

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF NEW CINGULAR WIRELESS	)	
PCS, LLC AND AMERICAN TOWERS LLC FOR	)	
ISSUANCE OF A CERTIFICATE OF PUBLIC	)	
CONVENIENCE AND NECESSITY TO CONSTRUCT	)	
A WIRELESS COMMUNICATIONS FACILITY IN THE	)	CASE NO.
COMMONWEALTH OF KENTUCKY IN THE	)	2015-00404
COUNTY OF WOLFE	)	

ORDER

On December 14, 2015, New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, and American Towers LLC (“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 self-supporting antenna tower not to exceed 265 feet in height, with attached antenna, to be located at 395 Miller Ridge Road, Pine Ridge, Wolfe County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 46’ 24.18” by West Longitude 83° 38’ 8.92”.

The Applicants have provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility. 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.

Pursuant to 807 KAR 5:063, the Applicants have filed statements of having provided the required notifications regarding the proposed construction. Pursuant to 807 KAR 5:063, the Applicants have filed evidence that the county judge/executive and all property owners within 500 feet and contiguous to the cell site have been notified of the proposed construction. The notices solicited any comments and informed the recipients of their right to request intervention.

The Commission received comments from David Graham ("Mr. Graham") objecting to the location of the proposed tower based upon alleged health risks from cell tower radio frequency emissions. Mr. Graham subsequently filed a request to intervene on January 11, 2016, opposing the location of the proposed tower due to alleged environmental effects of cell tower radio frequency emissions and because the proposed tower is located 175 feet from the Daniel Boone National Forest. On March 2, 2016, Mr. Graham filed a joint request to intervene, for safety, health and environmental reasons, that was signed by Mr. Graham; Raymond Banks, Mayor of Compton, Kentucky; and Garrett Denniston, Magistrate, Wolfe County Fiscal Court, District 3. On March 31, 2016, the Commission denied both requests to intervene, finding that federal law expressly prohibits the Commission from regulating the location of a cell tower on the basis of environmental effects of radio frequency emissions and that Mr. Graham failed to state how the proximity to Daniel Boone National Forest rendered the location of the proposed tower unsuitable or improper, especially given that the property owner, the United States Department of Agriculture, US Forestry Division, had received notice of the proposed tower and had not filed a protest or requested to intervene.

On April 6, 2016, Mr. Graham filed a letter requesting that the Commission reconsider its denial of his request to intervene on the basis that Mr. Graham identified sites other than the proposed location that were suitable for cell tower construction and that he failed to receive proper notice of the proposed construction. On April 11, 2016, the Commission denied Mr. Graham's request for reconsideration, finding that he failed to provide sufficient evidence to support his assertion that other sites were more suitable than the proposed location and that Mr. Graham received sufficient notice of the proposed construction, as evidenced by his statements and documents he filed regarding receipt of notice.

The Applicants have filed applications with the Federal Aviation Administration and the Kentucky Airport Zoning Commission seeking approval for the construction and operation of the proposed facility. Both applications have been approved.

On June 10, 2016, the Commission Staff served its First Request for Information to Applicants ("Staff's First Request"), which required the Applicants to, in accordance with 807 KAR 5:063, Section 1(1)(s), fully describe their consideration of alternative locations, including attempts to co-locate on existing structures, in the vicinity of the proposed telecommunications antenna tower.<sup>1</sup>

On June 24, 2016, Applicants filed their response to Staff's First Request, along with a motion *in limine* to prevent Applicants' responses from being included in evidence, or, in the alternative, a motion to quash Staff's First Request and submit the application for a decision. As a basis for the motion *in limine*, Applicants assert that the

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<sup>1</sup> Staff's First Request, Item 2.

