**COMMONWEALTH OF KENTUCKY**
**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

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| THE APPLICATION OF<br>BELLSOUTH MOBILITY, LLC,<br>D/B/A CINGULAR WIRELESS - KENTUCKY<br>FOR ISSUANCE OF A CERTIFICATE OF PUBLIC<br>CONVENIENCE AND NECESSITY TO CONSTRUCT<br>A WIRELESS COMMUNICATIONS FACILITY AT<br>ROUGH AND TOUGH ROAD<br>PRESTONSBURG, KENTUCKY 41653 OR, IN THE<br>ALTERNATIVE, AN ORDER REQUIRING CO-LOCATION<br>ON REASONABLE TERMS AND CONDITIONS<br>IN THE WIRELESS COMMUNICATIONS<br>LICENSE AREA IN THE COMMONWEALTH OF<br>KENTUCKY IN THE COUNTY OF FLOYD | ) | CASE NO.: 2004-00413 |

SITE NAME: BRAINARD

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**MEMORANDUM OF LAW IN SUPPORT OF APPLICANT'S REQUEST THAT THE PUBLIC SERVICE COMMISSION ENFORCE ITS CO-LOCATION MANDATE**

Applicant, BellSouth Mobility, LLC d/b/a Cingular Wireless-Kentucky (hereinafter, "BellSouth Mobility" or "Applicant"), by counsel, for its Memorandum in Support of Applicant's Request That the Public Service Commission Enforce its Co-Location Mandate, states as follows:

**Introduction**

The principles at stake in this proceeding are principles that have constituted the core of the Commission's work in telecommunications for many years: [1] ensuring that Kentucky maintains a competitive edge in the new information technology era; [2] assisting in the economic development of Kentucky's rural areas by ensuring that

utilities make wise and efficient use of their resources; [3] ensuring that utility infrastructure is both adequate and efficient; and [4] enforcing the statutory mandate that utility practices with regard to use of their facilities must be reasonable, efficient, and in the public interest. In recent years, the Commission also has played a key role in preserving Kentucky's scenic beauty by implementing the General Assembly's frequently reiterated goal of avoiding unnecessary tower proliferation.

The current policy and practice of East Kentucky Network Limited Liability Company ("East Kentucky Network") -- to refuse even to discuss co-location of another carrier's antennas on its existing towers -- flies in the face of these legal standards and policy goals.

The Commission should order East Kentucky to permit BellSouth Mobility, on reasonable terms and conditions consistent with industry practice, to co-locate antennas on its tower at Rough-N-Tuff and Richardson Branch, in Prestonsburg, Kentucky. The Commission should also order East Kentucky Network to cease its current policy and practice of refusing to negotiate with carriers who wish to co-locate antennas on East Kentucky Network's existing towers.

## Background

On October 22, 2004, BellSouth Mobility filed its application in this matter ("Application"), requesting a certificate of public convenience and necessity ("CPCN") to build a wireless telecommunications facility 340 feet in height in Prestonsburg, Floyd County, Kentucky (the "Brainard Site"), if – and *only* if -- the Commission has first found that BellSouth Mobility should not co-locate its facilities on the nearby 325' tower owned by East Kentucky Network. The East Kentucky Network tower, for which a CPCN was

granted on July 7, 2004,[1] is **a mere 982 feet** from the site at which BellSouth Mobility must build a new tower if the Commission does not require East Kentucky Network to permit co-location.

As BellSouth Mobility explained in its Application, East Kentucky Network has refused even to discuss co-location. On numerous occasions, representatives of BellSouth Mobility have contacted East Kentucky Network to discuss wise and productive use of existing facilities to expand and improve the telecommunications services available to eastern Kentuckians in East Kentucky Network's service area. On each and every occasion, BellSouth Mobility has been rebuffed – without reason, without discussion, without regard to the public interest issues inherent in intra-industry agreements to make efficient use of telecommunications infrastructure.[2]

The issues at stake here go beyond the need to provide eastern Kentuckians with access to traditional cellular and personal communications services ("PCS"). The same towers used to provide those services can be, and are, used in conjunction with cutting edge technology, providing telecommunications innovations that constitute a vital component in today's economy. Such technological innovations are crucially important to remote areas such as eastern Kentucky. Enhanced telecommunications capability enables schools, hospitals, and entrepreneurs to transcend geographic barriers.

