

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF GOGO, LLC FOR ISSUANCE)	
OF A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY TO)	
CONSTRUCT A WIRELESS)	CASE NO.
COMMUNICATIONS FACILITY AT 5011)	2015-00310
SCAFFOLD CANE ROAD, MT. VERNON,)	
ROCKCASTLE COUNTY, KENTUCKY, 40456)	

ORDER

On October 8, 2015, GoGo, LLC ("GoGo") tendered an application to construct a wireless communication tower in Rockcastle County pursuant to KRS 278.650 and as specified in 807 KAR 5:063. The application was initially marked deficient because: 1) GoGo had not registered with the Commission as a utility or otherwise identified a utility purpose for which the construction was intended; and, 2) GoGo had not registered with the Kentucky Secretary of State to conduct business in the Commonwealth. As of the date of this Order, the application has not been accepted for filing.

The Commission, after conducting a thorough review of available information, concludes that the services GoGo will offer do not fall under the definition of "cellular telecommunications service." Therefore, as discussed herein, GoGo does not require a certificate of public convenience and necessity ("CPCN") from the Commission to construct the tower or authority to otherwise operate in Kentucky, and this application should be rejected for filing.

BACKGROUND

GoGo is an aero-communications service company that provides voice, data, and messaging services to customers traveling in commercial and general aviation aircraft through a proprietary network of ground-based towers and antennas installed on the aircraft, operating through passengers' smart phones and tablets.¹ The Federal Communications Commission ("FCC") granted GoGo a Commercial Aviation Air-Ground Radiotelephone license allowing GoGo to, "construct and operate air-ground radio service stations" throughout the country.²

GoGo has applied, pursuant to KRS 278.650, to construct an antenna in Rockcastle County. In response to a Commission Staff Request for Information, GoGo has stated that it will accept any Commission decision on the Commission's jurisdiction regarding the construction of the tower.

DISCUSSION

Whether the Commission has jurisdiction to issue a CPCN for a wireless communication tower for an air-ground radiotelephone service is an issue of first impression for this Commission. A determination of Commission jurisdiction turns on statutory and regulatory definitions pertaining to the types and methods of communication service.

As an initial matter, Commission jurisdiction over wireless communication towers is set forth in KRS 278.650 and 278.665. KRS 278.665 grants the Commission authority to establish minimum content for a CPCN application to construct "cellular

¹ Response to Request by Commission for Information to GoGo, LLC (filed Jan. 21, 2016) ("Response to Staff's Request") at 1.

² Federal Communications Commission Wireless Telecommunications Bureau Radio Station Authorization, Exhibit H to the Application.

antenna towers” in an area outside the jurisdiction of a planning commission. KRS 278.650 provides, in pertinent part, that:

If an applicant proposes construction of an antenna tower for cellular telecommunications services or personal communications services which is to be located in an area outside the jurisdiction of a planning commission, the applicant shall apply to the Public Service Commission for a certificate of public convenience and necessity pursuant to KRS 278.020(1), 278.665, and this section. . . .

Neither “cellular telecommunications services” nor “personal communications services” are defined in KRS Chapter 278. Further, GoGo states that it provides air-ground radiotelephone service, as it is defined under federal law. For that reason, we look to definitions, as set forth in federal statutes and FCC regulations, to evaluate whether the proposed tower is subject to KRS 278.650.

The FCC defines air-ground radiotelephone service as “a radio service in which licensees are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.”³ The tower that GoGo proposes to construct is a ground station, which the FCC defines as “a stationary transmitter that provides service to airborne mobile stations.”⁴ The ground station communicates with the air-to-ground (“ATG”) antenna located on an aircraft, which in turn communicates with an onboard modem to which the smart devices communicate via wifi.

The definition of air-ground radiotelephone service as a telecommunications service leads to the definitions for “telecommunications services” and “telecommunications.” Federal law defines telecommunications service as “the offering

³ 46 C.F.R. § 22.99.

⁴ Federal Communications Commission Wireless Telecommunications Bureau Radio Station Authorization, Exhibit H to the Application.

of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁵ Telecommunications is defined as, “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁶

The FCC defines cellular service as “radio telecommunication services provided using a cellular system.” A cellular system is defined as, “[a]n automated high-capacity system of one or more multichannel base stations designed to provide radio telecommunication services to mobile stations over a wide area in a spectrally efficient manner. . . .”⁷ Therefore, pursuant to the above definitions, cellular telecommunications service could be defined as the “radio transmission of information of the user’s choosing without change in form or content of the information as sent and received that is provided over a cellular system to the public for a fee.”

GoGo’s service, although involving radio communication between the ATG antenna on the aircraft and the tower on the ground, does not involve radio communications between the end users’ communication devices on the aircraft and the cellular network. Because part of the transmission of the messages is not over the cellular network, and does not utilize cellular assigned radio frequencies, it does not appear that the service that GoGo offers would qualify as cellular telecommunications service for the purposes of KRS 278.650.

⁵ 47 U.S.C. § 153(53).

⁶ 47 U.S.C. § 153(50).

⁷ 47 C.F.R. § 22.99.

