

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

UNIFORM APPLICATION OF AT&T WIRELESS)	
PCS, INC., ACTING BY AND THROUGH ITS)	
AGENT, WIRELESS PCS, INC., FOR THE)	
ISSUANCE OF A CERTIFICATE OF PUBLIC)	CASE NO.
CONVENIENCE AND NECESSITY TO)	98-623-UAC
CONSTRUCT A PERSONAL COMMUNICATIONS)	
SERVICES NETWORK FACILITY IN)	
INDEPENDENCE, KENTUCKY AND CALLED)	
THE INDEPENDENCE/CEMETERY CELL SITE)	

O R D E R

On October 1, 1999, the City of Independence (the "City") filed a motion for rehearing and reconsideration of the Commission's September 10, 1999 Order granting AT&T Wireless PCS, Inc. ("AT&T"), a certificate of public convenience and necessity to construct a wireless telecommunications facility at 5388 Madison Pike, Independence, Kenton County, Kentucky. As grounds for its motion, the City argues that the Commission acted prematurely in granting the certificate prior to issuance of the Kenton County Circuit Court's decision regarding the applicability of KRS 381.690 to the subject site. The City also claims the matter is "before" the Commission because the City raised the issue in this forum; that the City lacks a remedy and therefore that the Commission has violated its due process rights; and that, for various reasons, the Kenton County Municipal Planning and Zoning Commission (the "Planning Commission") erroneously approved the application. Because these arguments lack merit, and because they do not justify rehearing pursuant to KRS 278.400, the motion is denied.

This Commission is not an appellate body with authority to review the propriety of a planning commission's procedures or determinations. Accordingly, the City's arguments that the Planning Commission wrongly interpreted the requirements of the 1996 Comprehensive Plan have no place here.

It is also irrelevant that the Kenton Circuit Court, which is currently considering the City's legal challenge to the site, has not yet issued its determination. As the Commission pointed out in its September 10 Order, AT&T is a party to the case pending before the court, and will be bound by its decisions. It is not "premature" for this Commission to have ruled on the public convenience and necessity issue prior to issuance of the Kenton Circuit Court's decision. The court's decision is based on different factors than that of the Commission. Wireless carriers routinely apply to various bodies before building an antenna tower, and it has never been suggested that the Commission should not issue its decision prior to the decisions of, for example, the Federal Aviation Administration ("FAA") or the Kentucky Airport Zoning Commission ("KACZ"). The applicants are bound by the decisions of these agencies also. AT&T has affirmed, in its response to the City's Motion, that it will not construct the facility without having received a favorable ruling from the Kenton Circuit Court.

In addition, the question of law that is properly before the Kenton Circuit Court is not properly before this Commission. Again, the issue is analogous to that presented by the jurisdiction of the FAA and the KAZC over wireless telecommunications towers: these agencies, rather than the Commission, determine a tower's effect on navigable airspace. Similarly, the construction of KRS 381.690 is before Kenton Circuit Court. The City errs when it claims that the issue was also properly before the Commission.

Given the Planning Commission's approval of the site, this Commission's role was limited to reviewing the proposed construction for safety and service issues. KRS 278.280; KRS 278.020. The record demonstrates that AT&T needs the subject site to provide service to its customers, and that the facility will be built pursuant to applicable nationally recognized building standards. The City does not demonstrate to the contrary. No process due to any party in the context of this Commission's proceedings has been denied.

IT IS THEREFORE ORDERED that the motion to rehear or reconsider the final order in this case is denied.

Done at Frankfort, Kentucky, this 13th day of October, 1999.

By the Commission

ATTEST:

Executive Director