

**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

* * * * *

**APPLICANTS’ MOTION TO
SUBMIT APPLICATION FILED ON OCTOBER 18, 2021
FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR
DECISION ON EXISTING EVIDENTIARY RECORD**

1.0 INTRODUCTION AND SUMMARY

New Cingular Wireless PCS LLC a Delaware limited liability company d/b/a AT&T Mobility (“AT&T”) and Tillman Infrastructure LLC, a Delaware limited liability company (“Tillman”) (collectively, “Applicants”), by counsel, hereby file this Motion requesting the Kentucky Public Service Commission (“PSC”) to Submit the pending Application for Decision on the Existing Evidentiary Record (“Applicants’ Motion”). Applicants’ have complied with the Intervention proceeding requirements and this Application is long overdue for decision. With each passing day the PSC fails to act, Grayson County residents are deprived of essential wireless communication services the community urgently needs.

Applicants' filed a Certificate of Public Convenience and Necessity ("CPCN") Application to construct a cellular tower on October 18, 2021. Roger and Janelle Nicolai (collectively the "Nicolais") filed a Motion to Intervene on November 16, 2021. The Nicolais were granted Intervention by PSC Order dated February 24, 2022. The Nicolais have taken full advantage of their Intervenor status and filed numerous arguments, comments, and data requests into the record. Applicants have filed responsive pleadings addressing all material issues raised by the Nicolais. Furthermore, Applicants' have responded to all PSC data requests prompted by the intervention proceedings. The responsive pleadings have been part of the record for over two months and the CPCN application is ripe for decision.

The requested CPCN should be forthwith granted for at least the following reasons:

1. Applicants have complied with PSC filing requirements and such filings constitute substantial evidence supporting issuance of the CPCN.
2. The Nicolais have had ample opportunity to fully participate as Intervenor in the proceeding and Applicants have responded to and rebutted all arguments raised.
3. The federal Telecommunications Act of 1996 ("TCA") requires state and local governments to make tower permitting decisions in a "reasonable time."¹ Proceedings on CPCN application have far exceeded the reasonable time standard. Of course, they have also exceeded the 150-day FCC Shot Clock² by many months.

On all of this reasoning, and as further detailed below, Applicants request the PSC

¹ 47 U.S.C. § 332(c)(7)(B)(ii).

² *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).

to forthwith complete deliberations, and grant the requested CPCN as soon as possible so that AT&T can move forward and provide Grayson County residents with essential wireless communications services.

2.0 RELEVANT FACTUAL BACKGROUND

The proposed “telecommunications antenna tower” which is the subject of the Application for a CPCN pursuant to KRS 278.020, 278.650; 807 K.A.R. 5:063, and other applicable law is a vital element of AT&T’s wireless communications network in Grayson County, Kentucky, and is necessary to provide service in accordance with the provisions of AT&T’s Federal Communications Commission license as stated in the Application and incorporated exhibits. A map included with the Application, as prepared by an AT&T Mobility Radio Frequency Engineer, indicated the Search Area in which the new tower must be located to provide the necessary wireless service. The proposed tower site is within such Search Area.

The following are the key dates in the processing of the Application for a CPCN in this proceeding:

- Application in within Case 2021-00398 filed on October 18, 2021.
- No Deficiency Letter issued by PSC Staff on October 25, 2021.
- Nicolais filed a Motion to Intervene on November 16, 2021.
- Applicants filed a Response to the Nicolais’ Motion to Intervene on November 30, 2021.
- PSC issued an Order granting the Nicolais’ Motion to Intervene and scheduling a local public hearing on February 24, 2022.
- A local public hearing on the proposal was held on March 3, 2022.
- Nicolais filed public comments responding to the local public hearing on March 15, 2022.
- Nicolais filed a Response to the Commission Order on April 1, 2022.
- Nicolais filed additional information on April 7, 2022.
- Applicants filed a Motion for Immediate Decision on Existing Evidentiary Record on April 13, 2022.

