

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF SPRINT SPECTRUM, L.P. ON)
BEHALF OF WIRELESSCO L.P. FOR ISSUANCE OF A)
CERTIFICATE OF PUBLIC CONVENIENCE AND)
NECESSITY TO CONSTRUCT A PERSONAL) CASE NO. 96-227
COMMUNICATION SERVICES FACILITY IN THE)
LOUISVILLE MAJOR TRADING AREA (COVERED)
BRIDGE PCS FACILITY LV03XCO76B2))

O R D E R

On December 5, 1996, subsequent to hearing held September 19, 1996, the Commission entered its Order finding, pursuant to KRS 278.020, that the public convenience and necessity require the construction of a personal communications services ("PCS") facility by WirelessCo, L.P. ("WirelessCo") at 11208 Covered Bridge Road, Prospect, Oldham County, Kentucky. On December 30, 1996, the Intervenors in the case ("Intervenors"), by counsel, filed a letter demanding that the certificate be rescinded and rehearing scheduled ("Petition").¹ The Commission shall treat the letter as a petition for rehearing pursuant to KRS 278.400. WirelessCo has filed its response entitled Motion to Dismiss/Deny Request for Rehearing and Response to Request for Hearing ("Response").

As grounds for their Petition, Intervenors allege that [1] the Commission failed to consider all the facts and alternatives; [2] the Commission's decision was based in part on a disagreement with Intervenors' claim that WirelessCo's antennae could be placed on the

¹ The Petition bears the signatures of all four persons who were granted intervention in this case. It also is signed by Wade Hampton Helm, Esq., as attorney for all four Intervenors.

nearby tower (the "Qwest" tower), when, in fact, Intervenor argued that the existing tower should be torn down and replaced with a stronger, taller tower on which collocation could take place; [3] failure of the Commission to inform the Intervenor that WirelessCo had filed, on September 30, a radio frequency propagation map showing coverage of the area if the Qwest site rather than the proposed site were used, together with an affidavit explaining the meaning of the map; [4] WirelessCo's failure to investigate the alternative site, and the Commission's consequent failure to consider the alternative; [5] the Commission's refusal to permit a nearby landowner to intervene; [6] the absence, in the December 5 Order, of an "indication of the rights or procedures for the Intervenor to appeal the PSC decision."

In its Response, WirelessCo addresses each of these allegations and asks the Commission to deny Intervenor's request for rehearing. In the alternative, WirelessCo requests dismissal of the Petition, basing this request largely upon Intervenor's failure to serve a copy of their Petition, by mail or otherwise, upon WirelessCo within the statutory period within which rehearing may be requested. Although the Petition was filed with the Commission on December 30, 1996, the final day for filing, it was not mailed to WirelessCo until January 2, 1997. WirelessCo attaches, as Exhibit B to its Response, a postmarked copy of the envelope in which the Petition was mailed to it by two of the Intervenor. WirelessCo cites cases regarding the necessity of strict compliance with enabling statutes and a Kentucky Supreme Court case ruling that only parties named within the statutory period are within the jurisdiction of a court. The Commission also notes that, in Simmons v. Taylor, Ky., 451 S.W.2d 385, 389 (1970), a second amended complaint was held to be untimely "filed" when, although the complaint was submitted to the court clerk within the

statutory period, there was no service on adverse parties until after the statutory period had expired. In addition, WirelessCo states it had a right to rely upon the statutory time limits and to assume, when it received no notice of further action within that time period, that the matter was concluded.

However, because the Commission has concluded that the merits of the Petition do not warrant rehearing, it is unnecessary to address Intervenors' failure to serve WirelessCo in a timely fashion. The reasons for the Commission's decision to deny rehearing are stated below.

First, the Commission gave full consideration to all the facts presented during these proceedings, including evidence presented concerning the potential for collocation on the proposed rebuilt Qwest tower. The record is replete with testimony on this issue. WirelessCo's radio frequency engineer, Steve Kennedy, explained that since the Qwest tower was not structurally sufficient to support WirelessCo's antennae, it would have to be demolished and another, taller tower put up at the site. Mr. Kennedy testified that "[i]f we're forced to go on that site, we will have to rebuild that tower and go taller. . . ." ² He also testified that the Qwest tower is "only about 1,200 feet off of Covered Bridge Road" and would be even more visible if WirelessCo increased its height. ³ Contrary to Intervenors' contention, the Commission demonstrated in its Order that it was aware of, and had considered, these facts. ⁴ The unrefuted testimony at the hearing was also that, even if the

² Transcript ("Tr.") at 17.

