

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY RSA #3 CELLULAR	)	
GENERAL PARTNERSHIP FOR APPROVAL TO	)	
CONSTRUCT AND OPERATE A NEW CELL	)	
FACILITY TO PROVIDE CELLULAR RADIO	)	CASE NO.
SERVICE (STEPHENSPORT) IN RURAL SERVICE	)	2017-00143
AREA #3 (BRECKINRIDGE COUNTY) OF THE	)	
COMMONWEALTH OF KENTUCKY	)	

ORDER

This matter is before the Commission on two requests to intervene in a cell tower Certificate of Public Convenience and Necessity (“CPCN”) matter; one request filed by Corey M. Biddle (“Mr. Biddle”), whose property surrounds the proposed site, and a second request filed by John K. Potts (“Mr. Potts”), whose property is adjacent to the proposed site. Mr. Biddle’s and Mr. Potts’ requests (“Requests for Intervention”) are made in the same letter and therefore, raise identical issues.

On October 25, 2017, Kentucky RSA #3 Cellular General Partnership (“Kentucky RSA #3”) filed an application requesting a CPCN to construct a wireless communications facility at 6199 Highway 2779, Hardinsburg, Breckinridge County, Kentucky (“Stephensport cell tower”).

Mr. Biddle and Mr. Potts’ requests to intervene were filed on December 27, 2017. Their requests to intervene were filed in addition to public comments filed in emails and letters sent to the Commission.<sup>1</sup> Mr. Biddle and Mr. Potts state that they oppose the

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<sup>1</sup> Public Comment: John Potts Letter, 4/10/2017; Corey M. Biddle Copy of 4/5/2017 email, 4/20/2017, Corey M. Biddle Copy of 4/5/2017 email, 5/17/2017.

location of the Stephensport cell tower due to concerns about the potential decrease in property value. Mr. Biddle and Mr. Potts offer to provide competing expert testimony that the proposed cell tower would be inconsistent with the community image. Mr. Biddle and Mr. Potts also question whether Kentucky RSA #3 adequately researched options for collocation and alternative sites. Mr. Biddle and Mr. Potts argue that a more discreet location for a cell phone tower would be more appropriate. They also dispute that placing the tower at the proposed site would remedy gaps in coverage.

On January 29, 2018, Kentucky RSA #3 filed its response to Mr. Biddle's and Mr. Potts' Requests for Intervention. Kentucky RSA #3 indicated it was responding to Mr. Biddle's and Mr. Potts' statements and questions made in emails to the Commission, and public comments in its response of January 29, 2018. Specifically, Kentucky RSA #3 addressed the principle issues of the necessity to close gaps in coverage and collocation opportunities. Kentucky RSA #3 explained that an existing cell tower on wheels ("COW") is currently at the proposed site in dispute and has been there since March 2008. The COW was a temporary coverage gap solution. Kentucky RSA #3 further explained its review and investigation process for determining a proposed cell tower site. Kentucky RSA #3 provided exhibits to Mr. Biddle and Mr. Potts supporting its process to locate a cell tower at the proposed site. Kentucky RSA #3 addressed each location specifically mentioned by Mr. Biddle and Mr. Potts for potential collocation and explained why collocation was not feasible. On February 5, 2018, Mr. Biddle and Mr. Potts, legal counsel for Kentucky RSA #3, and representatives of Kentucky RSA #3 attended an informal conference to discuss the issues involved in this matter. A memorandum was filed in the record on March 16, 2018 and Kentucky RSA #3 filed

supplemental comments to the memorandum on March 22, 2018. At the informal conference Kentucky RSA #3 brought: Leila Rezanavaz, Third Party Radio Frequency Engineer; Tim Ash, Director of Network Budget, Planning and Construction; and Doug Updegraff, Vice President & Chief Technology Officer to explain the technical reasons for selecting the Stephensport cell tower location. The Kentucky RSA #3 representatives also explained that alternative locations were considered, but rejected during its investigation of the proposed site. Additionally, Kentucky RSA #3 representatives explained the costs associated with studying a proposed site location as part of the state and federal regulatory requirements. Kentucky RSA #3 emphasized in its supplemental filing of March 22, 2018, that its principle objections to the proposed alternative locations were technical because radio engineering concerns would persist at an alternative site, regardless of the projected costs of locating an alternative site.

