

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF NEW CINGULAR WIRELESS	)	
PCS, LLC D/B/A AT&T MOBILITY FOR ISSUANCE	)	
OF A CERTIFICATE OF PUBLIC CONVENIENCE	)	
AND NECESSITY TO CONSTRUCT A WIRELESS	)	CASE NO.
COMMUNICATIONS FACILITY IN THE	)	2017-00368
COMMONWEALTH OF KENTUCKY IN THE	)	
COUNTY OF GRAVES	)	

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 Nancy M. Roche (“Ms. Roche”), whose property is near the proposed site, and a second request filed by Jose M. Flores (“Mr. Flores”), whose property is adjacent to the proposed site. Ms. Roche’s and Mr. Flores’s requests (“Requests for Intervention”) are substantially similar in wording and raise identical issues.

On September 6, 2017, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“New Cingular”) filed an application requesting a CPCN to construct a wireless communications facility at 850 State Route 348 East, Symsonia, Graves County, Kentucky (“Symsonia cell tower”).

Ms. Roche filed her request to intervene on October 25, 2017; Mr. Flores filed his request to intervene on November 9, 2017. Ms. Roche and Mr. Flores state that they oppose the location of the Symsonia cell tower due to concerns about potential decrease in property value of neighboring properties. Both Ms. Roche and Mr. Flores

question a study<sup>1</sup> (“Property Value Study”) conducted on behalf of New Cingular that finds that the proposed Symsonia cell tower will not negatively affect the value of surrounding properties. They contend that the Property Value Study is flawed because it is based upon data from a metropolitan area, as opposed to the rural area of the proposed site in Symsonia, and upon cell towers of sizes differing from the size of the proposed Symsonia cell tower. Ms. Roche and Mr. Flores also question whether New Cingular adequately searched for alternative sites. Both Ms. Roche and Mr. Flores acknowledge that there is a problem with cell phone coverage in the surrounding area, but argue that there are more appropriate locations for a cell phone tower.

On November 6, 2017, and November 9, 2017, New Cingular filed its responses to Ms. Roche’s and Mr. Flores’s respective Requests for Intervention. New Cingular objects to the Requests to Intervene, asserting that Ms. Roche and Mr. Flores do not cite to statutes or regulations to support their conclusion that the proposed Symsonia site should be rejected based on property value or aesthetic concerns. New Cingular further asserts that Ms. Roche and Mr. Flores offer only unsupported lay opinion that other locations are feasible, available for leasing, meet the radio frequency needs of the proposed project, and are 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.<sup>2</sup>

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<sup>1</sup> New Cingular’s Response to Public Letters of Concern (filed Oct. 2, 2017). New Cingular filed the property value study in response to public comments filed in this case.

<sup>2</sup> See *Cellco P’ship v. Franklin Cnty.*, 553 F.Supp. 2d 838 (E.D. Ky. 2008).

On November 20, 2017, Ms. Roche filed a reply to New Cingular's response to her request to intervene. Ms. Roche emphasizes three points: (1) Ms. Roche owns residential property in Symsonia and farmland near the proposed cell phone tower. (2) Ms. Roche requests permission to intervene to present expert testimony regarding the negative impact that placement of the proposed cell phone tower would have on property valuation. (3) Ms. Roche claims that the testimony of Symsonia residents on their property value is not "lay opinion".

### DISCUSSION

The only person with a statutory right to intervene in a proceeding before the Commission is the Attorney General.<sup>3</sup> Intervention by all others is permissive and is within the sole discretion of the Commission.<sup>4</sup>

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

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<sup>3</sup> See KRS 367.150(8)(b). The Attorney General has not requested to intervene in this matter.

<sup>4</sup> *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

Based upon a review of the pleadings at issue, the Commission finds that Ms. Roche and Mr. Flores are unlikely to present issues or develop facts that will assist the Commission in fully considering this matter. This is especially so given that Ms. Roche and Mr. Flores acknowledge that cell phone coverage in their area is inadequate, but provide only an unsupported conclusion that other sites are more appropriate. The Commission notes that other public comments filed in this matter addressed the need to address poor cell phone coverage.

The Commission finds that Ms. Roche and Mr. Flores failed to provide sufficient evidence to support their assertion that the Property Value Study was flawed, and that the Symsonia cell tower could be located elsewhere. Ms. Roche and Mr. Flores base their conclusions regarding the Property Value Study and the location of the Symsonia cell tower on generalized concerns and unsupported personal opinion. Ms. Roche and Mr. Flores question certain data points used in the Property Value Study, but failed to set forth the basis for their conclusion that the study is flawed. Similarly, Ms. Roche and Mr. Flores failed to set forth the basis for their conclusion that there are alternate sites that are feasible, available for leasing, and less intrusive than the selected site. Pursuant to relevant case law, unsupported lay opinions regarding the siting of cell towers, such as that offered by Ms. Roche and Mr. Flores, are not sufficient evidence on which to base a denial of a cell tower CPCN application.<sup>5</sup> For that reason, Ms. Roche and Mr. Flores are unlikely to present issues or develop facts that will assist the Commission in considering this matter, and their Requests for Intervention should be denied.

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<sup>5</sup> See *Cellco P'ship v. Franklin Cnty.*, 553 F.Supp. 2d 838.

The Commission further finds that the documents filed by Ms. Roche and Mr. Flores should be considered public comments in this proceeding. Ms. Roche and Mr. Flores will have ample opportunity to file additional comments in this proceeding even though they have not been granted intervenor status. Ms. Roche and Mr. Flores may file comments as frequently as they choose, and those comments will be entered into the record of this case. Ms. Roche and Mr. Flores can review all documents filed in this case and monitor the proceedings via the Commission's website.

IT IS THEREFORE ORDERED that:

1. Ms. Roche's Request to Intervene is denied.
2. Mr. Flores's Request to Intervene is denied.
3. Ms. Roche's and Mr. Flores's tendered documents shall be considered as public comment.

By the Commission



ATTEST:

  
Executive Director

\*Honorable David A Pike  
Attorney at Law  
Pike Legal Group PLLC  
1578 Highway 44 East, Suite 6  
P. O. Box 369  
Shepherdsville, KENTUCKY 40165-0369

\*New Cingular Wireless PCS, LLC dba AT&T  
1010 N St Mary's Street, 9th Floor  
San Antonio, TX 78215