

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF CROWN COMMUNICATION INC.,))	
TRITEL COMMUNICATIONS, INC., TRITEL)	
FINANCE, INC., KENTUCKY CGSA, INC., AND)	
GTE WIRELESS OF THE SOUTH, INC. FOR)	
ISSUANCE OF A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY TO CONSTRUCT)	
A WIRELESS COMMUNICATIONS FACILITY AT)	
OLD CANNONS LANE, LOUISVILLE, KENTUCKY)	CASE NO. 2000-042
40207 IN THE WIRELESS COMMUNICATIONS)	
LICENSE AREA IN THE COMMONWEALTH OF)	
KENTUCKY IN THE COUNTY OF JEFFERSON)	
)	
SITE NAME: SENECA PARK)	
SITE NUMBER: KY 254)	
REJECTED BY LOUISVILLE AND JEFFERSON)	
COUNTY PLANNING COMMISSION AS)	
LOCAL DOCKET NO. 4-8-99)	

O R D E R

On March 3, 2000, Crown Communication Inc. ("Crown"), Kentucky CGSA, Inc. d/b/a BellSouth Mobility ("BellSouth Mobility"), Verizon Wireless formerly known as GTE Wireless of the South, Inc. ("Verizon Wireless"), Tritel Communications, Inc., and Tritel Finance, Inc. ("Tritel") (collectively, "Applicants") filed an application seeking a Certificate of Public Convenience and Necessity to construct and operate a wireless telecommunications facility.¹ The proposed facility consists of a monopole antenna

¹ By Order dated May 22, 2000, Verizon Wireless and Tritel requested and were granted intervention and made additional Applicants in this case. In addition, Sprint PCS supplied information during the hearing in support of the application.

tower not to exceed 185 feet in height, with attached antennas, to be located at Old Cannons Lane, Louisville, Jefferson County, Kentucky. The coordinates for the proposed facility are North Latitude 38° 14' 16.42" by West Longitude 85° 39' 46.28".

Pursuant to KRS 278.650, the Applicants submitted application for the proposed construction for review by the Louisville and Jefferson County Planning Commission ("Planning Commission") on October 21, 1999. The Planning Commission rejected the application, and the Applicants have requested that this Commission override the Planning Commission's determination. The Planning Commission requested and was granted intervention in this proceeding.

The Applicants filed evidence of the appropriate notices provided pursuant to 807 KAR 5:063. The notices solicited comments from the recipients and informed them of their right to request intervention. The Commission received a substantial number of comments from property owners objecting to the proposed construction. Numerous individuals requested and were granted intervention in this matter and were represented, collectively, by counsel.

By Order dated May 5, 2000, the Commission scheduled a public hearing. In addition, the Commission ordered that evidence regarding potential alternative sites for the proposed construction and any requests for information must be filed with the Commission no later than 15 days from the date of the Order. The Commission further ordered that no evidence regarding alternative sites could be submitted at the hearing except in regard to those specific sites for which information has been filed. On May 22, 2000, the Intervenor opposing the proposed construction submitted a list of 21 potential alternative sites to be considered at the hearing scheduled to begin on

June 27, 2000. The Applicants filed a response to the Intervenor's list on June 2, 2000. After a prehearing conference on June 27, 2000, the public hearing in this matter was rescheduled to August 22, 2000. All parties agreed that there were only two issues to be addressed at the public hearing: (1) whether there is an acceptable alternative site upon which to construct an antenna tower, and (2) whether the public convenience and necessity require the construction of the proposed tower.

During the hearing, the Applicants provided extensive evidence supporting the necessity of the proposed construction. Crown identified four service providers, including the three co-applicants, whose needs would be met by collocation on the proposed monopole construction. Crown further advised that negotiations were in progress with a fifth service provider for collocation on the proposed monopole.² Crown noted that it had been searching for a prospective location in the vicinity for the past 2 years and that some of the service providers planning to collocate had been searching the area for as long as 4 years.³ Crown also advised that the proposed location was particularly suited to address the immediate needs of four service providers since the site lies within the intersection of the search areas of all four carriers.⁴ BellSouth Mobility cited numerous customer complaints and testified regarding its needs in the area, including capacity problems and insufficient signal strength, which cause interference and result in static, dropped calls, cross-talk and fast busy signals during

² Transcript of Evidence ("T.E."), Volume ("Vol.") 1 at 121.

³ T.E., Vol. 1 at 126.

⁴ T.E., Vol. 1 at 136.

customer calls.⁵ BellSouth Mobility advised that the proposed construction would correct its deficiencies, citing the results of its having tested temporary antennas at the site.⁶ Tritel identified its service objectives in the area and explained that there was insufficient coverage along I-64 and the surrounding area resulting in dropped calls, poor service, and the inability to place calls.⁷ Tritel further advised that it was confident the proposed facility will meet its coverage objectives in the area.⁸ Verizon Wireless explained its service needs for the area and identified capacity and quality of service problems that have resulted in customer complaints.⁹ Verizon Wireless stated that it has no doubts the proposed facility will meet its service objectives. A witness for Sprint PCS testified that it has both coverage and capacity problems in the area resulting in dropped calls or the inability to make calls.¹⁰ Sprint PCS has received numerous complaints regarding the quality of service in the area.¹¹ Sprint PCS expressed no

⁵ T.E., Vol. 2 at 56-61.

