

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF EAST KENTUCKY NETWORK)	
LIMITED LIABILITY COMPANY FOR THE)	
ISSUANCE OF A CERTIFICATE OF PUBLIC)	CASE NO.
CONVENIENCE AND NECESSITY TO CONSTRUCT)	2009-00064
A WIRELESS TELECOMMUNICATIONS FACILITY)	
IN LETCHER COUNTY, KENTUCKY)	

O R D E R

On March 6, 2009, East Kentucky Network, LLC, formerly Mountaineer Cellular Limited Liability Company ("Applicant"), filed an application seeking a Certificate of Public Convenience and Necessity ("CPCN") to construct and operate a wireless telecommunications facility. The proposed facility consists of a self-supporting antenna tower not to exceed 314 feet in height, with attached antenna, to be located on a ridge approximately three miles northwest of Whitesburg near Dry Fork, Letcher County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 8' 49.4" by West Longitude 82° 52' 6.4".

The Applicant has provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility. Based upon the application, the design of the tower and foundation conforms to applicable nationally recognized building standards, and a Licensed Professional Engineer has certified the plans.

Pursuant to 807 KAR 5:063, the Applicant has notified the County Judge/Executive of the proposed construction. The Applicant has filed applications with the Federal Aviation Administration (“FAA”) and the Kentucky Airport Zoning Commission (“KAZC”) seeking approval for the construction and operation of the proposed facility. Both decisions are pending.

The Applicant has filed evidence of the appropriate notices provided pursuant to 807 KAR 5:063. The notices solicited comments and informed the recipients of their right to request intervention. On April 20, 2009, the Commission granted intervention to Lee Etta Cummings (“Intervenor”).

On May 8, 2009, an Order was issued stating that information regarding potential alternative sites for the proposed construction must be filed within 20 days of the date of the Order. The Intervenor submitted a list of five potential alternative sites to be considered at the hearing. The Applicant filed a response to the Intervenor’s list on June 12, 2009.

By Order dated August 14, 2009, a formal hearing was scheduled for October 6, 2009. The Commission ordered that no evidence of any alternate sites, other than those provided pursuant to the May 8, 2009 Order, could be introduced at the hearing.

On October 6, 2009, a formal hearing was held with Vice-Chairman James Gardner serving as the hearing officer. During the hearing, the Applicant provided extensive evidence supporting the necessity of the proposed construction. The Applicant provided evidence that the service area the proposed construction would cover was currently a “dead” area for wireless service and that the proposed location would provide sufficient coverage in that “dead” area. The Applicant provided testimony

that many complaints and requests for coverage had been submitted from police officers and other emergency personnel, as well as other members of the community.¹ The Applicant also provided testimony that this “dead” area included a stretch of Highway 15 connecting Whitesburg and Isom that is highly traveled and known for frequent accidents.²

Testimony was given as to the alternate sites proposed by the Intervenor. Alternate Site 1 was the focus during the hearing, since the Applicant agreed that Alternate Site 1 would provide adequate coverage for its needs and admitted that this was one of the first sites it had considered for the tower.³ However, the Applicant stated that, in order to move the tower to this location, a new lease agreement would have to be obtained; a new National Environmental Protection Agency inspection conducted; a new State Historic Preservation Office inspection conducted and a report issued; a new application process with the Commission started; and a new road constructed to the tower location, which would result in environmental damage as well as enormous cost.⁴

The Intervenor provided evidence that Alternate Site 1 would not interfere with the potential development of her property or mining operations. She also provided a

¹ Pre-filed testimony of Marty Thacker at 7, 31-35.

² *Id.* at 42-44.

³ Response of Applicant to Filing of Alternate Tower Locations of the Intervenor, at 1 (June 12, 2009).

⁴ *Id.* at 13-22.

written estimate for the road construction that was significantly less expensive than the Applicant's estimate.⁵

The Intervenor provided evidence that the proposed location could possibly interfere with coal mining operations on her property. Testimony was given as to the difficulty in blasting around the tower, as well as the concern of the tower falling when blasting occurred.⁶ However, at the time of the hearing, no mining permit had been obtained for the Intervenor's property.⁷ Evidence was also provided showing a potential loss of development opportunities if the tower were built in the proposed location. The Intervenor testified that, over the past few years, more than one entity has been interested in the development of this property.⁸ However, evidence was presented that an agreement with entities other than the Intervenor would have to be reached before any development could take place at this location.⁹

Both parties submitted appraisal reports that stated there would be some loss to the value of Ms. Cummings' property; however, the amount of this decrease varied significantly.

