

RECEIVED

DEC 30 2019

PUBLIC SERVICE
COMMISSION

**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)	
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC)	CASE NO.: 2019-00176
CONVENIENCE AND NECESSITY TO CONSTRUCT)	
A WIRELESS COMMUNICATIONS FACILITY)	
IN THE COMMONWEALTH OF KENTUCKY)	
IN THE COUNTY OF CASEY)	

SITE NAME: DUNNVILLE RELO / PHIL

**APPLICANT’S MEMORANDUM IN SUPPORT OF GRANT OF A CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY**

1.0 INTRODUCTION

New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility (“AT&T” or “Applicant”), by counsel, files this Memorandum in Support of Grant of a Certificate of Public Convenience and Necessity (“CPCN”) in this proceeding. Grant of the CPCN is requested pursuant to KRS 278.020, 278.650, 278.665, 807 K.A.R. 5.063, and the federal Telecommunications Act.¹ On the entire administrative record and applicable law, there is no basis to delay further issuance of the CPCN, and Applicant requests a CPCN be granted forthwith.

¹ See 47 U.S.C. Section 332(c)(7)(B).

2.0 FACTUAL BACKGROUND

The Application for CPCN was filed June 7, 2019. Applicant has complied with all filing requirements of 807 K.A.R. 5:063, including requirements as to public notice, for submission of a development plan, and for all submissions with required signatures and stamps of Kentucky-licensed engineers. Kentucky Public Service Commission (“PSC”) staff issued a “no deficiency” letter dated June 13, 2019 in acknowledgement of the completeness of the Application. No waivers or deviations from any regulations have been requested. The PSC denied all pending requests for intervention by its Orders of October 1, 2019.

Applicant has contemporaneously filed a Motion for Confidential Treatment of Supplementary Evidence² including:

- (1) an Affidavit of a Principal-Network Planning Engineer of AT&T addressing the service advantages of the proposed new cellular antenna tower; and
- (2) Documentation of Cost Advantages of the proposed new Uniti Towers, LLC (“Uniti”) communications facility over the existing SBA tower on which non-party objectors have demanded that AT&T remain located.

Applicant has also contemporaneously filed the Real Estate Value Impact Study (“Katz Impact Study”) of highly credentialed appraiser Glen D. Katz³, which constitutes expert testimony on “land uses and values.” There is no other expert testimony of record on such issues.

²Such Supplementary Evidence is included in manilla envelopes marked ‘CONFIDENTIAL.’

³Mr. Katz’s extensive professional credentials as an appraiser are detailed beginning on page 24 of the above-mentioned Study.

3.0 ARGUMENT

Application Ripe for Decision. The Application was filed with the PSC on June 7, 2019. The Application and its incorporated Exhibits as well as the Supplementary Evidence and Applicant's other filings of record establish "fully [t]he facts relied upon to show that the proposed construction or extension is or will be required by public convenience or necessity...."⁴

There may be objectors who desire an open-ended comment period and for the PSC to delay reaching a decision in order to prevent construction of the proposed tower. However, the U.S. Congress has encouraged the "rapid deployment of new telecommunications technologies."⁵ Also, the Federal Communications Commission ("FCC"), by adoption of its 150 day "Shot Clock"⁶ for permitting decisions on new cellular antenna towers, has recognized that timing of such decisions is important. With a "no deficiency" letter having been issued by PSC Staff, all pending requests for intervention having been denied, and a local public hearing having occurred on December 11, 2019, this case is ripe for decision by the PSC.

⁴ 807 K.A.R. 5:001 – Section 14(i) as applied to cellular tower applications by 807 K.A.R. 5:063 – Section 1(a)(1).

⁵ See *PI Telecom Infrastructure V, LLC v. Georgetown-Scott County Planning Comm'n*, 234 F. Supp. 3d 856 (E.D. Ky. 2017) ("Congress enacted the TCA to promote competition between service providers that would inspire the creation of higher quality telecommunications services and to encourage the rapid deployment of new telecommunications technologies.")

⁶ *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 F.C.C. Rcd. 13994, 14013(a/k/a "Short Clock Ruling").

