

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF LEXINGTON MSA LIMITED)
PARTNERSHIP FOR ISSUANCE OF A)
CERTIFICATE OF PUBLIC CONVENIENCE AND)
NECESSITY TO CONSTRUCT AN ADDITIONAL)
CELL SITE IN MIDWAY, WOODFORD COUNTY,) CASE NO. 95-215
KENTUCKY FOR THE PROVISION OF DOMESTIC)
PUBLIC CELLULAR RADIO TELECOMMUNICATIONS)
SERVICE TO THE PUBLIC IN THE LEXINGTON)
MSA)

O R D E R

On May 11, 1995, Lexington MSA Limited Partnership d/b/a BellSouth Mobility, Inc. ("Lexington MSA Partnership") filed an application seeking a Certificate of Public Convenience and Necessity to construct and operate a cellular radio telecommunications antenna tower in the Lexington Metropolitan Statistical Area ("the Lexington MSA"). The proposed cell site consists of a self-supporting antenna tower not to exceed 291 feet in height, with attached antennas, to be located on Spring Station Pike, Midway, Woodford County, Kentucky. The coordinates for the proposed cell site are North Latitude 38° 09' 17.27" by West Longitude 84° 41' 59.81".

Lexington MSA Partnership has provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed cell site. Based upon the application, the design of the tower and foundation appears to meet the criteria of the Building Officials and Code Administrators International,

Inc. National Building Code, with reference to earthquakes, winds, and tornadoes.

Pursuant to KRS 100.324(1), the proposed cell site's construction is exempt from local zoning ordinances. However, Lexington MSA Partnership has notified the Woodford County Planning Commission of the proposed construction. Lexington MSA Partnership has filed applications with the Federal Aviation Administration ("FAA") and the Kentucky Airport Zoning Commission ("KAZC") seeking approval for the construction and operation of the proposed cell site. Both decisions are pending.

Lexington MSA Partnership has filed notices verifying that each person who owns property or resides within 500 feet of the proposed cell site has been notified of the pending construction. The notice solicited any comments and informed the property owners and residents of their right to intervene. In addition, notice was posted in a visible location on the proposed site for at least two weeks following the filing of the application. On June 29, 1995, the Commission received a motion to intervene and a request for hearing from Nuckols Farm, Inc. ("Nuckols Farm"). The motion was granted by Order of the Commission dated July 21, 1995.

A hearing was held in this matter on August 31, 1995. Nuckols Farm's primary contentions throughout this proceeding have been that the proposed construction will adversely affect the surrounding rural area and that Lexington MSA Partnership has failed adequately to investigate less objectionable alternatives. Nuckols Farm alleges that its farming business will suffer

financially from the proposed construction and has recommended site locations north of I-64 which it claims will have less adverse effect on its farming operations. A witness for Nuckols Farm also testified to the "adverse indirect" impact of the proposed construction on historic resources in the area.

Lexington MSA Partnership contends, on the other hand, that there are only four parcels of land which would be suitable for its purposes. Two of the properties were unavailable,¹ and one is that of the proposed site. The other location is one Intervenor stated would be available if he could convince his father and brother to agree to make it available. The record to date reflects no showing of such an agreement.

Lexington MSA Partnership argues that the proposed site is not only suitable for its purposes but also for those of its competitor, Cellular One. Lexington MSA Partnership has negotiated an arrangement with Cellular One to co-locate facilities on the proposed tower. Furthermore, the record shows that Cellular One could not co-locate on a facility north of I-64, as tenuously recommended by the Intervenor.

As shown above, Lexington MSA Partnership maintains that the proposed site is the best site for its facilities, and that it is the only site available which would be suitable for co-locating the facilities of both companies. In addition, a witness for Lexington MSA Partnership testified that the proposed construction is not

¹ One property owner, Parrish Hill Farm, did not return the agent's calls. The other, John T. Mitchell, refused outright to enter a lease.

located within any historic preservation area and is approximately 1.4 miles from the nearest historic district. Lexington MSA Partnership also states that the proposed Cellular One site on the Intervenor's property is closer to both Spring Station Road and to the Big Sink Rural Historic District than Lexington MSA Partnership's proposed site. Finally, Lexington MSA Partnership has made arrangements with its proposed lessor, Alfred Nuckols, to remove a 110 foot tower currently on his property in order to reduce the number of towers in the vicinity.