KRS 278.650 states, "In reviewing the application, the commission may take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values." The evidence presented shows that the

⁵ Pre-filed testimony of Fred Webb at 3 and pre-filed testimony of Intervenor at 2.

⁶ Pre-filed testimony of Fred Webb at 2.

⁷ Transcript of Evidence at 109.

⁸ Pre-filed testimony of Lee Etta Cummings at 1.

⁹ Transcript of Evidence at 129.

general character of the area around the proposed location is farm/pasture land. There was no evidence as to any development that has taken place around this area. Testimony was given that the area is on top of a mountain and the majority of the land is not flat land. Furthermore, 807 KAR 5:063, Section 1(s) requires an applicant to state that it “has concluded that there is no more suitable location reasonably available from which adequate service to the area can be provided, and that there is no reasonably available opportunity to co-locate.” The Intervenor submitted five potential alternate sites. The parties focused on Alternate Site 1 during the hearing. Although Alternate Site 1 would provide adequate service to the “dead area,” the Applicant presented evidence regarding the cost of constructing a road to the location and the difficulty in constructing a road that would be at a grade for safe travel to and from the tower for regular maintenance or emergency situations. Therefore, Alternate Site 1 is not a more suitable location. The Applicant stated that there was no more suitable location and that there was no opportunity to co-locate.¹⁰

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that the Applicant has demonstrated that a facility is necessary to provide adequate utility service and that, therefore, a Certificate of Public Convenience and Necessity to construct the proposed facility should be granted. Although the record indicates a decrease in the value of the Intervenor’s property, the amount of the decrease varies significantly. Based on the general area and nearby land uses, the Commission finds the Applicant’s appraisals to be more accurate. The potential for loss of revenue from coal mining operations is merely a possibility. A

¹⁰ Pre-filed testimony of Marty Thacker at 35-36.

mining permit had not been obtained at the time of the hearing, and evidence was provided to show that, with the correct blasting precautions, all of the coal could be recovered. Therefore, when the small decrease in the value of the Intervenor's property is weighed against the public need and necessity, the Commission finds that the CPCN should be granted. A denial of the application would result in a delay of up to a year or more in providing wireless coverage to the area in question, which is a highly traveled road. Emergency personnel and the citizens of Letcher County need wireless coverage in this area. The harm this delay would cause to the entire community far outweighs the small decrease in value to the Intervenor's property.

Pursuant to KRS 278.280, the Commission is required to determine proper practices to be observed when it finds, upon complaint or on its own motion, that the facilities of any utility subject to its jurisdiction are unreasonable, unsafe, improper, or insufficient. To assist the Commission in its efforts to comply with this mandate, the Applicant should notify the Commission if it does not use this antenna tower to provide service in the manner set out in its application and this Order. Upon receipt of such notice, the Commission may, on its own motion, institute proceedings to consider the proper practices, including removal of the unused antenna tower, which should be observed by the Applicant.

IT IS THEREFORE ORDERED that:

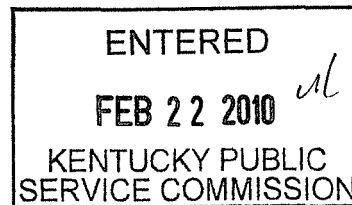
1. The Applicant is granted a CPCN to construct a wireless telecommunications facility. The proposed facility consists of a self-supporting antenna tower not to exceed 314 feet in height, with attached antenna, and is to be located on a ridge approximately three miles northwest of Whitesburg near Dry Fork, Letcher County,

Kentucky. The coordinates for the proposed facility are North Latitude 37° 8' 49.4" by West Longitude 82° 52' 6.4".

2. The Applicant shall file a copy of the final decisions regarding the pending FAA and KAZC applications for the proposed construction within 10 days of receiving the decisions.

3. The Applicant shall immediately notify the Commission in writing if, after the antenna tower is built and utility service is commenced, the tower is not used for a period of three months in the manner authorized by this Order.

By the Commission



ATTEST:


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