

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)	CASE NO.
CONVENIENCE AND NECESSITY TO)	2022-00116
CONSTRUCT A WIRELESS COMMUNICATIONS)	
FACILITY IN THE COMMONWEALTH OF)	
KENTUCKY IN THE COUNTY OF MCCREARY)	

ORDER

On April 8, 2022, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T Mobility) and Tillman Infrastructure, LLC (jointly, Joint Applicants) filed an application seeking a Certificate of Public Convenience and Necessity (CPCN) to construct and operate a wireless telecommunications facility. The proposed facility consists of a tower not to exceed 258 feet in height, with attached antennas, to be located at 5787 S. Hwy 1651, Pine Knot, McCreary County, Kentucky. The coordinates for the proposed facility are North Latitude 36° 39' 54.68" by West Longitude 84° 26' 54.71".

Pursuant to 807 KAR 5:063, Joint Applicants filed statements that they provided the required notifications regarding the proposed construction; as discussed below, notice was mailed to, but not received by, at least one of the adjoining property owners. Pursuant to 807 KAR 5:063, Joint Applicants have filed a list, including the county judge/executive and all property owners within 500 feet and contiguous to the cell site to whom notice of the proposed construction was sent by certified mail. The notices solicited comments and informed the recipients of their right to request intervention. As

of the date of this Order, no public comments have been received. However, in response to two requests for information regarding process of service,¹ Joint Applicants acknowledged that notice sent to the property owned by the Pine Knot Cemetery was returned as undelivered and that there was a different address to serve the Pine Knot Cemetery for notice purposes.² Joint Applicants explained the additional steps taken to attempt service on Pine Knot Cemetery and stated that they would supplement the record when a signed green card is received or if the notice is returned undelivered.³ It has been over 30 days since those attempts were made and no additional motions for intervention have been filed.

SBA Towers VII, LLC (SBA) requested intervention on April 25, 2022, and on May 19, 2023, the Commission issued an Order denying intervention.

Joint Applicants filed, along with the application, a No Hazard to Air Navigation letter from the Federal Aviation Administration.⁴ Joint Applicants filed an application seeking approval for the construction and operation of the proposed facility with the Kentucky Airport Zoning Commission.⁵ The approval of the application has not been filed.

¹ Joint Applicants' Response to Commission Staff's First Request for Information (Staff's First Request) (filed June 23, 2023) and Joint Applicants' Response to Commission Staff' Second Request for Information (Staff's Second Request) (filed Aug. 7, 2023).

² Joint Applicants' Response to Staff's Second Request, Item 1.

³ Joint Applicants' Response to Staff's Second Request, Item 1 and Joint Applicants' Supplemental Response to Staff's Second Request (filed Sept. 15, 2023).

⁴ Application, Exhibit E.

⁵ Application, Exhibit F.

Joint Applicants have provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility.⁶ Based upon the application, the design of the tower and foundation conforms to applicable nationally recognized building standards, and a licensed professional engineer has certified the plans.

Joint Applicants have provided information, including a radio frequency analysis, that the proposed facility is required to provide adequate service and improve its service coverage.⁷ Joint Applicants have also provided information that there is no reasonable opportunity to co-locate its equipment on existing structures.⁸

To obtain a CPCN, Joint Applicants must demonstrate a need for such facilities and an absence of wasteful duplication.⁹

“Need” requires “a showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated.”¹⁰ “Wasteful duplication” is defined as “an excess of capacity over need” and “an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties.”¹¹ The wireless market is competitive and, other than the placement of towers in areas outside the jurisdiction of planning and zoning commissions and interconnection with other

⁶ Application, Exhibit C.

⁷ Application at 7-8, Exhibit N.

⁸ Application at 4.

⁹ *Kentucky Utilities Co. v. Public Service Com’n*, 252 S.W.2d 885 (Ky. 1952).

¹⁰ *Kentucky Utilities Co. v. Public Service Com’n*, 252 S.W.2d 885, 890 (Ky. 1952).

¹¹ *Kentucky Utilities Co. v. Public Service Com’n*, 252 S.W.2d 885, 890 (Ky. 1952).

telecommunications providers, the Commission has little jurisdiction over wireless providers, including no jurisdiction over the rates and earnings of a wireless provider.¹² As an initial matter, the Commission notes that it is within its purview to deny the application based on a misstatement in the application that all contiguous property owners had received notice of the application.¹³ In fact, based on evidence in the record, it was unlikely that at least one party received notice.¹⁴ KRS 278.665 states that the Commission “shall require that every person who owns property contiguous to the property where the proposed cellular antenna tower will be located **receives** notice.” (emphasis added). The statute distinguishes between receipt of notice and mailing of notice. Thus, failure of all contiguous property owners to receive notice is grounds for a denial of a CPCN application. The Commission cautions parties filing applications that proper notice to all contiguous property owners is required for a CPCN for a wireless telecommunications facility and failing to make appropriate and proper attempts at service could result in the Commission denying an application.¹⁵

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that Joint Applicants have demonstrated that there is a need for the proposed facility as a result of increasing demand for telecommunications services, to assure adequate coverage in the area, and to improve service in McCreary County by

¹² See KRS 278.54611.

¹³ KRS 278.665.

¹⁴ Joint Applicants’ Response to Staff’s Second Request, Item 1.

¹⁵ This is one of at least three cases in the last six months in which the Commission has had to address notice. Case No. 2022-00062 *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 McCreary* (Ky. PSC Mar. 25, 2022) and Case No. 2022-00364 *Electronic Application of Duke Energy Kentucky, Inc. for a Certificate of Public Convenience and Necessity to Construct a 138-KV Transmission Line and Associated Facilities in Boone County, Kentucky* (Ky. PSC June 16, 2023).

providing interconnection between other sites forming a more cohesive network. The Commission also finds that the proposed facility will not result in wasteful duplication. Building a new tower to improve telecommunication services and assure adequate coverage when other construction sites have been sufficiently explored and there are no reasonable opportunities to co-locate the equipment required to do so is not wasteful duplication. The Commission, therefore, finds that a CPCN to construct the proposed facility should be granted.

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, Joint Applicants shall notify the Commission 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 shall be observed by the Joint Applicants.

IT IS THEREFORE ORDERED that:

1. Joint Applicants are granted a CPCN to construct a wireless telecommunications facility. The proposed facility consists of a tower not to exceed 258 feet in height, with attached antennas, to be located 5787 S. Hwy 1651, Pine Knot, McCreary County, Kentucky. The coordinates for the proposed facility are North Latitude 36° 39' 54.68" by West Longitude 84° 26' 54.71".

2. Joint Applicants 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 three months in the manner authorized by this Order.


3. Joint Applicants shall file the approval for the construction and operation of the proposed facility from the Kentucky Airport Zoning Commission within six months of the date of service of the Order.

4. Documents filed, if any, in the future pursuant to ordering paragraphs 2 or 3 herein shall reference this case number and shall be retained in the post-case correspondence file.

5. This case is closed and removed from the Commission's docket.

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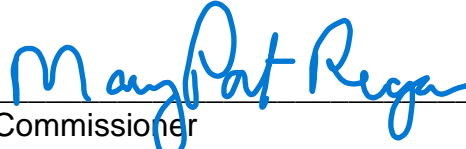
PUBLIC SERVICE COMMISSION



Chairman



Vice Chairman



Commissioner

ENTERED
OCT 03 2023
rcs
KENTUCKY PUBLIC
SERVICE COMMISSION

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