

**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 TO CANCEL HEARING AND SUBMIT APPLICATION FOR
DECISION AS A RESULT OF INTERVENERS’ FAILURE TO TIMELY FILE
WITNESS LIST
OR, IN THE ALTERNATIVE,
TO EXCLUDE ANY WITNESSES OFFERED BY INTERVENERS AND STRIKE
PROPERTY VALUE STUDIES FILED BY INTERVENERS**

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 to Cancel the July 27, 2023 Hearing as a result of Interveners’ Failure to Timely File a Witness List on or before July 20, 2023 in compliance with the PSC’s Order of June 1, 2023 (“Hearing Order”) and for the PSC to thereafter promptly reach final decision on the pending Application for Certificate of Public Convenience and Necessity (“CPCN

Application”).

In the alternative, Applicants move to exclude any Witnesses on behalf of Roger and Janelle Nicholai (“Intervenors”) and Strike the Property Value Studies, (including associated affidavits)¹ filed as a result of Intervenors’ failure to timely file a Witness List. As detailed below, Intervenors failure to timely list the authors of such Studies as Witnesses to be available at the upcoming July 27, 2023 Hearing, prevents Applicants from informed preparation for the Hearing and exercising due process rights to cross-examination recognized by the Hearing Order.

2.0 FACTUAL BACKGROUND

Applicants filed an application for Certificate of Public Convenience and Necessity (“CPCN”) for construction of a new cellular tower in Grayson County with the Public Service Commission (“PSC”) on October 18, 2021 (the “Application”).² One local public hearing was conducted pursuant to PSC Order of February 24, 2022 in Grayson County, Kentucky on March 3, 2022. Intervenors and many others testified at such local public hearing. Applicants have filed ample expert testimony in support of the CPCN Application.

Intervenors requested and were granted intervention by PSC Order of February

¹ *The Cost of Convenience: Estimating the Impact of Communication Antennas on Residential Property Values* by Stephen L. Locke and Glenn C. Bloomquist; *Wireless Towers and Home Values: An Alternative Valuation Approach Using a Spatial Econometric Analysis* by Ermanno Affuso and J. Reid Cummings, and Huubinh Le; and Affidavits of record of Stephen L. Locke, J. Reid Cummings, and Ermanno Affuso.

² This proceeding has been pending long beyond the 150-day FCC Shot-Clock for new cellular tower permitting applications. *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, 24 FCC Rcd. 13994, 14005, ¶ 32 (Nov. 18, 2009). Intervenors’ failure to timely file a required Witness List should not precipitate further delay in the PSC reaching final decision on the request for CPCN.

24, 2022. The stated basis for their intervention arises from allegations as to purported property value impact and tower site location. Numerous filings have been made by all parties in this proceeding pursuant to the Public Service Commission's ("PSC") procedural schedule Order issued on August 18, 2022.

The PSC's Hearing Order scheduled a Hearing at the PSC offices in Frankfort, Kentucky on July 27, 2023. The Hearing Order required parties to **file** a Witness list for the Hearing by July 20, 2023. 807 K.A.R. 5:00063 makes it clear that **only electronic filing or physical filing constitutes filing** with the PSC:

"Unless electronic filing procedures established in Section 8 of this administrative regulation are used, a paper shall not be deemed filed with the commission until the paper: 1. Is physically received by the executive director at the commission's offices during the commission's official business hours; and 2. Meets all applicable requirements of KRS Chapter 278 and KAR Title 807." (Emphasis added).

Mailing of a Witness List on the deadline would not meet the requirement of the regulation requiring electronic or physical filing.

The Hearing Order provides "[e]ach party will be permitted to question each witness, but all questions must be related to testimony the witness has provided, either in prior sworn testimony or from the witness stand, or to the application." The Order further provides "Witnesses who sponsor schedules, *testimony*, or responses to requests for information shall participate *in person* at the July 27, 2023 hearing." (Emphasis added). Applicants do not even know if Interveners plan to testify in the absence of a filed Witness List.