³ Tr. at 17-18.

⁴ December 5, 1996 Order at 3.

tower were replaced and WirelessCo placed its antennae on a new taller Qwest tower, it would still be unable to cover the area due to the terrain.⁵ In other words, if WirelessCo were required to collocate on the Qwest tower, thus making that tower even taller and more visible, it would require yet another site to cover the area: "basically it would take two sites to do what one site would do at Covered Bridge. . . . That site would be closer to more people . . . and more visible because it would have to be directly on top of Covered Bridge Road."⁶ When questioned specifically as to whether the taller, rebuilt Qwest tower would cover the area, Mr. Kennedy said, "I don't think it would. . . . We haven't done a precise computer generation like this, but we have inspected the area and done some drive testing and shown that this Prospect site will not reach out far enough to merge up with the drive test. It will reach out far enough to merge up with the Covered Bridge build site. . . .it's pretty simple to see that, if you move this site to the Qwest tower, that the coverage that Covered Bridge and Prospect provide is going to be less because you're farther distanced away. . . ."⁷ Mr. Kennedy further testified that, after a meeting with the Intervenors, he instructed his engineer to reevaluate the Qwest site, "not only at the existing level but at a higher level . . . to see what the overlay of coverage would do From that, we came to the conclusion that, if we did do the Quest [sic] site, (a) it would not work at the existing level; (b) it would have to be stacked higher; and (c) a repeater from 150 to 180 foot would have to be placed west of the Covered Bridge site with it being on the Quest [sic] tower in

⁵ Tr. at 37-38.

⁶ Tr. at 38.

⁷ Tr. at 69.

order to complete coverage.⁸ Finally, Mr. Kennedy testified it was not necessary to do a helicopter test to come to those conclusions.⁹

The Intervenors did not present any expert testimony to contradict the evidence presented by Mr. Kennedy, although they doubted its authenticity and requested further verification. Accordingly, WirelessCo stated it would prepare and furnish, subsequent to the hearing, a map overlay that would corroborate the testimony of its radio frequency engineer by showing the incomplete coverage of the area if it located a rebuilt tower on the Qwest site.¹⁰ WirelessCo's attorney stated, "We would have to supply it after the fact, Mr. Hearing Officer."¹¹ The Hearing Officer responded, "Well, if you all can agree upon it, that's fine."¹² At the close of the hearing, the Hearing Officer instructed WirelessCo to file the map overlay within ten days.¹³ Mr. Charles Huff, one of the Intervenors, then asked if the other parties to the case could "come over and see" the map overlay, adding "Well, it can't be faxed to us. We would just have to come and look at it. . . ."¹⁴ WirelessCo told the Intervenors they could also come to the company's offices to view the map overlay.¹⁵

⁸ Tr. at 270-71.

⁹ Tr. at 271.

¹⁰ Tr. at 48-49.

¹¹ Tr. at 49.

¹² Id.

¹³ Tr. at 278.

¹⁴ Tr. at 278-79.

¹⁵ Tr. at 279.

Accordingly, the map overlay with supporting affidavit of Steve Kennedy was timely filed in accordance with the agreement reached at hearing on September 30.¹⁶

Over two months elapsed between the filing of the map overlay with supporting affidavit and the issuance of the Commission's final Order. Intervenors claim now they were deprived of notice that the map overlay had been filed and that they were thus denied the opportunity to view it. However, the record demonstrates the parties knew the map overlay would be filed subsequent to the hearing without copies to them and that it would be available for them to view within ten days. No party raised any objection to this procedure at the hearing. Mr. Huff himself suggested that the Intervenors come to the Commission's office or visit WirelessCo's offices to look at the map. The map overlay, as public record, was available to the Intervenors as agreed at the hearing for over two months prior to issuance of the final Order. The Intervenors had ample time to view it.