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[1] *The Application of East Kentucky Network Limited Liability Company for the Issuance of a Certificate of Public Convenience and Necessity to Construct a Tower in Floyd County, Kentucky,* Ky. PSC Docket No. 2004-00190 (July 7, 2004).

[2] On information and belief, East Kentucky Network has co-located its facilities on existing towers owned by others.

Unfortunately, rough, mountainous terrain increases the expense of providing telecommunications infrastructure, just as it has historically increased the expense of providing highways. In addition, rural areas in general suffer from carriers' reluctance to incur the expense of building numerous towers where potential customers are few and projected return on investment is correspondingly low. The area served by East Kentucky Network is handicapped by both factors. But it need not be. An explicit policy, solidly grounded in law and enforced by this Commission, can ensure efficient tower sharing by the industry and maximize technologically-driven opportunities available to Kentuckians.

## ARGUMENT

### I. THE PUBLIC SERVICE COMMISSION HAS THE AUTHORITY – INDEED, THE RESPONSIBILITY -- TO REQUIRE RECALCITRANT CARRIERS TO PERMIT CO-LOCATION.

The law mandating Commission enforcement of reasonable utility practices is well-settled, as is the law requiring the Commission to prevent unnecessary duplication of utility facilities in general, and unnecessary tower proliferation in particular. The Commission should not hesitate to exercise this authority.

#### A. Use of a Utility's Facilities, Such As Communications Towers, Is "Utility Service" That Is Subject to Commission Jurisdiction And That Must Be "Reasonable" and "Adequate."

Since its inception, the Public Service Commission has possessed – and exercised -- jurisdiction over utilities' construction and use of their facilities. That jurisdiction includes the authority to require utilities to permit others to use those

facilities on reasonable terms and conditions. Courts have consistently affirmed the Commission's exercise of that jurisdiction.

In *Kentucky CATV v. Volz,* Ky. App., 675 S.W.2d 393 (1983), the Kentucky Court of Appeals squarely held that the term "utility service," over which the Commission has plenary authority pursuant to KRS 278.040, "not only includes the basic services for which a utility is created, but it also includes any service which arises from the use of a utility's facilities, such as its poles." *Id.* at 396. In so ruling, the court rejected arguments that the term "utility service" and Commission jurisdiction over it should be interpreted narrowly:

> KRS 278.260 empowers the Commission to investigate any "...practice or act affecting or relating to the service of the utility or any service in connection therewith" which may be "unreasonable, unsafe, insufficient or unjustly discriminatory...." We can only conclude that the statutory scheme confers broad jurisdiction over the use of "facilities" of all utilities.

*Id.*

A wireless communications carrier is unquestionably a utility. *Oldham County Planning and Zoning Comm'n v. Courier Communications Corp.,* Ky. App., 722 S.W.2d 904 (1987). A telecommunications tower is just as unquestionably a "facility" used by such a utility. *Volz* is dispositive. The Commission has jurisdiction.

*Volz* was reaffirmed in *Electric and Water Plant Bd. v. South Central Bell Telephone Co.,* Ky. App., 805 S.W.2d 141 (1990). In *Electric and Water Plant Board,* a city-owned cable provider argued, *inter alia,* that because it was not a utility subject to Commission jurisdiction and because it had poles of its own to share under a joint-use agreement, the Commission could not require it to pay a telephone company's tariffed

pole attachment rates. Citing the plenary jurisdiction established in *Volz,* the Court disagreed:

> We do note that this Court in *Kentucky CATV Association v. Volz,* Ky. App., 674 S.W.2d 393 (1983) ... held that the PSC has jurisdiction over joint pole use agreements.... The cable television operator becomes a customer of the utility company as the utility company is providing a service to the cable operator by allowing the operator to use its poles. *Volz, supra.* Thus, the PSC had jurisdiction over the appellant as it was a joint user of utility poles.

*Id.* at 144.

Thus, once again, use of a utility's facilities was deemed to be utility service within Commission jurisdiction. In *Electric and Water Plant Board,* as in *Volz*, rental of, and co-location on, a utility's facilities was within Commission jurisdiction even when the user was not a utility subject to Commission jurisdiction. Here, the would-be user of East Kentucky's tower is a "utility" subject to Commission jurisdiction, as is East Kentucky itself. *Courier Communications Corp.*

The breadth of Commission's authority over utility service issues – which include the use of a utility's facilities -- is found in the statutes as well as the case law. For example, pursuant to KRS 278.280, the Commission may, among other things, investigate the "reasonableness" of any utility's "practices" and, if it finds such practices unreasonable, it "shall" determine the proper "rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation." Similarly, pursuant to KRS 278.260, the Commission may investigate, on complaint or on its own motion, any utility's "practice or act affecting or relating to the service of the utility" and enter its orders accordingly. The Commission's authority is broad in every respect but

one: it has no discretion to refuse to exercise its authority. It must, instead, use its authority to ensure, among other things, that each utility subject to its jurisdiction furnishes "adequate, efficient and reasonable service." KRS 278.030.

