

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF TOWER ACCESS GROUP,)	
LLC, FOR DECLARATORY RULING AS TO)	CASE NO.
JURISDICTION OVER A 190-FOOT)	2015-00090
MONOPOLE CONSTRUCTED ON THE CAMPUS)	
OF EASTERN KENTUCKY UNIVERSITY)	

ORDER

On March 19, 2015, Tower Access Group, LLC (“TAG”) filed with the Commission, pursuant to 807 KAR 5:001, Section 19, an application seeking a declaratory order (“Application”) with respect to the Commission’s jurisdiction over the construction of a communications tower, consisting of a 190-foot monopole, located on the campus of Eastern Kentucky University (“EKU”). TAG, in the Application argues that: 1) TAG is not required to obtain a certificate of public convenience and necessity (“CPCN”) from the Commission because the monopole is located within the territorial boundaries of the city of Richmond, Kentucky (“Richmond”);¹ and 2) TAG was not required to obtain a CPCN for construction of the monopole because TAG is not a utility and had not entered into an agreement with any utility prior to undertaking the activity necessary to begin construction of the monopole.² TAG, in the alternative, asserts that: 1) the Commission should take no adverse action against TAG for constructing the monopole without obtaining a CPCN; and 2) the Commission should enter an order

¹ Application at 5.

² *Id.* at 9.

declaring that the monopole is available for colocation by utilities and will not be subject to penalties from the Commission.³

BACKGROUND

TAG constructs and operates wireless communication towers. On March 7, 2013, ECU awarded a contract to TAG to construct and operate a monopole on ECU's campus for the purpose of "expand[ing] cellular telephone service on campus and surrounding areas."⁴ After TAG and ECU executed a master ground lease agreement in November of 2013, TAG began undertaking activity necessary to begin construction of the monopole.⁵ Those steps included a site development survey, monopole and foundation design, geotechnical report, Federal Aviation Administration and Kentucky Airport Zoning Commission determinations, and authorization from the Kentucky Division of Building Code Enforcement to proceed with construction.⁶ TAG was informed by the Richmond Department of Planning and Zoning that there were no zoning regulations or permit requirements from Richmond that were applicable to the construction of a wireless cellular tower on the campus of ECU.⁷ The first wireless carrier entered into a sublease for use of the monopole in August of 2014.⁸ Construction began on the monopole on or about September 22, 2014.⁹ The monopole is now fully constructed and complete; however no utilities have been connected to the

³ *Id.* at 12.

⁴ *Id.* at 2.

⁵ *Id.* at 3-4.

⁶ *Id.* at 2-3.

⁷ *Id.* at 2.

⁸ *Id.* at 3.

⁹ *Id.*

site.¹⁰ The monopole is located at 4409 Kit Carson Drive, Richmond, Madison County, Kentucky. The coordinates for the facility are North Latitude 37° 43' 52.06" by West Longitude 84° 17' 52.57".

TAG states it did not petition the Commission for a CPCN before constructing the monopole because it concluded that no wireless tower contractor had filed for a CPCN on its own without a wireless telephone carrier filing as a co-applicant, and it believed the Commission had a policy of deferring to a local planning commission when a wireless tower was built within the local planning commission's geographic boundary.¹¹ When a third party requested verification that the Commission did not have jurisdiction over the proposed monopole, TAG requested a Staff Opinion from the Commission.

The Staff Opinion, issued on November 13, 2014, concluded that the Commission had jurisdiction over this matter because construction of the wireless cellular tower at issue here is exempt from a local planning agency's authority under KRS 100.361(2) due to the site's location on university property whose title is vested in the Commonwealth.¹² On December 1, 2014, TAG requested a reconsideration of the Staff Opinion and, if the opinion were not reversed, for Commission Staff to provide guidance on actions necessary to bring the tower into regulatory compliance.¹³ On March 9, 2015, the Commission issued a Staff Opinion that upheld the prior opinion.¹⁴ Commission Staff noted that there is no reason for TAG to apply for a CPCN if the tower

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² Staff Opinion 2014-015 (Ky. PSC Nov. 13, 2014).

