

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY CGSA,)
INC. FOR ISSUANCE OF A)
CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO)
CONSTRUCT AN ADDITIONAL CELL)
SITE IN LOUISVILLE, KENTUCKY FOR)
THE PROVISION OF DOMESTIC) CASE NO. 97-025
PUBLIC CELLULAR RADIO)
TELECOMMUNICATIONS SERVICE TO)
THE PUBLIC IN JEFFERSON COUNTY,)
KENTUCKY AND THE LOUISVILLE)
MSA)

O R D E R

On January 28, 1997, Kentucky CGSA, Inc. d/b/a BellSouth Mobility, Inc. ("BellSouth Mobility"), pursuant to KRS 278.020, filed with the Commission an application ("Application") seeking a Certificate of Public Convenience and Necessity for the construction and operation of a cellular radio telecommunications service facility in the Louisville Metropolitan Statistical area (the "Louisville MSA"). BellSouth Mobility posted notice of the proposed construction in a visible location for at least two weeks after the filing of its application.

The proposed facility consists of a monopole antenna tower not to exceed 126 feet in height, with attached antennas, to be located at 4001 Dupont Circle, Louisville, Jefferson County, Kentucky. The coordinates for the facility are North Latitude 38° 14' 0.84" by West Longitude 85° 37' 54.11".

Exhibit E to BellSouth Mobility's Application is a copy of a document entitled "Proposal to Louisville & Jefferson County Planning Commission Pursuant to KRS 100.324(5) and KRS 278.650" ("Proposal"). The Proposal refers to eight (8) exhibits: Exhibit A, Topographical Survey; Description of Lease Area and Access Easement; and Vicinity Map; Exhibit B, Elevation, Site Plan and Vicinity Map; Exhibit C, FCC Radio Station Authorization; Exhibit D, Application for Permit to Construct a Structure submitted to the Kentucky Transportation Cabinet, Office of Aeronautics, Frankfort, KY and Notice of Proposed Construction or Alteration to the FAA; Exhibit E, Property Owners and Residents and addresses located within a 500 ft. Radius of the proposed tower; Exhibit F, Lease between KGZ Enterprises, Inc. and BellSouth Mobility Inc; Exhibit G, Communication Pole Record Drawings; and Exhibit H, Report of Subsurface Exploration and Foundation Recommendations.

In its Proposal, BellSouth Mobility states that it "submits [the] Proposal to the Louisville & Jefferson County Planning Commission . . . in accordance with the requirements of KRS 100.324(5) and KRS 278.650 . . ." Both statutes require a utility to "submit the proposal" to the Planning Commission. Pursuant to KRS 100.324(5), the Planning Commission is required to review the proposal and, within sixty days of the submission, "make its final decision and advise the utility in writing whether the proposed construction is in accordance with the comprehensive plan and locally-adopted zoning regulations." Further, "[i]f the planning commission fails to issue a final decision within sixty (60) days, it is presumed to have approved the proposal, and may not later appeal a decision of the Public Service Commission. . . ." Id.

Exhibit E-1 to BellSouth Mobility's Application is the affidavit of Larry Hester, BellSouth Mobility's Real Estate Manager. Affiant states that he "hand-delivered a copy of the Proposal attached to [BellSouth Mobility's] CPCN Application as Exhibit E to Jack Ruf, Planner II of the Louisville & Jefferson County Planning Commission, at his office on the Ninth Floor, Municipal Court Building, 531 Court Place, Louisville Kentucky, on Friday morning, January 24, 1997, at approximately 9:30 AM."

On February 26, 1997, the Planning Commission filed with this Commission a copy of Mr. Ruf's letter to Mr. Hester concerning the hand-delivered information. In this letter, the Planning Commission informed BellSouth Mobility that said information "was insufficient to enable the Planning Commission to review a cellular tower proposal in light of its agreement with the Comprehensive Plan and locally adopted zoning regulations." The letter further states that the Planning Commission, treating BellSouth Mobility as an applicant, has met with BellSouth Mobility and "advised [it] of the items missing from [BellSouth Mobility's] request. These were: 1) no completed application form bearing the signature of the property owner, 2) only one set of plans were presented, and 3) the plans lacked any indication of review by the Metropolitan Sewer District and the Works Department."

