

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	)	CASE NO.
AND NECESSITY TO CONSTRUCT A WIRELESS	)	2018-00031
COMMUNICATIONS FACILITY IN THE	)	
COMMONWEALTH OF KENTUCKY IN THE	)	
COUNTY OF OWEN	)	

ORDER

On February 15, 2018, New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility (“AT&T Mobility”), filed an application seeking a Certificate of Public Convenience and Necessity (“CPCN”) to construct and operate a wireless telecommunications facility. The proposed wireless facility would consist of a tower not to exceed 370 feet in height, with attached antennas, to be located at 410 Fortner Ridge Road, Owenton, Owen County, Kentucky. The coordinates for the proposed facility are North Latitude 38°33’01.25” by West Longitude 84°42’55.36”.<sup>1</sup>

AT&T Mobility filed applications with the Federal Aviation Administration and the Kentucky Airport Zoning Commission seeking approval for the construction and operation of the proposed wireless facility at the proposed location, and both applications were approved by the respective agencies prior to the filing of this application.<sup>2</sup> AT&T Mobility filed statements indicating it provided the required notifications regarding the proposed

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<sup>1</sup> Application at 3.

<sup>2</sup> *Id.* at 4, Ex. E, Ex. F.

construction pursuant to 807 KAR 5:063.<sup>3</sup> As of the date of this Order, the only comments or requests for intervention came from Don M. Arnold and Deborah L. Arnold (the “Arnolds”). The Commission denied the Arnolds’ request to intervene by an order dated June 1, 2018,<sup>4</sup> but considered the Arnolds’ substantive comments and objections in making the final determination herein.

The Arnolds own property adjacent to the property on which AT&T Mobility intends to construct the proposed wireless facility. In their comments, the Arnolds argued that: (1) the proposed cell tower poses a safety risk to a portion of their property, because the base of the tower is about 250 feet from their property line and therefore could fall on their property; (2) the location and appearance of the tower will serve to reduce the adjacent land values; (3) the location and design of the tower, including its size and lights on the tower, will create an eyesore and nuisance to surrounding properties; and (4) there are other locations within the immediate area which are more secluded and further from visible sight lines and adjacent property and homes.<sup>5</sup>

AT&T Mobility responded to the Arnolds comments by arguing, among other things, that the area in question is rural in nature and that the proposed location is the least intrusive available alternative for the construction of the cell tower. AT&T Mobility also filed a report signed by William E. Grigsby, Jr., PE SE, addressing the safety concerns raised by the Arnolds and a report signed by Glen D. Katz, MAI, SRA, AI-GRS,

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<sup>3</sup> *Id.* at 6, Ex. J, Ex. K, and Ex. L.

<sup>4</sup> Case No. 2018-00031, *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 Communications Facility in the Commonwealth of Kentucky in the County of Owen*, Order (Ky. PSC Jun. 1, 2018).

<sup>5</sup> The Arnolds’ Comments (filed March 7, 2018).

AI-RRS of Realty Solutions Co. Inc. addressing the effect of the proposed wireless facility on surrounding property values.<sup>6</sup>

Generally, in reviewing an application for a CPCN pursuant to KRS 278.020(1), the Commission looks at whether the party requesting the CPCN demonstrated a need for such facilities and an absence of wasteful duplication.<sup>7</sup> 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.<sup>8</sup> However, the scope and nature of Commission's review is limited by federal law, which partially preempts state law in this area and seeks to promote access to wireless telecommunications facilities.<sup>9</sup>

Specifically, the 1996 Telecommunications Act<sup>10</sup> prohibits state and local governments from denying a request to construct or modify a cell tower absent

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<sup>6</sup> AT&T Mobility's Response to the Arnolds' Comments (filed March 27, 2018); *see also* Grigsby, Bill, *Report of Structural Engineering and Safety Considerations Application for Wireless Communications Facility* (filed on March 27, 2018 as Exhibit A to AT&T Mobility's Response to the Arnolds' Comments) (hereinafter "Grigsby Engineering Report"); Glen, *Real Estate Impact Value Study* (March 12, 2018) (filed on March 27, 2018 as Exhibit B to AT&T Mobility's Response to the Arnolds' Comments) (hereinafter "Katz's Real Estate Valuation Report").

<sup>7</sup> *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)).

<sup>8</sup> *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).

<sup>9</sup> *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 Com'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)).

<sup>10</sup> 47 U.S.C. § 151 *et seq.*

“substantial evidence contained in a written record.”<sup>11</sup> Federal courts applying that provision of the 1996 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 some local residents regarding property value, the availability of locations more suited for a proposed tower, or the safety of the tower where the party requesting approval for the construction has presented competent evidence regarding those matters.<sup>12</sup> The 1996 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.”<sup>13</sup> Finally, the 1996 Telecommunications Act prohibits regulation of the construction of cell towers if the regulation has the effect of prohibiting the provision of cellular service.<sup>14</sup>

Here, AT&T Mobility’s radio frequency engineers selected the site for the proposed wireless facility in a manner consistent with how AT&T Mobility selects other sites within the proposed network design area.<sup>15</sup> AT&T Mobility provided a map of the area within

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<sup>11</sup> 47 U.S.C. § 332(c)(7)(B)(iii).

<sup>12</sup> 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).

<sup>13</sup> *Id.* at § 332(c)(7)(B)(iv).

<sup>14</sup> *Id.* at § 332(c)(7)(B)(i)(II).