¹³ *Application* at 4.

¹⁴ Staff Opinion 2014-015A (Ky. PSC Mar. 9, 2015).

has been constructed, and that the Commission retains the authority to investigate violations of KRS Chapter 278 at its discretion, as well as assess appropriate penalties if violations are found.¹⁵

Following an informal meeting with Commission Staff, TAG filed the instant application for declaratory order and requested an expedited decision from the Commission.

TAG PETITION FOR DECLARATORY ORDER

TAG raises two arguments in its petition for declaratory order. First, TAG asserts that the Commission does not have jurisdiction in this matter because the wireless cellular tower is located within Richmond's geographic boundary. Second, TAG argues that the Commission does not have jurisdiction in this matter because TAG is not a utility and had not entered into an agreement with a utility prior to taking steps necessary to begin construction of the tower. In the event that the Commission finds it has jurisdiction in this matter, TAG requests that: 1) the Commission take no adverse action against TAG; 2) the Commission enter an order declaring that the tower is available for colocation by utilities; and 3) the Commission not subject TAG to any penalties.

TAG asserts that the Commission does not have jurisdiction over the instant matter because the tower at issue is located within Richmond's geographic boundary. TAG argues that, pursuant to statutes, case law, and policy statements,¹⁶ Richmond, and not the Commission, had jurisdiction over the tower at issue in this matter.

¹⁵ *Id.*

¹⁶ TAG provided no cites to any specific policy statements.

TAG argues that KRS 100.987, 278.650 and 278.665 give Richmond jurisdiction over the tower. KRS 100.987 provides that a local planning commission has the authority to regulate the siting of wireless cellular towers. Pursuant to KRS 278.650 and 278.665, the Commission has jurisdiction to issue a CPCN for the construction of a wireless cellular tower located in an area “outside the jurisdiction of a planning commission.”

TAG contends that *Kentucky Public Service Comm’n v. Shadoan*, 325 S.W.3d 360, 367 (Ky. 2010), stands for the principle that, without exception, cellular towers that are constructed within the boundaries of a local government that adopted planning and zoning regulations are not subject to the jurisdiction of the Commission. TAG contends that this understanding of Commission jurisdiction is buttressed by a 2006 electronic mail from Commission Engineering Staff.¹⁷

Lastly, TAG references correspondence from Richmond’s Planning Commission that asserted jurisdiction over the tower, despite the fact that the property is owned by ECU, an entity of the state. While acknowledging that KRS 100.361(2) exempts state-owned property from the authority of local planning units, TAG dismisses the relevance of KRS 100.361(2) to the facts of this matter, claiming that KRS 100.361(2) does not change the “clear legal conclusion”¹⁸ that Richmond had jurisdiction over this matter.

TAG also argues that the Commission lacks jurisdiction because at the time TAG was awarded the RFP and signed the Master Lease Agreement, TAG and the monopole were “neither the *type of entity* nor *the type of structure* that the Commission

¹⁷ Application at 8, and Exhibit K.

¹⁸ *Id.* at 9, footnote 1.

typically regulates”¹⁹ TAG asserts that, pursuant to KRS 278.665, the Commission promulgated 807 KAR 5:063 to codify the rules that govern the applications to construct cellular towers, and that the regulation that the Commission promulgated applies exclusively to utilities. TAG asserts that it does not meet the statutory definition of a utility set forth in KRS 278.010(3)(e) in that TAG does not own, control, operate, or manage any facility used or to be used in connection with the transmission of messages for the public for compensation. Citing to KRS 100.987,²⁰ TAG further asserts that the General Assembly clearly does not consider a company (like TAG) that provides infrastructure to a utility to be a utility. TAG argues that, while companies providing such infrastructure may have to submit to the jurisdiction of a local planning commission, they are not under the jurisdiction of the Commission.²¹

TAG argues that because it is not a utility and it was not in a formal relationship with a telecommunications provider at the time it answered the RFP, entered into the Master Lease Agreement, and started constructing the monopole, it did not have to apply to the Commission for approval to construct the monopole.²² TAG admits that it and ECU were hopeful that cellular telecommunications companies would

¹⁹ *Id* at 9. Emphasis in original.

