

**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 LAY PERSON OPINION TESTIMONY ON
AESTHETIC EFFECTS OF NEW CELLULAR TOWER**

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 lay person opinion testimony on purported aesthetic effects of the proposed new cellular tower from the scheduled July 27, 2023 Hearing in this proceeding. The federal Telecommunications Act of 1996 and applicable case precedent prevent the PSC from relying on such testimony in making its decision on the proposed Certificate of Public Convenience and Necessity (“CPCN”).

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 that lay person opinion testimony on purported aesthetic effects of the proposed new cellular tower could not constitute substantial evidence which would justify denial of the proposed CPCN pursuant to the federal Telecommunications Act of 1996 and/or federal court precedent cited below. 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

Applicants filed an application for Certificate of Public Convenience and Necessity ("CPCN Application") for construction of a new cellular tower in Grayson County with the Public Service Commission ("PSC") on October 18, 2021 (the "Application"). The location and appearance of the proposed wireless communications facility was fully described in the CPCN Application as follows:

"8. ... Applicants propose to construct a WCF at 2589 Blue Bird Road, Falls of Rough, KY 40119 (37° 35' 48.02" North latitude, 86° 29' 24.53" West longitude}, on a parcel of land located entirely within the county referenced in the caption of this application. The property on which the WCF will be located is owned by Terry L. Newton and Kimberly D. Newton pursuant to a deed recorded at Deed Book 444, Page 461 in the office of the County Clerk.

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

The proposed WCF will consist of a 145-foot tall tower, with an approximately 4-foot tall lightning arrester attached at the top, for a total height of 149-feet. The WCF will also include concrete foundations and a shelter or cabinets to accommodate the placement of AT&T Mobility's radio electronics equipment and appurtenant equipment. The Applicants' equipment cabinet or shelter will be approved for use in the Commonwealth of Kentucky by the relevant building inspector. The WCF compound will be fenced and all access gate(s) will be secured. A description of the manner in which the proposed WCF will be constructed is attached as Exhibit B and Exhibit C. 9. A list of utilities, corporations, or persons with whom the proposed WCF is likely to compete is attached as Exhibit D. 10. The site development plan and a vertical profile sketch of the WCF signed and sealed by a professional engineer registered in Kentucky depicting the tower height, as well as a proposed configuration for AT&T Mobility's antennas has also been included as part of Exhibit B.”

One local hearing was conducted pursuant to PSC Order of February 24, 2022 in Grayson County, Kentucky on March 3, 2022. Interveners and many others testified at such local public hearing. Applicants have filed ample expert testimony in support of the CPCN Application. Interveners and public commenters have had a protracted time period to file expert testimony on purported aesthetic effects of the proposed facility but have failed to do so.

Interveners requested and were granted intervention by PSC Order of February 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. Interveners have made no filing which purports to constitute expert testimony as to any adverse aesthetic impact of the tower when constructed.

The PSC's Hearing Order scheduled a Hearing at the PSC offices in Frankfort, Kentucky on July 27, 2023. Interveners failed to timely file a Witness List, so

Applicants have no knowledge of whether they intend to offer any type of testimony as to aesthetic effects. In addition, the Hearing Order allows public comment. Applicants, of course, have no direct knowledge of whether commenters will attempt to address purported aesthetic issues either by lay opinion or expert testimony.

3.0 ARGUMENT

The PSC has adopted no regulations providing objective standards for application of aesthetic considerations to the location of wireless communications facilities. There is no applicable Comprehensive Plan to consider as would be the case if an application to a local planning commission were involved. Specifically, the PSC has adopted no objective standards as to appearance of wireless communications facilities or height limitations or setbacks of such facilities from property lines or any standards requiring stealth or camouflage design. Thus, aesthetic considerations are highly undefined and speculative in connection with a proceeding before the PSC in which an applicant is seeking a CPCN for a new cellular antenna tower such as the present case.

Kentucky's appellate courts have been vigilant in requiring objective standards in connection with land use permitting matters in order to avoid arbitrary governmental actions prohibited by Section 2 of the Kentucky Constitution. *Hardin Cty. v. Jost*, 897 S.W.2d 592 (Ky. Ct. App. 1995)

The federal courts have, pursuant to the Telecommunications Act of 1996, set limits for permitting agency reliance on aesthetic considerations to deny a new tower application.