⁶ T.E., Vol. 2 at 75-77.

⁷ T.E., Vol. 2 at 218-219.

⁸ T.E., Vol. 2 at 225-226.

⁹ T.E., Vol. 3 at 122-124.

¹⁰ T.E., Vol. 3 at 223.

¹¹ T.E., Vol. 3 at 224.

doubt that the proposed facility would meet its service objectives.¹² Crown opined that the existing vegetation would provide a natural screen for the base of the facility.¹³

The Applicants also supplied information regarding 21 potential alternative sites identified by the Intervenors. Specifically, the Applicants reported their findings regarding the availability of the properties. The owners of sites 1, 2, 3, 4, 6, and 16 expressed no interest in placing a telecommunications facility on the property.¹⁴ Sites 5, 6, 7, 8 and 19 are locations along the right-of-way of I-64 owned by the Kentucky Transportation Cabinet (“KTC”).¹⁵ The KTC indicated its objections to non-transportation-related uses of the properties, including limitations imposed by federal funding for sites 8 and 19.¹⁶ In addition, any applications for non-transportation-related use would have to be made by adjoining landowners.¹⁷ Sites 17, 18, 20, and 21 are locations within Seneca Park owned by the city of Louisville, Louisville and Jefferson County Parks Department (“Department”), which was contacted regarding the availability of the properties. The Department responded that it is not its policy to support telecommunications facilities in parklands such as Seneca Park.¹⁸

¹² T.E., Vol. 3 at 232.

¹³ T.E., Vol. 1 at 137.

¹⁴ Applicant’s Exhibit (“Ap.Ex.”) at 11-16; T.E., Vol. 1 at 53-72.

¹⁵ T.E., Vol. 1 at 22.

¹⁶ Ap.Ex. at 5; T.E., Vol. 1 at 23-29.

¹⁷ T.E., Vol. 1 at 32-34.

¹⁸ Ap.Ex. at 3-4; T.E., Vol. 1 at 16-22.

Furthermore, each of the four carriers planning to collocate on the proposed facility reviewed all 21 of the potential alternative sites to determine if any of the alternative sites would meet their service objectives. BellSouth Mobility identified sites 7, 8, and 19 as acceptable alternatives that would meet its service objectives.¹⁹ BellSouth Mobility also reported that sites 5 and 15 would meet at least a portion of its service objectives.²⁰ Tritel identified sites 7, 8, 15, and 19 as acceptable alternatives that would meet its service objectives and not require the construction of additional facilities.²¹ Verizon Wireless identified sites 7, 8, and 15 as acceptable alternative sites that would meet its service objectives and stated that site 19 is marginally acceptable.²² Sprint PCS stated that none of the potential alternative sites is acceptable.²³ In addition, some of the potential alternative sites were reviewed from a feasibility standpoint and the Applicants determined that it would not be feasible to construct the necessary facilities at sites 2 and 6.²⁴ The Applicants also found that site 7 would require the razing of several houses and up to \$1,000,000 in construction expense.

In summary, the Applicants determined that none of the potential alternative sites are suitable for the proposed construction for one or more of the following reasons: (1) the landowner is unwilling to enter into lease agreement; (2) the site is located in or

¹⁹ T.E., Vol. 2 at 95-96.

²⁰ T.E., Vol. 2 at 158-159, 176-178.

²¹ T.E., Vol. 2 at 229-230.

²² T.E., Vol. 3 at 153-161.

²³ T.E., Vol. 3 at 238.

²⁴ T.E., Vol. 3 at 88-89.

adjacent to floodway or flood plain; (3) Federal Aviation Administration (“FAA”) height limits on the facility are insufficient to meet providers’ requirements; (4) radio frequency coverage is unacceptable; (5) spacing between other facilities in providers’ network is unacceptable; (6) the site is outside of providers’ designated search ring; (7) the site is inaccessible; and/or (8) construction of a facility on the site is not structurally feasible.

Finally, the Applicants explained why the “microcell” technology suggested by the Intervenor is not a viable solution for any of the four carriers’ service objectives. BellSouth Mobility advised that microcells are designed for stationary traffic (such as malls and stadiums) and would not be suitable for high-speed vehicular traffic.²⁵ Tritel estimated that the use of microcells, if feasible, would require the construction of approximately 17 separate sites to match the capacity level produced by the proposed facility.²⁶ Verizon Wireless explained why microcells would not be appropriate without a complete redesign and confirmed that microcells are not suitable for vehicular traffic.²⁷ Sprint PCS maintained that microcells are not a viable option due to interference, construction, and capacity issues.²⁸

The Intervenor argues that the Commission should accept the determination of the Planning Commission and that the Commission should find that a more suitable location for the proposed facility exists. The Intervenor challenges the radio frequency evidence presented by the carriers and claims that the intervenors have a direct

²⁵ T.E., Vol. 4 at 108-114.