²⁰ KRS 100.987 provides, in pertinent part, that:

Every utility or a company that is engaged in the business of providing the required infrastructure to a utility that proposes to construct an antenna tower for cellular telecommunications services . . . within the jurisdiction of a planning unit that has adopted planning and zoning regulation

²¹ Application at 10.

²² According to TAG, however, there was an agreement with a utility to collocate on the monopole prior to actual construction beginning. TAG states in the Application that AT&T Wireless entered into a sublease agreement for use of the monopole in August 2014, approximately a month prior to construction beginning on the monopole on September 22, 2014. See Application at 3.

collocate on the monopole, but asserts that the “venture was speculative.”²³ TAG also points out that the RFP and the Master Lease Agreement contemplate that other types of service providers, as well as wireless cellular telecommunications companies, would collocate on the monopole.

TAG, based on the above, concludes that had it applied to the Commission for authority to construct the monopole, it would have done so as “something other than a utility and with no evidence that cellular telephone services would ever be provided from the monopole.”²⁴ TAG notes the statement in Staff Opinion 2014-015A, that Commission Staff was unaware of another instance in which a company like TAG was the sole applicant for a CPCN to construct a telecommunications tower. TAG argues that this is the case because companies like TAG are not and have never been under the jurisdiction of the Commission and have never been required to file an application for a CPCN when they had not entered into an agreement with a wireless telecommunications company. TAG asserts that Commission approval would not have been necessary if TAG had constructed a tower and the first entity to sublease space was a local radio company, and then wireless telecommunications providers subsequently collocated on the tower. TAG claims that this is long-standing Commission policy.

TAG also asserts that there should not be a concern that the above would encourage utilities to circumvent the CPCN process. TAG claims that this would affect a very small subset of potential applicants because under most circumstances,

²³ *Id.* at 11.

²⁴ *Id.*

companies like TAG would still be required to apply to the local planning and zoning commissions, and to obtain approval from the Public Protection Cabinet Department of Housing, Buildings and Construction.

TAG concludes that because it is not a utility and did not have an agreement with a utility at the relevant time, the Commission had no jurisdiction to require TAG to file a CPCN for the construction of the monopole. TAG asserts that, at most, TAG, or a wireless telecommunications provider, should be required to notify the Commission when the wireless telecommunication provider collocates on the monopole.

TAG argues that even if the Commission were to find that TAG is within the Commission's jurisdiction, the facts show that TAG had no improper intention of circumventing Commission oversight. TAG states that even the Commission Staff Opinion acknowledged that TAG was in a unique position. TAG asserts that it approached all of the governmental agencies from which it believed it should acquire approval. TAG notes that it is not before the Commission because of the complaint of a third party regarding the construction of the monopole. TAG claims that it has petitioned the Commission on its own accord to confirm that it was in compliance with the law, which it believed in good faith that it was.

TAG states that it has already obtained all of the necessary approvals as if it were applying to the Commission for a CPCN to construct the monopole. TAG requests that if the Commission determines it has jurisdiction over TAG, that the Commission issue an Order declaring that no adverse action will be taken against TAG related to the monopole and also declare that the monopole is available and suitable for collocation by

utilities. TAG also requests that this same order state that the monopole will not be subject to penalties from the Commission for collocation.