A decision of the U.S. District Court for the Eastern District of Kentucky, *Cellco P'ship*

v. Franklin Cty., 553 F. Supp. 2d 838 (E.D. Ky. 2008), should guide the PSC's approach to aesthetic objections to the proposed wireless communications facility offered at the upcoming Hearing:

Accordingly, the testimony presented by Verizon regarding the safety of the tower, the need for it, whether there were other suitable locations for it and its affect on property values was uncontradicted. But the Planning Commission did not deny the application on any of these grounds. Instead, **it denied the application on the grounds that the local zoning ordinance requires it to consider the visual impact of the proposed tower and that several of the persons who spoke before it objected to the visual impact of the tower...**

There was some testimony regarding the "visual impact" of the proposed tower. This was the second grounds that the commission relied upon in denying the application. **In analyzing the evidence regarding the visual impact of the tower, the Court first notes that the petition signed by 72 residents in the area does not constitute such evidence.** The petition states only, "[w]e the undersigned property owners and/or citizens DO NOT WANT the [Verizon] Cell tower to be placed at" the proposed location. (Rec. No. 26, Defs.' Mem., Ex. 10, Hewitt Aff. Ex. A). While it is clear that the signers generally object to the placement of the tower, the petition does not state the specific grounds upon which they object to it. They may object to the tower on the basis of its visual impact or, like others who testified at the hearing, the petitioners may object to the tower on an unsupported belief that it is will decrease property values or pose a safety hazard; or the petitioners' may object to the tower on some other grounds not raised in the meeting. Thus, the petition does not constitute evidence of the tower's negative visual impact.

Five area residents did express some objection to the visual impact of the tower, either through testimony or letters to the Planning Commission: Ethyl Lee, Jesse Lee, Jim Rector, and the Pieratts. **However, in *New Par*, the court stated that "a few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence on which the Town could base the denials."** *New Par*, 301 F.3d at 398 (quoting *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir. 1999)). In that case, the court found that the fact that "aesthetic concerns were mentioned only a few times, and they were never discussed" at the local zoning board meetings was not substantial evidence of the proposed tower's negative visual impact. *Id.*

....

"Because 'few people would argue that telecommunications towers are aesthetically pleasing,' a local zoning board's 'aesthetic judgment must be grounded in the specifics of the case.'" *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003)(quoting *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 61 (1st Cir. 2001).

In this case, only five residents explicitly objected to the visual impact of the tower. **They objected primarily because they would see the tower from their houses and the tower would be "unsightly." These objections represent "generalized expressions of concern with aesthetics." The same objection could be made by any resident in any area where a tower was proposed. The Sixth Circuit has never found that lay opinion evidence alone constitutes substantial evidence supporting the denial of an application.** See *MIOP, Inc. v. City of Grand Rapids*, 175 F.Supp.2d 952, 956-57 (W.D. Mich. 2001)(stating that, "[c]onsistent with Sixth Circuit precedent, this Court does not find lay opinion evidence sufficient to satisfy the substantial evidence requirement.")” *Id.* (Emphasis added).

Thus, lay opinion² aesthetic objections to the proposed cellular antenna tower could not support denial of the CPCN application. As a consequence, it is prejudicial for the PSC to even hear such testimony.

² KRS 278.650 provides that the PSC "... may take into account the character of the general area concerned and the likely effects of installation on nearby land use and values." This statute is consistent with the cited federal precedent disfavoring *lay opinion* in that aesthetic arguments must be based on *evidence* (i.e. "effects"). Lay opinions are not evidence. Moreover, the PSC itself explained:

"Generally, in reviewing an application for a CPCN pursuant to KRS 278.020(1), the Commission looks at whether the party requesting the CPCN demonstrate a need for the facilities and an absence of wasteful duplication. When determining whether to grant a CPCN for a cell tower pursuant to KRS 278.650, *et. seq.*, the Commission is also permitted to consider the effect of the cell tower on the character of the general area and nearby land uses and values. However, the scope and nature of the Commission's review are limited by federal law, which partially preempts state law in this area and seeks to promote access to wireless telecommunications facilities." 2019 KY. PUC LEXIS 847 (PSC Order of August 20, 2019 in PSC Case No. 2019-00117).

Cellular S. Real Estate, Inc. v. City of Germantown, No. 2:12-cv-02888-JPM-tmp, 2015 U.S. Dist. LEXIS 80416 (W.D. Tenn. June 22, 2015)³ applies the same analysis as in *Cellco*:

Regarding property values, Cellular South argues that "[n]either the residents that opposed Cellular South's Application, nor the members of the Board that rejected the Application offered any evidence whatsoever to support their lay opinions that the construction of the proposed WSF would negatively impact property values in the area." (ECF No. 19 at 9.) As for impact on **aesthetics**, Cellular South further contends that "[t]he generalized concerns of several Germantown residents regarding the aesthetics of the proposed WSF are virtually identical to the objections . . . rejected by the Sixth Circuit as legally insufficient to provide substantial evidence to deny an application for a WSF." (Id. at 11 (citation omitted).)

....

Just as in *West Bloomfield* -- and in contrast to *Helcher* and *VoiceStream* -- these opinions are not based on objective evidence, and instead amount to asserting: "not in my backyard." **"[A] few generalized expressions of concern with aesthetics, standing alone, cannot serve as substantial evidence on which to base a wireless permit denial."** *VoiceStream*, 342 F.3d at 831 (quoting *New Par v. City of Saginaw*, 301 F.3d 390, 398 (6th Cir. 2002)). Accordingly, the Court finds that the City's reasons for denial concerning aesthetics and property values were not based on substantial evidence in the record. See *Telespectrum*, 227 F.3d at 424 (finding testimony by residential landowners regarding diminishing property values was merely "unsupported opinion" because the testimony was not supported by substantial evidence)." *Id.* (Emphasis added).

