

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY CGSA, INC. FOR)
ISSUANCE OF A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO CONSTRUCT)
AN ADDITIONAL CELL SITE IN LOUISVILLE,)
KENTUCKY FOR THE PROVISION OF DOMESTIC) CASE NO. 96-081
PUBLIC CELLULAR RADIO)
TELECOMMUNICATIONS SERVICE TO THE)
PUBLIC IN JEFFERSON COUNTY, KENTUCKY AND)
THE LOUISVILLE MSA)

O R D E R

On March 6, 1996, Kentucky CGSA, Inc. d/b/a BellSouth Mobility Inc. ("BellSouth Mobility") filed an application seeking a Certificate of Public Convenience and Necessity to construct and operate a cellular radio telecommunications facility in the Louisville Metropolitan Statistical Area ("the Louisville MSA"). The proposed facility consists of a monopole antenna tower not to exceed 126 feet in height, with attached antennas, to be located at 1418 Sanita Road, Louisville, Jefferson County, Kentucky. The coordinates for the proposed facility are North Latitude 38° 11' 33.23" by West Longitude 85° 42' 15.46".

BellSouth Mobility has provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility. Based upon the application, the design of the tower and foundation conforms to applicable nationally recognized building standards, and the plans have been certified by a Registered Professional Engineer.

Pursuant to KRS 100.324(1), the proposed facility's construction is exempt from local zoning ordinances.¹ However, BellSouth Mobility has notified the Jefferson County Planning Commission (the "Planning Commission") of the proposed construction. To date, no comments have been filed by the Planning Commission. BellSouth Mobility has filed applications with the Federal Aviation Administration ("FAA") and the Kentucky Airport Zoning Commission ("KAZC") seeking approval for the construction and operation of the proposed facility. Both applications have been approved.

BellSouth Mobility has filed notices verifying that each person who owns property or resides within 500 feet of the proposed facility has been notified of the pending construction. The notice solicited any comments and informed the property owners and residents of their right to intervene. In addition, BellSouth Mobility has posted notice of the proposed construction in a visible location for at least two weeks after filing its application. The Commission received several protest letters from surrounding property owners, residents, and the City of Watterson Park ("City"). A total of four protestors requested and were granted intervention in this matter. These protestors (the "Intervenors") are represented collectively by counsel. A hearing was held regarding this matter on September 27, 1996.

The Intervenors oppose the proposed construction, citing the potential impact on property values, safety concerns regarding heavy truck traffic on the adjacent roadway and close proximity to nearby structures, and aesthetic impact on one of two entrances to the

¹ Since the filing of this case, KRS 100.324 has been amended to provide that proposals to construct cellular telecommunications towers in counties containing cities of the first class must be submitted to the local planning unit.

City. BellSouth Mobility presented evidence concerning, inter alia, the necessity of the cell site to provide adequate and reliable service and the structural design and integrity of the proposed monopole. According to BellSouth Mobility, the cell site property is zoned M-3 Industrial, a zoning classification for which commercial towers would be a permitted use, although if zoning rules applied, a height variance would be required for the proposed construction. Witnesses for BellSouth Mobility testified that a nearby Cellular One tower is not feasible for collocation. BellSouth Mobility introduced both the FAA and KAZC approvals for the proposed construction during the hearing. In an attempt to alleviate concerns regarding the aesthetics of the proposed construction, BellSouth Mobility amended its application to propose construction of a monopole rather than a self-supporting, lattice-type tower. BellSouth Mobility also stated that significant barriers would be installed to protect the facility from impact of heavy truck traffic and that additional screening would be provided if requested by the Intervenors. BellSouth Mobility witnesses also testified that, during negotiations between the parties, an alternative site was investigated by BellSouth Mobility but was abandoned after potential environmental problems from petroleum were encountered during site preparation.

The Intervenors argued that more suitable sites could be found and remained concerned that heavy truck traffic may compromise the structure. In addition, a witness for the Intervenors testified that the petroleum encountered by BellSouth Mobility at the alternative site was likely naturally occurring and therefore not of significant concern.

