

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF EAST)	
KENTUCKY NETWORK, LLC D/B/A)	
APPALACHIAN WIRELESS FOR THE ISSUANCE)	CASE NO.
OF A CERTIFICATE OF PUBLIC CONVENIENCE)	2024-00174
AND NECESSITY TO CONSTRUCT A)	
REPLACEMENT TOWER IN MORGAN COUNTY,)	
KENTUCKY)	

ORDER

On January 14, 2025, East Kentucky Network, LLC d/b/a Appalachian Wireless (Appalachian Wireless) filed East Kentucky Network, LLC D/B/A Appalachian Wireless's Motion for Reconsideration of the December 23, 2024 Order (Motion for Reconsideration or Motion), pursuant to KRS 278.400, requesting reconsideration of the final Order entered December 23, 2024, regarding the denial of Certificate of Public Convenience and Necessity (CPCN) application to construct and operate a wireless telecommunications facility. The proposed facility consists of a tower not to exceed 300 feet in height, with attached antennas, to be located on a tract of land near 2220 Centerville Road, West Liberty, Morgan County, Kentucky, 41472. The coordinates for the proposed facility are North Latitude 37 50' 18.5" by West Longitude 83 17' 43.3".¹ The

¹ The application was originally filed on June 11, 2024. By letters dated June 13, 2024, and July 23, 2024, Appalachian Wireless was informed of filing deficiencies. Those deficiencies were cured, and the application deemed filed on July 31, 2024.

December 23, 2024 Order denied the CPCN based on the lack of proof of service concerning notice to one of the affected property owners, Isaac and Kristin Allen (Allens).²

Pursuant to 807 KAR 5:063, Appalachian Wireless has filed statements that it provided the required notifications regarding the proposed construction; as discussed below, notice was mailed to but not proven to have been received by at least one of the adjoining property owners.³ Pursuant to 807 KAR 5:063, Appalachian Wireless has filed a list, including the Morgan County Judge/Executive and all property owners within 500 feet and contiguous to the cell site, to whom notice of the proposed construction was sent by certified mail.⁴ The notices solicited any comments and informed the recipients of their right to request intervention.⁵

As of the date of this Order, no public comments have been received. There are no intervenors.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when “the evidence presented leaves no room for difference of opinion among reasonable minds.”⁶

² Order (Ky. PSC Ded. 23, 2024).

³ Application at 1-2.

⁴ Application, Exhibit 2.

⁵ Application, Exhibit 2.

⁶ *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

An order can only be unlawful if it violates a state or federal statute or constitutional provision.⁷

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

KRS 278.665(2) establishes the requirement that every person who owns property contiguous to where the proposed cellular antenna tower will be located, receives notice by certified mail, return receipt requested, of the proposed construction, given the Commission docket number under which the application will be processed, and informed of the opportunity to intervene in the Commission proceedings on the application for cellular antenna towers located outside of an incorporated city.

MOTION

Appalachian Wireless' Motion for Reconsideration acknowledged that there was no "signed green card" which would have been proof of service demonstrating the Allens received notice of the replacement cell tower.⁸ Appalachian Wireless argued, however, the provided printout from the United States Postal Service (USPS) tracking website was

⁷ *Public Service Comm'n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm'n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

⁸ Motion for Reconsideration (filed Jan. 14, 2025) at 1.

sufficient proof of delivery and pointed out that the tracking number on the USPS tracking printout and the certified mail receipt are the same.⁹

Appalachian Wireless subsequently obtained an affidavit dated January 10, 2025, from the Allens which attested to the fact that they had received notice from Appalachian Wireless on or about October 3, 2024, informing them of the application to the Commission for permission to replace the Tower and their right to intervene.¹⁰ Additionally, the affidavit states that another notice was hand delivered.¹¹

DISCUSSION AND FINDINGS

Having reviewed the evidence and the motion in this matter, the Commission finds that rehearing should be granted. The information originally provided by Appalachian Wireless had three different mailing addresses for the Allens and no “signed green card.”¹² The address on the notice itself, the address on the Certified Mail Receipt attached to the notice, and the address on the USPS tracking website for the notice, were all different.¹³ Additionally, although the tracking number on the USPS tracking printout and the certified mail receipt were the same, the USPS tracking website receipt indicates only that it was purportedly “left with an individual at Hazel Green, Ky 41332.”¹⁴ Again,

⁹ Although the tracking number on the USPS tracking printout and the certified mail receipt are the same, the USPS tracking website receipt indicates only that it was purportedly “left with an individual at Hazel Green, Ky 41332,” the Certified Mail Receipt read that it was sent to “Grassy Creek, Ky 41352,” and the address on the Public Notice indicated that it was purportedly sent to the Allens went to “West Liberty, Ky 41472.”

¹⁰ Motion for Reconsideration, Exhibit 1.

¹¹ Motion for Reconsideration, Exhibit 1.

¹² Application, Exhibit 2 and Appalachian Wireless’s Motion for Extension (filed Oct. 14, 2024) Exhibit A-2.