Interveners have filed the Property Value Studies purportedly as evidence in this

proceeding³ However, Interveners failed to timely file a Witness List by July 20, 2023 as required by the Hearing Order.⁴ The fact that the scheduled Hearing is less than a week away on July 27, 2023 makes the filing deadline all the more critical.

3.0 ARGUMENT

No applicable law supports Interveners failing to timely file a Witness List and thereafter being allowed to offer written testimony of persons unavailable for cross-examination into evidence or surprise appearances of undisclosed witnesses at a hearing.

The fact that the Interveners knew of the Witness List deadline upon receipt of the June 1, 2023 Hearing Order makes the failure to file the Witness List further inexcusable. Applicants in good faith timely filed their Witness List.⁵ All of these circumstances are highly prejudicial to Applicants' due process rights in attempting to defend against the allegations of Interveners.

The right to cross-examine witnesses offering evidence has often been found

³ *The Cost of Convenience: Estimating the Impact of Communication Antennas on Residential Property Values* by Stephen L. Locke and Glenn C. Bloomquist; *Wireless Towers and Home Values: An Alternative Valuation Approach Using a Spatial Econometric Analysis* by Ermanno Affuso and J. Reid Cummings, and Huubinh Le; and Affidavits of record of Stephen L. Locke, J. Reid Cummings, and Ermanno Affuso.

⁴In an email of July 24, 2023, Brandon Bruner, PSC Administrative Branch Manager (Filings Branch) to Applicant's counsel: "I have searched for any outstanding mail to log for this case and currently do not have anything that has not already been logged." Thus, Interveners not only missed the July 20 deadline, but have still failed to file a Witness List with the Hearing only three days away.

⁵ Applicants have, in contrast, timely complied with the Hearing Order in identifying the authors of expert reports, specifically Sherri Lewis and Glen Katz, as witnesses who will attend the July 27, 2023 Hearing. In addition, Tillman Infrastructure LLC Management witness Annie Zocco, whose Affidavit appears of record, has also been timely identified as scheduled to attend the Hearing.

essential to due process in administrative hearings. As the Kentucky Supreme Court explained in *Kaelin v. Louisville*, 643 S.W.2d 590, 592 (Ky. 1982), “[w]e hold that, in a trial-type adjudicatory hearing before an administrative body, the right of cross-examination is required by due process of law.”

The PSC is not bound by technical rules of evidence in connection with its hearings as stated in KRS 278.310.⁶ However, the unavailability of a witness for cross-examination is a matter of constitutional due process, not merely the rules of evidence. The Kentucky Supreme Court explained in *Commonwealth v. Maddox*, 955 S.W.2d 718 (Ky. 1997), “[w]henver limitations on the right of cross-examination are analyzed, it should be remembered that the right implicated is a *fundamental constitutional right* and that such limitations should be cautiously applied.” (Emphasis added).

The PSC must ensure that all parties to its proceedings are afforded due process. As explained by the Court of Appeals, “the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary interpretation.” *Utility Regulatory Commission v. Kentucky Water Service Co.*, 642 S.W.2d 591, 593 (Ky. Ct. App. 1982).

The Interveners efforts to propound the Property Valuation Studies as evidence without listing the authors on a timely filed Witness List and having them available for cross-examination at the upcoming Hearing should not be tolerated by the PSC.

Each party must have the opportunity to confront and cross-examine adverse witnesses. The United States Supreme Court long ago noted:

⁶ Nonetheless, the PSC considers the evidence rules as “advisory in nature to the proceedings of the Commission.” *Windstream Kentucky East, LLC*, Case No. 2009-00246, 2009 Ky. PUC LEXIS 1211, Order at #7 (Nov. 24, 2009).