#### DISCUSSION

The only person with a statutory right to intervene in a proceeding before the Commission is the Attorney General.<sup>2</sup> Intervention by all others is permissive and is within the sound discretion of the Commission.<sup>3</sup>

The standards the Commission must consider in exercising its discretion to determine permissive intervention are set forth in 807 KAR 5:001, Section 4(11). Pursuant to 807 KAR 5:001, Section 4(11)(a), a person seeking to intervene must file a written request that states the person's special interest, or facts he or she will develop to

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<sup>2</sup> See KRS 367.150(8)(b). The Attorney General has not requested to intervene in this matter.

<sup>3</sup> *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

assist the Commission in fully considering the matter. 807 KAR 5:001, Section 4(11)(b), provides that the Commission:

shall grant a person leave to intervene if the [C]ommission finds that . . . he has a special interest in the case that is not otherwise adequately represented or that his intervention is likely to present issues or to develop facts that assist the [C]ommission in fully considering the matter without unduly complicating or disrupting the proceedings.

Based upon a review of the pleadings at issue, the Commission finds that Mr. Biddle and Mr. Potts are unlikely to present issues or develop facts that will assist the Commission in fully considering this matter. This is especially so given that Mr. Biddle and Mr. Potts acknowledged that the COW is located at the proposed cell tower location and has been since March 2008. Kentucky RSA #3 adequately explains that the COW is a temporary solution to phone coverage in the area and coverage would be inadequate should the COW be removed and the Stephensport cell tower is not approved to replace it. Mr. Biddle and Mr. Potts offer only unsupported lay opinion that other locations are feasible, available for leasing, meet the radio frequency needs of the proposed project, and are less intrusive than the selected site. Pursuant to relevant case law, unsupported lay opinion regarding whether there are other suitable locations for a cell tower is not sufficient evidence on which to base a denial of a cell tower CPCN application.<sup>4</sup>

The Commission finds that Mr. Biddle and Mr. Potts failed to provide sufficient evidence to support their assertion that the Stephensport cell tower should be located elsewhere due to property devaluation or that the Stephensport cell tower could be located elsewhere and maintain cell services in the area. Mr. Biddle and Mr. Potts base

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<sup>4</sup> See *Cellco P'ship v. Franklin Cnty.*, 553 F.Supp. 2d 838 (E.D. Ky. 2008).

their conclusions regarding the property value and the location of the Stephensport cell tower on generalized concerns and unsupported personal opinion. Mr. Biddle and Mr. Potts failed to set forth the basis for their conclusion that there are alternate sites that are feasible, available for leasing, and less intrusive than the selected site. As discussed, *supra*, unsupported lay opinions regarding the siting of cell towers, such as that offered by Mr. Biddle and Mr. Potts, are not sufficient evidence on which to base a denial of a cell tower CPCN application.<sup>5</sup> For that reason, Mr. Biddle and Mr. Potts are unlikely to present issues or develop facts that will assist the Commission in considering this matter, and their Requests for Intervention should be denied.

The Commission further finds that the documents filed by Mr. Biddle and Mr. Potts should be considered public comments in this proceeding. Mr. Biddle and Mr. Potts will have an opportunity to file additional comments in this proceeding even though they have not been granted intervenor status. Mr. Biddle and Mr. Potts may file comments as frequently as they choose, and those comments will be entered into the record of this case. Mr. Biddle and Mr. Potts can review all documents filed in this case and monitor the proceedings via the Commission's website.

IT IS THEREFORE ORDERED that:

1. Mr. Biddle's Request to Intervene is denied.
2. Mr. Potts' Request to Intervene is denied.
3. Mr. Biddle's and Mr. Potts' tendered documents shall be considered as public comment.

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<sup>5</sup> See *Cellco P'ship v. Franklin Cnty.*, 553 F.Supp. 2d 838 (E.D. Ky. 2008).

By the Commission

ENTERED  
APR 11 2018  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
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Executive Director  
for Gary R. Pinson

Case No. 2017-00143

\*Felix Sharpe  
Dinsmore & Shohl, LLP  
101 South Fifth Street  
Suite 2500  
Louisville, KENTUCKY 40202

\*Kentucky RSA #3 Cellular General Partnership,  
2902 Ring Road  
P. O. Box 5012  
Elizabethtown, KY 42701

\*Honorable John E Selent  
Attorney at Law  
Dinsmore & Shohl, LLP  
101 South Fifth Street  
Suite 2500  
Louisville, KENTUCKY 40202