<sup>15</sup> Application at 7.

which the tower must be located pursuant to the radio frequency requirements as determined by its engineers, and indicated that the tower would be constructed in that area.<sup>16</sup> AT&T Mobility indicated that there was no opportunity for co-location on a nearby tower.<sup>17</sup> AT&T Mobility stated that the proposed wireless facilities would serve as a necessary link in its wireless communications network and would improve coverage in an area not served or not adequately served by its current facilities.<sup>18</sup> Thus, AT&T Mobility demonstrated 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 Arnolds asserted that there were other, more secluded places nearby at which AT&T Mobility could place the proposed wireless facilities, which the Arnolds contend would lessen the negative impact of the cell tower on surrounding properties. However, the Arnolds did not specify where those properties were located. There is also no evidence those areas would satisfy AT&T Mobility's radio frequency requirements; there is no evidence that property is available for use by AT&T Mobility in those areas; there is no evidence that AT&T Mobility would be permitted by the Federal Aviation Administration or the Kentucky Airport Zoning Commission to place the facilities in those locations; and there is no evidence that the effect on properties near those locations, if any, would be any different than the effects on property near the proposed location. Moreover, as noted above, AT&T Mobility presented a map showing the area where its radio frequency engineers determined the tower should be located, and the use and development of

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<sup>16</sup> *Id.* at 7, Ex. N.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 2-3.

properties within the search area appear to be the same or similar to those in the area at issue herein. Thus, the evidence does not support denying this application based on the location of the proposed construction as compared to other nearby sites.

As part of the application, AT&T Mobility provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility, including plans signed by a professional engineer and a report from a geotechnical engineering firm.<sup>19</sup> However, the Arnolds raised concerns regarding the safety of the proposed tower and alleged that it might fall on a portion of their property, because their property line is about 250 feet from the proposed tower, which is 370 feet in height with the proposed antenna. AT&T Mobility responded to those concerns with the report of Mr. Grigsby, a Structural Engineer, indicating that it was unlikely that the tower would fall, and that in the event it did fall it would likely do so in a manner that would not pose a hazard to any portion of the Arnolds' property.<sup>20</sup> The Commission also observes that the area the Arnolds contend is within the "fall zone" of the tower is currently wooded as indicated by the Arnolds. Thus, the Commission finds that the design and placement of the tower and foundation conforms to applicable nationally recognized building standards and that it does not pose an unreasonable, if any, safety risk to surrounding properties.

In opposing the location of the proposed cell tower, the Arnolds also made generalized claims that the proposed cell tower would result in reductions in property

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<sup>19</sup> See Application; *see also* Grigsby Engineering Report at 1-2, 5 (indicating that the design of the cell tower is consistent with applicable building codes, which require that it be able to sustain a 3 second gust of 89 miles per hour).

<sup>20</sup> Grigsby Engineering Report at 2, 5 (where Mr. Grigsby stated that it was his opinion that the tower would be able to sustain a gust of well beyond the 89 miles per hour required by the building code and in which he noted that when a catastrophic failures occur that cell towers do not generally fall like a tree cut from the bottom but rather bend from the top down, because the towers are designed to be strongest at the base with a weak point that will bend down at about two-thirds the height of the tower).



value and that the tower would result in an eyesore or nuisance to surrounding properties. However, pursuant to federal law, lay opinions of the type offered by the Arnolds generally cannot support a decision to deny a request to construct a cell tower.<sup>21</sup> AT&T Mobility also presented the report of Mr. Katz's indicating that the construction of a cell tower has no effect on the value of nearby properties, though the report has limited probative value because the methodology used by Mr. Katz provided little support for his main conclusions.<sup>22</sup> However, even if the cell tower does have an effect on nearby properties, there is no evidence that those effects would be any different if the cell tower was moved to another area that met the radio technical requirements necessary to provide the service at issue. Therefore, requiring AT&T Mobility to move the tower from one area to a similar area nearby, assuming the existence of another available property, would simply shift the alleged effects of the tower as opposed to eliminating those effects. Thus, the Commission cannot find that effects on the value or aesthetics of nearby properties would justify denying the CPCN requested herein, particularly when no other property owners have raised an objection.

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<sup>21</sup> See *supra*, Note 23.

<sup>22</sup> Mr. Katz noted that views of cell towers become blurred or obscured by trees, roofs, topography and other skyline features at distances of 500 to 750 feet and indicated that you would not expect a change in the value of property at those distances. Katz's Real Estate Valuation Report at 5-7. He then looked at a number of studies that tracked sale prices for properties within 500 feet of cell towers and similar facilities (or 750 feet depending on the study) against the prices of similar property outside those distances and asserted that the studies indicated that there was no significant difference between the properties that were within the tested proximity and those outside the tested proximity. *Id.* at 11-19. However, two of the case studies relied exclusively on sales numbers obtained after the facilities in question were constructed, so they would seem to have little if any probative value for demonstrating any change in property value from before and after the facilities were constructed. See *Id.* at 10-7 (where the "Date Sold" is always after the "Year of installation"). The third and final case study relied on by Mr. Katz only has information about the sale prices of a single property from before the construction of the cell tower and after the construction. *Id.* at 18 (the only property that was purchased and sold during the relevant period – before the installation date and then after – was the 5900 Woodhaven Ridge Ct. property).

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, AT&T Mobility should 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 AT&T Mobility.

IT IS THEREFORE ORDERED that:

1. AT&T Mobility is granted a CPCN to construct the proposed wireless telecommunications facility. The proposed facility consists of a tower not to exceed 370 feet in height, with attached antennas, to be located at 410 Fortner Ridge Road, Owenton, Owen County, Kentucky. The coordinates for the proposed facility are North Latitude 38°33'01.25" by West Longitude 84°42'55.36".
2. AT&T Mobility 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 a period of three months in the manner authorized by this Order.
3. Documents filed, if any, in the future pursuant to ordering paragraph 2 herein shall reference this case number and shall be retained in the utility's general correspondence file.



By the Commission

ENTERED  
JUN 22 2018  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
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Executive Director

Case No. 2018-00031

\*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