The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. (Citation omitted.) But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

ICC v. Louisville a N.R. Co., 227 U.S. 88, 93 (1912)

Kentucky courts have long recognized the substantive import of compliance with witness list requirements and have sanctioned non-compliance by a variety of available means under applicable law including exclusion of witnesses and exhibits and even dismissal of claims.⁷ There is ample basis for the PSC to find each of these Court of Appeals Opinions to be persuasive in the circumstances of Interveners failing to file a Witness List due per express terms of the PSC Hearing Order a week in advance of the July 27, 2023 Hearing.

Parties to an administrative proceeding cannot be allowed to offer evidence for

⁷ See *Rossi v. CSX Transp., Inc.*, 357 S.W.3d 510 (Ky. Ct. App. 2010)(Exclusion of testimony of witness not on witness list affirmed); *Leblanc v. Dorten*, No. 2008-CA-001574-MR, 2009 Ky. App. LEXIS 172 (Ct. App. Sep. 18, 2009)(Exclusion of witnesses and evidence for failure to file witness list upheld); *Konstantinidis v. Reliford*, No. 2005-CA-000913-MR, 2006 Ky. App. Unpub. LEXIS 149 (Ct. App. Oct. 20, 2006)(Exclusion of witnesses for failure to file witness list and resulting summary judgment upheld); *Varghese v. Varghese*, Nos. 2015-CA-000510-MR, 2015-CA-000517-MR, 2016 Ky. App. Unpub. LEXIS 606 (Ct. App. Sep. 2, 2016)(Exclusion of witnesses and exhibits upheld for non-compliance); *Mortg. Elec. Registration Sys. v. Clark*, No. 2005-CA-002144-MR, 2007 Ky. App. Unpub. LEXIS 393 (Ct. App. May 18, 2007)(Failure to file witness list supported dismissal); and *Cadle Co. v. MMAPCO, LLC*, No. 2005-CA-002611-MR, 2007 Ky. App. Unpub. LEXIS 1197 (Ct. App. May 18, 2007)(Failure to file witness list supported dismissal.); and *Wehrley v. Kroon*, No. 2010-CA-000211-MR, 2011 Ky. App. Unpub. LEXIS 181 (Ct. App. Mar. 4, 2011)(Exclusion of expert witness for late filing of witness list affirmed).

consideration of the PSC without subjecting witnesses offering such evidence to cross-examination at a due process hearing such as scheduled for July 27, 2023.

Intervenors have made arguments in this proceeding as to purported impact on property valuation of the proposed cellular tower. Inclusion of the Intervenors' Property Value Studies into evidence without timely listing and making the authors available in person for cross-examination on July 27, 2023 plainly has the effect of trampling of Applicants' rights to due process. The PSC has stricken such evidence from the record in the absence of the availability of a witness for cross-examination in other cases. See PSC Order of May 21, 1990 in Case 89-349:

"In this instance, HU had no opportunity to cross-examine Mr. Harman on the content of his letter or to offer rebuttal evidence. Therefore, to allow the letter to remain in the record would deny KU due process of law. Accordingly, the Commission finds that Mr. Herman's letter should be stricken."

See also PSC Order of April 30, 2013 in Jessamine-South Elkhorn Water District Case No. 2012-00470, 2013 Ky. PUC LEXIS 377 striking certain references to testimony on due process grounds arising in part from the lack of opportunity for cross-examination. The same result as in Cases 89-349 and 2012-00470 is required in the present proceeding.

4.0 REQUEST FOR RELIEF

WHEREFORE, the Applicants, by counsel, request the PSC to irrevocably cancel the July 27 Hearing based on failure of Intervenors to timely file a Witness List and make such witnesses available for cross-examination in compliance with the Hearing Order. Submission of the Application on the record and prompt final decision by the PSC would then be fully warranted as relief to Applicants.

In the alternative, Applicants request the PSC strike from the record of this proceeding all evidentiary submissions of Interveners, including each of the aforementioned Property Value Studies, for which the witness offering the evidence has not been identified on a timely filed Witness List as available in-person at the upcoming Hearing for cross-examination.

Applicants further request the PSC grant Applicants 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
2663 Blue Bird Road
Falls of Rough, Kentucky 40119

Respectfully submitted,

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