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February 3, 2005

RECEIVED

FEB 04 2005

PUBLIC SERVICE
COMMISSION

via Federal Express
Ms. Beth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

Re: *The Application of BellSouth Mobility, LLC, d/b/a Cingular Wireless - Kentucky for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility at Rough and Tough Road, Prestonsburg, Kentucky 41653 or, in the Alternative, an Order Requiring Co-Location on Reasonable Terms and Conditions in the Wireless Communications License Area in the Commonwealth of Kentucky in the County of Floyd; Site name: Brainard; Case No. 2004-00413*

Dear Ms. O'Donnell:

Enclosed for filing with the Public Service Commission of the Commonwealth of Kentucky (the "Commission") is one original and ten (10) copies of East Kentucky Network, LLC's Response to BellSouth Mobility's Motion for Joinder, Acceptance for Filing of the Attached Memorandum of Law, and for a Preliminary Procedural Schedule Including an Informal Conference in the above-styled case.

In addition, I have enclosed an extra copy of the response to be file-stamped. Please return the file-stamped copy to me in the enclosed, self-addressed, stamped envelope.

Thank you, and if you have any questions with regard to this matter, please call me.

Very truly yours,

DINSMORE & SHOHL LLP



Holly C. Wallace

HCW/rk
Enclosures

Ms. Beth O'Donnell
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cc: Laura Phipps
David A. Pike, Esq.
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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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FEB 04 2005

PUBLIC SERVICE
COMMISSION

In the Matter of:

THE APPLICATION OF BELLSOUTH MOBILITY, LLC,)
D/B/A CINGULAR WIRELESS - KENTUCKY)
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO CONSTRUCT) C
A WIRELESS COMMUNICATIONS FACILITY AT)
ROUGH AND TOUGH ROAD)
PRESTONSBURG, KENTUCKY 41653 OR, IN THE)
ALTERNATIVE, AN ORDER REQUIRING CO-LOCATION)
ON REASONABLE TERMS AND CONDITIONS)
IN THE WIRELESS COMMUNICATIONS)
LICENSE AREA IN THE COMMONWEALTH OF)
KENTUCKY IN THE COUNTY OF FLOYD)

ORIGINAL

SITE NAME: BRAINARD

**RESPONSE TO BELLSOUTH MOBILITY’S MOTION FOR JOINDER,
ACCEPTANCE FOR FILING OF THE ATTACHED MEMORANDUM
OF LAW, AND FOR A PRELIMINARY PROCEDURAL SCHEDULE
INCLUDING AN INFORMAL CONFERENCE**

East Kentucky Network, LLC (“East Kentucky Network”), by counsel, in support of its Response to the Motion for Joinder, Acceptance for Filing of the Attached Memorandum of Law, and for a Preliminary Procedural Schedule including an Informal Conference ("Motion for Joinder") of BellSouth Mobility, LLC (“BellSouth Mobility”), states as follows.

INTRODUCTION

BellSouth Mobility’s lengthy Memorandum of Law notwithstanding, the issue before the Public Service Commission of the Commonwealth of Kentucky (the “Commission”) is simple—whether BellSouth Mobility made a good-faith effort to negotiate with East Kentucky Network prior to seeking Commission intervention and filing its Motion for Joinder. As East Kentucky

Network demonstrates below, BellSouth Mobility did not make a good-faith effort to negotiate with East Kentucky Network, thus, BellSouth Mobility's Motion for Joinder is without merit and should be denied.

ARGUMENT

BELLSOUTH MOBILITY IS REQUIRED TO MAKE A GOOD-FAITH EFFORT TO SEEK CO-LOCATION.

The Telecommunications Act of 1996 allows state and local governments to retain authority over “placement, construction, and modification of personal wireless service facilities” including telecommunications towers. 47 U.S.C. §332(c)(7). In accordance with the Telecommunications Act of 1996, the Kentucky General Assembly enacted statutes, and the Commission promulgated regulations, regarding the obligations of a party, such as BellSouth Mobility, seeking to construct a telecommunications tower.

