, it is neither reasonable nor in the public's interest or convenience to require New Cingular Wireless to further pursue co-location. Therefore, we will not require New Cingular Wireless to further pursue co-location, and Appalachian Wireless's motion to withdraw its motion to intervene should be granted.

Pursuant to KRS 278.280, the Commission is required to determine proper practices to be observed when it finds, upon complaint or on its own motion, that the facilities of any utility subject to its jurisdiction are unreasonable, unsafe, improper, or insufficient. To assist the Commission in its efforts to comply with this mandate, New Cingular Wireless should notify the Commission if it does not use this antenna tower to provide service in the manner set out in its application and this Order. Upon receipt of such notice, the Commission may, on its own motion, institute proceedings to consider the proper practices, including removal of the unused antenna tower, which should be observed by New Cingular Wireless.

IT IS THEREFORE ORDERED that:

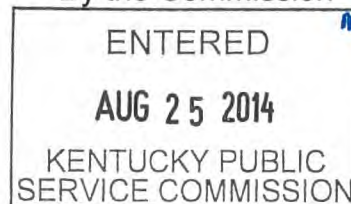
1. New Cingular Wireless is granted a Certificate of Public Convenience and Necessity to construct a wireless telecommunications facility. The proposed facility consists of a self-supporting antenna tower not to exceed 265 feet in height, with attached antenna, and is to be located at 613 Ford's Gap Road, Auxier, Floyd County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 44' 4.76" by West Longitude 82° 46' 27.89".

2. New Cingular Wireless shall immediately notify the Commission in writing, if, after the antenna tower is built and utility service is commenced, the tower is not used for a period of three months in the manner authorized by this Order.

3. Documents filed, if any, in the future pursuant to ordering paragraph 2 herein shall reference this case number and shall be retained in the utility's general correspondence files.

4. Appalachian Wireless's motion to withdraw its motion to intervene is granted.

By the Commission



ATTEST:



Executive Director

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