The U.S. Court of Appeals for the Sixth Circuit applied the same principles in *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794 (6th Cir. 2012):

While the concerns brought before the Board certainly relate to building a wireless facility that is aesthetically pleasing and "harmonious with the surrounding area," the evidence in the record is

³ Tennessee, like Kentucky, is in the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit. Accordingly, the decisions of U.S. District Courts in Tennessee interpreting law of the Sixth Circuit, are persuasive in Kentucky.

hardly substantial. The generalized complaints effectively amount to NIMBY—not in my backyard. How substantial must substantial evidence be? Substantial evidence should be substantiated. *Telespectrum*, 227 F.3d at 424 (noting that the unsupported testimony of a community resident, though "credible [and] sympathetic[,] . . . was no more than unsupported opinion" and was not substantial evidence). The evidence relied on by the Board of Trustees was merely alleged, not substantiated....

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. *New Par v. City of Saginaw*, 301 F.3d 390, 399 n.4 (6th Cir. 2002) (citing *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 688, 695 (4th Cir. 2000) ("If, however, the concerns expressed by the community are objectively unreasonable, such as concerns based upon conjecture or speculation, then they lack probative value and will not amount to substantial evidence.")).

If § 332 were read as broadly as the Township suggests and these generalized objections sufficed, any wireless facility could be rejected. Anyone who opposed a cell tower in their backyard could offer an excuse that it would be bad for the community, would not be aesthetically pleasing, or would be otherwise objectionable. But that by itself is not enough. There must be evidence. And not just any evidence—evidence that is *substantial*. And substantial evidence must be substantiated by something. "Substantial evidence, in the usual context, has been construed to mean less than a preponderance, but more than a scintilla of evidence." *Cellular Tel. Co.*, 166 F.3d at 494.

The fourth reason provided is that "the Zoning Ordinance (Section 26-49 a.10) specifies that the Township Board found that the presence of numerous tower and pole structures, particularly if located within residential areas, would decrease the attractiveness of and destroy the character and integrity of the community." Section 26-49(a)(10) of the zoning ordinance states: "The township board finds that *the presence of numerous tower and/or pole structures, particularly if located within residential areas, would decrease the attractiveness and destroy the character and integrity of the community.*" (emphasis added). The former stated reason simply parrots the language of the ordinance. Merely repeating an ordinance does not constitute substantial evidence. See, e.g., *T-Mobile Ne. LLC v. City of Lawrence*, 755 F. Supp. 2d 286, 291 (D. Mass. 2010). Further, the evidence in the record suggests quite the contrary. There were not numerous towers or poles in that area—in fact, the lack of wireless towers in that area was the reason why T-Mobile sought to build one.

The Township's reasons for denial concerning aesthetics were not based on substantial evidence in the record." *Id.*

The PSC has itself repeatedly recognized that lay opinion testimony as to aesthetics does not constitute evidence which could support a denial of a CPCN for a new proposed cellular antenna tower. 2017 Ky. PUC LEXIS 1167 (Order of December 18, 2017 in Case 2017-0369); 2017 Ky. PUC LEXIS 1167 (Order of September 7, 2008 in Case No. 2018-00095); and 2020 KY. PUC LEXIS 1621 (Order of August 18, 2020 in CASE NO. 2020-00139).

Exclusion of lay opinion testimony on aesthetics is fully consistent with the above precedent. Interveners and public commenters should not be misled that their *lay opinions* as to aesthetics could support a denial of the CPCN Application. Any lay testimony as to the aesthetic impact of the proposed cellular antenna tower should be limited to demonstrable empirical facts. Allowing lay opinion testimony on aesthetics creates the implication that a new tower CPCN application involves a popularity contest. Federal and Kentucky law⁴ does not allow such an approach to permitting decisions.

⁴ See *Jost, supra*, and Section 2 of the Kentucky Constitution as to arbitrary governmental action.

4.0 REQUEST FOR RELIEF

WHEREFORE, the Applicants request the PSC and/or its Hearing Officer to exclude lay opinion testimony on aesthetic effects of the proposed tower prior to the start of the upcoming Hearing. 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 lay opinion testimony on aesthetics outright, the PSC and/or its Hearing Officer should state at the beginning of the Hearing that federal cases, specifically the aforementioned *Cellco Partnership* and *T-Mobile Opinions*, prevent the PSC from relying on lay person opinion testimony on aesthetics to deny a requested CPCN for a new tower. Persons attending the Hearing would then be fully aware of the federal limitation on the PSC's decision. Due process of Applicants would be protected and public confidence in the hearing process and ultimate PSC decision would be advanced. 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
2663 Blue Bird Road
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Respectfully submitted,

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