

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF CROWN COMMUNICATION)
INC. AND CELLCO PARTNERSHIP D/B/A VERIZON)
WIRELESS FOR ISSUANCE OF A CERTIFICATE)
OF PUBLIC CONVENIENCE AND NECESSITY TO)
CONSTRUCT A WIRELESS COMMUNICATIONS)
FACILITY AT 2201 OLD HIGBEE MILL ROAD,)
LEXINGTON, KENTUCKY 40514 IN THE WIRELESS)
COMMUNICATIONS LICENSE AREA IN THE)
COMMONWEALTH OF KENTUCKY IN THE)
COUNTY OF FAYETTE)
)
)
SITE NAME: ELKHORN)
SITE NUMBER: 10575)

CASE NO.
2001-063-UAC

O R D E R

On April 4, 2001, Crown Communication Inc. (Crown) and Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless) (collectively, Applicants) filed an application seeking a Certificate of Public Convenience and Necessity to construct and operate a wireless telecommunications facility. The height of the proposed facility is not to exceed 199 feet and is to be located at 2201 Old Higbee Mill Road, Lexington, Fayette County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 59 51.32 by West Longitude 84° 34 41.98 .

Pursuant to 807 KAR 5:063, the Applicants have notified the local planning unit of the proposed construction. The Lexington-Fayette Urban County Government (LFUCG) rejected the application, and the Applicants have requested that this

Commission override the Planning Commission's determination. The Planning Commission requested and was subsequently granted intervention in this proceeding.

The Applicants have filed evidence of the appropriate notices provided pursuant to 807 KAR 5:063. The notices solicited any comments and informed the recipients of their right to request intervention. Numerous individuals requested and were granted full intervention in this matter. The Intervenors present at the public hearing were Ernest Cook, Mark and Laura Dail, James K. Piper, Sr., and Adam Schmitz.

By Order dated September 17, 2001, the Commission scheduled a public hearing. In addition, the Commission ordered that evidence regarding potential alternative sites for the proposed construction and any requests for information must be filed with the Commission no later than 15 days from the date of the Order. The Commission further ordered that no evidence regarding alternative sites could be submitted at the hearing except in regard to those specific sites for which information has been filed. A total of nine alternative sites were submitted by the LFUCG and the Intervenors to be considered at the hearing scheduled to begin on November 6, 2001. Of the nine alternative sites, six were existing structures to be reviewed for possible collocation and the other three were sites on different properties for proposed construction. The Applicants filed a response to the list of alternative sites on October 17, 2001. All parties agreed that there were only two issues to be addressed at the hearing: (1) whether there is an acceptable alternative site upon which to construct an antenna tower or to collocate the antennas, and (2) whether the public convenience and necessity require the construction of the proposed tower.

During the hearing, the Applicants provided evidence supporting the necessity of the proposed construction. Crown identified three service providers whose needs would be met by collocation on the proposed monopole construction. Crown further stated that the proposed tower could accommodate a minimum of four service providers and possibly more depending on the type of loading used by the service provider.¹ It was noted that at least one of the service providers planning to collocate on the proposed construction had been searching the area for as long as 3 years to find a prospective location.² Crown also advised that the proposed location was particularly suited to address the immediate needs of three service providers since the site lies within the intersection of the search areas of all three carriers.³ Tritel Communications (Tritel) cited numerous customer complaints and testified regarding its needs in the area.⁴ Tritel also advised that the proposed construction would correct its deficiencies, citing the results of drive tests and various field techniques that were utilized to verify the complaints received and the lack of coverage.⁵ Cingular Wireless (Cingular) identified its service objectives and indicated that they had received complaints of interference and dropped calls in the area of the proposed construction.⁶ Cingular also conducted drive tests to verify the complaints that were received, and advised that a tower at the

¹ Transcript of Evidence (T.E.) at 43.

² T.E. at 136 and 265.

³ T.E. at 73-74.

⁴ T.E. at 149.

⁵ T.E. at 149.

⁶ T.E. at 212-213.

proposed location would meet its coverage and service objectives in the area.⁷ Verizon Wireless identified capacity and coverage problems that have resulted in customer complaints in the area with part of their objective being to provide adequate coverage along Harrodsburg Road and the surrounding area.⁸ Verizon Wireless further stated that it believed the proposed facility would meet its service objectives for the area. Crown identified existing vegetation that could provide a natural screen for the base of the facility, but further stated that the Applicants would be willing to provide the necessary buffering as required by the LFUCG.⁹

The Applicants also supplied information regarding 9 potential alternative sites identified by the intervenors. Regarding the availability of the properties, the Applicants stated that the owners of sites 2, 4, 7, 8, and 9 expressed no interest in placing a tower in the location suggested by the intervenors.¹⁰ Although site 7 is located on the same property as the proposed site, the owners are unwilling to move the tower from its proposed location on their property. The Applicants provided notification from the church that owns the property stating their unanimous disapproval of moving the tower from its currently proposed location.¹¹

⁷ T.E. at 212-214.

⁸ T.E. at 264-265.

⁹ T.E. at 87.

¹⁰ T.E. at 62-67.

¹¹ Applicant s Exhibit Barman-5; T.E. at 64.