Finally, the letter states that its purpose is "to ask [BellSouth Mobility] for some indication as to when [it] will be submitting a complete application for [its] proposal to the Planning Commission so that the sixty (60) day statutory timeframe may begin." Subsequently, the Planning Commission filed a letter requesting that this Commission "withhold any consideration of this application until the applicant complies with the

requirements of KRS 100.324(5) by submitting a complete application for this body to review in light of its agreement with the Comprehensive Plan and locally adopted zoning regulations."¹ The issue presented is whether KRS 100.324(5) or KRS 278.650 requires BellSouth Mobility to submit to the Planning Commission a "proposal" or an "application."

Although the statutes clearly require the submission of a "proposal," they do not define the term "proposal." Under the circumstances, the Commission has a duty to accord the words of the statutes their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. Bailey v. Reeves, Ky., 662 S.W.2d 832 (1984). "Proposal" is synonymous with "suggestion"² while "application" is synonymous with "petition."³ The Planning Commission attempts to avoid the operation of this rule of construction and harmonize its interpretation of KRS 100.324(5) with KRS 278.650 by, in essence, arguing that the term "proposal" as used in the statutes is synonymous with the term "application." The Planning Commission cites no authority, however, to justify such a construction of the statutes.

Giving the words of the statutes their literal meaning and adding no exceptions neither leads to absurdity nor to a wholly unreasonable conclusion. The words at issue are not synonymous. The language of the relevant statutes supports this conclusion. Moreover, KRS 278.650 does not appear to contemplate Planning Commission rejections

¹ See Planning Commission's letter filed with this Commission on April 28, 1997.

² See Webster's Collegiate Thesaurus 584 (1988).

³ Id. at 40.

based upon any ground other than location. KRS 278.650(2) provides support for this conclusion. It states, in pertinent part, that:

If a planning commission rejects a proposal . . . the commission may override the decision of the planning commission and issue a certificate of convenience and necessity for construction of the cellular or personal communications services antenna tower, if it determines that there is no acceptable alternate site, and that the public convenience and necessity requires the proposed construction. [Emphasis added.]

Thus, this Commission is required to consider alternate sites only when the Planning Commission rejects a utility's proposal and this Commission determines that the public convenience and necessity require the proposed construction. Because "site" is synonymous with "location,"⁴ and because the issue of alternate sites or locations is raised by Planning Commission rejections only, it appears that KRS 278.650 contemplates a review by the Planning Commission that focuses solely on the "location" of the proposed construction.

Giving the words of KRS 278.650 their literal meaning, the Commission finds that BellSouth Mobility, on January 24, 1997, satisfied the statute's requirements by submitting its Proposal to the Planning Commission for its review and comment. The Commission further finds that said Proposal provides sufficient information for the Planning Commission to determine whether the proposed location is suitably located. Finally, the Commission finds that the 60-day statutory period, within which the Planning Commission must issue its final decision on this matter, expired on March 25, 1997.

⁴ See Webster's Collegiate Thesaurus 682 (1988).

Because the Planning Commission neither timely nor otherwise issued its final decision regarding this matter, the statutory presumption applies. It is, therefore, presumed that the Planning Commission approved BellSouth Mobility's proposal. Having made this initial determination, the Commission must now determine whether the public convenience and necessity require the proposed construction.

BellSouth Mobility has 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 the plans have been certified by a registered professional engineer.

BellSouth Mobility has also 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 approvals have been obtained.

Moreover, BellSouth Mobility filed with the Commission notices verifying that each person who owns property or resides within 500 feet of the proposed facility had been notified of the proposed construction. Each notice solicited comments and informed the property owners and residents of their right to intervene. The Commission received two protest letters from nearby property owners or residents, one of whom intervened in this matter. Subsequently, said intervenor withdrew his objection to the proposed construction and the Planning Commission was granted full intervention in this proceeding.

