

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| 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 a request for reconsideration of the Commission's Order entered on March 31, 2016 ("March 31 Order"), which denied a request to intervene filed by David R. Graham ("Mr. Graham"). Mr. Graham owns property adjacent to the site on which New Cingular Wireless PCS, LLC and American Towers LLC (jointly, "Applicants") propose to build a wireless communications facility ("Pea Ridge cell tower"). On April 6, 2016, Mr. Graham filed a letter requesting that the Commission reconsider its denial of his request to intervene.

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. In the March 31 Order, the Commission denied Mr. Graham's request to intervene, finding that, based on the pleadings filed, Mr. Graham was unlikely to present issues or develop facts that will assist the Commission in fully considering this matter. Mr. Graham based his request to intervene on potential health risks from cell tower radio frequency emissions

and on the planned location of the Pea Ridge cell tower in close proximity to the Daniel Boone National Forest. As the Commission stated in the March 31 Order, pursuant to federal law,<sup>1</sup> the Commission is expressly prohibited from considering precisely what Mr. Graham asked the Commission to consider — regulating the location of a cell tower on the basis of the environmental effects of radio frequency emissions. Additionally, the Commission found that Mr. Graham failed to state how the proximity of Daniel Boone National Forest renders the location of Pea Ridge cell tower unsuitable or improper, especially given 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 had not intervened in this matter.

Pursuant to KRS 278.400, within 20 days after a determination has been made by the Commission, a party, such as Mr. Graham, may file a request for reconsideration, stating specifically the matters on which reconsideration is sought. In making the request, the party may offer additional evidence that could not with reasonable diligence have been offered previously.

In his April 6, 2016 request for reconsideration, Mr. Graham states that he has determined there are two other locations where the Pea Ridge cell tower could be located and provides Wolfe County Property Valuation Administration (“PVA”) maps with hand-drawn asterisks marking the locations. Mr. Graham further states that he did

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<sup>1</sup> 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.

not receive a certified letter notifying him of the proposed construction of Pea Ridge cell tower, but instead received notice from a legal notice placed in the newspaper.<sup>2</sup>

Based upon a review of the evidence of record, the Commission finds that, in his request for reconsideration, Mr. Graham is unlikely to present issues or develop facts that will assist the Commission in fully considering this matter, and thus his request for reconsideration should be denied.

The Commission finds that Mr. Graham fails to provide sufficient evidence to support his assertion that the Pea Ridge cell tower could be located elsewhere. Mr. Graham provided two maps marking the suggested sites with hand-drawn asterisks, but fails to identify the locations with specificity. Further, Mr. Graham fails to set forth the basis for his conclusion that the alternate sites are feasible, available for leasing, and less intrusive than the selected site. Pursuant to relevant case law, unsupported lay opinion regarding whether there are other suitable locations for a cell tower, such as that offered by Mr. Graham, is not sufficient evidence on which to base a denial of a cell tower CPCN application.<sup>3</sup> For that reason, Mr. Graham is unlikely to present issues or develop facts that will assist the Commission in considering this matter, and his request for reconsideration is denied.

The Commission further finds that Mr. Graham received sufficient notice of the proposed construction of Pea Ridge cell tower. Pursuant to 807 KAR 5:063, applicants proposing to construct a cell tower must provide three types of notice: 1) certified letters

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<sup>2</sup> Mr. Graham is raising the lack of notice for the first time in his request for reconsideration. Mr. Graham has not raised this issue in the six previous letters filed with the Commission in this matter.

<sup>3</sup> 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).

to those who “according to the records of the property valuation administration” own property within 500 feet of the proposed tower; 2) publication in a newspaper of general circulation in the county where the proposed cell tower will be constructed; and 3) visible signage on the proposed site and on the nearest public road. One purpose of the notice requirement is to inform a person of his or her right to request intervention; that Mr. Graham filed a request to intervene is evidence that he received sufficient notice. Further, the Commission notes that, in his request for reconsideration, Mr. Graham states that he received notice of the Pea Ridge cell tower from a newspaper and, in public comments filed on December 29, 2015, Mr. Graham provided a copy of the newspaper notice filed by Applicants for the Pea Ridge cell tower. Lastly, according to documents filed by both Mr. Graham and by Applicants, PVA records list the owner of Mr. Graham’s property as “Loretta Spencer, etal [sic] c/o Dephia Graham, P.O. Box 455, Winchester, KY 40392.” The record reflects that notice was sent by certified mail to Loretta Spencer, Et Al, c/o Dephia Graham, P.O. Box 455, Winchester, KY 40392. For the above reasons, the Commission finds that Mr. Graham received sufficient notice, and his request for reconsideration based upon failure to receive notice should be denied.

IT IS THEREFORE ORDERED that:

1. Mr. Graham’s request for reconsideration is denied.
2. Mr. Graham’s tendered documents shall be considered as public comment.

By the Commission

ENTERED  
APR 11 2016  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
Acting Executive Director *for*

Case No. 2015-00404

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