- Nicolais filed a Response objecting to the Motion on April 18, 2022.
- Nicolais filed additional public comment objecting to public comments in support of the tower filed by residents on August 11, 2022.
- PSC issued a Scheduling Order for the Intervention Proceedings on August 18, 2022.
- Nicolais filed their Initial Request for Information from Applicants on August 30, 2022.
- PSC issued a Data Request from Applicants on August 31, 2022.
- Applicants filed Responses to the Nicolais' and PSC's requests on September 13, 2022.
- Nicolais filed their Second Request for Information on September 26, 2022.
- Applicants filed their Response to the Nicolai's Second Request for Information on October 4, 2022.
- Nicolais filed their Final Testimony on October 14, 2022.
- Applicants filed their Rebuttal Testimony on November 28, 2022.
- Applicants filed a Notice of Compliance and Request for Decision on December 9, 2022.
- FCC 150-Day Shot Clock Deadline for PSC Decision expired March 17, 2022 (over 344 days ago).
- Pendency of the Application since the last day for Parties to request a Public Hearing or submit a request for the matter to be decided based upon the written record, pursuant to the PSC's Scheduling Order: 77 Calendar Days.
- Pendency of Application in this Case 2021-00398 since Non-Deficient Filing: 487 Calendar Days.

3.0 ARGUMENT

All facts, circumstances, and applicable law require the PSC proceed to complete its deliberations, and promptly grant the requested CPCN on all evidence of record.

3.1 Applicants' Compliance with PSC Requirements Compels Grant of the Requested CPCN.

807 K.A.R. 5:063 - Section 1 identifies the documentation required in order to file an application for a CPCN to construct a tower. Applicants conduct due diligence and properly obtains the required information well before filing the Application, just as

Applicants have done in the present case. At great effort in time and out-of-pocket expenses in the tens of thousands of dollars, AT&T Mobility and Tillman identified a suitable location for a new tower site, completed an option/lease with the landowner, completed a tower lease between them, had extensive exhibits prepared by in-house and outside contractor professionals, and have filed the within Application with the PSC. Applicants have met all filing requirements applicable to this proceeding as prescribed by the Kentucky Revised Statutes and the Kentucky Administrative Regulations and as recognized by the PSC Staff in its “No Deficiency” letter of October 25, 2021. Federal precedent under the TCA provides that compliance with the agency’s own requirements constitutes substantial evidence.³ Accordingly, Applicants’ compliance with all applicable PSC requirements provides substantial evidence compelling grant of the requested CPCN.

3.2 Nicolais Have Had Ample Opportunity to Fully Participate as Intervenors in the Proceeding and Applicants Have Responded to and Rebutted All Arguments Raised.

The PSC granted the Nicolais Intervention under 807 K.A.R. Section 4(11) nearly a year ago. The Nicolais have made 10 filings into the record consisting of over a hundred pages of information. The Nicolais’ opposition to Applicants’ proposed wireless communications facility centers on essentially two arguments, that is, (1) that

³ *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 799 (6th Cir. 2012). See also *Cellco Partnership v. Franklin County, et al*, 553 F. Supp. 2d 838, 845 (E.D. Ky. 2008)(“The substantial evidence test applies to the locality’s own zoning requirements....”)

the tower will be aesthetically unpleasing⁴; and (2) that the tower will diminish the value of the their property.⁵ By subsequent responsive pleadings, Applicants' have refuted both arguments. While the Nicolas' have also eluded to rawland and co-location alternatives, an available and suitable location *within* the Search Area was never proffered; As demonstrated in its filings, Applicants have ruled out co-location alternatives and determined that there is no more suitable alternative rawland location reasonably available from which adequate service can be provided. Accordingly, Applicants' will not revisit these specious arguments here.

