

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF HORVATH TOWERS V, LLC FOR)	
ISSUANCE OF A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY TO CONSTRUCT)	CASE NO.
A WIRELESS COMMUNICATIONS FACILITY IN THE)	2019-00117
COMMONWEALTH OF KENTUCKY IN THE)	
COUNTY OF WHITLEY)	

ORDER

On April 15, 2019, Horvath Towers V, LLC (Horvath), a Delaware limited liability company, filed an application seeking a Certificate of Public Convenience and Necessity (CPCN) to construct and operate a wireless telecommunications facility. The proposed wireless facility consists of a tower that will be 230 feet in height with a lightning arrestor that will be an additional 10 feet in length, for a total height of 240 feet. The proposed wireless facility will be located at 140 East Church Street in Whitley County, Kentucky. The coordinates for the proposed facility are North Latitude 36°40'57.18" by West Longitude 84°07'37.74".¹

Horvath stated that the tower was being constructed for use by Verizon Wireless to address an inadequacy in Verizon Wireless's coverage or to extend service to an area not currently served.² Horvath indicated that Verizon Wireless's radio frequency engineers established a search area for a location for the proposed wireless facility to

¹ Application at 1-3.

² *Id.* at 2.

address those service issues.³ Horvath stated that there were no opportunities for co-location of Verizon Wireless's facilities in the search area.⁴

Horvath has provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility.⁵ Based upon the application, the design of the tower and foundation appears to conform to applicable nationally recognized building standards, and a licensed professional engineer has certified the plans.

Horvath filed applications with the Federal Aviation Administration (FAA) and the Kentucky Airport Zoning Commission seeking approval for the construction and operation of the proposed wireless facility at the proposed location. The FAA issued a Determination of No Hazard to Air Navigation on March 4, 2019, but the Kentucky Airport Zoning Commission had not made a determination at the time the application was filed.⁶

Horvath filed statements indicating it provided the required notifications regarding the proposed construction pursuant to 807 KAR 5:063.⁷ The Commission received no requests for intervention. However, the Commission did receive comments from Brian L. Chinn, who owns property that is both adjacent and to the east of the location of the proposed wireless facility.

³ Application at 6, Exhibit N.

⁴ Application at 4.

⁵ *Id.* at 3–5.

⁶ *Id.* at 4, Exhibit E, Exhibit F.

⁷ *Id.* at 5–6, Exhibit J, Exhibit K, and Exhibit L.

Mr. Chinn raised concerns about how the proposed wireless facility would affect the value of his property. He asserted that the wireless facility would be visible from his property, that his property is within the “fall zone” of the proposed wireless facility, and that people will perceive that the proposed wireless facility will affect their health, all of which he asserted would decrease the value of his property. He stated that he understood “the need for technological advancements and the property rights of [his] neighbor to negotiate a significant monetary advantage for a tower lease,” but argued that adjacent property owners should be compensated for any effect on the value of their property as well.⁸

Horvath argued that Mr. Chinn’s concerns regarding the proposed facility’s effect on property value are unwarranted. In support of that argument, Horvath provided an article published in the May/June 2016 edition of *Probate and Property Magazine*, a publication of the American Bar Association, that cited to several studies that found that cell towers have no or limited effects on the value of surrounding properties. Though, the article acknowledged a single study from New Zealand, relied on by Mr. Chinn, which found that cell phone towers do have an effect on the value of nearby residential properties.⁹ Horvath also noted that Mr. Chinn’s property was initially considered as a possible location for the proposed wireless facility with Mr. Chinn’s approval,¹⁰ and

⁸ Chinn, Brian, Letter Dated April 30, 2019 (received May 6, 2019).

⁹ Horvath’s Response to Chinn’s April 2019 Letter (received June 24, 2019).

¹⁰ John Marcelletti with Pyramid Network Services, LLC, provided a letter to Horvath, which was attached as Exhibit C to the response to Mr. Chinn’s April 30, 2019 letter (hereinafter the Marcelletti Letter). Mr. Marcelletti’s letter stated, in part:

I reached out to all of the surrounding properties that had available land to see if they were willing to allow a tower on their property. I spoke with a number of people along with Brian Chinn over the phone in the beginning

seemed to suggest that as a basis for discounting the concerns he raised about the effect of the tower on the value of his property.¹¹

Generally, in reviewing an application for a CPCN pursuant to KRS 278.020(1), the Commission looks at whether the party requesting the CPCN demonstrate a need for the facilities and an absence of wasteful duplication.¹² When determining whether to grant a CPCN for a cell tower pursuant to KRS 278.650, *et. seq.*, the Commission is also permitted to consider the effect of the cell tower on the character of the general area and nearby land uses and values.¹³ However, the scope and nature of the Commission's review are limited by federal law, which partially preempts state law in this area and seeks to promote access to wireless telecommunications facilities.¹⁴

of August 2018. On or about August 22nd we met in person and he walked me around his property to discuss the proposal and select an area he was willing to consider as a candidate. He confirmed his interest to be included. A few days later I submitted three candidates for review which included Mr. Chinn's property.

