

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)	CASE NO.
CONVENIENCE AND NECESSITY TO)	2018-00388
CONSTRUCT A WIRELESS COMMUNICATIONS)	
FACILITY IN THE COMMONWEALTH OF)	
KENTUCKY IN THE COUNTY OF WAYNE)	

ORDER

This matter arises from an application for a Certificate of Public Convenience and Necessity (CPCN) filed by New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility (AT&T Mobility), pursuant to KRS 278.020, KRS 278.650, and 807 KAR 5:063, to construct and operate a wireless telecommunications facility, including an antenna tower, to be located at 297 Parmleysville Road, Monticello, Kentucky 42633, in Wayne County. The Commission granted AT&T Mobility the CPCN as requested in an Order entered February 14, 2019. On January 7, 2020, AT&T Mobility filed a motion indicating that it did not anticipate exercising the CPCN within one year of the CPCN being granted and, therefore, requested to amend the CPCN to extend the time to exercise the authority granted thereunder. The Commission will reopen this case to consider AT&T Mobility's motion.

A person seeking to construct an antenna tower for cellular telecommunications services or personal communications services outside the jurisdiction of a planning

commission must obtain a CPCN from the Commission.¹ Once the Commission grants a CPCN, the applicant must exercise it within the time prescribed by KRS 278.020(1)(e), which states:

Unless exercised within one (1) year from the grant thereof, *exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent*, the authority conferred by the issuance of the certificate of convenience and necessity shall be void, but the beginning of any new construction or facility in good faith within the time prescribed by the commission and the prosecution thereof with reasonable diligence shall constitute an exercise of authority under the certificate.² (Emphasis added.)

The Commission has interpreted KRS 278.020(1)(e) as stating that a CPCN is void as a matter of law if it is not exercised within the time prescribed therein,³ which is consistent with the plain language of the statute that a CPCN “shall be void” if not exercised in a timely manner. The time prescribed by KRS 278.020(1)(e) is one year from the date the CPCN is granted, “exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent.”⁴ The term “exclusive of” ordinarily and as used therein means “not including” or “not taking into account.”⁵ Meaning, if a

¹ KRS 278.650; *see also* KRS 278.020(1) (“No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010 . . . until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.”).

² KRS 278.020(1)(e).

³ *See Application of South Kentucky Rural Electric Cooperative Corporation for an Adjustment of Electric Rates*, Case No. 2011-00096, pg. 36-7 (Ky. PSC Mar. 30, 2012) (“South Kentucky did not start construction of its new headquarters facility within one year of the issuance of the CPCN, and the delay was not due to any court order or failure to obtain a necessary grant or permit. Consequently, the CPCN . . . has lapsed and is void.”).

⁴ KRS 278.020(1)(e).

⁵ Merriam-Webster, *Exclusive of*, <<https://www.merriam-webster.com/dictionary/exclusive%20of>> (Accessed Feb. 4, 2020) (defining “exclusive of” as “not taking into account”); *see also Watkins v. Waterfield*, 297 S.W.2d 761 (Ky. 1956) (where the Court interpreted language in the Kentucky Constitution

delay occurs due to the order of a court or failure to obtain a necessary grant or consent, then the period of that delay would be excluded for the purpose of determining whether one year has passed rendering a CPCN that has not been exercised void.⁶

AT&T Mobility's motion requests an extension of time to exercise the CPCN previously approved in this matter. However, because a CPCN is void if not exercised within the time prescribed and a qualifying delay extends the typical one-year period as a matter of law, there is no basis for making a motion for an extension of the time prescribed by KRS 278.020(1)(e) to exercise a CPCN. Thus, the Commission construes AT&T Mobility's motion as a request for a declaratory order finding that the delay alleged is "due to the order of [a] court or failure to obtain [a] necessary grant or consent" such that the typical one-year period for exercising the CPCN is extended pursuant to KRS 278.020(1)(e) due to the delay.

As an explanation for the delay, AT&T Mobility reported that it was determined the construction of the wireless communication facility may affect listed threatened and endangered species or designated critical habitats as discussed in 47 CFR 1.1307(a)(3); that an environmental assessment has been prepared and is currently being reviewed by the FCC pursuant to procedures described at 47 CFR 1.1308(d); and that AT&T Mobility expects to be able to begin construction when the FCC completes its review of environmental impact.⁷ Thus, the Commission finds that the delay alleged by AT&T

stating "within ten days (except Sundays)" to mean within ten days "exclusive of Sundays" and explained that it meant that Sundays could not count toward the 10 days).

⁶ *Cf. Watkins, supra* at FN 3.

⁷ AT&T Mobility's Motion at pg. 2 (filed January 7, 2020).

Mobility is due to the failure to obtain a necessary grant or consent such that it would extend the typical one-year period for exercising the CPCN.⁸

However, AT&T Mobility requested in its motion that the period for exercising the CPCN be extended by six months to August 14, 2020. AT&T Mobility has stated that the delay is likely to be such that AT&T Mobility will be able to begin construction on or before August 14, 2020, but depending on when the delay due to the environmental assessment ends and how long it was ongoing before AT&T Mobility made its motion, the period prescribed by KRS 278.020(1)(e) may not extend to August 14, 2020. Thus, while the Commission finds that the delay extends the period in which AT&T Mobility may exercise the CPCN by the duration of the delay, the Commission is not able to specifically find that the delay extends the period to August 14, 2020.

IT IS THEREFORE ORDERED that:

1. This case is reopened to address AT&T Mobility's motion.
2. AT&T Mobility must exercise its CPCN within the period prescribed by KRS 278.020(1)(e).
3. The delay AT&T Mobility is experiencing arising from the review of its environmental assessment extends the typical one-year period prescribed for exercising its CPCN by the duration of that delay.
4. This case is closed and removed from the Commission's docket.

⁸ See, e.g. *Application of Skyway Towers, LLC and Kentucky RSA No. 1 for Issuance of a CPCN to Construct a Wireless Communications Facility*, Case 2016-00390, pg. 2 (Ky. PSC Aug. 31, 2018) ("The delay that Verizon Wireless is experiencing due to its compliance with the Endangered Species Act of 1973 in order to protect migratory bats is squarely within the meaning of the exception in [KRS 278.020(1)(e)].").

By the Commission

ENTERED
FEB 11 2020
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director
for Kent A. Chandler

Case No. 2018-00388

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