

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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	)	CASE NO.
COMMUNICATIONS FACILITY IN THE	)	2017-00369
COMMONWEALTH OF KENTUCKY IN THE	)	
COUNTY OF BUTLER	)	

ORDER

This matter is before the Commission on a request to intervene in a cell tower Certificate of Public Convenience and Necessity (“CPCN”) matter. The request that was filed into the record on September 20, 2017, by Coty Whittinghill, complains that construction of a cell tower would diminish his property value and produce harmful electric and magnetic fields.

On September 12, 2017, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“New Cingular”) filed an application requesting a CPCN to construct a wireless communications facility at 5545 Caneyville Road, Morgantown, Butler County, Kentucky (“Welcome Road cell tower”).

Mr. Whittinghill states that he opposes the location of the Welcome Road cell tower due to concerns about potential decrease in property value and health concerns about radio frequency emissions.

On September 29, 2017, New Cingular filed its response to Mr. Whittinghill's request for intervention. New Cingular objects to the request to intervene, asserting that radio frequency emissions are the subject of federal regulation and the Commission may not consider radio frequency emissions in its evaluation of a proposed facility.<sup>1</sup> Mr. Whittinghill does not cite to statutes or regulations to support his conclusion that the proposed Welcome Road cell tower site should be rejected based on property value or aesthetic concerns. New Cingular further asserts that, under relevant case law, unsupported lay opinion or generalized aesthetic concerns about cell tower placement is not sufficient evidence on which to base a denial of a cell tower CPCN application.<sup>2</sup>

#### DISCUSSION

The only person with a statutory right to intervene in a proceeding before the Commission is the Attorney General.<sup>3</sup> Intervention by all others is permissive and is within the sound discretion of the Commission.<sup>4</sup>

The standards the Commission must consider in exercising its discretion to determine permissive intervention are set forth in 807 KAR 5:001, Section 4(11). Pursuant to 807 KAR 5:001, Section 4(11)(a), a person seeking to intervene must file a written request that states the person's special interest, or facts he or she will develop to

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<sup>1</sup> See KRS Chapter 100 and the Telecommunications Act of 1996, as codified at 47 U.S.C Section 332(7)(B)(iv).

<sup>2</sup> See *Cellco P'ship v. Franklin Cnty.*, 553 F.Supp. 2d 838 (E.D. Ky. 2008). New Cingular notes that Butler County has not adopted zoning requirements and also cites *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F. 3d 794, 804 (6<sup>th</sup> Cir. 2012).

<sup>3</sup> See KRS 367.150(8)(b). The Attorney General has not requested to intervene in this matter.

<sup>4</sup> *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996).

assist the Commission in fully considering the matter. 807 KAR 5:001, Section 4(11)(b), provides that the Commission:

shall grant a person leave to intervene if the [C]ommission finds that...he has a special interest in the case that is not otherwise adequately represented or that his intervention is likely to present issues or to develop facts that assist the [C]ommission in fully considering the matter without unduly complicating or disrupting the proceedings.

Based upon a review of the pleadings at issue, the Commission finds that Mr. Whittinghill is unlikely to present issues or develop facts that will assist the Commission in fully considering this matter.

The Commission finds that Mr. Whittinghill failed to provide sufficient evidence to support his assertion that his property value will be diminished, and that the Welcome Road cell tower could be located elsewhere. Mr. Whittinghill's request to intervene is based on generalized concerns and unsupported personal opinion. New Cingular responded with a Property Value Study prepared by a property valuation expert.<sup>5</sup> New Cingular's Response also explained the federal jurisdiction over radio frequency emissions and the current law in Kentucky.<sup>6</sup> Pursuant to relevant case law, unsupported lay opinions regarding the siting of cell towers, such as those offered by Mr. Whittinghill, are not sufficient evidence on which to base a denial of a cell tower CPCN application.<sup>7</sup> For that reason, Mr. Whittinghill is unlikely to present issues or develop facts that will assist the Commission in considering this matter, and his requests for intervention should be denied.

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<sup>5</sup> *New Cingular's Response in Opposition to Motion to Intervene*, filed Sept.29, 2017, paragraph 5.

<sup>6</sup> *Id.* at paragraph 4.

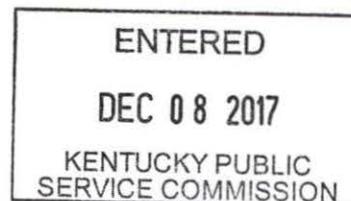
<sup>7</sup> *See Cellco P'ship v. Franklin Cnty.*, 553 F.Supp. 2d 838.

The Commission further finds that the documents filed by Mr. Whittinghill should be considered public comments in this proceeding. Mr. Whittinghill will have ample opportunity to file additional comments in this proceeding even though he has not been granted intervenor status. Mr. Whittinghill may file comments as frequently as he chooses, and those comments will be entered into the record of this case. Mr. Whittinghill can review all documents filed in this case and monitor the proceedings via the Commission's website.

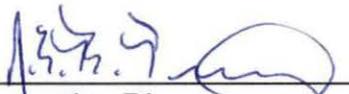
IT IS THEREFORE ORDERED that:

1. Mr. Whittinghill's request to intervene is denied.
2. Mr. Whittinghill's tendered documents shall be considered as public comment.

By the Commission



ATTEST:

  
Executive Director *for Dawn Pinson*

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