At the hearing Nuckols Farm moved to dismiss the application on the grounds that Lexington MSA Partnership [1] had failed to give adequate notice to the public; [2] had failed to comply with KRS 100.324; and [3] had failed to comply with KRS 278.020(1). The Commission declined to rule on the motion at the hearing and granted Nuckols Farm the opportunity to file its motion in writing. The Commission also granted Nuckols Farm's request to submit additional evidence regarding engineering limitations that allegedly circumscribed the search area wherein Lexington MSA Partnership should construct its tower. In addition, the Commission directed the parties to file simultaneous briefs on the merits. Since the hearing, Nuckols Farm has filed its written Motion to Dismiss; its post-hearing brief; and a document entitled "Nuckols Farm Inc. Supplemental Evidence Relating to LATA Boundaries." Lexington MSA Partnership has filed a Response to the supplemental evidence submitted by Nuckols Farm and a brief entitled "Response to Motion to Dismiss and Brief of Lexington MSA

Limited Partnership." The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that any waiver of the Local Access Transport Area boundary at issue is far too remote and speculative to have any bearing upon this proceeding. In addition, Nuckols Farm's motion to dismiss should be denied for the reasons discussed below.

First, Lexington MSA Partnership's statement and supporting testimony that notice was posted on a barn near Spring Station Pike is sufficient to show that adequate notice was given. Any presumption to the contrary raised by testimony of persons who claim they did not see the notice was overcome by Lexington MSA Partnership's affirmative testimony.

Second, KRS 100.324(4) requires "[a]ny proposal for acquisition or disposition of land for public facilities, or changes in the character, location, or extent of structures or land for public facilities, excluding state and federal highways and public utilities and common carriers by rail mentioned in this section," to be referred to the local planning commission for review "in light of its agreement with the comprehensive plan." (Emphasis added.) According to the plain language of the statute, public utilities need not comply with this section.

Third, Nuckols Farm urges dismissal on the ground that Lexington MSA Partnership failed to comply with KRS 278.020 when it performed \$45,000 worth of road construction work prior to the issuance of a certificate of public convenience and necessity. However, the site preparation does not constitute part of ratebase,

since the Commission does not regulate cellular rates.² In addition, the Commission has never interpreted the "plant, equipment, property or facility for furnishing . . . services," of KRS 278.020(1) to include site preparation for cellular towers. It would be unreasonable, as a practical matter, to do so, since in some cases the utility must construct a road to the site in order to gather the engineering information necessary to file the application in the first place.

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, Lexington MSA Partnership should notify the Commission if it does not use this antenna tower to provide cellular radio telecommunications services in the manner set out in its 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 Lexington MSA Partnership.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that Lexington MSA Partnership should be granted a Certificate of Public Convenience

² Administrative Case No. 344, Inquiry Into the Provision and Regulation of Cellular Mobile Telephone Service In Kentucky.

and Necessity to construct and operate the proposed cell site in the Lexington MSA under its currently approved tariff.

IT IS THEREFORE ORDERED that:

1. Lexington MSA Partnership be and it hereby is granted a Certificate of Public Convenience and Necessity to construct and operate a self-supporting antenna tower not to exceed 291 feet in height, with attached antennas, to be located on Spring Station Pike, Midway, Woodford County, Kentucky. The coordinates for the proposed cell site are North Latitude 38° 09' 17.27" by West Longitude 84° 41' 59.81".


2. The authority granted herein is conditioned upon Lexington MSA Partnership and Cellular One furnishing the Commission with a written agreement that provides for the co-location of their cellular facilities on the tower.


3. Lexington MSA Partnership shall file a copy of the final decisions regarding its pending FAA and KAZC applications for the proposed construction within 10 days of receiving these decisions.

4. Lexington MSA Partnership 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 3 months in the manner authorized by this Order.

Done at Frankfort, Kentucky, this 27th day of November, 1995.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

Commissioner Breathitt dissents from the decision of the Commission in this case.


Linda K. Breathitt
Commissioner

ATTEST:


Executive Director