

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF WIRELESSCO., L.P. D/B/A)
SPRINT SPECTRUM, L.P. FOR ISSUANCE OF A)
CERTIFICATE OF PUBLIC CONVENIENCE AND)
NECESSITY TO CONSTRUCT A PERSONAL) CASE NO. 96-240
COMMUNICATION SERVICES FACILITY IN THE)
LOUISVILLE MAJOR TRADING AREA [LONGRUN)
PCS FACILITY LV03XC0085B5])

O R D E R

On May 21, 1997, the Commission issued its Order in this case (the "Order") denying the application of WirelessCo, L.P. ("WirelessCo") for a certificate of public convenience and necessity to construct a personal communications services facility at 513 Brooks Lane in Shelby County, Kentucky. In its Order, the Commission made it clear that it had found persuasive the concerns of nearby property owners who testified, inter alia, that the facility should not be located in their immediate vicinity, an agriculturally zoned area being subdivided into residential lots devoid of commercial development.¹ The Commission also found, based upon the record in this case, that diligent efforts on the part of WirelessCo should enable it to locate a more suitable site to provide service.² The evidence of record did not convince the Commission that [1] the utility had expended appropriate time and care in choosing a location for the proposed facility or that [2] its service would be adversely affected by the denial of the

¹ Order at 3.

² Id.

certificate for this particular location. Accordingly, the Commission found that public convenience and necessity did not require the granting of the certificate. It also ordered WirelessCo to investigate alternatives and report on its investigation.

On June 11, 1997, WirelessCo filed a petition for rehearing ("Petition"), requesting clarification of the Commission's Order and stating that it is uncertain whether the Commission has retained jurisdiction over this matter in providing that it may return with information regarding its investigation into feasible alternative sites. WirelessCo also contends that the Commission has violated both state and federal law in its Order and that the decision is not supported by sufficient evidence. WirelessCo requests rehearing on the matter to give evidence regarding its efforts to obtain another site. In the alternative, WirelessCo seeks reversal of the Order, apparently on the grounds that the Order is unreasonable, unlawful, and arbitrary and that a review of the record pursuant to this request will so demonstrate to the Commission. WirelessCo also requests the Commission to reconsider its decision to deny WirelessCo's motion to strike a certain affidavit filed by Ronald Snyder, an intervenor in this case. Several intervenors filed on June 24, 1997, a memorandum ("Intervenor Memorandum") in opposition to WirelessCo's Petition.

The Commission will first address the request for rehearing. Pursuant to KRS 278.400, a party may offer at rehearing "additional evidence that could not with reasonable diligence have been offered on the former hearing." As the Intervenor Memorandum points out, WirelessCo offers no such evidence. It requests only another opportunity to reiterate arguments that it made, or that it could have made, at the original

hearing. Accordingly, the petition for rehearing should be denied. WirelessCo also apparently believes that the Commission, in reviewing the record, will simply recognize that its decision was in error. The record is, however, replete with facts that weigh against granting the certificate requested, and the Commission will detail them here.

WirelessCo claims in its Petition, at 4, that there is no finding that the property of nearby residents would be affected by the proposed facility. There is, however, more than sufficient evidence in the record to support the Commission's conclusion that the tower is inappropriate at the site proposed and that its construction at that site would have a negative impact on the area. The proposed site is very near several residences. Indeed, the edge of the facility compound is less than eleven feet from a farm belonging to Charles and Violet Stalker, intervenors in this case, and the center of the monopole itself would be a mere twenty-three feet from their fence.³ The Stalkers' farmhouse is on the National Historic Register, and retains its original smokehouse and slave quarters.⁴ The only buffering between the site and the Stalkers' farm is a small scrub woods which was used as grazing land until a few years ago, and it is the property of the Stalkers and not of the lessor.⁵ Further, there appears to be little, if any, buffer between the site and the property belonging to Mr. Allegeier, another intervenor

³ Hearing Transcript ("Tr.") at 272.

⁴ Tr. at 427-28.