Current Market Rent Compels Grant of CPCN. The above-referenced Documentation of Cost Advantages shows the wide disparity in monthly rent between the existing SBA tower and the proposed Uniti tower. There is no basis to confine AT&T to remaining on the existing SBA tower when Uniti has offered a substantially lower cost siting opportunity. Effectively, the proposed Uniti facility has established a new and substantially lower market rent. This evidence of record shows SBA's tower does not provide a "reasonably available opportunity to collocate," within the meaning of 807 K.A.R. 5:063-Section 1(s). The PSC's grant of a CPCN in Case No. 2017-00435 by Order entered November 1, 2018⁷ followed this same analysis of collocation issues in circumstances in which there was a higher rent SBA tower in the vicinity of the location of the proposed new tower. Consequently, Applicant's demonstration of the rent disparity compels grant of the CPCN in light of the PSC's finding of "no deficiency" as to Applicant's submissions, the record, PSC precedent, and all applicable law.

Broad Import of Competition. Competition is recognized as beneficial to the public in connection with the provision of wireless service. The PSC's March 26, 2018 Order in Case No. 2017-00435 explains the importance of competition:

"... [t]he competition engendered in having more than one tower is likely to improve co-location opportunities for other telecommunications providers in the area. This is likely to lead to expanded availability of advanced wireless services. [footnote omitted].

... SBA is not a wireless customer in the area or a property owner. SBA is a competitor with an interest in keeping tower rents high by limiting the number of towers. This runs counter to one of the stated purposes of the Telecommunications Act of 1996, which is to promote competition. [footnote omitted]." *Id.* at p. 5.

⁷ Copy attached hereto and incorporated as **Exhibit A**.

The General Assembly's mission for the PSC with respect to telecommunications is set forth in KRS 278.546, which provides among other things that "[s]tate-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000," and "[c]onsumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical services" (Emphasis added).

In addition to promoting competition among telecommunications infrastructure providers, approval of the requested CPCN will improve collocation opportunities for other telecommunication providers in this area under business terms that are moderated by competition. The tower proposed by Applicant is designed to accommodate antennas for AT&T and three additional service providers,⁸ which is a key to opening competition.

Radio Frequency Engineer's Affidavit. The Supplementary Evidence includes an Affidavit of a Principal-Network Planning Engineer of AT&T addressing the wireless service advantages of the proposed new cellular antenna tower. Regardless of protests of a tower company competitor, persons receiving rent from such competitor for a tower on their property, or other individual protestors, it is wireless service to the general public that is properly the primary should be of key concern of the PSC in reaching its decision on the Application. The existing SBA tower not being reasonably available for collocation per 807 K.A.R. 5:063 – Section 1(s) and this evidence of technical improvement of service each independently provide sufficient and compelling justification for the grant of a CPCN.

⁸Exhibit B to the Application, as signed/stamped by a Kentucky-licensed engineer, illustrates the proposed tower is designed to accommodate the location of antennas and equipment of three additional wireless carriers.

As explained in *Kentucky Utilities Co. v. Pub. Serv. Com'n*, 252 S.W.2d 885, 890 (Ky. 1952) "a determination of public convenience and necessity requires both a finding of the need for a new service system or facility from the standpoint of service requirements, and an absence of wasteful duplication resulting from the construction of the new system or facility." The Engineer's Affidavit leaves no doubt that the proposed tower provides the potential for improved service over the existing tower and is, thus, anything but a "wasteful duplication of service." Accordingly, grant of a CPCN is warranted.

General Land Use Concerns Fail to Support Denial of the Application. Statutes granting authority to the PSC and implementing regulations do not establish "current and historic land uses in the area and the character of the area" as dispositive criteria which determine the PSC's decision on an application for a CPCN. Per KRS 278.650, the PSC "may take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values" (emphasis added). However, it is not required to do so, and no documentation of record indicates it would be the common practice of the PSC to delve into such issues. Also, protests on the land use issues ring disingenuous with one tower already in the vicinity of the proposed tower.

The above-referenced Katz Impact Study provides expert appraiser testimony and substantial evidence in its summary page as follows:

"I have completed an impact study regarding potential influence of wireless communications tower facilities on market value of surrounding properties, specifically addressing the subject project low-density residential and agricultural neighborhood. The study consists of analyzing sale activity and value trends of properties located in proximity to cell towers, as compared to properties which are not in proximity, but are otherwise competitive as replacements in the market.

