

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF TITAN TOWERS, L.P.,)	
TRITEL COMMUNICATIONS, INC. AND)	
TRITEL FINANCE, INC. FOR ISSUANCE)	
OF A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY TO)	CASE NO. 2001-219-UAC
CONSTRUCT A PERSONAL)	
COMMUNICATIONS SERVICES)	
FACILITY IN THE LOUISVILLE MAJOR)	
TRADING AREA [McAFEE FACILITY])	

O R D E R

On August 6, 2001, Titan Towers, L.P., Tritel Communications, Inc., and Tritel Finance, Inc. (Applicants) filed an application with the Commission requesting a Certificate of Public Convenience and Necessity to construct and operate a wireless telecommunications facility at 3049 Louisville Road, Harrodsburg, Mercer County, Kentucky, commonly named McAfee Facility. By written request, Leroy and Carol Hagan, 300 Hagan Lane, Harrodsburg, Kentucky 40330; Ernest and Denise Newton, 295 Hagan Lane, Harrodsburg, Kentucky 40330; and Kenneth and Phyllis Taylor, 2999 Louisville Road, Harrodsburg, Kentucky 40330 have requested full intervention herein. The Commission finds that such intervention is likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Accordingly, the written requests of the above-named individuals for full intervention should be granted. They shall be known collectively as Intervenors.

The Commission, on its own motion, has scheduled a hearing on the proposed wireless telecommunications facility for March 12, 2002 at 9:00 a.m., Eastern Standard Time, in Hearing Room 1 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky.

On October 22, 2001, the Applicants filed a motion to set a hearing date and raised an issue regarding the application of KRS 100.987(4)(c). The Greater Harrodsburg/Mercer County Planning & Zoning Commission (P&Z Unit) made its decision to reject the application on October 3, 2001. The decision was made timely and within the framework of the 60-day period allowed by statute. However, the Applicants were not notified in writing until they received the notification letter on October 15, 2001, which was beyond the 60-day period as defined by KRS 100.987(4)(c). In their motion, the Applicants contend that, though the P&Z Unit has rejected the site, the case should proceed before the Commission as if the P&Z Unit had instead approved it. The basis for Applicants' argument is that the P&Z Unit failed to advise the Applicants and this Commission of its decision within 60 days of the date the uniform application was submitted. Applicants misread the statute in two critical ways.

KRS 100.987(4)(c) does indeed require the P&Z Unit to advise the utility and this Commission of its decision within 60 days of receiving an application. The statute does not, however, deprive the P&Z Unit of its authority if this deadline is not met. Instead, the statute provides that [i]f the planning commission fails to *issue a final decision* within sixty (60) days it is presumed that the local planning commission has

approved the utility's uniform application.¹ Here, the P&Z Unit issued its decision within the statutory timeframe. Moreover, the Applicants failed to consider the meaning of the word "presumed." Black's Law Dictionary (7th Ed. 1999) defines the word "presume" as follows: "To assume beforehand; to suppose to be true in the absence of proof." Here, there certainly is proof that the P&Z Unit rejected the proposed site.

Accordingly, this case must proceed under KRS 100.987(5) as one in which the utility has requested that the Commission override the P&Z Unit's rejection. Therefore, in the hearing on this matter, the parties shall be prepared to present evidence demonstrating that there is, or that there is not, an acceptable alternative site for the proposed construction.²

As noted above, on October 3, 2001, the P&Z Unit rejected the application. The motion filed by the Applicants on October 22, 2001 will be deemed a motion to override the local P&Z Unit's decision to reject the application.

If an Intervenor wishes to appear at the hearing in opposition to the proposed facility and present evidence against the construction, the Intervenor must, within 10 days of the date of this Order, so notify the Commission in writing, with a copy to all parties. If no statement of intent to appear at the hearing and present evidence against the proposed facility is received by that date, the hearing will be cancelled and this matter will be submitted to the Commission based on the written record without further Orders herein.

¹ Id. (Emphasis added.)

² Id.

Pursuant to KRS 100.987(5), the Commission may override the P&Z Unit's rejection of the application only if public convenience and necessity require the proposed construction and if no acceptable alternative site for the proposed construction exists.