²⁶ T.E., Vol. 4 at 102-104.

²⁷ T.E., Vol. 3 at 155-156.

²⁸ T.E., Vol. 4 at 145-146.

economic interest in advancing the desired result. The Intervenor contend that the best evidence of the service providers' needs are reflected in the results of the carriers' drive tests, which are a part of the record and which the Intervenor claim show no degradation in service. With regard to the potential alternative sites, the Intervenor submit that the Applicants did not sufficiently investigate the availability of the alternative sites. In their review of the record, the Intervenor identified sites 7 and 15 as viable alternatives and advised the Commission that site 15 should be pursued as the preferred location. Finally, the Intervenor maintain that use of microcell technology is preferable to constructing a single supporting facility for all the carriers.

KRS 278.650 provides for the Commission's override of the Planning Commission's rejection of a wireless telecommunications tower application if there is no acceptable alternative site and the public convenience and necessity require the construction. "Public convenience and necessity" pertain to the service needs of utility customers. Public Service Comm'n v. City of Paris, Ky., 299 S.W.2d 811, 816 (1957) (demand and need for service "is to be gauged from the point of view of the consumers"); Satterwhite v. Public Service Comm'n, Ky., 474 S.W.2d 387, 388-89 (1971) (persons over whose land transmission lines would cross were not entitled to notice of, or participation in, hearing on certificate for the lines, and the Commission was not concerned with the specific path for the lines "because it was not relevant to the issue of convenience and necessity"). The record in this case is replete with evidence that the public convenience and necessity require the proposed construction. In contrast, the evidence of record does not reveal the existence of an acceptable alternative site for construction or collocation.

The law on the jurisdictional issue in this matter is succinct and vests with the Commission the ultimate authority to override a determination of the Planning Commission. It is with reluctance that the Commission overrides the determination of the Planning Commission in this proceeding, for its determination is based upon legitimate concerns within the scope of its jurisdiction. However, KRS 278.650 makes it clear that the need for service takes precedence over aesthetics. Even if it did not, we are bound by federal law, which demands “rapid deployment of telecommunications technology.” AT&T Communications of the South Central States v. BellSouth Telecommunications, Inc., 20 F.Supp.2d 1097 (E.D. Ky. 1998). See also 47 U.S.C. § 332(c)(7)(B) (no state or local government may deny a wireless telecommunications utility permission to construct if such denial will have the effect of prohibiting the provision of service).

Cases of this nature frequently involve a clash between two competing issues: preservation of Kentucky’s scenic beauty and the need to ensure that the advantages of modern telecommunications technology are available to all of Kentucky’s citizens. The issue of scenic beauty frequently arises because the location of a cellular tower is often in or near residential areas. The law, in requiring cellular companies to choose a location that is least objectionable, attempts to reconcile these competing interests; but, in the last analysis, when no such reconciliation is possible, the need for service must triumph over aesthetics. KRS 278.020; KRS 278.650. The Intervenor in this case have demonstrated that the site proposed herein leaves much to be desired from an aesthetic point of view. However, the record indicates that no suitable alternative site exists.

Pursuant to KRS 278.030(2), BellSouth Mobility, Verizon Wireless, Tritel, and Sprint PCS are required to “furnish adequate, efficient and reasonable service.” It is, in turn, the obligation of this Commission to ensure that the facilities of all utilities it regulates are sufficient to comply with this mandate. See KRS 278.040 (requiring the Commission to enforce the provisions of KRS Chapter 278); KRS 278.280 (requiring the Commission to ensure, among other things, that the facilities of utilities are sufficient and adequate). Here, the Applicants have shown that denial of the instant application would jeopardize the availability of adequate utility service and that the alternative solutions proposed by Intervenor would be inefficient and/or unreasonable. Accordingly, the Commission finds that the application should be approved. However, the Applicants should make every effort to mitigate the effects of the construction on the surrounding area including maintaining or replacing, to the extent practical, existing vegetation on the proposed construction site.

Crown 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 Licensed Professional Engineer.

The Applicants have filed applications with the FAA and the Kentucky Airport Zoning Commission seeking approval for the construction and operation of the proposed facility. Both applications have been approved.

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

For the foregoing reasons, the Commission, having considered the evidence of record and being otherwise sufficiently advised, HEREBY ORDERS that:

1. Crown is granted a Certificate of Public Convenience and Necessity to construct a wireless telecommunications facility. The proposed facility consists of a monopole antenna tower not to exceed 185 feet in height, with attached antenna, and is to be located at Old Cannons Lane, Louisville, Jefferson County, Kentucky. The coordinates for the proposed facility are North Latitude 38° 14' 16.42" by West Longitude 85° 39' 46.28".

2. The Applicants shall take reasonable steps to mitigate the aesthetic impact of the proposed construction on surrounding property, including maintaining or replacing, to the extent practical, existing vegetation on the proposed construction site.

3. The Applicant 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 9th day of May, 2001.

By the Commission

ATTEST:


Executive Director