

**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

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**MOTION FOR INFORMAL CONFERENCE  
WITH COMMISSION STAFF**

Applicants filed an application for Certificate of Public Convenience and Necessity (“CPCN”) for construction of a new cellular tower in Grayson County on October 18, 2021. The Nicholai’s requested and were granted intervention by PSC Order of February 24, 2022. Numerous filings have been made by all parties in this proceeding pursuant the Public Service Commission’s (“PSC”) procedural schedule issued on August 18, 2022. Extensive public comments have been filed, including comments from local citizens supporting the CPCN proposal.

This case has been ripe for decision since December 9, 2022, in that there are no further motions pending for further hearing or proceedings. The PSC has not formally declared a moratorium or been “closed for business” in the relevant period.

Furthermore, it is not subject to any injunction of a court preventing action on the pending application. Applicants have requested the PSC to make its decision and grant a CPCN starting with Applicants' filing of its Motion to Submit Application for Decision on Existing Evidentiary Record on February 24, 2023. Applicants have thereafter repeatedly re-noticed their Motion. Intervenors have not requested that a decision be further delayed for any reason. The case has now been pending for 571 days since its filing and 564 days since a No Deficiency Letter was issued by PSC Staff.

The federal Telecommunications Act requires state and local governments to reach a decision in a reasonable time. 47 U.S.C. § 332(c)(7)(B)(ii). The FCC has established a "shot clock" of 150 days for decisions by state or local government on new cellular tower applications. 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). The present application has now been pending for well over a year beyond the expiration of the FCC shot clock. This extraordinary period cannot possibly be considered a "reasonable time."

Local planning commissions in Kentucky are required by KRS 100.987(4)(c) to reach final decisions on new cellular tower applications within 60 days of a complete filing or the application is deemed approved. The contrast with the PSC's inaction in the present case is simply stunning.

There is no apparent rational basis for the PSC's delay of over 564 days beyond a no-deficiency notice in failing to make a final decision on the requested CPCN. The U.S. Congress has recognized the need for "rapid deployment of new

telecommunications technologies" in its adoption of the Telecommunications Act. 1996 Federal Telecommunications Act Preamble, 110 Stat. 56 (Emphasis added). All of the foregoing law weighing in favor of a decision and the fact that Applicant, AT&T Mobility, has FCC licenses to provide improved wireless service in Grayson County, and the intent and wherewithal to do so has not moved the PSC to exercise its responsibility under applicable law and make a decision. (See Exhibit A of Applicants' CPCN Application). Further, the fact that a complete administrative record with all required due process has been completed and that a local public hearing has long ago been held per applicable law (KRS 278.650) appears to have done nothing to move the PSC to reach its decision.

The federal Telecommunications Act does provide that failure of a state or local government to act on a cellular tower application can be an actionable violation of the TCA in the same manner as a denial. 47 U.S.C. § 332 (c)(7)(B)(v). The U.S. Court of Appeals for the Sixth Circuit fully recognized that a government's failure to act on a new cellular tower application can be actionable in *Wireless Income Properties v. McDonald*, 403 F.3d 392 (6th Cir. 2005) (city "violated the TCA by failing to act on Wireless's filed applications").

In the present circumstances of what may only be describes as inexplicable and extraordinary delay, Applicants must move for an Informal Conference with PSC Staff to seek explanation of the delay and/or whether the PSC needs additional evidence or proceedings to forthwith make a final decision on the long pending application for CPCN to provide improved wireless service in Grayson County. 807 K.A.R. Chapter 005 - Section 9(4).

WHEREFORE, the Applicants, by counsel, request the PSC to grant Applicants' request for Informal Conference and to grant them any other relief to which they are entitled.

Respectfully submitted,

*David A. Pike*

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David A. Pike  
and

*F. Keith Brown*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 12th day of May, 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  
2663 Blue Bird Road  
Falls of Rough, Kentucky 40119

Respectfully submitted,

*David A. Pike*

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