In December 2018 Verizon's engineers decided on George and Carolyn Bowman's property for the new tower. . . .

¹¹ See Horvath's Response to Chinn's April 2019 Letter (received June 24, 2019).

¹² See Case No. 2016-00371, *Electronic Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates and for Certificates of Public Convenience and Necessity* (Ky. PSC June 22, 2017), Final Order at 20-1 (discussing the requirements for issuing a CPCN pursuant to KRS 278.020(1)).

¹³ See KRS 278.650 ("the commission *may* take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values") (emphasis added).

¹⁴ See 47 U.S.C. § 332(c)(7)(B) (limiting the ability of States to prohibit the construction of wireless facilities, particularly where it will limit access to services offered by those facilities); *Telespectrum, Inc. v. Public Service Comm'n*, 227 F.3d 414, 423 (6th Cir. 2000) (where the Sixth Circuit noted that the aim of 47 U.S.C. § 332(c)(7) was to "facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers"); see also *T-Mobile Cent., LLC Charter Township of West Bloomfield*, 691 F.3d 794, 798-809 (6th Cir. 2012)(discussing federal preemption of state law generally regarding the construction of cell towers and more specifically discussing the substantial evidence standard and when a state decision is said to have denied access to wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II)).

Specifically, the Telecommunications Act prohibits state and local governments from denying a request to construct or modify a cell tower absent “substantial evidence contained in a written record.”¹⁵ Federal courts applying that provision of the Telecommunications Act have held, among other things, that state and local governments may not deny a request to construct a cell tower based upon the generalized concerns of a few local residents regarding property value, the availability of locations more suited for a proposed tower, or the safety of the tower in which the party requesting approval for the construction has presented competent evidence regarding those matters.¹⁶ The Telecommunications Act also prohibits state and local governments from regulating the placement of cell towers based on the “environmental effects of radio frequency emissions to the extent that such facilities comply with [federal law] concerning such emissions.”¹⁷ Finally, the Telecommunications Act prohibits regulation of the construction of cell towers if the regulation has the effect of prohibiting the provision of cellular service.¹⁸

¹⁵ 47 U.S.C. § 332(c)(7)(B)(iii).

¹⁶ See *Cellco Partnership v. Franklin Co., Ky.*, 553 F. Supp. 2d 838, 845-846 (E.D. Ky. 2008) (indicating that generalized concerns regarding “the safety of the proposed tower, the need for it, whether there were other suitable locations for it, and whether it would affect property values” raised by residents did not justify denying the request for approval of the cell tower where the wireless facility owner presented testimony and a report from a radio engineer regarding the placement of the tower, a structural engineer regarding the safety of the tower, and a property appraiser regarding the effect, or lack thereof, of the tower on property values); but see *T-Mobile Northeast, LLC v. Town of Islip*, 893 F. Supp. 2d 338, 362 (E.D. NY. 2012) (where the court found that specific statements regarding aesthetics from multiple residents, a civic association, and an assembly person with knowledge of the area constituted substantial evidence justifying the denial of a request to construct a cell tower).

¹⁷ *Id.* at § 332(c)(7)(B)(iv).

¹⁸ *Id.* at § 332(c)(7)(B)(i)(II).

Here, Horvath presented evidence that the proposed wireless facility was being constructed to be used by Verizon Wireless to address coverage issues in the area.¹⁹ Further, although Mr. Chinn opposes the location of the tower, he stated that he had been a customer of Verizon Wireless for 20 years before he moved to his current residence and determined that Verizon Wireless's coverage in the area was "nonexistent."²⁰ Thus, the Commission finds that there is a need to construct a wireless facility in the area to address Verizon Wireless' coverage issue, and the only issue seems to be whether the location is appropriate.

Mr. Chinn suggested that it would be better to place the proposed wireless facility on Dean Chamber's property, which is across the interstate from the proposed location, because there is an existing tower at that location and it is further from residential properties.²¹ However, Horvath presented evidence that the location on Dean Chamber's property, which it had initially considered, is outside the search area identified by Verizon Wireless's radio frequency engineers²² and that the existing tower on Dean Chamber's property has been abandoned and left in disrepair such that it would be unsafe to use.²³ Horvath also indicated that there were no opportunities for co-location in the search

¹⁹ Application at 2.