Motion to Intervene of Kentucky Cable Telecommunications Association

On April 6, 2015, Kentucky Cable Telecommunications Association (“KCTA”) filed with the Commission a motion for intervention, seeking to intervene in this proceeding. As grounds for its motion, KCTA states that it is concerned by TAG’s argument that it is not a utility and, therefore, not subject to Commission regulation. KCTA specifically objects to “any declaration that a structure built specifically to accommodate utility attachments is not subject to Commission jurisdiction.”²⁵ KCTA states, however, that if the Commission grants TAG relief based upon any of the other arguments presented in its application, the motion to intervene would be moot.²⁶

DISCUSSION

807 KAR 5:001, Section 19, grants the Commission discretion to issue declaratory orders. Declaratory orders are intended to provide guidance with respect to the jurisdiction of the Commission, and the applicability, meaning, and scope of an administrative regulation of the Commission or provision of KRS Chapter 278. The Commission may dispose of an application for declaratory order solely on the basis of the written submissions filed, and may take any action necessary to ensure a complete record, to include holding oral arguments on the application and requiring the production of additional documents.²⁷

²⁵ Kentucky Cable Telecommunications Association’s Motion to Intervene (filed Apr. 6, 2015.)

²⁶ *Id.*

²⁷ 807 KAR 5:001, Sections 19 (7) and (8).

As an initial matter, the Commission acknowledges that the circumstances surrounding the construction of this tower are unique. First, it is being built at the behest of a state institution. Second, it is being built on state property, which is exempt from local planning and zoning, even if the site is located within the geographical boundary of a planning and zoning commission. Third, bidding on the RFP and entering into the master lease were done on a speculative basis to the extent there was no pre-existing contract with a utility guaranteeing collocation, although construction began *after* a utility had agreed to sublease space. The Commission also acknowledges that TAG, according to the construction sites listed on its website, has built towers in Kentucky only in counties that have adopted countywide planning and zoning.²⁸ Therefore, TAG has had no prior cause to apply to the Commission for a CPCN for other construction projects. However, the uniqueness of the circumstances does not excuse TAG's actions in not applying for a CPCN.

While TAG argues that the Commission does not have jurisdiction in this matter because the tower is within Richmond's geographic boundary, the Commission notes that TAG does not distinguish a critical fact in the instant case: the proposed tower was constructed on property owned by the state. TAG relies upon *Shadoan* to support its argument that Richmond had jurisdiction over the construction of the tower. However, in *Shadoan*, the Kentucky Supreme Court upheld the Commission's determination that, pursuant to KRS 100.987, the local planning unit and not the Commission had jurisdiction over *private property* where the local planning unit had enacted planning and zoning regulations, even though the local planning unit had not enacted cellular tower

²⁸ See <http://toweraccessgroup.com/tower-info/> (Last accessed April 3, 2015.)

construction regulations. Here, the monopole is constructed on state-owned property that is exempt from planning and zoning regulations.

The Commission further notes that the November 13, 2014 Staff advisory opinion stated that, pursuant to KRS 100.361(2) and Commission precedent, when a proposed cellular tower will be located on state-owned property, the proposed cellular tower will be constructed outside the political boundary of a local planning unit.²⁹ In the March 9, 2015, advisory opinion, Commission Staff confirmed the opinion reached in the first advisory opinion.

Pursuant to KRS 278.650 and 278.665, the Commission has jurisdiction to issue a CPCN for the construction of a wireless cellular tower located in an area outside the jurisdiction of a planning commission. Pursuant to KRS 100.987, local planning commissions, but not the Commission, have jurisdiction over towers built within the political boundary of a local planning commission that has adopted planning and zoning regulations.³⁰

However, pursuant to KRS 100.361(2), any property owned by the Commonwealth of Kentucky or its political subdivisions is exempt from the authority of local planning units. KRS 100.361(2) states:

Nothing in this chapter shall impair the sovereignty of the Commonwealth of Kentucky over its political subdivisions. Any proposal affecting land use by any department, commission, board, authority, agency, or instrumentality of state government shall not require approval of the local planning unit. . . .

²⁹ Staff Opinion 2014-015 at 2.

³⁰ See Shadoan, 325 S.W.3d, 365

Thus, the construction of a wireless cellular tower on property owned by the Commonwealth is, by law, not within the boundary of a local planning unit or commission.³¹

Pursuant to KRS 164.001, ECU is a public postsecondary education institution operated by the Commonwealth of Kentucky. Actual ownership of property acquired by a postsecondary education institution is vested "in the name of the Commonwealth for the use and benefit of the institution."³² Therefore, the title to property owned by ECU is vested in the Commonwealth of Kentucky.