Similarly, GoGo's service does not appear to qualify as a personal communications service, which is defined in 47 C.F.R. § 24. The FCC promulgated the rules for personal communications services to regulate radio transmission and to issue licenses for radio stations within a defined radio spectrum. Personal communications services is defined as radio communications that encompass mobile communication, which includes radio communication service between mobile and land stations, and ancillary fixed communication, which is radio communication service between specified fixed points.⁸ The crucial difference between GoGo and personal communications services is the radio spectrum in which each is licensed to operate. Pursuant to GoGo's Application, it is licensed as an air-ground radio service and must operate within 849-851 and 894-898 Megahertz ("MHz").⁹ Pursuant to FCC regulations, personal communications services are permitted to operate in an assigned spectrum other than the air-ground radio service.¹⁰

GoGo also states that it provides "commercial mobile radio service" as an air-ground radiotelephone service provider.¹¹ KRS 278.010(31) defines "commercial mobile radios services," which is often viewed as synonymous with cellular service. KRS 278.010(31) defines CMRS, in pertinent part, as having:

[T]he same meaning as in 47 C.F.R. sec. 20.3 and includes the term "wireless" and service provided by any wireless real time two (2) way voice communication device, including radio-telephone communications used in cellular telephone service, personal communications service, and the functional

⁸ 47 C.F.R. § 24.5.

⁹ Federal Communications Commission Wireless Telecommunications Bureau Radio Station Authorization, Exhibit H to the Application.

¹⁰ 47 C.F.R. § 24.5.

¹¹ Response to Staff's Request at 1.

or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line

GoGo's service does not provide service via any "wireless real time" communication device because the wireless (cellular) network is not accessed by the communication devices. Nor does the service involve a personal communications service or functional equivalent of a radio-telephone communications line. 47 C.F.R § 20.3, which KRS 278.010(31) references, defines CMRS as:

A mobile service that is:
(a)(1) provided for profit, i.e., with the intent of receiving compensation or monetary gain;
(2) An interconnected service; and
(3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or
(b) The functional equivalent of such a mobile service described in paragraph (a) of this section, including a mobile broadband Internet access service as defined in § 8.2 of this chapter.¹²

This definition does not provide much in the way of guidance to resolve the issue before the Commission; however, another section of the C.F.R. categorizes air-ground radiotelephone service as a CMRS. 47 C.F.R. § 20.9(a) states, in pertinent part, that, "[t]he following mobile services shall be treated as common carriage services and regulated as commercial mobile radio services . . . (8) Air-Ground Radiotelephone Service"

Nevertheless, even if Air-Ground Radiotelephone Service is considered CMRS, the Commission does not have jurisdiction over the construction of a tower for such

¹² Pursuant to 47 C.F.R. § 20.3, CMRS includes services that include mobile broadband Internet access services as defined in 47 C.F.R. § 8.2, which, however, are not under the Commission's jurisdiction pursuant to KRS 278.5462.

services. The General Assembly does not consider CMRS and cellular service to be synonymous. For example, although defining CMRS in KRS 278.010(31), the General Assembly limited the Commission jurisdiction to only those towers used for *cellular* telecommunications service. KRS 278.54611(1) provides that the provision of [CMRS] shall be market-based and not subject to Public Service Commission regulation” and specifically precludes the Commission from imposing any requirement with respect to “the availability of facilities or equipment used to provide [CMRS]”. Later in the statute the General Assembly provides that “[t]he commission shall retain jurisdiction over *cellular* towers pursuant to KRS 278.665.”¹³ The General Assembly would likely not have made the distinction between CMRS and cellular in KRS 278.54611 if CMRS and cellular were intended to be synonymous.

Finally, the Commission notes that the Federal Aviation Administration (“FAA”) in concert with the FCC effectively regulate the “availability” of air-ground communications systems by proscribing operating constraints and rules for when and where such services may be employed and accessible to persons on board aircraft.¹⁴ The deployment of ground stations (i.e., towers) for commercial air-ground communications systems are used only to facilitate communications by persons aboard aircraft which may, only incidentally, involve any form of *intrastate* telecommunications service directly to the public.

CONCLUSION

Based on the above, the Commission concludes that GoGo’s proposed tower does not fall under the Commission jurisdiction and that GoGo’s application should be

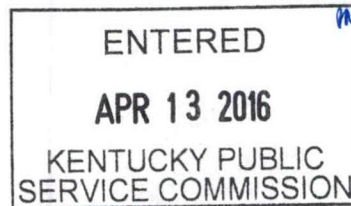
¹³ KRS 278.54611(5). (*Emphasis added*).

¹⁴ *See, generally*, 14 C.F.R Chapter 91.

rejected for filing. The finding that the Commission does not have jurisdiction in this matter is based upon current state and federal law. If there are changes to applicable state and/or federal law in the future or, if once constructed, the tower is used for another purpose, the Commission may revisit this issue.

IT IS THEREFORE ORDERED that GoGo's application for authority to construct a wireless communication tower pursuant to KRS 278.650 is rejected due to lack of Commission jurisdiction.

By the Commission



ATTEST:


Acting Executive Director

*Todd R Briggs
Briggs Law Office, PSC
4965 U.S. Highway 42
Suite 1000
Louisville, KENTUCKY 40222