

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF WIRELESSCO., L.P., BY))
AND THROUGH ITS AGENT AND GENERAL))
PARTNER SPRINT SPECTRUM, L.P., AND SBA))
TOWERS KENTUCKY, INC., JOINTLY, FOR))
ISSUANCE OF A CERTIFICATE OF PUBLIC) CASE NO. 97-355
CONVENIENCE AND NECESSITY TO
CONSTRUCT A PERSONAL COMMUNICATIONS
SERVICES FACILITY IN THE LOUISVILLE MAJOR
TRADING AREA (ALTON FACILITY)

O R D E R

On February 2, 1999, the Commission issued its final Order in this case granting the joint application of SBA Towers Kentucky, Inc. (SBA) and Sprint Spectrum, L.P., agent for WirelessCo., L.P. (Sprint Spectrum) (collectively, the Applicants) for a Certificate of Public Convenience and Necessity (CPCN) to construct and operate a wireless telecommunications facility at 1830 Old Frankfort Highway, Lawrenceburg, Anderson County, Kentucky. The CPCN was granted after a contested proceeding that lasted over a year and that included an evidentiary hearing held on May 6, 1998.

During the hearing the Applicants provided extensive evidence to demonstrate, pursuant to 807 KAR 5:063, that no more suitable site than the one chosen exists. Pursuant to the Order of the hearing officer, the Applicants filed additional radio frequency propagation maps to show comparative coverage levels for the proposed site and for additional sites proposed by the intervenors. After review of the evidence, the

Commission concluded that no alternative site proposed would provide coverage to the north and west equal to the coverage that would be provided from the proposed site.

The intervenors in this matter, Rolf Hellinger, James Johnson, and Dennis Raleigh (collectively, Petitioners), have filed petitions for rehearing. Both claim that the Commission erred in its analysis of the radio frequency propagation maps; both claim that the Commission erroneously characterized what is referred to in the record as alternative site D as being south of the proposed site; both allege due process violations, and claim that the law and the evidence in this case have not been fairly reviewed. Additional allegations include, the alleged illegality of the lease entered into by SBA and the lessor; the Open Bible Church; the alleged safety problem arising from placement of the tower in a landfill area; the alleged failure of the Applicants to provide adequate notice prior to filing for a CPCN; allegedly inappropriate consideration of the testimony of Powertel/Kentucky, Inc. (Powertel), that it is interested in co-locating its antennae on the proposed facility; and alleged revision of the application to reflect that Lexington, and not Louisville, is the major trading area involved. In addition, Mr. Raleigh contends that the Commission erred in finding that KRS 100.324(1) exempts the Applicants from local zoning ordinances.

Numerous allegations raised by the Petitioners fail to state grounds for rehearing in this matter. However, the following clarifications are provided.

First, the application has not been revised to reflect that a different major trading area is involved. The trading area is the Louisville MTA. The clerical error in the style of the case is simply that: a clerical error. The Federal Communications Commission assigns service territories for wireless carriers and this Commission has no jurisdiction

in the matter. In any event, the name of the major trading area has absolutely no relevance to the need for a facility to serve the subject area. Similarly, it is not within the province of this Commission to determine the legality of the Open Bible Church's having entered into a contract to lease a portion of its property. The Commission's jurisdiction is over the rates and services of utilities. KRS 278.040.

The Commission does have jurisdiction over the safety of utility facilities. KRS 278.280. However, testimony presented at the hearing in this matter demonstrates that the structure in question will be constructed in a safe manner. Applicant witness Mike DeBoer, a civil engineer, testified in response to questions regarding the soil conditions at the site that fill has nothing to do with this. We will be founding on bedrock.¹

There is no error in the Commission's determination that KRS 100.324(1) exempts the facility from planning commission jurisdiction. The application in question was filed many months prior to July 15, 1998, the effective date of 1998 Ky. Acts Ch. 231, which provides for a sixty day review by planning commissions that have registered with the Public Service Commission, followed by Commission review based on public convenience and necessity. As the Kentucky Court of Appeals found in Oldham County Planning and Zoning Commission v. Courier Communications Corp., Ky. App., 722 S.W.2d 904 (1987), wireless telecommunications carriers are public utilities as defined in KRS 278.010(3). Thus, under law applicable at the time the subject application was filed, the Applicants were not subject to local ordinances in locating their service facilities:

By enactment of KRS 100.324, the legislature has seen fit, for the public good, to remove public utilities from the jurisdiction of local planning commissions. This exclusion is neither unconstitutionally arbitrary in its

¹ Transcript of Evidence (Tr.) at 138.

application nor an unconstitutional taking of property without due process or just compensation.