¹³ Application, Exhibit 2 and Appalachian Wireless’s Motion for Extension, Exhibit A-2.

¹⁴ Appalachian Wireless’s Motion for Extension, Exhibit A-2.

this was different address than the address on the Certified Mail Receipt and the Commission notes that this, alone, is not sufficient evidence that the Allens received actual notice. Had the addresses been the same, the proof of the USPS tracking website receipt may have been sufficient. Multiple requests for information were issued to Appalachian Wireless in an effort to obtain sufficient proof that the Allens had received actual notice.¹⁵ As addressed in the original Order entered December 23, 2024, the required proof of notification was not submitted with the application nor was it submitted following multiple requests for information.¹⁶

It was not until Appalachian Wireless filed their Motion for Reconsideration with the attached affidavit from the Allens, attesting that they had received the notice on or about October 3, 2024, that the record was clear the Allens had in fact received notice of the proposed construction as required by KRS 278.665(2).

Motions for a rehearing or reconsideration may be based on new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. Obtaining proof from the Allens that they had received notice presumably was possible at the time of the application or prior to discovery response deadlines; however, the affidavit is new evidence for the Commission to consider.

In addition to property owner notice, CPCN applications require applicant address and satisfy other elements to obtain approval. To that end, Appalachian Wireless has

¹⁵ Commission Staff's First Request for Information (filed Sept. 18, 2024), Commission Staff's Second Request for Information (filed Oct. 24, 2024), and Commission Staff's Third Request for Information (filed Nov. 19, 2024).

¹⁶ Order (Ky. PSC Dec. 23, 2024).

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 applications are pending.¹⁷

Appalachian Wireless also provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility.¹⁸ 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.

Appalachian Wireless has provided information, including a radio frequency analysis, that the proposed facility is required to provide adequate service and improve its service coverage.¹⁹ Appalachian Wireless is replacing an existing structure-

To obtain a CPCN, Appalachian Wireless must demonstrate a need for such facilities and an absence of wasteful duplication.²⁰

“Need” requires “a showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated.”²¹ “Wasteful duplication” is defined as “an excess of capacity over need” and “an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties.”²² The

¹⁷ Application, Exhibit 6.

¹⁸ Application, Exhibit 5.

¹⁹ Application, Exhibit 1.

²⁰ *Kentucky Utilities Co. v. Public Service Com’n*, 252 S.W.2d 885 (Ky. 1952).

²¹ *Kentucky Utilities Co. v. Public Service Com’n*, 252 S.W.2d 885, 890 (Ky. 1952).

²² *Kentucky Utilities Co. v. Public Service Com’n*, 252 S.W.2d 885, 890 (Ky. 1952).

wireless market is competitive and, other than the placement of towers and interconnection with other telecommunications providers, the Commission has little jurisdiction over wireless providers, including no jurisdiction over the rates and earnings of a wireless provider.²³

Having considered the evidence of record and being otherwise sufficiently advised, the Commission now finds that Appalachian Wireless has demonstrated that there is a need for the proposed facility as a result of increasing demand for telecommunications services, to assure adequate coverage in the area, and to improve service in Morgan County by providing a more cohesive network.

The Commission also finds that the proposed facility will not result in wasteful duplication as this is a replacement tower. The Commission, therefore, finds that 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 to comply with this mandate, Appalachian Wireless 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 shall be observed by Appalachian Wireless.

²³ See KRS 278.54611.

IT IS THEREFORE ORDERED that:

1. Appalachian Wireless's motion for reconsideration is granted.
2. Appalachian Wireless is granted a CPCN to construct a wireless telecommunications facility. The proposed facility consists of a tower not to exceed 300 feet in height, with attached antennas, to be located 2220 Centerville Road, West Liberty, Morgan County, Kentucky, 41472. The coordinates for the proposed facility are North Latitude 37 50' 18.5" by West Longitude 83 17' 43.3".
3. Appalachian Wireless 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 three consecutive months in the manner authorized by this Order.
4. Appalachian Wireless shall file a copy of the final decisions regarding the pending FAA and KAZC applications for the proposed construction within ten days of receiving the decisions.
5. Documents filed, if any, in the future pursuant to ordering paragraph 3 herein shall reference this case number and shall be retained in the post-case correspondence file.
6. This case is closed and removed from the Commission's docket.

PUBLIC SERVICE COMMISSION

Chairman 

Commissioner


Commissioner

Commissioner John Will Stacy did not participate in the deliberations or decision concerning this case.

ATTEST:

 
Executive Director

ENTERED
JAN 28 2025
AH
KENTUCKY PUBLIC
SERVICE COMMISSION

*Krystal Branham
Attorney
East Kentucky Network, LLC dba Appalachian
101 Technology Trail
Ivel, KY 41642

*Michael L Johnson
East Kentucky Network, LLC
101 Technology Trail
Ivel, KY 41642

*East Kentucky Network, LLC dba Appalachian
101 Technology Trail
Ivel, KY 41642

*Raina Helton
East Kentucky Network, LLC
101 Technology Trail
Ivel, KY 41642