Public utilities provide a platform for economic sustainability, community growth, safety and education. These factors in turn influence value and demand for real estate. Based on the actions of buyers, occupants, and sellers of real estate, it is clear that communications towers are part of this platform. There are no indications for value diminution of low-density residential and agricultural properties located with proximity to the proposed facility, or the neighborhood in general. Consistently, factual market evidence shows this type of facility has not, and does not, negatively impact surrounding property, and supports the positive influences on value and demand for real estate.” Glen D. Katz, MAI, SRA, AI-GRS, AI-RRS - Real Estate Value Impact Study, p. 1.

Any testimony or comment by lay person objectors cannot overcome the substantial evidence provided by the foregoing conclusions of the Katz Impact Study. The Sixth Circuit’s Opinion in the *Telespectrum, Inc. v. PSC*, 227 F.3d 414 (6th Cir. 2000) tower case recognized that even the testimony of “credible, sympathetic witnesses ... was no more than unsupported opinion....” *Id.* at 424. *Telespectrum* goes on to explain “... the cases cited by the Sixth Circuit remark that opinion is not sufficient to meet the substantial evidence requirement” and concluded “... this Court does not find lay opinion evidence sufficient to satisfy the substantial evidence requirement.” *Id.* at 424.

The Sixth Circuit’s Opinion in *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794 (6th Cir. 2012) reiterates the import of expert testimony:

“... Nothing in the record suggests what qualifications Mr. Crook possessed or whether he had any expertise to opine on the coverage gap in the area. His ostensibly lay opinion is not substantial evidence. *MIOP, Inc. v. City of Grand Rapids*, 175 F.Supp. 2d 952, 956-57 (W.D. Mich. 2001) (citing *Telespectrum*, 227 F.3d at 424 *Id.* at 804.”

On this Sixth Circuit Authority, the Katz Impact Study is the only expert and substantial evidence of record on property valuation issues. Comments of lay person objectors on such issues cannot provide substantial evidence to support denial of the Application.

Aesthetic Arguments Cannot Justify Denial of CPCN. Similarly, generalized

concerns as to aesthetics do not provide any basis for denial of the Application. Such arguments based upon unsupported lay opinions regarding the siting of cell towers were rejected by the PSC in Case No. 2017-00368 and in Case No. 2017-00435.

The proposed self-support tower has been designed, configured, and located in such a manner that would objectively lead to the conclusion of no adverse effects on nearby properties. An aerial photo appearing within Exhibit L to the Application identifies extensive vegetation to be in the vicinity of the proposed tower which would provide a screening effect. Moreover, the Site Plan (C-1) contained within Exhibit B to the Application and containing the signature and stamp of a Kentucky-licensed engineer depicts the site location and a 500-foot radius line. No buildings or residences are wholly within the 500-foot radius from the proposed tower. Also, the Site Plan shows the property of the Antioch Christian Church is on the opposite side of Kentucky Highway 127 from the proposed tower site and that no building on such property is within the 500' radius from the tower. Thus, documentation of record supports no reasonable claim of adverse aesthetic impact.

The PSC regulations establish no setback distance between a cellular tower site and residential or other structures or property lines and further provide no specific aesthetic criteria for decisions on CPCN requests for new tower construction. In this context, it would be arbitrary, discriminatory, not founded on substantial evidence, and otherwise a prohibition of service under the Telecommunications Act to deny the Application on a finding it is purportedly too close to other land uses.

Under federal law, any decision rendered by state or local authorities regarding the placement of wireless facilities must be in writing and supported by substantial evidence

in a written record. 47 U.S.C. § 332(c)(7)(B)(iii). Generalized aesthetic concerns based on lay opinion, such as what any resident in any area in which any tower is placed might make, do not constitute substantial evidence. See *Cellco Partnership v. Franklin Co.*, KY, 553 F. Supp. 2d 838, 845-846 (E.D. Ky. 2008); *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 804 (6th Cir. 2012). Neither the PSC enabling statutes, nor its implementing regulations establish any specific objective standards for aesthetic considerations in rulings on a request for a CPCN for a new tower.

Absence of Substantial Evidence Supporting Denial is Dispositive. Testimony and public comment of persons opposed to the proposed cellular antenna tower include lay opinions, speculation, irrelevant facts or issues, and other considerations which could not support a denial of the Application within the controlling standards of Kentucky law or the federal Telecommunications Act. Moreover, the PSC has recognized filings by SBA arise from self-serving proprietary considerations.⁹

The PSC's Order of November 22, 2019, as amended December 3, 2019, made it clear that "[N]o evidence shall be taken at the local public hearing" in Casey County on December 11, 2019. Long before the hearing, Applicant had submitted uncontroverted expert testimony, whether in the form of signed/sealed documents, reports, and/or affidavits, in support of the grant of the CPCN throughout this proceeding.