Id. at 907.

Petitioners also complain that they had to set aside extensive hours to review maps delivered to the Commission offices after the hearing.² However, the delivery of the oversized propagation maps to Commission offices, with reduced copies to the intervenors, was the process agreed to at the hearing.³

Next, it is argued that the Applicants did not issue adequate notice to the public prior to filing the application. The Anderson News, in which notice was published, is alleged to be of low distribution.⁴ However, publication in The Anderson News is sufficient pursuant to 807 KAR 5:063 and Petitioners do not offer a specific alternative newspaper distributed within the county. The Petitioners themselves clearly had actual notice of the application, for they intervened and participated throughout the proceeding. Further, Exhibit E to the Application includes a site survey prepared and sealed by a registered land surveyor that identifies property owners within 500 feet of the proposed tower site and includes only those property owners to whom notice was properly sent, return receipt requested, by the Applicants pursuant to 807 KAR 5:063. The names of property owners alleged by Petitioners Hellinger and Johnson to be within 500 feet⁵ are not listed on the land survey.

² Hellinger & Johnson Petition for Rehearing at 5.

³ Tr. at 195 202.

⁴ Hellinger & Johnson Petition for Rehearing at 3.

⁵ Hellinger & Johnson Petition for Rehearing at 3.

Next, it is argued that the Commission should not have considered the testimony of Powertel that it would locate antennae on a structure erected at the proposed site. Mr. Hellinger and Mr. Johnson argue, among other things, that Powertel is not an applicant in this case, that Powertel's system is unlike Sprint Spectrum's, and that Powertel furnished no coverage maps.⁶ It is appropriate for the Commission to consider the possibility that granting a CPCN would obviate the future necessity of construction of an additional tower. See Kentucky Utilities Co. v. Public Service Commission, Ky., 252 S.W.2d 885, 890-91 (1952) (citing as a factor to consider in a utility construction case the need to avoid wasteful duplication of facilities). The dissimilarity between Powertel's and Sprint Spectrum's systems is irrelevant. Moreover, the Commission did not rely upon Powertel's statement of the need for service in granting this CPCN. It relied upon that of Sprint Spectrum.

Petitioner Raleigh argues that his right to a fair and impartial hearing was violated because he lacked notice that expert witnesses would testify on behalf of the Applicants.⁷ However, the Commission's March 11, 1998 Order requiring the Applicants to present testimony on the engineering design of the proposed structure, as well as issues including location, construction, and safety, put all parties on notice that such testimony would be presented.

Petitioner Raleigh also argues that the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. 151 et seq. (the Telecommunications Act) invests Kentucky's local governments with authority over the placement of

⁶ Hellinger & Johnson Petition for Rehearing at 7.

⁷ Raleigh Petition for Rehearing at 2.

telecommunications facilities. This contention is incorrect as a matter of law. Even assuming, arguendo, that the federal government could constitutionally dictate to a state that its power must be delegated to its political subdivisions, the Telecommunications Act demonstrates no such intent. Instead, with certain limitations, the Telecommunications Act preserves the authority of a *State* or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities. 47 U.S.C. 332(c)(7)(A) (emphasis added). In Kentucky, the General Assembly has vested the final authority regarding placement of utility facilities in this Commission. As the court in Courier Communications, 722 S.W.2d at 907, explained:

Local zoning authorities have only those powers expressly provided by statute. They are not invested with a constitutional nor a common law right to regulate property through the passage of local zoning ordinances. Such ordinances are the result of police power vested in the state legislature, which in turn may invest in the legislative branch of municipal government a specified portion of that power. That the legislature has seen fit not to invest the appellants with the authority to regulate public utilities is not a proper basis for challenge to KRS 100.324.

