

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

NEW CINGULAR WIRELESS PCS, LLC,)
d/b/a AT&T MOBILITY,)
)
Plaintiff,)
)
vs.)
)
THE VILLAGE OF)
PALMYRA, NEBRASKA)
)
Defendant.)
_____)

No. _____

COMPLAINT

This action arises out of the unlawful denial of Plaintiff’s Application For Conditional Use Permit - Tower Development Permit (“Application”) for a wireless communications facility siting request by the Board of Trustees of the Village of Palmyra, Nebraska (the “Board”). Plaintiff, New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (“AT&T”), for its complaint alleges as follows:

1. The Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the “Telecommunications Act” or the “1996 Act”) preempts State and local decisions that “prohibit or have the effect of prohibiting the provision of personal wireless services,” and requires that State and local decisions denying requests to place personal wireless service facilities, such as cell towers, be supported by substantial evidence contained in a written record. 47 U.S.C. § 332(c)(7)(B). The Board violated § 332(c)(7)(B) when it denied AT&T’s Application for permission to construct a Three Hundred and Twenty Foot (320’) wireless communications guyed

tower along with ground equipment and fencing (the “Facility”) at 915 F Road, Palmyra, Nebraska (the “Site”)¹

2. AT&T seeks to install the Facility at the Site in order to remedy a significant and substantial gap in its personal wireless service coverage in the area. AT&T considered numerous potential locations for the proposed Facility, but each of the alternatives proved infeasible. AT&T’s proposal to place the Facility at the Site is the only feasible option for filling the significant gap in coverage in the area.

3. The Board’s denial of AT&T’s Application was not based on substantial evidence contained in a written record, as required by 47 U.S.C. § 332(c)(7)(B)(iii). In addition, the Board’s denial prohibits or has the effect of prohibiting AT&T’s provision of personal wireless services, in violation of 47 U.S.C. § 332(c)(7)(B)(i). AT&T thus seeks all appropriate relief pursuant to 47 U.S.C. § 332(c)(7)(B)(v).

THE PARTIES

4. Plaintiff New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (referred to hereinafter as “AT&T”) is a Delaware limited liability company certificated to conduct business in the State of Nebraska and operates wireless communications facilities throughout the State. New Cingular Wireless PCS, LLC, is indirectly wholly owned by AT&T Inc., which through its operating subsidiaries provides wireless communication services nationwide.

5. Defendant is a Village in Otoe County, Nebraska governed by a Board of Trustees as provided under Neb. Rev. Stat. § 17-201 and 17-203.

¹ West ½ of the SW ¼ of the SE ¼ of Section 26, T9N, R9E, Otoe County, NE Parcel ID 004037500.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to (a) section 332(c)(7)(B)(v) of the Telecommunications Act because AT&T has been adversely affected and aggrieved by the Board's denial of its Application and (b) 28 U.S.C. § 1331 because this action presents a federal question under the Telecommunications Act.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Defendant resides in this Judicial District and the events and/or omissions giving rise to AT&T's claims arose in this Judicial District.

FACTS

I. Background

8. AT&T provides wireless voice and data products and services to customers nationwide, including "personal wireless services" within the meaning of Section 332 of the Telecommunications Act, 47 U.S.C. § 332 (c)(7)(c).

9. The licenses authorizing AT&T to provide wireless service in the Village were issued by the FCC pursuant to the Telecommunications Act of 1996, as amended (the "Act")² The Act establishes a national policy to "make available, so far as possible, to all people of the United States, without discrimination . . . a rapid, efficient, Nation-wide and worldwide wire and radio communications service with adequate facilities at reasonable charges for the purposes of national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151.

10. From 2007 to 2019, the number of wireless users increased from more than 255 million to over 404 million.³ According to a 2019 National Health Interview Survey conducted by

² Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

³ CTIA 2019 Annual Survey Highlight and <https://www.theglobaleconomy.com/>, January, 2020.

the National Center for Health Statistics, 60.3% of American households were wireless only.⁴ At present, the number of landline telephone subscribers across the nation is declining every year while the number of wireless subscribers increases.⁵

11. For many Americans, wireless devices have become an indispensable replacement for traditional landline telephones. Even when Americans maintain both types of service, they are opting increasingly to use wireless devices over their landline telephone. From 1996 to 2004, Americans more than quadrupled their time spent talking on their cell phones while markedly reducing the number of long distance and local calls made on traditional land lines. The number of minutes wireless customers spent on their phone increased by 29% from 2018 to 2019 alone. In 2019, American wireless subscribers spent a total of 3.1 trillion minutes talking on the phone.⁶

12. For Americans living in “wireless only” homes and working in “wireless only” businesses, cell phones are their only lifeline in emergencies. Since 2006, the number of 9-1-1 calls made by people using wireless phones has grown from around 50 million a year to over 240 million annually. Industry experts estimate that approximately 80% of those 9-1-1 calls are placed from cell phones and the percentage is growing.⁷

13. To meet the policy goals established by Congress, and provide personal wireless services to local businesses, public safety entities, and the general public, AT&T must consistently update its technology, facilities, and network to keep up to date with customers’ ever-growing demand for mobile services, including mobile data service and wireless phone coverage. Among

⁴ Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, July-December 2019. National Center for Health Statistics. September 2020. Available from: <https://www.cdc.gov/nchs/nhis.htm>.

⁵ *Id.*

⁶ <https://www.statista.com/2020>.

⁷ CTIA 2019 Annual Survey Highlight.

other things, AT&T must create and maintain a network of “cell sites,” each of which consists of antennas and related equipment designed to send and receive radio signals.

14. Wireless devices using all-digital technology operate by transmitting a radio signal to antennas mounted on a tower, pole, building, or other structure. The antennas feed the signals to electronic devices housed in a small equipment cabin or base station. The base station is connected by microwave, fiber optic cable, or ordinary telephone wire to a base station controller subsequently routing the calls throughout the world.

In order to provide reliable service to a user, coverage must overlap in a grid pattern resembling a honeycomb. In order for the entire network to be operational, there must be properly placed cell sites installed and functioning so that reliable coverage can be realized. Only when the entire system is operational will a user have service and be able to partake in uninterrupted conversations throughout a given territory. If there is no functioning cell site within a given area, there would be no service for customers within that area and mobile customers who travel through the area will experience an unacceptable level of dropped calls.

15. When there is a need to improve coverage in a specific area, AT&T’s engineers produce a search ring, identifying the area within which a wireless facility of the necessary height must be located or upgraded. The study takes into account the topography of the land, the coverage boundaries of neighboring cells, and other factors. For low power signals such as the wireless signals at issue here, there must be an unobstructed line of sight, thereby limiting the number of adequate sites at which a wireless facility may be located.

II. AT&T’s Contract with FirstNet

16. The First Responder Network Authority (“FirstNet Network”) of the United States was created under the Middle Class Tax Relief and Job Creation Act of 2012 (MCTRJCA) as an

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