

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF NEW CINGULAR WIRELESS PCS,)	
LLC AND AMERICAN TOWERS LLC FOR ISSUANCE)	
OF A CERTIFICATE OF PUBLIC CONVENIENCE AND)	CASE NO.
NECESSITY TO CONSTRUCT A WIRELESS)	2015-00404
COMMUNICATIONS FACILITY IN THE)	
COMMONWEALTH OF KENTUCKY IN THE COUNTY)	
OF WOLFE)	

ORDER

This matter is before the Commission on two requests to intervene in a cell tower Certificate of Public Convenience and Necessity (“CPCN”) matter, one request filed by an adjacent property owner, David R. Graham (“Mr. Graham”) (“Request to Intervene”), and a second request filed jointly by Mr. Graham, Raymond Banks, Mayor of Campton, Kentucky, and Garrett Denniston, Magistrate, Wolfe County Fiscal Court, District 3, (collectively, “Petitioners”) (“Joint Request to Intervene”).

On December 14, 2015, New Cingular Wireless PCS, LLC (“New Cingular”) and American Towers LLC (jointly, “Applicants”) filed an application requesting a CPCN to construct a wireless communications facility at 395 Miller Ridge Road, Pine Ridge, Wolfe County, Kentucky (“Pea Ridge cell tower”).

On January 11, 2016, Mr. Graham filed his Request to Intervene in the proceeding, stating that he opposes the location of the Pea Ridge cell tower due to environmental concerns regarding radio frequency emissions from cell towers and

because the Pea Ridge cell tower will be located 175 feet from the Daniel Boone National Forest.

On February 1, 2016, Applicants filed their response objecting to Mr. Graham's Request to Intervene, asserting that federal statutory and case law prohibits the Commission from regulating the location of cell towers on the basis of environmental effects.¹ Applicants also state that Mr. Graham failed to provide a basis to intervene regarding the distance between Pea Ridge cell tower and Daniel Boone National Forest.

On February 25, 2016, the Commission directed Mr. Graham to file a reply to Applicants' response ("Reply"), or the matter would be decided on the existing written record. On March 3, 2016, Mr. Graham filed his Reply, stating that he continues to oppose the location of Pea Ridge cell tower for health and safety reasons, and attached to his response an Internet article that alleges cell towers pose a health risk to persons living within a quarter mile of a cell tower from radiation emissions.² Mr. Graham also argued that the cell tower could be built in other nearby locations, but did not identify possible sites.

On March 2, 2016, Mr. Graham submitted the Joint Request to Intervene signed by the Petitioners. As a basis for the Joint Request to Intervene, Petitioners state that, for "safety, health, and environmental" reasons, a cell phone tower could be built at another location, but do not set forth the nature of or expound further upon their health

¹ 47 U.S.C. § 332(7)(B)(iv); *Telespectrum, Inc. v. Public Service Com'n*, 227 F.3d 414 (6th Cir. 2000). This case was heard at the Commission in Case No. 1997-00394, *In the Matter of the Application of Telespectrum, Inc. for a Certificate of Public Convenience and Necessity to Construct a Cell Site Off Pine Ridge/Ranch Road, Northwest of Olive Hill, in Western Carter County, Kentucky (Globe Site)* (Order denying application June 25, 1998; on remand from E.D. Ky., order approving application Nov. 1, 2001).

² Dangers of Living Near Cell Phone Towers Raised, *East County Magazine*, http://www.eastcountymagazine.org/cell_phone_towers_238 (accessed March 12, 2014).

and safety concerns. The Commission notes that the Joint Request to Intervene was written by Mr. Graham, and thus based upon his previous filings, the “safety, health, and environmental” concerns arise from cell tower radio frequency emissions.

On March 9, 2016, Applicants filed separate responses to Mr. Graham’s Reply and to the Joint Request to Intervene. In their responses to both the Reply and to the Joint Request to Intervene, Applicants reiterate that the Commission is expressly prohibited from regulating the location of a cell tower on the basis of radio frequency emissions. In response to the assertion that the cell tower could be located elsewhere, Applicants argue that the Reply and Joint Request to Intervene set forth only unsupported lay opinion that other locations are feasible, available for leasing, and less intrusive than the selected site. Applicants assert that, under relevant case law, unsupported lay opinion regarding whether there are other suitable locations for a cell tower is not sufficient evidence on which to base a denial of a cell tower CPCN application.³

DISCUSSION

The only person with a statutory right to intervene in a proceeding before the Commission is the Attorney General (“AG”).⁴ Intervention by all others is permissive and is within the sound discretion of the Commission.⁵

The standards the Commission must consider in exercising discretion to determine permissive intervention are set forth in 807 KAR 5:001, Section 4(11).