The primary issue in a telecommunications facility case is radio frequency coverage. See, e.g., KRS 278.020. The Applicants stated objective here is to ensure continuous coverage from Lawrenceburg further north to Frankfort and the surrounding highways, including Highway 151, running Northwest from Alton to Waddy. The latter highway, providing access from Lawrenceburg to Louisville, should be covered.⁸ Testimony from a witness for the Applicants, Mr. Rueff, characterized alternative site D as much worse than the proposed site because it would be located almost a half mile to the east of the proposed site and further from Highway 151, which is one of Sprint

⁸ Tr. at 52-53.

Spectrum's main coverage objectives.⁹ It is clear from the post hearing exhibits that the level of coverage along Highway 151 for alternative site D is reduced to the north along the highway and to the west toward Louisville. The resulting coverage, as compared to the proposed site, would be less consistent with Sprint Spectrum's stated objective of continuous coverage along Highway 151 between Alton and Waddy. Petitioner Hellinger in his October 8, 1998 comments to the post hearing coverage exhibits filed by Sprint Spectrum, at 2, acknowledges that the location at alternative site D reduces the coverage level of a portion of Highway 151. Finally, Petitioners err in contending that the Commission Order characterized alternative site D as further to the south than the proposed site. There simply is no such statement in the Order.

The analysis of the alternative sites compared to the proposed site demonstrates that none of the alternatives analyzed during, or subsequent to, the hearing would be more suitable in satisfying Sprint Spectrum's stated coverage objectives. See 807 KAR 5:063. Each of the alternative sites reviewed by Sprint Spectrum resulted in reduced levels of coverage along the areas identified as primary coverage objectives. The Commission finds no reason to revisit its decision regarding the suitability of the alternative sites for which analyses have been provided.

However, Petitioners Hellinger and Johnson also argue that potential sites within the primary search area would be more suitable. The primary search area is north of the secondary search area in which the proposed site is located. The Petitioners allege that alternative sites within the primary search area were not considered. According to testimony on behalf of the Applicants, the primary search area had to be abandoned

⁹ Tr. at 64.

due to the lack of available property. Accordingly, a secondary search area further to the south was used and resulted in the proposal of the site for which the CPCN was granted.¹⁰ The Applicants contend that because the secondary search area was located south of the primary search area, alternative sites even farther to the south would be less suitable. All alternatives suggested by Petitioners Hellinger and Johnson in their October 23, 1997 filing are alleged to be to the south or southwest of the proposed site.¹¹

Although the sites suggested by the intervenors in filings submitted prior to the hearing are shown by the record not to be more suitable than the chosen site, there is one potential alternative to the north on Highway 127 that appears to be in the primary search area and may, in fact, provide superior coverage to that for which the CPCN was granted. This is the property owned by Mrs. Mary Bell Dailey at 4239 U.S. 127. By letter dated October 5, 1998 and copied to the Commission, Ms. Dailey informed the applicants that she was amenable to negotiating a lease on her property. The Commission is concerned at the lateness of the filing of this information. However, had the intervenors understood earlier in this process that only potential alternatives to the north of the proposed site were viable, the information might have been produced earlier. Moreover, in a utility facility siting case, the possibility that a superior site is available should be explored. The property in question is, after all, alleged to be in the Applicants' primary search area.

¹⁰ Tr. at 89.

¹¹ The Commission notes that the October 23 filing states that alternative site D is approx. .02 mile S from present proposal location [sic]. As the Petitioners point out in their petitions for rehearing, this site is not actually south of the proposed site.

Accordingly, Applicants should file with the Commission, within 30 days of the date of this order, information regarding additional investigation into the feasibility of the site. The information so filed should include a radio frequency propagation map in the same format as the post hearing exhibits showing the coverage that would be achieved by siting the proposed facility at 4239 U.S. 127; information regarding whether a lease is reasonably available; a discussion of the potential for objections by property owners in the vicinity of the 4239 U.S. 127 site; and any other information relevant to the suitability of locating the site at 4239 U.S. 127. Information regarding the suitability of such a site for Powertel also may be filed. The intervenors may, within 10 days after Applicants filing, file comments on the additional evidence, at which time the matter will stand submitted.

The Commission emphasizes that this record is reopened for the sole purpose of receiving, and evaluating, information regarding the potential alternative site at 4239 U.S. 127.

The Commission, having been sufficiently advised, **HEREBY ORDERS** that rehearing is granted for the limited purpose described herein.

Done at Frankfort, Kentucky, this 15th day of March, 1999.

By the Commission

ATTEST:

Executive Director