

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF MOUNTAINEER CELLULAR)
GENERAL PARTNERSHIP FOR THE ISSUANCE) CASE NO. 96-519
OF A CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY TO CONSTRUCT A TOWER)

O R D E R

On December 4, 1996, Mountaineer Cellular General Partnership ("Mountaineer Cellular") filed an application seeking a Certificate of Public Convenience and Necessity to build and operate a cellular radio telecommunications facility for Rural Service Area No. 10 ("RSA No. 10"). RSA No. 10 includes Breathitt, Estill, Jackson, Knott, Lee, Letcher, Owsley, Perry, Powell, and Wolfe counties. Mountaineer Cellular has requested authorization to construct a cell site in Knott County. Mountaineer Cellular was previously granted authority to operate a cellular radio telecommunications system in RSA No. 10 in Case No. 91-002.¹

The proposed cell site consists of a 300-foot or less self-supporting antenna tower to be located 1.8 miles north of the intersection of State Routes 550 and 1087 near Mousie in Knott County, Kentucky ("the Rock Fork cell site"). The coordinates for the Rock Fork cell site are North Latitude 37° 26' 39.4" by West Longitude 82° 52' 46.4".

¹ Case No. 91-002, The Application of Mountaineer Cellular General Partnership for the Issuance of Certificate of Public Convenience and Necessity to Provide Domestic Public Cellular Radio Telecommunications Service to the Public and for Establishment of Initial Rates.

Mountaineer Cellular has provided information regarding the structure of the tower, safety measures, and antenna design criteria for the Rock Fork cell site. 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 Rock Fork cell site's construction is exempt from local zoning ordinances; however, Mountaineer Cellular notified the Knott County Judge/Executive's Office of the pending construction.² Mountaineer Cellular 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 Rock Fork cell site. Both applications are pending.

Mountaineer Cellular has filed notices verifying that each person who owns property or who resides within 500 feet of the Rock Fork cell site has been notified of the pending construction. The notice solicited any comments and informed the property owners or residents of their right to intervene. In addition, notice was posted in a visible location on the proposed site for at least two weeks after Mountaineer Cellular's application was filed. Intervention status was granted to Phillip Slone, Carolyn Triplett, Dana Mullins, and Colleen Childers.

On June 11, 1997, a hearing was held at the request of the parties. At the hearing, Mr. Slone and Ms. Childers, who were the only intervenors in attendance, testified that they objected to the proposed construction because of its location, the possibility that it will

² The Commission notes that Knott County does not have a formal local planning unit.

cause road damage, and the possibility that it will cause them to be exposed to greater health risks resulting from Rf emissions.

During the hearing, Mountaineer Cellular, relying on federal law, moved "that all evidence with respect to the health effects of [its] application and its tower be excluded from [the] hearing."³ The hearing officer deferred the issue to the Commission. Consequently, the record contains evidence regarding Rf emissions and the motion to exclude the evidence is moot. In its closing statement, Mountaineer Cellular moved the Commission to exclude said evidence from its consideration.⁴

The clear language of Section 704 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 ("the Act") prohibits states from regulating the placement of cellular facilities on the basis of environmental effects of Rf emissions. Since the passage of the Act, this Commission has consistently ruled that it may not consider evidence of environmental effects in deciding the appropriateness of issuing a certificate of public convenience and necessity for the construction of a cellular facility. Accordingly, the evidence on this issue has not been considered by this Commission in reaching its decision in this matter. Mountaineer Cellular's motion to exclude the evidence from the Commission's consideration is therefore moot.

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

³ See Transcript of Evidence ("T.E.") at 14-15.

⁴ See T.E. at 84-85.

assist the Commission in its efforts to comply with this mandate, Mountaineer Cellular should notify the Commission if it does not use this antenna tower to provide cellular radio telecommunications services 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 Mountaineer Cellular.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that Mountaineer Cellular should be granted a Certificate of Public Convenience and Necessity to construct and operate the Rock Fork cell site in RSA No. 10 under its previously approved tariff.

IT IS THEREFORE ORDERED that:


1. Mountaineer Cellular is granted a Certificate of Public Convenience and Necessity to construct and operate the Rock Fork cell site.
2. Mountaineer Cellular shall file a copy of the final decisions regarding the pending FAA and KAZC applications for this cell site construction within 10 days of receiving these decisions.
3. Mountaineer Cellular 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 12th day of August, 1997.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director