Pursuant to Kentucky statutory authority, any utility seeking to construct a telecommunications tower must file an application including a statement that,

there is no reasonably available opportunity to locate its antennas and related facilities on an existing structure, including documentation of attempts to locate its antennas and related facilities on an existing structure . . . and a statement indicating that the applicant attempted to locate its antennas and related facilities on a tower designed to host multiple wireless service providers’ facilities or on an existing structure, such as a telecommunications tower

KRS 100.9865; *see also* 870 KAR 5:063 §1(1)(s). In addition to providing the above-referenced statement, a party seeking to construct a tower is obligated to make a good-faith effort to seek co-location:

The planning commission may require the applicant to make a reasonable attempt to co-locate additional transmitting or related equipment If the local planning commission requires the applicant to attempt co-location, the applicant shall provide the

local planning unit with a statement indicating that the applicant has:

- (a) Successfully attempted to co-locate . . . ; or
- (b) Unsuccessfully attempted to co-locate on towers designed to host multiple wireless service provider's facilities or existing structures capable of supporting the applicant's facilities and that:
 - 1. Identifies the location of the towers or other structures on which the applicant attempted to co-locate; and
 - 2. Lists the reasons why the co-location was unsuccessful in each instance.

KRS 100.987(6). Significantly, the reference to co-location pertains only to parties seeking to construct a new tower, and requires them to make a good-faith attempt at co-location.

Pursuant to the plain language of the statutes, BellSouth Mobility bears the burden to establish that it made a good-faith effort to co-locate. In addition, the Commission has the authority to investigate the sufficiency of BellSouth Mobility's attempts at co-location. *See e.g.*, PSC Case 96-269, Order of January 6, 1997; PSC Case 97-278, Order of February 17, 1998; and PSC Case 97-180, Order of May 21, 1998. BellSouth Mobility cannot establish that it satisfied its burden to make a good-faith effort to co-locate.

BellSouth Mobility and East Kentucky Network have had a single conversation regarding co-location. In addition to this single conversation, BellSouth Mobility left a single voice message regarding the issue. East Kentucky Network heard nothing further from BellSouth Mobility until it received the present Motion for Joinder. Given BellSouth Mobility's half-hearted attempt to negotiate co-location, East Kentucky Network was astonished to receive BellSouth Mobility's Motion for Joinder and flabbergasted by BellSouth Mobility's statement that "East Kentucky Network has rebuffed without reason BellSouth Mobility's *numerous* attempts to discuss co-location" (Motion for Joinder, p. 3) (emphasis added). East

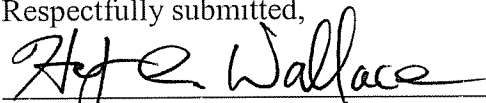
Kentucky Network takes umbrage with this gross mischaracterization of the facts. A single conversation, and a single voice message do not constitute "numerous" efforts to discuss co-location.

Rather than pursue good-faith negotiations with East Kentucky Network, as required by law, BellSouth Mobility apparently decided to short-circuit the process and file a Motion for Joinder. East Kentucky Network can only surmise that BellSouth Mobility made a strategic decision to attempt to persuade the Commission to order East Kentucky Network to provide co-location on BellSouth Mobility's terms, rather than attempt to negotiate a resolution with East Kentucky Network. A co-locating entity may only co-locate "in a manner that does not impose additional costs or operating restrictions on the primary user." KRS 100.987(8). BellSouth Mobility cannot simply impose its will on East Kentucky Network, it must attempt to negotiate in good faith. BellSouth Mobility's efforts in the present case do not constitute a good-faith effort at co-location.

CONCLUSION

For the reasons stated above, BellSouth Mobility has not satisfied its obligation to negotiate in good faith with East Kentucky Network. Accordingly, the Commission should deny BellSouth Mobility's Motion for Joinder.

Respectfully submitted,



John E. Selent

Holly C. Wallace

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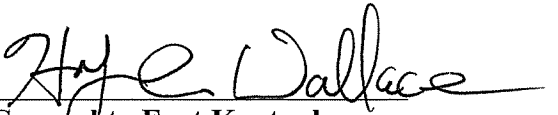
(502) 585-2207 (Fax)

Counsel to East Kentucky Network, LLC

CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of the foregoing was served by first class United States mail this 3rd day of February, 2005, upon the following:

David A. Pike
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