KRS 100.361(2) exempts state-owned property from local planning unit regulations. Therefore, when a proposed antenna tower for cellular communications will be located on property whose title is vested in the Commonwealth, it follows that the proposed tower will be constructed outside the political boundary and jurisdiction of a local planning unit.³³ Thus, pursuant to KRS 278.650, the Commission has jurisdiction over the construction of a proposed wireless cellular tower located on property whose title is vested in the Commonwealth, and a CPCN application must be filed and prior Commission approval granted before construction begins.³⁴

As discussed below, the monopole is precisely the type of structure requiring Commission approval as provided by KRS 278.650. The monopole, as proposed in the

³¹ Case No. 2009-00034, *Application of New Cingular Wireless PCS, LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility*, Order (Ky. PSC Mar. 22, 2010) and Final Order (Ky. PSC Apr. 1, 2010).

³² KRS 164.410(3).

³³ Case No. 2009-00034, *New Cingular Wireless PCS, LLC* Order (Ky. PSC Mar. 22, 2010) and Final Order (Ky. PSC Apr. 1, 2010).

³⁴ *Id.*

RFP, was intended to “expand the cellular coverage on EKU’s campus.”³⁵ The RFP also states that the structure is to be a “high quality telecommunications tower.”³⁶ It is clear from the RFP and the details that TAG had outlined in both of its letters requesting Staff opinions on this matter that the primary purpose of the structure is for “cellular telecommunications service” as referenced in KRS 278.650 and is the exact type of structure for which a CPCN is required under KRS 278.020 and KRS 278.650. Whether the structure may have a secondary or auxiliary purpose or use does not change the nature of the tower. Therefore, the monopole is the type of structure for which a CPCN is required.

The Commission notes that although TAG does not meet the definition of a utility under KRS 278.010, the Commission is not persuaded that a company that builds a tower for cellular telecommunications service, but does so without an existing agreement with a utility, is exempt from the obligation to obtain a CPCN.³⁷ KRS 278.020(1) states, in pertinent part, that:

No person partnership, public or private corporation, or combination thereof shall . . . begin construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010

A high quality telecommunications tower is a facility that, under KRS 278.010(3), is “used or to be used for or connection with” furnishing for the public the telecommunications service enumerated in KRS 278.010(3)(e). Therefore, construction of a communications tower, if outside the jurisdiction of a local planning and zoning

³⁵ Application, Exhibit B at 6.

³⁶ *Id.*

³⁷ The Commission notes, again, that prior to the beginning of construction of the monopole, an agreement with a utility was in place.

commission, should not begin without prior Commission approval, regardless of whether the entity constructing the communications tower is a utility as defined by KRS 278.010(3)(e). Although neither KRS 278.020(1) nor KRS 278.650 requires that a utility be the applicant for construction of a facility, they require that a CPCN be issued prior to the beginning of construction.

In determining whether proposed construction meets the public convenience and necessity, the Commission weighs many factors including, but not limited to, the need for the new facility in order to meet service requirements and whether the new facility would cause unnecessary duplication of services. *See, Kentucky Utilities Co. v. Pub. Serv. Com'n*, 252 S.W.2d 885, 889-890 (Ky. 1952). For communications towers, the Commission must consider these standards and also consider the requirements enumerated in KRS 278.650 and 278.665. The Commission promulgated 807 KAR 5:063 to establish the minimal filing requirements not only to meet these statutory requirements, but also to assist the Commission in determining whether the proposed tower is justified by the public's convenience and necessity. Although the provisions of 807 KAR 5:063 address the filing requirements for a utility, which is the entity typically involved in the construction of these towers, the statutory requirements are broader, and they apply to any person proposing the construction of a facility that is used or to be used to provide utility service. Thus, the statutory requirements, in combination with the provisions of 807 KAR 5:063, provide notice to an applicant of the type of information needed to support an application seeking the issuance of a CPCN to construct a communications tower.