Each of the three carriers planning to collocate on the proposed facility reviewed all 9 of the potential alternative sites to determine if any of the alternative sites would meet their service objectives. Tritel identified site 7 as an acceptable alternative that would meet its service objectives. Tritel stated that site 4 could work if the existing structure was altered to the height needed, and site 8 could be used if the tower was constructed at a height of 210 feet.¹² Cingular identified sites 2, 4, 7, and 8 as acceptable alternatives that would meet its service objectives, but sites 2 and 4 would have to be altered in order to satisfy the height requirements at those locations.¹³ Verizon Wireless identified sites 4 and 7 as acceptable alternatives that would meet its service objectives and stated that site 9 would partially meet its objective.¹⁴ The only sites that fully satisfy the service objectives for all three carriers are sites 4 and 7, but the landowner is unwilling to lease the identified land to the Applicants in both locations.

In summary, the Applicants determined that none of the potential alternative sites are suitable for the proposed construction for one or more of the following reasons: (1) the landowner is unwilling to enter into a lease agreement; (2) radio frequency coverage is unacceptable; (3) the site is outside of providers designated search ring.

The Intervenors argue that the Commission should accept the determination of the LFUCG and that the Commission should accept alternative site 4 or 7 as an acceptable site for the proposed telecommunications facility. The LFUCG contends that

¹² T.E. at 161-163.

¹³ T.E. at 219-220.

¹⁴ T.E. at 275-277.

the proposed location is in violation of its regulations regarding building setback lines, and further states that it would approve the site if it were placed at alternative site 7. The intervenors contend that the evidence of the providers' needs reflected in the results of the carriers' drive tests, which are part of the record, is not sufficient to show that degradation in service exists. The Intervenor also feels the Applicants did not establish that service was needed by not being able to identify the exact number of customer complaints regarding service in the area. With regard to alternative sites, the Intervenor contends that alternative site 7 should be pursued as the preferred location for the proposed facility.

KRS 278.650 provides for the Commission's override of the Planning Commission's rejection of a wireless telecommunications tower application if there is no acceptable alternative site and the public convenience and necessity require the construction. Public convenience and necessity pertain to the service needs of utility customers. Public Service Commission v. City of Paris, Ky., 299 S.W.2d 811, 816 (1957) (demand and need for service is to be gauged from the point of view of the consumers); Satterwhite v. Public Service Commission, Ky., 474 S.W.2d 387, 388-89 (1971) (persons over whose land transmission lines would cross were not entitled to notice of, or participation in, hearing on certificate for the lines, and the Commission was not concerned with the specific path for the lines because it was not relevant to the issue of convenience and necessity). The record in this case is replete with evidence that the public convenience and necessity require the proposed construction. In contrast, the evidence of record does not reveal the existence of an acceptable

alternative site for construction or collocation.

The law on the jurisdictional issue in this matter is succinct and vests with the Commission the ultimate authority to override a determination of the Planning Commission. It is with reluctance that the Commission overrides the determination of the Planning Commission in this proceeding, for its determination is based upon legitimate concerns within the scope of its jurisdiction. However, KRS 278.650 makes it clear that the need for service takes precedence over aesthetics. Even if it did not, federal law, which demands rapid deployment of telecommunications technology, binds us. AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., 20 F.Supp.2d 1097 (E.D. Ky. 1998). See also 47 U.S.C. § 332(c)(7)(B) (no state or local government may deny a wireless telecommunications utility permission to construct if such denial will have the effect of prohibiting the provision of service).

Cases of this nature frequently involve a clash between two competing issues: preservation of Kentucky's scenic beauty and the need to ensure that the advantages of modern telecommunications technology are available to all of Kentucky's citizens. The issue of scenic beauty frequently arises because the location of a cellular tower is often in or near residential areas. The law, in requiring cellular companies to choose a location that is least objectionable, attempts to reconcile these competing interests; but, in the last analysis, when no such reconciliation is possible, the need for service must triumph over aesthetics. KRS 278.020; KRS 278.650. The Intervenors in this case have demonstrated that the site proposed herein leaves much to be desired from an aesthetic point of view. However, the record indicates that no suitable alternative site

exists.

Pursuant to KRS 278.030(2), Tritel, Cingular, and Verizon Wireless are required to furnish adequate, efficient and reasonable service. It is, in turn, the obligation of this Commission to ensure that the facilities of all utilities it regulates are sufficient to comply with this mandate. See KRS 278.040 (requiring the Commission to enforce the provisions of KRS Chapter 278); KRS 278.280 (requiring the Commission to ensure, among other things, that the facilities of utilities are sufficient and adequate). Here, the Applicants have shown that denial of the instant application would jeopardize the availability of adequate utility service and that the alternative solutions proposed by Intervenor would be inefficient and/or unreasonable. Accordingly, the Commission finds that the application should be approved. However, the Applicants should make every effort to mitigate adverse effects of the construction on the aesthetics of the surrounding area, including, but not limited to, maintaining or replacing, to the extent practical, existing vegetation on the proposed construction site.

The Applicants have 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 a Licensed Professional Engineer has certified the plans.

The Applicants have 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 applications have been approved.

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, the Applicants should notify the Commission if they do not use this antenna tower to provide service in the manner set out in their 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 the Applicants.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that the Applicants have demonstrated that a facility is necessary to provide adequate utility service and therefore a Certificate of Public Convenience and Necessity to construct the proposed facility should be granted.

IT IS THEREFORE ORDERED that:

1. The Applicants are granted a Certificate of Public Convenience and Necessity to construct a wireless telecommunications facility. The height of the proposed facility is not to exceed 199 feet and is to be located at 2201 Old Higbee Mill Road, Lexington, Fayette County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 59 51.32 by West Longitude 84° 34 41.98 .

2. The Applicants 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 25th day of March, 2002.

By the Commission

ATTEST:

Deputy W. H. Fowler
Executive Director