Having reviewed the record, the Commission finds that the proposed construction is necessary, that the effect on surrounding property should be minimal, and that BellSouth Mobility has adequately addressed the safety concerns presented by the Intervenors. In

addition, BellSouth Mobility has amended its application to propose construction of a monopole rather than a lattice-type tower and has offered to provide additional landscaping to minimize the aesthetic impact.

Finally, the Intervenors claim that the Commission's utility construction proceedings, conducted pursuant to KRS 278.020(1), are constitutionally flawed because standards governing them are inadequate.² This Commission is not the appropriate forum to decide constitutional issues. However, since the Intervenors argue that the application should be denied on this ground, the Commission must briefly address the issue.

The Commission believes that KRS 278.020(1), the statute which confers upon the Commission authority to decide this matter, provides it with sufficient guidance. The statute provides for approval of construction if "public convenience and necessity require" it. KRS 278.020(1). Intervenors cite no authority whatever to show that "public convenience and necessity" is too vague a phrase upon which to base a decision. The meaning of the phrase has long been settled in Kentucky. The Intervenors cite Kentucky Utilities Co. v. Public Service Commission, Ky., 252 S.W.2d 885, 890 (1952),³ in which Kentucky's highest court defined "public convenience and necessity," but they fail to demonstrate anything ambiguous or confusing in the court's words:

[a] determination of public convenience and necessity requires both a finding of the need for a new service system or facility from the standpoint of service requirements, and an absence of wasteful duplication resulting from the construction of the new system or facility.

² Brief for Intervening Parties ("Intervenors' Brief") at 2.

³ Intervenors' Brief at 4.

Id. Intervenor do not offer a single case in which any court anywhere has defined the term "public convenience and necessity" inconsistently. The Intervenor claim there is "no settled definition of what constitutes wasteful duplication."⁴ However, this phrase also was defined over forty years ago: wasteful duplication exists when there exists an "excess capacity over need" and an "unnecessary multiplicity" of facilities. Id. at 890.

This statutory standard, as defined by the courts, is the standard which guides the Commission in this decision. As a final matter, the Commission notes that denial of the application would not constitute an appropriate remedy in any event. Because such a denial would prevent the applicant from providing adequate service, it would constitute a refusal of the Commission to fulfill its statutory duty to ensure that utilities provide adequate and reliable service. See KRS Chapter 278. Furthermore, even if Intervenor were correct, the applicant in this case would have suffered the same injury as the Intervenor, since it too would have been subjected to an unconstitutional and arbitrary process. Intervenor offer no reason why the applicant and its customers should be punished under such circumstances.

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, BellSouth Mobility 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,

⁴ Intervenor's Brief at 4.

on its own motion, institute proceedings to consider the proper practices, including removal of the unused antenna tower, which should be observed by BellSouth Mobility.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that BellSouth Mobility should be granted a Certificate of Public Convenience and Necessity to construct and operate the proposed facility in the Louisville MSA under its currently approved tariff.

IT IS THEREFORE ORDERED that:

1. BellSouth Mobility is granted a Certificate of Public Convenience and Necessity to construct and operate a monopole antenna tower not to exceed 126 feet in height, with attached antennas, to be located at 1418 Sanita Road, Louisville, Jefferson County, Kentucky. The coordinates for the proposed facility are North Latitude 38° 11' 33.23" by West Longitude 85° 42' 15.46".

2. Upon request by the Intervenors, BellSouth Mobility shall provide a reasonable amount of additional landscaping for the purpose of screening the proposed facility.

3. BellSouth Mobility 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 3 months in the manner authorized by this Order.

Done at Frankfort, Kentucky, this 4th day of February, 1997.

PUBLIC SERVICE COMMISSION

Lynda K. Breathitt
Chairman

Edwin J. Hines
Vice Chairman

B. J. Helton
Commissioner

ATTEST:

Don Mills
Executive Director