⁵ Tr. at 288.

vigorously opposed to the site.⁶ In addition, the Greenberg Farm, directly to the west of the Brooks Lane site, is currently being developed into a major subdivision.⁷

Indeed, the record indicates that WirelessCo would have been hard pressed to find a site in this relatively sparsely populated area that is less suitable for construction of a telecommunications facility.

Next, WirelessCo claims, Petition at 6, that there has been "no evidence of any impact on neighbors, other than subjective emotional impact." WirelessCo's apparent belief that there is no impact upon property owners adjacent to cell sites (other than a "subjective" one which WirelessCo apparently dismisses out of hand) is at odds with KRS 278.650, which authorizes the Commission to consider "the character of the general area concerned, and the likely effects of the installation [of a cellular or personal communications services facility] on nearby land uses and values." The statute presupposes the possibility of negative impacts on nearby property. Moreover, WirelessCo's own property evaluation expert stated that realtors should, "if they do their job," disclose to potential buyers of property that the property in question is adjacent to a future tower or monopole site.⁸ The expert went on to explain that he does not believe that an adjacent telecommunications facility negatively affects property value; however, disclosures required of realtors by law concern "defects" that negatively affect the value of the property being sold. See, e.g., KRS 324.160. There is no requirement that

⁶ Tr. at 361-62.

⁷ See February 13, 1997 Letter from Triple S Planning Commission to Don Mills.

⁸ Tr. at 223.

realtors disclose to potential buyers conditions that are irrelevant to the value of the subject property.

As to whether the area concerned in this application would sustain any "impact" from construction of the proposed facility, WirelessCo's expert testified that western Shelby County has the highest land values in the entire county,⁹ and that the area concerned is zoned agricultural, which requires parcels of five acres or more.¹⁰ He also stated his opinion that the local zoning body would probably not agree to permit a commercial use "right in the middle of Brooks Lane."¹¹ This is in contrast to the Colt Run Road site originally proposed which, regardless of its zoning classification -- a matter of some debate at the hearing -- unquestionably is near two businesses, the County Line Market and a veterinary center for horses.¹² Further, area resident Scott Stalker argued at the hearing that wealthier buyers who buy in the Brooks Lane area are "pickier" buyers and that the presence of a telecommunications facility would consequently lower the prices property owners in the Brooks Lane vicinity currently can command.¹³ He discussed the preference of his new neighbors that even utility wires be buried.¹⁴ Consequently, it appears from the record in this case that a personal communications

⁹ Tr. at 203.

¹⁰ Tr. at 221-22.

¹¹ Tr. at 224.

¹² Tr. at 285.

¹³ Tr. at 197.

¹⁴ Tr. at 319.

services facility built so near residences would indeed have an adverse impact on those who live in this scenic area and who argued against the proposed construction in this proceeding.

WirelessCo also contends that the Commission has not indicated what additional efforts WirelessCo might have made to locate a more suitable site, and points out that it has presented evidence of investigation into some alternatives. Petition at 4-5. WirelessCo obviously believes its efforts have been sufficient. The intervenors in this case most emphatically do not agree. As neighbors of the proposed facility, intervenors in this case have testified that their efforts to assist WirelessCo to investigate alternatives have been ignored by WirelessCo.¹⁵ WirelessCo claims it has made every effort to work with the intervenors and to find the least objectionable site. However, for reasons more fully explained below, the Commission accepted the intervenors' testimony on this issue.

Scott Stalker testified that, during the October 1996 community meeting with WirelessCo representatives, he, his mother, J.S. Smith, and the local magistrate, "that have spent our entire life in the area . . . volunteered to help them find a good alternative site, and nobody ever called us."¹⁶ Mr. Stalker characterized WirelessCo's as a "get in, get it up, and move on approach."¹⁷ Mrs. Marjorie Cox also took direct issue with WirelessCo's statements that it had worked with persons who live in the area to find alternatives, stating that offers from several people present at the October 1996 meeting

¹⁵ See, e.g., TR at 386-388.

¹⁶ Tr. at 290.