³ See *Cellco P’ship v. Franklin Cnty.*, 553 F.Supp. 2d 838 (E.D. Ky. 2008); *T-Mobile Cent. V. Charter Twp. of W. Bloomfield*, 691 F.3d 794 (6th Cir. 2012).

⁴ See KRS 367.150(8)(b). The AG has not requested to intervene in this matter.

⁵ *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

Pursuant to 807 KAR 5:001, Section 4(11)(a), a person seeking to intervene must file a written request that states the person's special interest, or facts he or she will develop to assist the Commission in fully considering the matter. 807 KAR 5:001, Section 4(11)(b), provides that the Commission:

shall grant a person leave to intervene if the [C]ommission finds that...he has a special interest in the case that is not otherwise adequately represented or that his intervention is likely to present issues or to develop facts that assist the [C]ommission in fully considering the matter without unduly complicating or disrupting the proceedings.

Based upon a review of the pleadings at issue, the Commission finds that Petitioners are unlikely to present issues or develop facts that will assist the Commission in fully considering this matter.

The primary issue raised in both Mr. Graham's Request to Intervene and the Joint Request to Intervene is the consideration of the environmental effects of radio frequency emissions as a basis to deny the Pea Ridge cell tower application or to direct Applicants to locate the tower on a different site. As set forth in the Federal Telecommunications Act of 1996 and affirmed by the United States Court of Appeals for the Sixth Circuit,⁶ the Commission is expressly prohibited from regulating the location of a cell tower on the basis of the environmental effects of radio frequency emissions. Given the limitations on the Commission's authority to consider this issue, Petitioners

⁶ 47 U.S.C. § 332(7)(B)(iv); *Telespectrum, Inc. v. Public Service Com'n*, 227 F.3d 414 (6th Cir. 2000). This case was heard at the Commission in Case No. 1997-00394, *In the Matter of the Application of Telespectrum, Inc. for a Certificate of Public Convenience and Necessity to Construct a Cell Site Off Pine Ridge/Ranch Road, Northwest of Olive Hill, in Western Carter County, Kentucky (Globe Site)* (Order denying application June 25, 1998; on remand from Eastern District of Kentucky United States District Court, order approving application Nov. 1, 2001). The United States Court of Appeals for the Sixth Circuit not only prohibited the Commission from denying the Telespectrum CPCN application on the basis of environmental effects, the matter was remanded to the Commission for an Order approving the application pursuant to an order of the Eastern District of Kentucky.

fail to present an issue that will assist the Commission in fully considering the Pea Ridge cell tower CPCN application, and thus the respective requests to intervene should be denied.


The Commission further finds that Mr. Graham's Request to Intervene based upon the close proximity between Daniel Boone National Forest and the Pea Ridge cell tower should be denied. Mr. Graham fails to identify how the location of the Pea Ridge cell tower is impacted by the distance to the forest or what laws are violated by the location. Further, the record reflects that the United States Department of Agriculture, US Forestry Division, who owns and administers the Daniel Boone National Forest, received notice of the proposed cell tower and that it has not intervened in this matter.

The Commission further finds that the documents filed by Petitioners should be considered as public comment in this proceeding. Petitioners will have ample opportunity to file additional comments in this proceeding even though they have not been granted intervenor status. Petitioners may file comments as frequently as they choose, and those comments will be entered into the record of this case. Petitioners can review all documents filed in this case and monitor the proceedings via the Commission's website at the following web address: https://psc.ky.gov/PSC_WebNet/ViewCaseFilings.aspx?Case=15-404.

IT IS THEREFORE ORDERED that:

1. Mr. Graham's Request to Intervene is denied.
2. Petitioners' Joint Request to Intervene is denied.
3. Petitioners' tendered documents shall be considered as public comment.

By the Commission

ENTERED 
MAR 31 2016
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Acting Executive Director

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