Finally, there is no new matter in the map overlay with supporting affidavit. The hearing testimony of Steve Kennedy is more than sufficient to support the finding of fact that a taller Qwest tower would not provide sufficient coverage. The Intervenors have offered no expert testimony or any other evidence to the contrary. Rehearing is appropriate when there exists "additional evidence that could not with reasonable diligence have been offered on the former hearing." KRS 278.400. Intervenors state they would like the opportunity to "challenge" the map overlay; however, they offer no reason why they could not have presented evidence on their own on the issue of coverage at the former hearing.

¹⁶ September 29 was a Sunday.

The issue in a utility construction case is whether public convenience and necessity require the proposed facility to provide service. The Commission appropriately found that WirelessCo carried its burden of proof. The proposed alternative would result in an unnecessary duplication of facilities. See Kentucky Utilities Co. v. Public Service Com'n, Ky., 252 S.W.2d 885 (1952).

Additionally, Intervenors complain that a nearby landowner, Charles W. Hebel, Jr., an attorney, was improperly denied intervenor status "because he failed to respond with the required second letter."¹⁷ The decision was "improper," Intervenors allege, because "only half of the retained Intervenors . . . had sent a second letter."¹⁸ The Intervenors have missed the point. The record shows that the landowner in question was never denied intervenor status. He never requested it. The number of letters submitted to the Commission is irrelevant. Parties admitted to Commission proceedings on the basis of a single letter request intervention in that single letter.

Intervenors also claim that the nearby landowner's non-party status left them "without adequate counsel" since they were relying on his expertise as an attorney to assist them at hearing.¹⁹ Mr. Hebel had not, however, filed a notice of appearance on behalf of any party before the Commission; nor had he indicated to the Commission in any respect that he represented any of the Intervenors in this proceeding. He does not, in fact,

¹⁷ Petition at 2.

¹⁸ Id.

¹⁹ Id.

represent them now. The Intervenors' Petition was filed on their behalf by a different attorney.

Finally, Petitioners complain that the Commission did not include in its final order information regarding "rights or procedures . . . to appeal the PSC decision."²⁰ These procedures are specified by statutes which are, of course, publicly available. The Commission is not required to explain these procedures in each and every order it issues.

On January 15, 1997, Mr. Huff filed a reply to WirelessCo's Response in which he reiterates arguments and raises additional grounds which he claims entitle him to rehearing. These claims are untimely filed. Further, the grounds stated do not meet the statutory requirements for granting rehearing. Many of his statements are based upon misunderstanding of the applicable law and procedure. For example, Mr. Huff claims the attorney who submitted the Petition on his and the other Intervenors' behalf should not have been served with WirelessCo's Response apparently because that attorney no longer represents him in this matter. However, pursuant to Commission regulation and the Kentucky Supreme Court's Rules of Professional Conduct, counsel for WirelessCo appropriately served Intervenors' attorney of record rather than the Intervenors themselves. Several arguments made by Mr. Huff concern claims belonging to other persons. Mr. Huff should be aware that his representation of interests belonging to persons other than himself constitutes the unauthorized practice of law, and this Commission will not entertain arguments so made. Kentucky Bar Assn v. Henry Vogt Machine Co., Inc., Ky., 416 S.W.2d 727 (1967); KBA Opinion U-27, issued October, 1980.

²⁰ Id.

As a final matter, Mr. Hebel has filed a letter dated January 15, 1997 which states it is "an intervention." It endorses the Petition and requests rehearing. The Commission shall treat the letter as a motion. Because the motion for rehearing is denied, Mr. Hebel's motion to intervene should be dismissed as moot.

The Commission, having reviewed the record and having been sufficiently advised, THEREFORE ORDERS that:

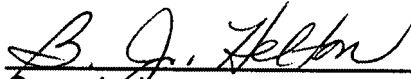
1. The Intervenors' Petition for Rehearing is denied.
2. The motion for intervention of Mr. Charles W. Hebel, Jr., is dismissed as moot.

Done at Frankfort, Kentucky, this 21st day of January, 1997.


PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director