Commission's authority to regulate the construction of proposed tower is limited by federal law, which requires, among other things, that a denial of a request to construct a proposed tower be supported by substantial evidence in the form of objective criteria set forth in a statute or regulation.<sup>2</sup> Applicants further assert that, in their application, they satisfied the requirements of 807 KAR 5:063, Section 1(1)(s), which requires an applicant seeking to construct a cell tower to state that it has "considered the likely effects of the installation on nearby land uses and values, and has concluded that there is no more suitable location reasonably available. . . and that there is no reasonably available opportunity to co-locate." Applicants argue that because they satisfied the relevant regulation and there are no other applicable statutes or regulations that require Applicants to provide documentary evidence of alternative sites, Applicants should not be required to provide the additional information sought in Staff's First Request. As a basis for the motion to quash the staff requests and submit the application for decision, Applicants argue that it has been 189 days since the Commission accepted the application for filing, and that federal law requires the Commission to act upon a tower application within 150 days of being filed.<sup>3</sup> Applicants contend that Staff's First Request was untimely, and thus should be quashed and the matter submitted for a decision.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that the motion *in limine* should be denied. The Commission notes that 807 KAR 5:063, Section 1(1)(s), provides for "documentation of attempts to co-

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<sup>2</sup> See 47 U.S.C. § 332(c)(7)(B)(iii).

<sup>3</sup> *Id.*

locate” in conjunction with an applicant’s statement regarding consideration of alternative sites and colocation. Further, the application filed in this matter is substantially similar to the application filed in Case No. 2014-00108,<sup>4</sup> which was subsequently withdrawn by Applicants due to changes in Applicants’ deployment schedule. In that case, a competing cellular carrier moved to intervene, stating that the parties were in discussions regarding a possible colocation agreement. The motion to intervene was denied as moot once the application was withdrawn. Based upon statutes, regulations, and the previous case, the Commission acted within its statutory authority to build a robust record in this matter. The Commission further finds that the issuance of this Order renders the motion to quash moot, and therefore the motion to quash should be denied as moot.

In their response to Staff’s First Request, Applicants stated that they met the applicable regulatory criteria set forth in 801 KAR 5:063, Section 1(1)(s), and that they “concluded that there is no more suitable location reasonably available from which adequate services can be provided, and that there are no reasonably available opportunities to co-locate the necessary antennas on an existing structure.”<sup>5</sup> In support of this position, Applicants included an Alternative Site Analysis Report, dated June 21,

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<sup>4</sup> Case No. 2014-00108, *Application of New Cingular Wireless PCS, LLC and American Towers LLC 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 Wolfe* (Ky. PSC June 20, 2014).

<sup>5</sup> Response to Staff’s First Request, Item 12.

2016, and correspondence from AT&T, dated June 23, 2016, regarding a radio frequency analysis for the proposed site.<sup>6</sup>

The documents indicate that Applicants considered colocation and concluded that, due to physical conditions and age of the tower, the existing tower would not support the required antenna.<sup>7</sup> Applicants also considered numerous alternative sites, including federally owned property, that were ruled out due to steep terrain, lack of access roads, lack of utilities, and densely forested landscape.<sup>8</sup> After eliminating unsuitable sites, Applicants approached landowners of other potential sites, but the landowners were not willing to lease space for tower placement at this time.<sup>9</sup> The owner of the proposed site was willing to lease the space for the tower, and the site met all requirements, including radio frequency site design objective, appropriate separation from other properties in the area, and access and utility requirements.<sup>10</sup>

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that the Applicants have demonstrated that a facility is necessary to provide adequate utility service and, therefore, 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

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<sup>6</sup> *Id.*, Attachments.

<sup>7</sup> *Id.*, Attachment B at 1.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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, the Applicants should 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 should be observed by the Applicants.

IT IS THEREFORE ORDERED that:

1. The Applicants are granted a CPCN to construct a wireless telecommunications facility. The proposed facility consists of a self-supporting antenna tower not to exceed 265 feet in height, with attached antenna, and is to be located at 395 Miller Ridge Road, Pine Ridge, Wolfe County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 46' 24.18" by West Longitude 83° 38' 8.92".

2. The Applicants' motion *in limine* to prevent responsive information to Staff's First Request from being included in the record of the case is denied.

3. The Applicants' motion to quash is denied as moot.

4. The 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 a period of three months in the manner authorized by this Order.

5. Documents filed, if any, in the future pursuant to ordering paragraph 4 herein shall reference this case number and shall be retained in the utility's general correspondence file.

By the Commission

ENTERED  
JUL 08 2016  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
Acting Executive Director

Case No. 2015-00404

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