

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

THE APPLICATION OF)	
NEW CINGULAR WIRELESS PCS, LLC,)	
A DELAWARE LIMITED LIABILITY COMPANY,)	
D/B/A AT&T MOBILITY)	
AND TILLMAN INFRASTRUCTURE LLC, A DELAWARE)	
LIMITED LIABILITY COMPANY)	
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC)	CASE NO.: 2021-00398
CONVENIENCE AND NECESSITY TO CONSTRUCT)	
A WIRELESS COMMUNICATIONS FACILITY)	
IN THE COMMONWEALTH OF KENTUCKY)	
IN THE COUNTY OF GRAYSON)	

SITE NAME: FALLING BRANCH

* * * * *

**MOTION IN LIMINE TO EXCLUDE TESTIMONY AND OTHER EVIDENCE ON
PURPORTED ENVIRONMENTAL EFFECTS OF RADIO FREQUENCY
EMISSIONS**

1.0 INTRODUCTION

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility and Tillman Infrastructure LLC (“Applicants”), by counsel, hereby make a Motion in Limine for the PSC or its Hearing Officer to exclude testimony and other evidence on purported environmental effects of radio frequency emissions from the scheduled July 27, 2023 Hearing in this proceeding. The PSC’s reliance on such testimony in circumstances in which Applicants have committed the facility to be designed and operated in compliance with FCC regulations is prohibited by the federal Telecommunications Act

of 1996 and applicable case precedent.

The PSC's Order of June 1, 2023 recognizes certain opportunities for testimony on behalf of the Interveners.¹ Such Order also provides a procedure for public comment during the Hearing. Any person intending to offer testimony or comment in connection with the Hearing needs to know in advance of the 47 U.S.C. Section 47 U.S.C. Section 332(c)(7)(B)(iv) statutory exclusion of agency reliance on testimony as to the purported environmental effects of radio frequency emissions from being a basis for the PSC's decision. Such advance awareness is consistent with everyone's due process rights and in making for an efficient Hearing which maintains public confidence in the PSC. Moreover, the exclusion of any such testimony prevents the ultimate PSC decision from being tainted by direct or indirect evidentiary considerations prohibited by federal law.

2.0 RELEVANT FACTUAL BACKGROUND

A copy of the relevant FCC license granted to Applicant AT&T Mobility for the area to be served by the proposed wireless telecommunications facility was provided as Exhibit A to the Application for CPCN filed with the PSC. As an FCC licensee, Applicant is, of course, subject to the FCC regulation. The Application states in Paragraph 6 that "... the facility will be constructed and operated in accordance with applicable FCC regulations." The filed September 4, 2022 Radio Frequency Engineering Statement of AT&T Mobility Radio Frequency Engineer Sherri Lewis further confirms "AT&T's equipment will be constructed and operated in compliance with applicable Federal Communications

¹Any rights to provide testimony at the Hearing are contingent on timely advance filing of a Witness List.

regulations, including such regulations regarding radio frequency interference.”

3.0 ARGUMENT

The federal Telecommunications Act, specifically 47 U.S.C. Section 332(c)(7)(B)(iv), provides: “[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission’s regulations concerning such emissions.” This federal statute preempts KRS 278.310 which allows the PSC to be permissive in consideration of other types of evidence in other types of cases.

Orders of the PSC have repeatedly recognized the application of the 47 U.S.C. Section 332(c)(7)(B)(iv) exclusion to its proceedings. See 2019 KY. PUC LEXIS 174 (PSC Case No. 2018-00384)(Order of February 4, 2019); and 2016 Ky. PUC LEXIS 307 (PSC Case No. 2015-00404)(Order of March 31, 2016).

The U.S. Supreme Court’s 2015 Opinion in *T-Mobile South, LLC v. City of Roswell* Georgia, 135 S.Ct. 808, 190 L.Ed.2d 679 (U.S. 2015) explains: “The Act provides that localities ... may not regulate the construction of personal wireless service facilities “on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications Commission’s] regulations concerning such emissions.” §§332(c)(7)(B)(i)(I), (iv).” *Id.* at 688-689.

As far back as 2000, the U.S. Court of Appeals for the Sixth Circuit² recognized the statutory exclusion of environmental effects of radio frequency emissions issues in

² As the PSC is well aware, the Sixth Circuit has jurisdiction over Kentucky and several

wireless site permitting cases in its Opinion in *Telespectrum, Inc. v. PSC*, 227 F.3d 414 (6th Cir. 2000). The U.S. Court of Appeals explained:

"... [W]e recognize that concerns of health risks due to the emissions may not constitute substantial evidence in support of denial by statutory rule, as no state or local government or instrumentality thereof may regulate the construction of personal wireless facilities "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv)." *Id.* at 424.