East Kentucky Network's practice of refusing even to consider permitting BellSouth Mobility to co-locate, regardless of terms and conditions, is the sort of utility behavior that the statute was enacted to prevent, for refusal to co-locate on *any* terms is patently unreasonable as well as grossly inefficient. It is, in *Volz* terms, a refusal to provide "utility service." Commission action to end East Kentucky Network's refusal to permit co-location is both lawful and necessary.

For over seven decades, an integral part of the Commission's responsibility to Kentuckians has been to ensure that each utility's practices with regard to its facilities are reasonable and serve the public interest. The Commission has not hesitated to enforce this mandate, and the courts have not hesitated to affirm Commission orders doing so.

The Commission has jurisdiction over this issue. It should exercise it.

B. Pursuant to Established Law, the Commission Must Prohibit The Wasteful Duplication of Facilities That Will Inevitably Result if Co-Location is Not Ordered.

KRS 278.020 requires an inquiry into the potential for wasteful duplication when a utility requests a CPCN – and KRS 278.020 governs construction of wireless telecommunications facilities, just as it governs construction of other utility facilities. *See* KRS 278.650 (specifying that an applicant to construct an antenna tower for cellular or personal communications services "shall apply to the Public Service

Commission for a certificate of public convenience and necessity *pursuant to KRS 278.020(1),* 278.665, and this section") (Emphasis added.). An integral part of any KRS 278.020(1) inquiry into the "necessity" for a utility facility is the question of whether construction of a new facility will constitute "wasteful duplication" – an "unnecessary multiplicity of physical properties." *Kentucky Utilities Co. v. Public Service Comm'n,* Ky., 252 S.W.2d 885, 890 (1952). This standard implements the plain language of the statute, for there obviously is no "necessity" to build if sufficient infrastructure to provide service already exists.

Nor does the law restrict the inquiry into "wasteful duplication" to the existing facilities of the applying utility alone. Instead, the law of "necessity" includes an inquiry into the *sufficiency of existing structures owned by other utilities to remedy an applicant's deficiency.*

For example, in *Kentucky Utilities, id.* at 892, the court required the Commission to conduct the same inquiry BellSouth Mobility requests here. In *Kentucky Utilities,* the court upheld the Commission's grant of a CPCN to East Kentucky Power Company to construct a new generating plant. However, concerned that "a cluttering of the land with poles and wires" could result from the power company's plan to build additional transmission lines to carry the new power to the cooperatives, the court remanded the transmission line issue to the Commission for a determination as to whether it would be feasible for East Kentucky Power to transmit its new power over other utilities' facilities:

> If, upon such further hearing, it should develop that there will be wasteful duplication of transmission facilities in certain areas, then the Commission should consider whether it is feasible to distribute the energy generated by the East Ky. Plant over transmission lines of the appealing utilities. *If the latter should be found not feasible,*

> we believe the commission would be justified in granting a certificate for the proposed transmission lines of East Ky., because the need for service is clear.

*Id.* at 892 (emphasis added).

Thus, only after an investigation demonstrated that use of other utilities' transmission facilities would not be feasible could the Commission lawfully issue a CPCN for new facilities. This is precisely the relief requested by BellSouth Mobility here: an inquiry under KRS 278.020(1) as to the feasibility of the use of existing facilities *before* a final determination that an entirely new tower is a "necessity."

As in *Kentucky Utilities,* the need for service is clear. As in *Kentucky Utilities,* the Commission should avoid "cluttering" the land with unnecessary facilities when an obvious alternative is before it.

## II. REFUSAL TO PERMIT CO-LOCATION VIOLATES KENTUCKY'S STATUTORY PROHIBITION AGAINST UNNECESSARY UTILITY CONSTRUCTION IN GENERAL, AND AGAINST UNNECESSARY TOWER PROLIFERATION IN PARTICULAR.