¹⁷ Id.

were simply ignored.¹⁸ Mrs. Cox offered her assistance to WirelessCo from the witness stand.¹⁹ The WirelessCo representative who attended the October 16 community meeting was not available to testify as to events at that meeting.²⁰

As the intervenors repeatedly pointed out at hearing, the record in this case indicates that WirelessCo has proceeded in the matter of this application in a hasty, almost haphazard manner. While the Commission applauds WirelessCo's determination to provide dependable personal communications services in Kentucky as soon as it reasonably can, it cannot approve of the manner in which WirelessCo has handled this application.

WirelessCo and its various agents (collectively referred to as "WirelessCo") erred repeatedly in dealings with nearby property owners, misnaming recipients of notices, inadvertently omitting a nearby property owner from a list of persons residing within 500 feet of the originally proposed site, misaddressing envelopes, and misstating the projected tower height.²¹ WirelessCo also failed, during the course of this proceeding,

¹⁸ Tr. at 386-88.

¹⁹ Tr. at 392.

²⁰ Tr. at 50-51.

²¹ See, e.g., Letter of May 30, 1996 from Gearon & Co., Inc. to Mr. and Mrs. Joe and Ann Sullivan (stating that the facility was proposed to be built at 7075 Colt Run Road rather than at 775 Colt Run Road); Exhibit J to Amended Application of September 24, 1996 (notices sent on September 6, 1996, to persons owning property near 513 Brooks Lane, the second proposed site, erroneously stating that the total height of the facility, with attached antennas, would be 150' rather than 165'); Commission Order dated October 11, 1996 (ordering WirelessCo to send corrections to recipients of the notice). WirelessCo addressed one notice to Mr. and Mrs. Joe and Ann "Sullivan" when the residents in question actually are
(continued...)

to comply with a Commission Order dated October 15, 1996 until after an intervenor had filed a motion to dismiss the application based on WirelessCo's failure to comply.²²

While none of the errors described in this Order justifies a denial of a certificate for a facility required by the public convenience and necessity, the sheer volume of error serves strongly to corroborate the testimony of the intervenors that WirelessCo pursued its application hurriedly, without adequate investigation into alternative sites. Moreover, WirelessCo's errors demonstrate that it had made little effort to become familiar with the area in which it proposed to build. For example, the Jacksons, whose home is within 500 feet of the originally proposed Colt Run site, were not notified when the original application was filed, despite WirelessCo's statement in its application that all property owners within 500 feet had received notice. The Jacksons' house is large and is very

21

(...continued)

named "Solomon" and addressed their letter to 90790 Shelbyville Road when the Solomons' street address actually is 9790 Shelbyville Road. See Letter dated June 18, 1996 from Donald T. Prather, Esq., to Don Mills (stating that the correct name and address appear in the local telephone directory). WirelessCo sent notice to Mr. and Mrs. Charles and Violet "Gregory" instead of to Mr. and Mrs. Charles and Violet "Stalker." Tr. at 384. It sent a notice to Mr. and Mrs. Cox at 1081 Tattenham Lane instead of 10801 Tattenham Lane. Tr. at 384. It stated in its application dated June 24, 1996, that it had notified all property owners within 500 feet of the proposed construction when it actually had failed to do so. See Tr. 355; June 18, 1997 Letter from Donald T. Prather, Esq. to Don Mills (stating that Dr. Brooks Jackson, II and Barbara Jackson, who own property within 500 feet of the originally proposed site were omitted from the list of property owners receiving notice).

22

See Motion to Dismiss filed November 1, 1996, by Intervenor Robert Snyder, on the basis of WirelessCo's failure to respond to his questions within the time ordered by the Commission; Affidavit of Marshall Hazelhurst, Exhibit A to Applicant's Response filed November 11, 1996, explaining, at Paragraph 4, that the October 15 Order had been "inadvertently overlooked."

near the originally proposed location. Anyone sufficiently familiar with the area to form an opinion as to the impact that would result from construction at a particular location should know that the Jackson house is there. WirelessCo used written county records and a survey furnished by an outside entity to provide it with the list of people within 500 feet of the proposed site.²³ Apparently no one involved was sufficiently familiar with the area to realize that the Jacksons had been omitted from the list. This is not surprising, however, given the changes in personnel during WirelessCo's application process.

