

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC 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 ADAIR)

CASE NO.
2021-00049

ORDER

On February 25, 2021, Thomas and Rachel Dzieran (collectively, Dzierans) filed a document with the Commission in which the Dzierans request, *inter alia*, intervention in this proceeding.¹ The Dzierans own property within 500 feet of, but not adjacent to, property on which New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility and Uniti Towers LLC (collectively, Applicants) have proposed to construct a 212-foot tall tower on which to locate wireless antenna.² The Dzierans' request intervention on the following issues: (1) to gather information on the proposed tower's compliance with the federal endangered species laws, claiming there is a protected species of bat on the property;³ (2) radio frequency radiation from the tower as well as implementation of 5G;⁴ and (3) supposed setback regulations require the tower be at least 212 feet away from any

¹ Request for Intervention.

² Application at 3 and Exhibit B.

³ Request for Intervention at unnumbered page 1.

⁴ *Id.*

adjoining property, one foot for every one foot of tower height, and the tower is closer than 212 feet to the Dzierans' property.⁵

LEGAL STANDARD

The only person who has a statutory right to intervene in a Commission case is the Attorney General of the Commonwealth of Kentucky pursuant to KRS 367.150(8)(b). Intervention by all others is permissive and is within the sole discretion of the Commission.⁶

Administrative Regulation 807 KAR 5:001 Section 4(11)(b), provides two independent bases for intervention: (1) the person “has a special interest in the case that is not otherwise adequately represented,” or (2) “intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.” The Commission’s discretion in granting intervention is not unlimited. The Kentucky Court of Appeals has held, in addition to meeting at least one of the standards for intervention in 807 KAR 5:001, Section 4(11), “that the person seeking intervention must have an interest in the “rates” or “service” of a utility, since those are the only two subjects under the jurisdiction of the PSC.”⁷ Thus, if a person’s alleged interest is outside the jurisdiction of the Commission, that interest cannot be a “special interest” for the purposes of being granted intervention pursuant to 807 KAR 5:001 Section 4(11)(b).

⁵ *Id.* at unnumbered page 2.

⁶ *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1966).

⁷ *EnviroPower, LLC v. Public Service Com'n of Kentucky*, 2005-CA-001792-MR, 2007 WL 289328, at *4 (Ky. App. Feb. 2, 2007).

DISCUSSION AND FINDINGS

Based on a review of the pleadings at issue and being otherwise sufficient advised, the Commission finds that the Dzierans failed to demonstrate that they have a special interest over which the Commission has jurisdiction that is not otherwise adequately represented or that the Dzierans are likely to present issues or develop facts that will assist the Commission in considering this matter without unduly complicating the proceedings, for the reasons discussed below.

The Dzierans first assert that questions concerning the Endangered Species Act⁸ must be answered before construction of the proposed tower can begin. The Endangered Species Act, however, is a matter of federal jurisdiction and enforcement thereof does not fall to the Commission. As this is not a matter over which the Commission has jurisdiction, it is not a “special interest” necessary to warrant intervention, nor is it a factor that the Commission could consider in reviewing the application, thus, the Dzierans could not present issues or develop facts that may assist the Commission in this proceeding.

Second, the Dzierans assert concerns regarding radio frequency radiation as well as concerns about implementation of 5G.⁹ Federal law, however, preempts the Commission from denying an application based upon emission concerns:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions.¹⁰

⁸ 16 U.S.C. 35 § 1531 *et seq.*

⁹ Request for Intervention at unnumbered page 1.

¹⁰ 47 U.S.C. § 332(c)(7)(B)(iv).

The Applicants have received the necessary permits from the Federal Communications Commission,¹¹ and therefore the Commission cannot consider the Dzierans's concerns about radio frequency emissions. As radio frequency emissions are not a matter over which the Commission has jurisdiction, it is not a "special interest" necessary to warrant intervention, nor could it be a factor that the Commission could consider in reviewing the application; thus, the Dzierans could not present issues or develop facts that may assist the Commission in this proceeding.

Last, the Dzierans allege that the proposed tower raises issues concerning national standards for minimum setbacks from adjoining property.¹² The Dzierans allege that the proposed tower would sit within a few feet of their property line and, therefore, violates these setback standards. The Dzierans provide no cite for the supposed national setback standards and the Commission is unaware of any such national standards. Assuming, *arguendo*, that such standards existed, if the standards were indeed national, they would be a matter of federal, and not state, enforcement. The Commission, further, is unaware of any state setback requirements that the Commission must enforce when reviewing an application to construct a wireless tower. A review of KRS Chapter 278 and the regulations the Commission enforces reveals no minimum setback standards. The Commission, therefore, finds that the Dzierans' concerns regarding meeting national setback standards do not provide a basis upon which intervention may be granted.

The Dzierans will have an opportunity to participate in this proceeding even though they are not granted intervenor status. The Dzierans can review all public documents

¹¹ Application, Exhibit A.

¹² Request for Intervention at unnumbered page 2.

filed in this case and monitor the proceedings via the Commission's website <https://psc.ky.gov/Case/ViewCaseFilings/2021-00049/>. In addition, the Dzierans may file comments as frequently as they choose, and those comments will be entered into the record of this case.

IT IS THEREFORE ORDERED that the motion to intervene filed by the Dzierans is denied.

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By the Commission

ENTERED
DEC 17 2021
rcs
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2021-00049

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