

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 CONVENIENCE AND NECESSITY)	CASE NO.
TO CONSTRUCT A WIRELESS)	2022-00062
COMMUNICATIONS FACILITY IN THE)	
COMMONWEALTH OF KENTUCKY IN THE)	
COUNTY OF MCCREARY)	

ORDER

On March 25, 2022,¹ New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T Mobility) and Harmoni Towers LLC (Harmoni Towers) (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 267 feet in height, with attached antennas, to be located at 141 Joe Neal Road, Parkers Lake, McCreary County, Kentucky. The coordinates for the proposed facility are North Latitude 36° 50' 21.56" by West Longitude 84° 29' 06.37".

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

¹ The application was tendered on February 28, 2022. A deficiency letter was issued on March 16, 2022. The Joint Applicants filed a response on March 25, 2023, and a deficiency cured letter was issued on April 16, 2022.

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 any 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,² Joint Applicants acknowledged that notice sent to the property owned by the Daniel Boone National Forest was returned as undelivered and that there was a different address to serve the Daniel Boone National Forest for notice purposes.³ Joint Applicants explained the additional steps taken to attempt service on Daniel Boone National Forest and stated that they would supplement the record when a signed green card is received or if the notice is returned undelivered.⁴ 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 March 21, 2022, and on May 19, 2023, the Commission issued an Order denying intervention. On June 28, 2023, AT&T Mobility and Harmoni Towers, LLC filed notice that Tillman Infrastructure, LLC, a successor in interest to Harmoni Towers, LLC, is now the co-applicant in this matter.

Joint Applicants filed, along with the application, a No Hazard to Air Navigation letter from the Federal Aviation Administration. Joint Applicants filed an application

² 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's Second Request for Information (Staff's Second Request) (filed Aug. 8, 2023).

³ Joint Applicants' Response to Staff's Second Request, Item 2.

⁴ Joint Applicants' Response to Staff's Second Request, Item 2. The record was supplemented on Sept. 12, 2023.

seeking approval for the construction and operation of the proposed facility with the Kentucky Airport Zoning Commission. The approval of the application has not been filed.

Joint Applicants have provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility.⁵ 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.⁶ Joint Applicants have also provided information that there is no reasonable opportunity to co-locate its equipment on existing structures.⁷

To obtain a CPCN, Joint Applicants must demonstrate a need for such facilities and an absence of wasteful duplication.⁸

“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.”⁹ “Wasteful duplication” is defined as “an excess of capacity over need” and “an excessive investment in relation to

⁵ Application, Exhibit B and Exhibit G.

⁶ Application at 7-8, Exhibit N. Joint Applicants’ Sur-Reply to SBA’s Reply to Joint Applicants’ Response to Motion to Intervene (filed Apr. 25, 2023), Exhibit 1.

⁷ Application at 4–5.

⁸ *Kentucky Utilities Co. v. Public Service Com’n*, 252 S.W.2d 885 (Ky. 1952).

⁹ *Kentucky Utilities Co. v. Public Service Com’n*, 252 S.W.2d 885, 890 (Ky. 1952).

productivity or efficiency, and an unnecessary multiplicity of physical properties.”¹⁰ 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 telecommunications providers, the Commission has little jurisdiction over wireless providers, including no jurisdiction over the rates and earnings of a wireless provider.¹¹

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.¹² In fact, based on evidence in the record, it was unlikely that at least one party received notice.¹³ 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

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

¹¹ See KRS 278.54611.

¹² KRS 278.665.

¹³ Joint Applicants’ Response to Staff’s Second Request, Item 2.

telecommunications facility and failing to make appropriate and proper attempts at service could result in the Commission denying an application.¹⁴

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 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

¹⁴ 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).

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 267 feet in height, with attached antennas, to be located 141 Joe Neal Road, Parkers Lake, McCreary County, Kentucky. The coordinates for the proposed facility are North Latitude 36° 50' 21.56" by West Longitude 84° 29' 06.37".

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

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

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ENTERED
OCT 05 2023
rcs
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


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