It is well settled under federal law that aesthetic considerations are not a substantial evidence basis to deny an Application for a communication facility (see: *New Par v. Charter Township of Brighton*, 452 F.Supp. 3d 663, 676 (E.D. Michigan 2020) (“a few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence on which the Town could base the denials.”); *Cellco Partnership v. Franklin Co., KY*, 553 F. Supp. 2d 838, 845-846 (E.D. Ky. 2008) (“The Sixth Circuit has never found that lay opinion evidence alone constitutes substantial evidence supporting the denial of an application.”); *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 804 (6th Cir. 2012) (“General concerns from a few residents that the tower would be ugly or that a resident would not want it in his backyard are not sufficient.”); *Cellular South Real Estate, Inc. v. City of Germantown*, 2015 U.S. Dist. LEXIS 80416 (W.D. Tenn. 2015) (“[T]he City's reasons for denial

⁴ Roger and Janelle Nicolai Request for Intervention, November 11, 2021, pg. 2 (“The facility will be an ‘eyesore’ and impact the aesthetics and appeal...”).

⁵ Roger and Janelle Nicolai Request for Intervention, November 11, 2021, pg. 3 (“We should not have to suffer a drop in property value – and increased difficulty in the sale of our property...”).

concerning aesthetics and property values were not based on substantial evidence in the record”).

In response to the Nicolais’ second argument, Applicants commissioned and filed an expert report, which found that the proposed communications facility will not negatively impact the value of Nicolais’ property.⁶ The Nicolais filed academic articles on the impact of communications facilities on the property values generally along with qualified comments from the article’s authors. However, the Nicolais’ never commissioned or filed any site-specific study refuting Applicants’ expert report. Accordingly, the Nicolais have failed to rebut Applicants’ expert’s findings that the proposed communications facility will not negatively impact the value of their property.

The Nicolais have been granted Intervenor status for nearly a year and have had ample opportunity to make arguments and file supporting evidence into the record. Applicants have refuted all arguments raised by the Nicolais by subsequent responsive pleadings. Administrative agency decisions are to be based on objective criteria⁷ in order to be founded on substantial evidence and to survive arbitrariness review. Having refuted all material arguments raised by the Nicolais’ there is no substantial evidence that would support denial of the CPCN Application. Accordingly, the PSC should move to complete its deliberations and issue the requested CPCN as soon as practically possible.

3.3 The Federal Telecommunications Act of 1996 (“TCA”) Requires State and Local Governments to Make Tower Permitting Decisions in a “Reasonable

⁶ Real Estate Value Impact Study, Glen Katz, November 23, 2021.

⁷ See *Hardin County v. Jost*, 897 S.W.2d 592 (Ky. App. 1995) finding a local government permitting process based on subjective criteria to be arbitrary and unconstitutional.

Time.”

Proceedings on the Application, which was filed October 18, 2021, has lingered well beyond the TCA “reasonable time” standard.⁸ Such delay is not consistent with the broader purposes of the TCA. The U.S. Congress in adopting the Telecommunications Act of 1996 in the Act’s preamble recognized the importance of the “... rapid deployment of new telecommunications technologies.”⁹ (Emphasis added).

The Telecommunications Act of 1996 provides in pertinent part:

A state or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. (Emphasis added). 47 USC Section 332(c)(7)(B)(ii).

Federal courts have recognized “*Congress implemented the “reasonable period of time” provision of the TCA to “stop local authorities from keeping wireless providers tied up in the hearing process’ through invocation of state procedures, moratoria, or gimmicks.”*(emphasis added)¹⁰ Of course, the Intervention proceedings have delayed the

⁸ Although not controlling on the PSC, KRS 100.987(4)(c) provides local planning commissions in Kentucky considering Uniform Applications for construction of a cellular tower to make their decision within *sixty* days of receipt of a complete application. This requirement calls into question why a planning commission can and is required to reach decision in sixty days, while this proceeding filed on October 18, 2021, remains pending. A reasonable time for a PSC decision may be longer than the sixty days applicable to a planning commission but is surely not reasonable to allow the PSC deliberations and decision beyond sixteen months.

⁹ See 1996 Federal Telecommunications Act Preamble, 110 Stat. 56 (“An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies” (Emphasis added.))

¹⁰ *Masterpage Communications v. Town of Olive*, 481 F.Supp. 2d 66, 77 (N.D. New York 2005).

decision process far beyond the FCC Shot Clock¹¹ deadline, preventing the grant of a CPCN within a reasonable period of time.