²⁰ Chinn, Brian, Letter dated June 26, 2019 (received July 1, 2019).

²¹ *Id.*

²² Horvath's response to Staff's First Request for Information (Staff's First Request), Item 1; Affidavit of Jordan Hoepfner at para. 7, Exhibit C; Affidavit of Gordan Synder at para. 3 ("[I]t is my conclusion that the site identified as 'Candidate C Dean Chambers' falls outside the demand area for Verizon's customers, and hence falls out of the search ring. Therefore, it is my conclusion that this site would not meet Verizon's customer needs and hence is not viable.").

²³ Horvath response to Staff's First Request, Item 1; Affidavit of Jordan Hoepfner at para. 8, Exhibit D; Affidavit of John Marcelletti at para. 3-5.

area,²⁴ and the maps presented by Horvath support that assertion.²⁵ Thus, the Commission finds that the proposed wireless facility is necessary to provide adequate utility service and that a CPCN to construct the proposed facility should be granted.

The Commission acknowledges Mr. Chinn's concerns regarding the effects the construction of the proposed wireless facility could have on nearby property values. However, pursuant to the federal law, lay opinions as to the effect of a tower on property values generally cannot support a decision to deny a request to construct a cell tower,²⁶ and the studies referenced by both parties are not highly probative as presented herein. Further, the proposed wireless facility will be about 255 feet from Mr. Chinn's property line and about 773 feet from his residence.²⁷ The area is also not purely residential—there is a cemetery to the east of the proposed tower (on the opposite side of Mr. Chinn's property from the proposed wireless facility), a railroad track about 500 feet to the west and immediately adjacent to the proposed wireless facility, and a major interstate about a half a mile from the proposed wireless facility and the nearby residences.²⁸ Thus, the Commission cannot find that effects on the value or aesthetics of nearby properties would

²⁴ Application at 4, Exhibit N.

²⁵ See Application at Exhibit N (showing a satellite view of the search ring); Application at Exhibit C (showing the location of towers in the area, none of which appear to be in the search ring); Horvath response to Staff's First Request, Item 1(c); Affidavit of Jordan Hoepfner at para. 6 (indicating that the map attached as Exhibit C to the application showed towers registered with the Federal Communications Commission's Antenna Structure Registration).

²⁶ See, e.g. *Telespectrum, Inc.*, 227 F.3d at 417, 424 (where the Sixth Circuit held that the Kentucky Public Service Commission's decision to deny a CPCN for a cell tower based in part the testimony of two residents that the cell tower would diminish the value of their home, which was 412 feet from the proposed tower, was not based on substantial evidence).

²⁷ Horvath response to Staff's First Request, Item 3; Affidavit of Jordan Hoepfner at para. 10.

²⁸ See Application at Exhibit B, Sheet B-2 (showing the location of the railroad, cemetery, and interstate in relation to the proposed tower and nearby residences); Application at Exhibit N (showing satellite view in which the railroad and interstate are visible).

justify denying the CPCN requested herein, particularly when no other property owners have raised an objection.

However, although it is granting the CPCN for the reasons discussed above, 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, Horvath shall notify the Commission within a reasonable time if the antenna tower is not used to provide service in the manner set out in the 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 Horvath.

IT IS THEREFORE ORDERED that:

1. Horvath is granted a CPCN to construct the proposed wireless telecommunications facility. The proposed facility consists of a tower that will be 230 feet in height with a lightning arrestor that will be an additional 10 feet in length, for a total height of 240 feet. The proposed facility will be located at 140 East Church Street in Whitley County, Kentucky. The coordinates for the proposed facility are North Latitude 36°40'57.18" by West Longitude 84°07'37.74".

2. Horvath 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 three months in the manner authorized by this Order.

3. Horvath shall file a copy of the final decision regarding the pending Kentucky Airport Zoning Commission application upon receipt.

4. Documents filed, if any, in the future pursuant to ordering paragraph 2 or 3 herein shall reference this case number and shall be retained in the post-case correspondence file.

5. This case is hereby closed and will be removed from the Commission's docket.

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By the Commission

ENTERED
AUG 20 2019
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2019-00117

*Honorable W. Brent Rice
Attorney At Law
McBrayer PLLC
201 East Main Street
Suite 900
Lexington, KENTUCKY 40507

*Jacob C. Walbourn
McBrayer PLLC
201 East Main Street
Suite 900
Lexington, KENTUCKY 40507

*Cellco Partnership dba Verizon Wireless
One Verizon Way, Mailcode VC53S309D
Basking Ridge, NJ 07920