The adopted application requirements of the agency with jurisdiction over permitting of a tower are critical to determine whether a decision is supported by substantial

⁹See page 4 of PSC's October 1, 2019 Order in current proceeding finding SBA's interest to be "commercial." See also page 5 of PSC's March 26, 2018 Order in Case No. 2017-00435.

evidence. *Cellco Partnership v. Franklin County*, 553 F.Supp.2d 838 (E.D. Ky. 2008)

explains:

““The TCA’s substantial evidence requirement “surely refers to the need for substantial evidence under the criteria laid down by the zoning law itself.” *Town of Amherst, N.H. v. Omnipoint Communications*, 173 F.3d 9, 14 (1st Cir. 1999). “The substantial evidence test applies to the locality’s own zoning requirements....” *Id.* at 16.” *Id.* at 545-546.

Applicant has complied with the PSC’s express requirements on their face and has further received a “no deficiency” letter on the Application as referenced above. Any objectors’ argument for adding additional or different requirements to the plain requirements of statute and regulations should have no impact on the PSC’s decision. Considering the multitudes of cellular tower CPCN applications which have been decided by the PSC on application of existing statutory and regulatory standards¹⁰, a contrary decision in this proceeding could not be based on substantial evidence. In addition, such a decision would be arbitrary under Section 2 of the Kentucky Constitution and discriminatory against AT&T under the Telecommunications Act.

Futility of Argument Against the CPCN. Non-party objectors might expect the PSC to undertake extraordinary efforts to find evidence or concoct a reason to deny the requested CPCN in circumstances in which uncontroverted evidence of record overwhelming supports the Application. However, as made clear by the Kentucky Court of Appeals in *Energy Regulatory Commission v. Kentucky Power Company*, 605 S.W.2d 46 (Ky. App. 1980), the PSC is not required to go beyond the record before it:

“The Commission had no duty to refute evidence submitted to it by an applicant who had the burden of proof. We believe the better rule to be employed by the circuit court in its review of the Commission’s decision is

¹⁰ Applicant incorporates by reference all Orders of the PSC granting CPCNs for construction of cellular antenna towers in 2019.

that when all the evidence has been heard and reasonable men differ in the conclusion to be drawn, the question should be left to the trier of fact. *Lee v. Tucker, Ky.*, 365 S.W.2d 849 (1963). KRS 278.440 provides that the circuit court shall decide this kind of appeal upon the evidence submitted to the Commission as shown by the transcript and no other evidence shall be received.”

Consistent with Kentucky law and the TCA, Applicant asks the PSC properly to make its decision on the existing evidentiary record and grant the requested CPCN. Such a decision would be well-positioned to survive any KRS 278.440 appeal objectors might choose to mount.

4.0 CONCLUSION

On the full administrative record, Applicant has overwhelmingly met its burden of proof to obtain grant of a CPCN. There is substantial evidence of record supporting such grant and there is no substantial evidence which could sustain a denial. Accordingly, the PSC should forthwith grant such CPCN as there is no reason for delay.

5.0 REQUEST FOR RELIEF

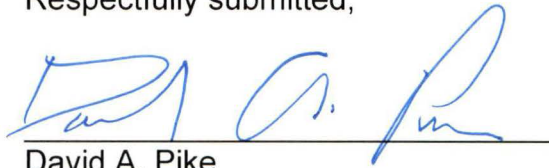
WHEREFORE, Applicant respectfully requests the Kentucky Public Service Commission to:

- (a) Accept this Memorandum for filing;
- (b) Issue the requested CPCN
- (c) Grant Applicant any other relief to which it is entitled.

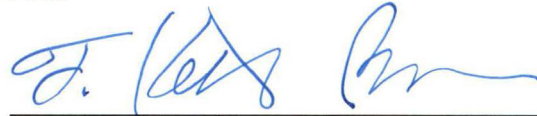
6.0 CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of December 2019, the foregoing was hand-delivered to the offices of the Kentucky Public Service Commission in Frankfort, Kentucky for filing in the within proceeding. No natural person or entity has been granted intervention in this proceeding. Accordingly, no other service of this Motion has been made.

