

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.
CONVENIENCE AND NECESSITY TO CONSTRUCT)	99-194-UAC
A PERSONAL COMMUNICATIONS SERVICES)	
FACILITY IN THE LEXINGTON MAJOR TRADING)	
AREA (SWIGERT ROAD FACILITY))	

O R D E R

On September 7, 1999, the Commission scheduled a hearing in this case to determine whether it should override the decision of the Planning Commission of the Lexington-Fayette Urban County Government ("Planning Commission") to reject the application in this case. On August 27, 1999, the Planning Commission filed its decision, with written record of the meetings in which this matter was considered, into the record. On September 21, 1999, the Applicants, WirelessCo. L.P. and SBA Towers Kentucky, Inc. (the "Applicants"), filed a motion to alter the scope of the proceeding set by the Commission's Order. Specifically, the Applicants ask that the issues to be considered at the hearing be limited to service and safety. As grounds for their motion, the Applicants state that the Planning Commission failed to notify them "in writing of its final decision" as required by KRS 100.987(4). Accordingly, the Applicants contend, the application is "presumed" to have been approved.

For the following reasons, the Applicants motion to alter the scope of the hearing as described in the September 7 Order is denied.

The first sentence of KRS 100.987(4) requires the Planning Commission to advise this Commission, as well as the Applicant, "in writing of its final decision." However, no presumption of approval as the result of failure to so advise an applicant is prescribed. The "presumption" cited by the Applicants appears in the second sentence of KRS 100.987(4), which states that the application is "presumed" to have been approved by the planning commission "[i]f the planning commission fails to issue a final decision within sixty (60) days" or within the time agreed to by the applicant and the planning commission. The Planning Commission minutes appear to indicate that the Applicants and the Planning Commission entered into an agreement for an extension of time. Moreover, the Applicants do not argue that the presumption applies because of a Planning Commission failure to meet the statutory deadline. The Applicants argue that the presumption applies because they were not notified in writing of the Planning Commission's final decision.

Most presumptions are, in any event, rebuttable. See Bartlett v. Com. ex rel. Calloway, Ky., 705 S.W.2d 470, 472 (1986). The Planning Commission's decision filed with this Commission, along with its active opposition in this proceeding, surely is rebuttal enough. However, even assuming, arguendo, that the presumption referred to in KRS 100.987(4) is a conclusive one, the presumption does not even appear to come into play unless the decision is not "issued" within the statutory timeframe. The Applicants have not alleged that no

decision was issued; they simply allege that they were not sent a written copy of that decision.

The Commission having been sufficiently advised, IT IS THEREFORE ORDERED that Applicants' Motion to Limit Issues to be Addressed By the Commission at the October 13, 1999 Hearing is denied.

Done at Frankfort, Kentucky, this 11th day of October, 1999.

By the Commission

ATTEST:

Executive Director