On May 29, 1997, a hearing was held on BellSouth Mobility's proposal. At the hearing, BellSouth Mobility stated that it "would like to, if need be, treat the hearing as if the Planning Commission had, in fact, disapproved [the proposed] site so [it] can go ahead and prove [its] case and get an Order from [the] Commission. . . ."⁵ The Planning Commission stated that "it would be entirely inappropriate to deem this a disapproval. There's been no review."⁶ The Planning Commission nevertheless encouraged the Commission to proceed with the hearing.⁷

Stating that it was "concerned that the process is not being adhered to as contemplated by the statutes,"⁸ the Planning Commission moved this Commission to "take all testimony so as not to unduly delay the applicants in their application" but requested that the hearing "be continued until such time as [BellSouth Mobility] make[s] formal application with the Planning Commission pursuant to its regulations and procedures, keeping the record in this case open, then to receive the recommendation of the local planning unit."⁹ Thereafter, the Planning Commission waived its right to

⁵ See Transcript of Evidence ("T.E.") at 10.

⁶ Id.

⁷ Id. at 11.

⁸ Id. at 6.

⁹ Id. The Commission notes that the Planning Commission has not adopted procedures to implement the requirements of KRS 100.324(5). It is our understanding, however, that the Planning Commission is proposing to do so. This Commission believes that Planning Commission procedures will eliminate disputes like the instant one. We, therefore, encourage the adoption of procedures.

cross-examine the witnesses and its request to be excused from the hearing was granted.¹⁰ The hearing was attended by BellSouth Mobility and Commission Staff only.

During the hearing, BellSouth Mobility presented extensive evidence regarding the design and construction of the proposed structure, the necessity of the proposed construction, and its selection of the proposed location. Extensive evidence regarding its investigation of alternate sites was also presented by BellSouth Mobility.

The Planning Commission has offered no evidence or testimony regarding the merits of the proposed construction. Its sole contention is that this Commission "lacks jurisdiction to make a decision in this case in that there has been no application to the local planning unit for approval as required by the amendments to the statutes, both 100 and 278."¹¹ The Commission rejects this argument not only for the reasons previously stated but also because the Commission has a duty to "give effect to the intention of the lawmakers." Green v. Moore, 281 Ky. 305, 135 S.W.2d 682, 683 (1939).

By enactment of KRS 100.324, the legislature has seen fit to ensure to the public that proposed utility construction will be considered based upon service criteria. The enactment of Subsection 5 of the statute did not change this legislative fact. The paramount consideration, as expressed by the Commission override and the 60-day-

¹⁰ As a preliminary matter, the Planning Commission stated at the hearing that it did not want to participate in the proceeding because it wants its review, once undertaken, to be "without having been prejudiced by hearing any testimony." At that time, the Planning Commission further stated that "[a]ll of [its] testimony would be directed toward the issue which [it] framed...with respect to [BellSouth Mobility's] failure to comply with the statute in having the Planning Commission review." See T.E. at 11-12.

¹¹ Id. at 5.

Planning-Commission sunset provisions in KRS 100.324(5) and KRS 278.650, remains the provision of adequate utility service. The Commission must, therefore, apply the statutes as written and leave any changes to the General Assembly.

The Commission, having reviewed the evidence of record and being otherwise sufficiently advised, finds the Planning Commission has failed to introduce evidence to overcome the statutory presumption that it approved BellSouth Mobility's proposal. Its motion seeking a continuance of the hearing and this proceeding should, therefore, be denied. The Commission further finds that BellSouth Mobility should be granted a Certificate of Public Convenience and Necessity to construct and operate the proposed facility in the Louisville MSA because the facility is necessary and the location appears to be suitable for the proposed construction.¹²

Finally, the Commission, pursuant to KRS 278.280, 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, BellSouth Mobility should notify the Commission if it does not use this antenna tower to provide service 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 BellSouth Mobility.

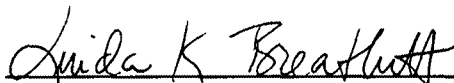
¹² The proposed site will be located in a commercially-zoned area. In addition, the record does not contain any claims by the Planning Commission that the site is unsuitable.

IT IS THEREFORE ORDERED that:

1. The Planning Commission's motion for continuance is hereby denied.
2. BellSouth Mobility is granted a Certificate of Public Convenience and Necessity to construct and operate a monopole antenna tower not to exceed 126 feet in height, with attached antennas, to be located at 4001 Dupont Circle, Louisville, Jefferson County, Kentucky. The coordinates for the proposed facility are North Latitude 38° 14' 0.84" by West Longitude 85° 37' 54.11".
3. BellSouth Mobility 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 23rd day of October, 1997.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director