The venerable KRS 278.020(1) and the body of law that has developed with relation to it continue to apply to wireless communications utilities. *See* KRS 278.650 (effective 2002, stating that a wireless communications tower requires a CPCN pursuant to KRS 278.020(1) unless it is proposed to be within the jurisdiction of a planning commission). But recent years have seen the development of an additional set of statutes, procedures, and regulations that also apply to wireless telecommunications towers. The unmistakable thrust of most of this new body of law is to prevent the unnecessary proliferation of these towers upon Kentucky's landscape. These laws are

violated by East Kentucky's adamant refusal to consider co-location that would obviate the need for new construction.

As the Commission is well aware, cellular towers' height, visibility, and specific placement needs, along with the burgeoning number of users and a corresponding need for more and more coverage and capacity (and thus more and more towers), has spurred public reaction and legislative attention that find no comparison in other utility construction issues. The General Assembly has even removed, for cell towers alone, the general exemption from land use inquiry that once applied to all Commission-regulated utility construction. KRS 100.324 (eff. 2002). In addition, KRS 100.985, *et seq.*, the statutory scheme for planning commission review of tower placement, demonstrates the General Assembly's determination that the towers, though necessary, must be kept to the necessary minimum. An obvious way to minimize the need for more and more towers – or, as the court in *Kentucky Utilities* put it, and to avoid unnecessary "cluttering of the land" -- is to emphasize, in laws and the regulations, co-location and sensitivity to the surrounding area. This is, in fact, precisely what has happened in the law of cellular tower construction, even in areas where there is no planning commission and the Public Service Commission retains jurisdiction under KRS 278.020.

No other type of utility construction entails a legislative exhortation to the Commission to "take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values." KRS 278.650 (eff. 2002). No other type of utility construction has been removed from Commission jurisdiction and given to planning commissions where planning commissions exist. KRS

278.650; KRS 100.987 (eff. 2002). Unlike other Commission-regulated utilities, wireless carriers that seek planning commission approval for sites within areas subject to planning must demonstrate a lack of co-location opportunities. KRS 100.8965(19). A planning commission is authorized to deny a wireless construction application if the applicant refuses to co-locate. KRS 100.987(7).

In short, the law specifically pertaining to construction of wireless telecommunications tower greatly strengthens KRS 278.020's general prohibition against duplication of facilities. It also explicitly favors co-location over new construction.

## III. PURSUANT TO COMMISSION PRECEDENT, EAST KENTUCKY NETWORK MUST BE REQUIRED TO PERMIT BELLSOUTH MOBILITY TO CO-LOCATE FACILITIES ON EXISTING TOWERS.

Even before the 2002 change in law, the Commission placed extreme emphasis on co-location in all cell site proceedings, requiring carriers to file reports documenting efforts to co-locate rather than build, conditioning at least one CPCN on an applicant's willingness to permit another carrier to co-locate, and in one instance halting proceedings on four CPCN applications to investigate claims that the applicant had not attempted to co-locate rather than build.

The Commission's current administrative regulation governing wireless communications tower construction, 807 KAR 5:063, specifically requires all applicants to report their investigations into co-location possibilities.

In 1998, the Commission halted the CPCN process in four cases to require full investigation and detailed reports based on an allegation that the applicant in these cases had failed fully to consider co-location possibilities.[3]

In 1995, in *Application of Lexington MSA Limited Partnership for Issuance of a Certificate of Public Convenience and Necessity to Construct an Additional Cell Site in Midway,* Kentucky PSC Docket 95-215 (November 27, 1995), the Commission explicitly conditioned Lexington MSA Limited Partnership's CPCN upon the filing of a written agreement permitting a second carrier to co-locate its facilities on the new tower. The order was so conditioned *even though the applicant had shown that it needed the tower to provide coverage for its own customers.* Thus, the Commission has *already held* that, even if the owner of a tower "needs" the facility, the public convenience and necessity still will not be served unless the owner also permits other carriers to co-locate.

The legal standard established in the *Midway* case does not change simply because East Kentucky Network has already received a CPCN for its Rough-N-Tuff site. The certificated structures in both cases are utility facilities dedicated to public use, and their use is therefore within Commission jurisdiction. If the PSC had authority to require co-location in Case No. 95-215 – and it clearly did – then it has authority to

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[3] *See* Order dated April 17, 1998, in *Application of Crown Communication Inc. and Nextel West Corporation for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility at Lebanon Junction in the Trunked SMR License Area In the Commonwealth of Kentucky in the County of Bullitt, Site Name: Clark (Douglas & Ruth Clark) Site Number: K-5017-A* (incorporating Case Nos. 98-010, 98-011, and 98-029 by reference and requiring full investigation into co-location possibilities).

require co-location now. There is no principled reason to treat Lexington MSA Partnership and East Kentucky Network differently.

