

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF CROWN COMMUNICATION)	
INC. AND KENTUCKY CGSA, INC. FOR ISSUANCE)	
OF A CERTIFICATE OF PUBLIC CONVENIENCE)	
AND NECESSITY TO CONSTRUCT A WIRELESS)	
COMMUNICATIONS FACILITY AT 1220 EAST OAK)	
STREET IN LOUISVILLE, KENTUCKY 40204)	
IN THE WIRELESS COMMUNICATIONS LICENSE)	
AREA IN THE COMMONWEALTH OF KENTUCKY)	CASE NO.
IN THE COUNTY OF JEFFERSON)	2000-043
)	
SITE NAME: GRINSTEAD)	
SITE NUMBER: KY 276)	
REJECTED BY LOUISVILLE AND JEFFERSON)	
COUNTY PLANNING COMMISSION AS LOCAL)	
DOCKET NO: 4-10-99)	

O R D E R

On April 5, 2000, Crown Communication Inc. ("Crown"), Kentucky CGSA, Inc. d/b/a BellSouth Mobility, Inc. ("BellSouth Mobility") and GTE Wireless of the South, Inc. n/k/a Verizon Wireless ("Verizon Wireless")¹ ("collectively, Applicants") filed an application seeking a Certificate of Public Convenience and Necessity to construct and operate a wireless telecommunications facility. The proposed facility consists of a monopole antenna tower not to exceed 185 feet in height, with attached antennas, to be located at 1220 E. Oak Street, Louisville, Jefferson County, Kentucky. The coordinates for the proposed facility are North Latitude 38° 14' 3.49" by West Longitude 85° 43' 44.79".

¹ On August 7, 2000, Verizon Wireless filed a motion to amend the application in this proceeding by adding Verizon Wireless as an additional applicant.

Pursuant to KRS 278.650, the Applicants submitted the proposed construction for review by the Louisville and Jefferson County Planning Commission (“Planning Commission”) on October 29, 1999. The Planning Commission rejected the proposed construction, 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 any comments and informed the recipients of their right to request intervention. The Commission received numerous letters objecting to the proposed construction. The President of the Louisville Board of Aldermen, Steve Magre, by counsel, requested and was granted intervention in this matter. No other members of the public requested intervention.

By Order dated August 7, 2000, the Commission scheduled a public hearing. In addition, the Commission ordered that any evidence regarding potential alternative sites for the proposed construction, if any, 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 may be submitted at the hearing except in regard to those specific sites for which information has been filed. No requests for information or potential alternative sites were filed prior to the hearing held on September 21, 2000.

During the hearing, public comment was made by one property owner who objected to the proposed construction based on inadequate buffers from his property. The property

owner requested that appropriate steps be taken to buffer adjacent property if the construction was approved.

The Applicants provided extensive evidence supporting the necessity of the proposed construction. BellSouth Mobility documented its need for an additional wireless facility in the area by presenting evidence of current network interference problems. These problems will be corrected upon completion of a six-cell site replacement project which includes the instant site, four co-locations and the wireless facility proposed in Case No. 2000-042,² currently pending before the Commission. In addition, Verizon Wireless supplied evidence of its need for an additional wireless facility for its digital service in the area, presenting evidence of dropped calls, inability to initiate calls and the lack of building penetration in the area.

Neither intervenor presented witnesses in this proceeding, relying upon the determination of the Planning Commission as the basis for their opposition. The Planning Commission determined that the proposed construction was neither in accordance with the Comprehensive Plan nor with applicable portions of the Development Code. Specifically, the Planning Commission noted incompatibility with the existing residential area, insufficient investigation of alternate sites, including opportunities to co-locate, and inappropriate setbacks from adjoining properties.

² Case No. 2000-042, The Application of Crown Communication Inc. and Kentucky CGSA, Inc. for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility at Old Cannons Lane, Louisville, KY 40207 in the Wireless Communications License area in the Commonwealth of Kentucky in the County of Jefferson Site Name: Seneca Park

During the hearing, no evidence of alternative sites was presented since no intervenor pre-filed a list of alternative sites as required by the Commission's procedural order. Pursuant to 807 KAR 5:063, the Applicants filed, as Exhibit O of the application, statements that there is no reasonably available opportunity to collocate and that there are no acceptable alternative sites. The Applicants thoroughly discussed their investigation of opportunities to collocate and the availability of alternative sites and have certified that there is no reasonably available opportunity either to collocate or to locate a wireless communications facility on an acceptable alternative site.

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. 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"); 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"). 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).

Pursuant to KRS 278.030(2), BellSouth Mobility and Verizon Wireless 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. Accordingly, in the absence of evidence to the contrary, 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.

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 Federal Aviation Administration 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 1220 E. Oak Street, Louisville, Jefferson County, Kentucky. The

coordinates for the proposed facility are North Latitude 38° 14' 3.49" by West Longitude 85° 43' 44.79".

2. The Applicants shall take reasonable steps to mitigate the aesthetic impact of the proposed construction on surrounding property.

3. Crown 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