In 2012, the U.S. Court of Appeals for the Sixth Circuit in *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 800 (6th Cir. 2012) was very clear regarding the express application of the Telecommunications Act's limitations on local governments authority to consider radio frequency emissions effects evidence. In reviewing a local government denial of a wireless facility application, the Sixth Circuit explained:

"... There was no evidence whatsoever that the wireless facility would have any impact on the conifers, beyond Mr. Grondin's accusation. Further, concerns that RF emissions could potentially impact trees or children at the daycare were prohibited by statute as grounds to deny a wireless permit. "No state or local government or instrumentality thereof may regulate the construction of personal wireless facilities on the basis of environmental effects of RF emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. Section 332(c)(7)(B)(iv)...." *Id.* at 800.

Most recently, the Sixth Circuit further reemphasized the federal statutory prohibition of consideration of radio frequency emissions effects in *Robbins v. New Cingular Wireless PSC, LLC*, 854 F.3d 315 (6th Cir. 2017):

"Congress passed the TCA to foster industry competition in local markets, encourage the development of telecommunications technology, and provide consumers with affordable access to telecommunications services.

other states.

Telecommunications Act of 1996, Preamble, *Pub. L. No. 104-104*, 110 Stat. 56 (1996). The TCA furthers those goals by preventing local governments from impeding the siting and construction of cell towers that conform to the FCC's RF-emissions standards. See 47 U.S.C. § 332(c)(7)(B)(iv). By delegating the task of setting RF-emissions levels to the FCC, Congress authorized the federal government—and not local governments—to strike the proper balance between protecting the public from RF-emissions exposure and promoting a robust telecommunications infrastructure. See *id.*; *In the Matter of Procedures for Reviewing Requests for Relief from State & Local Regulations Pursuant to Section 332(c)(7)(b)(v) of the Commc'ns Act of 1934 in the Matter of Guidelines for Evaluating the Env'tl. Effects of Radiofrequency Radiation*, 12 F.C.C. Rcd. 13494, 13505 (1997)." *Id.* at 319-320.

In summary, the U.S. Court of Appeals for the Sixth Circuit, in multiple published opinions has enforced the federal Telecommunications Act of 1996 prohibition on regulation of proposed cellular towers based on environmental effects of radio frequency emissions. Relevant law could not be more clear cut on the issue.

AT&T Wireless Servs. of Cal. Ltd. Liab. Co. v. City of Carlsbad, 308 F. Supp. 2d 1148 (S.D. Cal. 2003) is persuasive in illustrating that the judiciary must carefully assess whether the environmental effects of radio frequency emissions are driving other considerations in an administrative proceeding. The courts and the PSC must keep in mind that both direct and *indirect* reliance of objections arising from radio frequency emissions allegations are prohibited by the federal Telecommunications Act:

"... Significantly, the conference report on the TCA, adopted by Congress, makes clear that local government may not indirectly base its decision to deny an application to place a cell site upon concern over the environmental effects of RF emissions:

The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction, or modification of CMS facilities *directly or indirectly* on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations...

H.R. Conference Report No. 104-458, 201 (1996) (emphasis added). Given this legislative history, the court concludes that concern over the decrease in property values may not be considered as substantial evidence if the fear of property value depreciation is based on concern over the health effects caused by RF emissions. Thus, direct or indirect concerns over the health effects of RF emissions may not serve as substantial evidence to support the denial of an application....” *Id.* at 1159. (Headnote/Footnote References Omitted).

Thus, exclusion of evidence as to purported environmental effects of radio frequency emissions is necessary to prevent it from being determined to have even an indirect effect on the decision on judicial review. The PSC should not take the risk that its decision will be fundamentally tainted by purported evidence of impermissible environmental effects.

The definitive federal statute at 47 U.S.C. Section 47 U.S.C. Section 332(c)(7)(B)(iv) and the foregoing confirming federal court decisions leave no room for doubt as to the obligations of the PSC on this issue. All persons offering testimony or public comment at the upcoming Hearing should be made aware of this evidentiary exclusion at least at the beginning of the Hearing. Allowing such testimony is an exercise in futility. Indulgence of such testimony sidetracks the hearing into discussions of claims on which the PSC cannot base its decision under federal law. Applicants’ statutory and due process rights would suffer and public trust in the PSC would be diminished as a result of developing a record filled with testimony on which the PSC cannot rely.

4.0 REQUEST FOR RELIEF

WHEREFORE, the Applicants request the PSC and/or its Hearing Officer to exclude testimony on purported environmental effects of radio frequency emissions from the Hearing prior to the start of the proceeding. In the alternative, the PSC is requested to strike any such testimony which enters the evidentiary record prior to its deliberations on the Application for CPCN. In the further alternative, should the PSC and/or its Hearing Officer not prohibit the environmental effects testimony outright, the PSC and/or its Hearing Officer should read 47 U.S.C. Section 332(c)(7)(B)(iv) into the record prior to any testimony or public comment at the upcoming Hearing. Persons attending the Hearing would then be fully aware of the federal statutory limitation on the PSC's decision. Applicants further request any other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of July, 2023, a true and accurate copy of the foregoing was electronically filed with the PSC and sent by U.S. Postal Service first class mail, postage prepaid, to the Interveners at the following address:

Roger and Janelle Nicolai
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Respectfully submitted,

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