Finally, as the intervenors pointed out at the hearing, there is on record an alternative site that is, presumably, still available and is more appropriate than the Brooks Lane site denied in this case: the originally proposed site at 775 Colt Run Road. The Commission does not state here that the 775 Colt Run Road site would necessarily be approved if WirelessCo amended its application to request such approval. Nor does it ignore the problems with that location. However, the Colt Run Road site is within 500 feet of fewer property owners than is the Brooks Lane site; unlike the Brooks Lane site, it is adjacent to two businesses, the County Line Market and a veterinary and surgical center for horses;²⁴ it meets the engineering requirements of WirelessCo;²⁵ and it is already adjacent to a railroad track,²⁶ which is characterized by a WirelessCo property

²³ Tr. at 396.

²⁴ Tr. at 285. Mr. Stalker stated he believes this area has had commercial use for at least 30 years. Tr. at 26.

²⁵ Tr. at 56, Testimony of John W. Austin, Sr., Radio Frequency Engineer.

²⁶ Tr. at 286.

evaluation expert as having a "negative impact" on nearby property.²⁷ There also is a man-made embankment on Colt Run which will help buffer the site.²⁸ Finally, and most intriguingly, WirelessCo itself, through its agent, stated at one point that the Colt Run Road site, in its opinion, "had the least impact on the surrounding area."²⁹

WirelessCo also asks the Commission to clarify its requirement that the company investigate the feasibility of alternative sites and then report its findings to the Commission. The Commission recognizes that its paramount responsibility in matters of utility construction is to ensure adequacy of service, and that it remains within the realm of possibility that WirelessCo will be unable to locate a site anywhere in the area other than at 513 Brooks Lane. Such an eventuality is, the Commission believes, extremely remote. However, if that is the case, WirelessCo is to so inform the Commission, filing the information in this docket and serving all parties of record. WirelessCo is, however, cautioned that the Commission will not look favorably upon any request to build on the site denied in the Order in the absence of affirmative proof that WirelessCo has sought the assistance of the intervenors herein and that either [1] the request for assistance was refused, or [2] the combined efforts of the utility and persons familiar with the area have failed to locate another site.

As a final matter, WirelessCo requests the Commission to reconsider its denial of WirelessCo's motion to strike the Affidavit of Ronald Snyder. Mr. Snyder's affidavit

²⁷ Tr. at 225.

²⁸ Tr. at 287.

²⁹ Letter dated July 5, 1996, from Gearon & Co., Inc. to Mr. and Mrs. M. Brooks and Barbara H. Jackson.

dealt with effects of the proposed tower on surrounding sites and WirelessCo apparently believes that this evidence of impact on neighbors is the only such evidence, other than "subjective" evidence, in the record.³⁰ According to WirelessCo's reasoning, striking the affidavit would leave the record devoid of evidence of negative impact, and the Commission's Order would have to be reversed. WirelessCo's motion to reconsider is denied for the reasons stated in the Order. Further, as explained herein, the expert testimony Mr. Snyder's affidavit purports to provide certainly is not the only evidence of negative impact contained in this record. The testimony of WirelessCo's own expert established that the proximity of a future personal communications services facility site is a condition to be disclosed to a buyer of property. Moreover, the testimony of area residents regarding the effect of the proposed construction on the character of the general area in which they live is legitimate evidence the Commission sees no reason to ignore.

When there is no alternative site available to construct a needed facility to provide utility service, this Commission will issue a certificate of public convenience and necessity, even if the site is regrettably unsuitable for such a structure. WirelessCo's evident hurry to complete its buildout, coupled with its failure to accept the assistance of persons who know the western Shelby County area well, indicate that this is not such a case.

The Commission having been sufficiently advised, IT IS THEREFORE ORDERED that WirelessCo's motion for rehearing is denied.

³⁰ Petition at 6.

Done at Frankfort, Kentucky, this 26th day of June, 1997.

PUBLIC SERVICE COMMISSION

Jinda K. Breckhoff
Chairman

E. J. Hill
Vice Chairman

B. J. Helton
Commissioner

ATTEST:

Don Mills
Executive Director