Based on the forgoing, the Commission concludes that TAG should have obtained a CPCN prior to building the tower. TAG could have applied for the CPCN in one of two ways: (1) by applying for a CPCN pursuant to KRS 278.020, KRS 278.650 and 807 KAR 5:063; or, (2) by applying as a co-applicant with a utility. Absent either of these two actions, and Commission approval, TAG should not have started construction of the tower on EKU's campus. Any other conclusion by the Commission could potentially allow a wireless carrier, in conjunction with a third party, to circumvent the statutory CPCN requirements for the construction of wireless communications towers.

A CPCN is a license to construct a facility, and the Commission does not issue a CPCN after construction is completed. Therefore, there is no reason for TAG to now apply for a CPCN, as the monopole has already been constructed. As TAG correctly notes, there have been no protests or objections to this tower and, consequently, the Commission finds no basis to require the razing of this facility due to its construction without a CPCN. In instances involving the unauthorized construction of a facility by a rate-regulated utility, the Commission may disallow the recovery of some or all of those costs in the utility's base rates. Here, TAG is not a utility and the wireless carriers that may collocate on the monopole are not rate-regulated.³⁸ Therefore, the only penalties to which TAG may be subject are those enumerated in KRS 278.990.

The Commission, *supra*, noted several unique circumstances surrounding the construction of the monopole: (1) it is being built at the behest of a state institution; (2) it is being built on state property, which is exempt from local planning and zoning, even if the site is located within the geographical boundary of a planning and zoning

³⁸ See generally, KRS 278.54611.

commission; and (3) bidding on the RFP and entering into the master lease were done on a speculative basis to the extent there was no pre-existing contract with a utility guaranteeing collocation, although construction began *after* a utility had agreed to sublease space. The Commission believes that this mitigates the necessity to pursue a show cause action against TAG for the potential imposition of penalties under KRS 278.990 in this instance. In the future, however, TAG and any other similarly situated entity shall obtain Commission approval prior to building a wireless telecommunications tower that is outside the political boundary of a local planning commission, unless a CPCN has been issued to a jurisdictional utility authorizing the construction.

Furthermore, the Commission will not order that the monopole be razed: enhancing the wireless telecommunications infrastructure in the Commonwealth is an important public priority. Therefore, any entity wishing to collocate on the monopole may do so without fear that the monopole will subsequently be razed. Any entity that collocates on the monopole will not be subject to penalties from the Commission. However, if a wireless telecommunications provider does collocate on the monopole, it must give notice to the Commission pursuant to 807 KAR 5:063, Section 3.

The Commission finds that, because we are asserting jurisdiction over the monopole, that KCTA's motion to intervene should be dismissed as moot.

IT IS THEREFORE ORDERED that:

1. TAG's application for a declaratory order is granted as discussed in the findings above.
2. The monopole constructed by TAG at 4409 Kit Carson Drive, Richmond, Madison County, Kentucky, is located outside of the jurisdiction of a local planning

commission, is subject to Commission jurisdiction and should not have been constructed without the prior issuance of a CPCN.

3. No action shall be taken against TAG for the imposition of penalties pursuant to KRS 278.990 for its failure to obtain a CPCN for the construction of the monopole.

4. Any entity that collocates on the monopole will not be subject to the imposition of penalties pursuant to KRS 278.990 for such collocation.

5. Any utility planning to collocate its antenna on the monopole shall notify the Commission pursuant to 807 KAR 5:063, Section 3.

6. The Commission will not require that the monopole be razed due to its construction without a CPCN.

7. TAG shall seek prior Commission approval before beginning construction of any antenna tower for cellular telecommunications service that is located outside of the jurisdiction of a local planning commission.

8. TAG shall immediately notify the Commission in writing if, after the monopole is built and utility service is commenced, the monopole is not used for a period of three months for the provision of utility service.

9. KCTA's motion for intervention is denied as moot.

10. Documents filed, if any, in the future pursuant to ordering paragraph 8 herein shall reference this case number and shall be retained in TAG's general correspondence file.

By the Commission

ENTERED
MAY 05 2015
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2015-00090

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