Respectfully submitted,



David A. Pike
And



F. Keith Brown
Pike Legal Group, PLLC
1578 Highway 44 East, Suite 6
P. O. Box 369
Shepherdsville, KY 40165-0369
Telephone: (502) 955-4400
Telefax: (502) 543-4410
Email: dpike@pikelegal.com
Attorneys for Applicant

EXHIBIT A

2018 Ky. PUC LEXIS 999

Kentucky Public Service Commission

November 01, 2018

CASE NO. 2017-00435

KY Public Service Commission Decisions

Reporter

2018 Ky. PUC LEXIS 999 *

**In the Matter of: APPLICATION OF TILLMAN INFRASTRUCTURE LLC AND
NEW CINGULAR WIRELESS PCS, LLC D/B/A AT&T MOBILITY FOR
ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
TO CONSTRUCT A WIRELESS COMMUNICATIONS FACILITY IN THE
COMMONWEALTH OF KENTUCKY IN THE COUNTY OF MARSHALL**

Core Terms

proposed facility, tower, wireless communication, motion to intervene, antenna tower, antenna, notice, notify, foot, rend, proposed construction, reasonably available, provide information, utility services, proper practice, own motion, telecommunication, infrastructure, co-location, convenience, coordinates, latitude, wireless, height, site

Opinion

[*1]

ORDER

On November 14, 2017, Tillman Infrastructure, LLC (Tillman), and New Cingular Wireless, PCS, d/b/a AT&T Mobility (Applicants), 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 an antenna tower not to exceed 325 feet in height, with attached antennas, to be located at 1641 Lee Burd Road, Benton, Kentucky. The coordinates for the proposed facility are North Latitude 36 [degree] 49'24.34" by West Longitude 88 [degree] 28'25.57".

Applicants have 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 conform to applicable nationally recognized building standards, and a licensed professional engineer has certified the plans.

Pursuant to 807 KAR 5:063, Applicants have filed statements of having provided the required notifications regarding the proposed construction. Pursuant to 807 KAR 5:063, Applicants have filed evidence that the county judge/executive and all property owners within 500 feet and contiguous [*2] to the cell site have been notified of the proposed construction. The notices solicited any comments and informed the recipients of their right to request intervention.

SBA Properties filed a motion to intervene on December 27, 2017, and it was denied by Order of the Commission dated March 26, 2018. Mr. Scott Norman filed a motion to intervene on April 10, 2018, and it was denied by Order of the Commission dated July 2, 2018. No other requests to intervene or public comments have been filed with the Commission.

Both motions to intervene raised the issue of whether co-location was reasonably available (Applicants facilities are currently located on SBA Properties' structure pursuant to a lease agreement). Although the motions to intervene were denied, Commission Staff issued, and Applicants responded to, one round of data requests on this issue. The data requests revealed that within a 50-mile radius of the site of the proposed wireless communication facility, the rent on towers owned by SBA Properties are 58.7% greater than the rent on wireless communication facilities owned by other companies. Applicants also provided information that the rent on the proposed tower would be less [*3] than half of what they are presently paying SBA Properties. Therefore the Commission believes that Applicants have met their burden of showing that co-location is not reasonably available, even with the close physical proximity of SBA Properties' wireless communication facility.

AT&T Mobility 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. The FAA application has been approved and the application with KAZC is pending approval.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that Applicants have demonstrated that a facility is necessary to provide adequate utility service and, therefore, a CPCN to construct the proposed facility should be granted.

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 [*4] to comply with this mandate, Applicants should notify the Commission if the antenna tower is not used to provide service in the manner set out in the 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 Applicants.

IT IS THEREFORE ORDERED that:

1. Applicants are granted a CPCN to construct a wireless telecommunications facility. The proposed facility consists of an antenna tower not to exceed 325 feet in height, with attached antennas, and to be located at 1641 Lee Burd Road, Benton, Kentucky. The coordinates for the proposed facility are North Latitude 36 [degree] 49'24.34" by West Longitude 88 [degree] 28'25.57".

2. Applicants shall file with the Commission notice of KAZC's approval of their application within ten days of receiving said approval.
3. Applicants shall immediately notify the Commission in writing, if, after the 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.
4. Documents filed, if any, in the future pursuant [***5**] to ordering paragraph 2 or 3 herein, shall reference this case number and shall be retained in the post-case correspondence file.
5. This case is closed and removed from the Commission's docket.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

By the Commission

KY Public Service Commission Decisions

End of Document