Intervenors are put on notice that evidence regarding potential acceptable alternative sites for the proposed construction and any requests for information must be filed with the Commission, with a copy to all parties of record, no later than 20 days from the date of this Order. No Intervenor may produce evidence regarding any other alternative site at the hearing except in regard to the specific sites of record as described in this Order.

Information requests and site information regarding potential acceptable alternative sites, if filed by the Intervenor(s), shall be responded to by the Applicants within 40 days of the date of this Order, and Applicants shall include in such responses a report of their view of the feasibility of the alternative sites presented by the Intervenor(s).

In light of the P&Z Unit's rejection of the application, the Commission finds that the issues to be addressed by the Commission at the public hearing shall be jurisdictional safety issues (engineering, design, safety, construction, and operation of the tower); any proposed acceptable alternative sites for the location of the tower; and the public necessity for construction and operation of the tower.

IT IS THEREFORE ORDERED that:

1. The status of full intervenor is granted to Leroy and Carol Hagan, Ernest and Denise Newton, and Kenneth and Phyllis Taylor.

2. The Intervenors shall be entitled to the full rights of a party and shall be served with Commission Orders and with filed testimony, exhibits, pleadings, correspondence, and all other documents submitted by the parties after the date of this Order.

3. Should any Intervenor file documents of any kind with the Commission in the course of these proceedings, a copy of said documents shall be served on all other parties of record.

4. A hearing on the application and proposed wireless telecommunications facility is scheduled for March 12, 2002 at 9:00 a.m., Eastern Standard Time, in Hearing Room 1 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky.

5. No Intervenor nor any person subsequently granted intervention herein may submit evidence regarding acceptable alternative sites for the proposed facility at the hearing in this matter, except in regard to those specific sites for which information has been filed within 20 days of the date of this Order.

6. The Applicants shall respond in writing to a filing regarding information requests and potential acceptable alternative sites, if any, within 40 days from the date of this Order, and shall include in their response information concerning the availability and technical feasibility of such proposed acceptable alternative sites.

7. The Applicants shall appear at the hearing and shall be prepared to present testimony regarding the jurisdictional safety issues relating to the facility (design, location, safety, construction, and operation). In addition, Applicants shall appear at the hearing and shall be prepared to present testimony and evidence regarding the proposed acceptable alternative sites filed in the record and proposed by

the Intervenors herein. The Applicants are not obligated to respond to any additional or other alternative sites that might be proposed during the hearing in this matter. In regard to the uniform application, proceedings, and hearing, it is ordered that the Federal Communications Commission (FCC) has exclusive jurisdiction over issues regarding radio frequency emissions, including environmental effects of radio frequency emissions, and radio frequency interference that comply with the FCC standards. 47 U.S.C. § 332(c)(7) and Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners, 199 F.3d 1185 (10th Cir. 1999).

8. The Commission will not take into consideration matters exclusively within the jurisdiction of the P&Z Unit relating to the character of the general area in which the tower is to be constructed and the likely effects of the installation on nearby land uses and values.

9. Issues to be addressed at hearing by testimony and evidence are those relating to KRS 100.987(5)(a) for potential acceptable alternative sites, if any, jurisdictional safety issues as set out herein, and the public convenience and necessity requiring the proposed construction.

10. If no Intervenor files a statement of intent to appear and present evidence in opposition to the proposed telecommunications facility within 10 days of the date of this Order, the hearing shall be cancelled and the matter submitted to the Commission on the existing record without further Orders by the Commission.

11. The Applicants motion to proceed pursuant to KRS 100.987(4)(c) by regarding the P&Z Unit's failure to advise the Applicants and the Commission of its

rejection of the application within the statutory 60 days, and to proceed as though it is presumed that the P&Z Unit approved the application is hereby denied.

12. Neither opening statements nor witnesses summaries of prefiled testimony shall be permitted at the hearing in this matter.

13. Any interested person shall have the opportunity to present testimony or comment on the proposed facility.

14. Prefiled testimony, if any, shall be filed within 45 days of the date of this Order.

15. Pursuant to KRS 100.324, a copy of this Order is being sent to the Greater Harrodsburg/Mercer County Planning & Zoning Commission, 109 Short Street, Harrodsburg, Kentucky 40330.

Done at Frankfort, Kentucky, this 14th day of January, 2002.

By the Commission

ATTEST:


Executive Director