Under Kentucky law and Commission precedent, two bodies of law apply to communications towers: the law prohibiting unnecessary proliferation of towers and the law prohibiting "unnecessary duplication" of utility facilities. The Commission has consistently enforced both bodies of law through its orders and regulations.

The Commission should order East Kentucky to permit co-location, on reasonable terms and conditions, on its existing towers.

## IV. FEDERAL PUBLIC POLICY, AS WELL AS THAT OF THIS COMMONWEALTH, SUPPORTS BELLSOUTH MOBILITY'S CONTENTION THAT RECALCITRANT CARRIERS MUST PERMIT CO-LOCATION TO SPUR THE DEVELOPMENT OF TECHNOLOGICALLY- DRIVEN OPPORTUNITY.

Federal law, specifically the Telecommunications Act of 1996, demands "rapid deployment of telecommunications technology." *AT&T Communications of the South Central States v. BellSouth Telecommunications, Inc.*, 20 F.Supp.2d 1097 (E.D. Ky. 1998). Kentucky law and Commission precedent echo this policy goal: Both before and after passage of the Telecommunications Act of 1996, the Kentucky Commission has been a national leader in recognizing the importance of rapid development of the telecommunications market through innovation and competition, realizing in particular the vital public interest in ensuring that eastern Kentucky does not lag behind the rest of the Commonwealth, and the nation, in deploying the services necessary for participation in the new information-based national economy. Governor Fletcher, working with ConnectKentucky, also has made these goals a priority.

Rapid deployment of wireless technology can take place in rural and mountainous areas such as those served by East Kentucky only if wise and efficient use is made of existing towers.

Efficient use of existing towers is particularly crucial in the rural and mountainous areas in which East Kentucky's towers are located. Deployment of duplicative new towers in this area is particularly wasteful and cost-ineffective, given the expense and difficulty of construction. The terrain is rugged and lacks both the population density and the ready-made business customer base available to providers in metropolitan areas. The refusal of a wireless communications infrastructure owner to provide shared access to existing facilities exacerbates the problem of service distribution in these areas when coupled with the burdens on market forces that drive development. The Commission, pursuant to its jurisdiction over such facilities, is uniquely positioned to remedy this problem by ordering co-location on reasonable terms where opportunities to do so exist.

There is a growing realization that wireless networks are, moreover, the best hope for deploying innovative telecommunications technology in rural areas. *USA Today* notes that "[w]ireless networks already are helping farmers check weather and crop prices, improving home schooling and rescuing small towns at risk of losing businesses to better-connected communities." "Inventive Wireless Providers Go Rural," *USAToday.com* (July 14, 2004).

Kentucky has committed itself to making the new information technology available to its citizens. A key goal of Governor Fletcher's *Prescription for Innovation,* announced to the 75th Annual Kentucky League of Cities Convention in Owensboro on

October 7, 2004, is to use existing infrastructure to maximize Kentuckians' access to modern information technology. That goal is well-served by efficient use of existing towers.

Kentucky's rural and mountain communities must not be left behind as American society, along with its economy, advances to the next technological level.

East Kentucky Network should be required to permit co-location.

## CONCLUSION

The Commission has consistently prohibited unnecessary duplication of facilities and enforced co-location requirements under Kentucky law. It should do so here. To permit East Kentucky Network to continue its policy of refusing to permit – or even to discuss --co-location on its towers is at odds with the Commission's long-standing refusal to countenance utility behavior that defies the public interest. Law, logic, and all common sense are contradicted by a policy that would result in the existence of two huge towers, each exceeding 300 feet in height, within 982 feet of each other.

For the foregoing reasons, BellSouth Mobility respectfully requests that the Commission investigate the feasibility of co-location of BellSouth Mobility's facilities on East Kentucky Network's Rough-N-Tuff Tower and, if such co-location is feasible, order East Kentucky Network to permit BellSouth Mobility to co-locate its facilities on the Rough-N-Tuff Tower on reasonable terms and conditions. BellSouth Mobility further respectfully requests that the Commission enter its order declaring that East Kentucky

Network must abandon its unlawful policy and practice of refusing to permit co-location on its existing towers.

Respectfully submitted,

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