The U.S. Court of Appeals for the Sixth Circuit in its *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794 (6th Cir. 2012) Opinion rejected permitting standards which unreasonably extend the decision process:

We agree with Judge Cudahay and adopt the “least intrusive” standard from the Second, Third, and Ninth Circuits. It is considerably more flexible than the “no viable alternatives standard”, as a carrier could endlessly have to search for different marginally better alternatives. Indeed, in this case the Township would have had T-Mobile search for alternatives indefinitely. *Id.* at 808.

Federal district courts in the Sixth Circuit have relied upon *T-Mobile Central* and found the permitting authority failed to reasonably act in the 150-day deadline of the FCC Shot Clock where nothing in the agency regulations justified the delay in decision on a complete application. *American Towers, Inc. v. Wilson County*, 2014 U.S. Dist. LEXIS 131, 59 Comm. Reg. (P &F) 878 (M.D. of Tennessee, Nashville Division 2014) (“Wilson County violated the TCA by failing to act on ATI’s second set of applications within a reasonable time”).

Outside of the Sixth Circuit, a federal district court in the Northern District of New York, cited *American Towers* and explained “Under the provisions of the TCA and FCC Orders, the local municipality has 150 days in which to promptly review an application and make its final determination, consistent with local law, the TCA and

¹¹ The TCA requires state and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed. . . ." 47 U.S.C. § 332(c)(7)(B)(ii). The FCC defines "a reasonable period of time" in terms of a "shot clock." See *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.* ("2018 Third Report and Order"), 33 F.C.C. Rcd. 9088, ¶ 104 (2018)

federal rules and regulations.” *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 315 (N.D.N.Y. 2017). Failure of the permitting authority to make a decision after 175 days led the District Court to conclude the permitting authority had “... failed to rebut the presumption that their delay was unreasonable and their actions constitute a failure to act or unreasonably delay in violation of the TCA.” *Id.* at 316. The decisions of the federal courts leave no doubt that the PSC should avoid unreasonable and unjustified delay. All precedent requires the PSC to proceed to final decision on the Application.

Consistent with *T-Mobile Central*, Applicants have complied with the requirements of KRS Chapter 278 and implementing regulations resulting in a No-Deficiency letter issued by PSC Staff on October 25, 2021. Furthermore, AT&T has considered alternative locations in good faith and determined there is no more suitable location reasonably available per 807 K.A.R. 5:063 Section 1(s). Further delay on the proceedings, which has already been pending for over 494 days, and has lingered well beyond the FCC Shot Clock benchmark, would make a travesty out of the 807 K.A.R. Section 4(11) standard for intervention of not “unduly complicating or disrupting the proceedings.” Moreover, the 150-day FCC Shot Clock, which expired on March 17, 2022 in this proceeding, is very persuasive on how long administrative review of a cellular tower application should take. On the merits of the issues raised, and in the interest of compliance with the TCA “reasonable time” standard, the PSC should promptly move to final decision on the Application.

4.0 CONCLUSION

The PSC should promptly conclude deliberations and approve the requested CPCN so Applicants may begin providing Grayson County residents with necessary wireless communications infrastructure. The Application was originally filed with the PSC on October 18, 2021, was found to be Non-Deficient by PSC Staff Letter on October 25, 2021 and has been pending before the PSC for 487 days from the Staff's Letter to the making of this Motion by Applicants. The 150-day FCC Shot Clock for PSC decision in this matter expired on March 17, 2022.

All factual background and argument set forth in this Motion supports Applicants' request for:

- (1) submission of this long pending case for decision on the request for CPCN;
- (2) and ultimate grant of the CPCN as requested in the Application.

All such requested action by the PSC is in protection of Applicants' rights pursuant to KRS Chapter 278; PSC implementing regulations; the TCA and case precedent thereunder; Section 2 of the Kentucky Constitution; and constitutional guarantees of substantive and procedural due process.

WHEREFORE, the Applicants, by counsel, request the PSC to grant Applicants the relief requested above and 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 February, 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 Intervening Party at the following address:

Roger and Janelle Nicolai
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Falls of Rough, Kentucky 40119

Respectfully submitted,

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