

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

NE COLORADO CELLULAR, INC., a Colorado corporation, d/b/a VIAERO WIRELESS,

Plaintiff,

v.

VILLAGE OF DONIPHAN, NEBRASKA,

Defendants.

No.:

**COMPLAINT AND REQUEST FOR
EXPEDITED RELIEF PURSUANT
TO 47 U.S.C. § 332(c)(7)(B)(v)**

NE Colorado Cellular, Inc., a Colorado corporation, d/b/a Viaero Wireless (“Viaero”) asserts the following claims against the Village of Doniphan, Nebraska (“the Village”) and respectfully requests expedited consideration by the Court pursuant to the Telecommunications Act of 1996 (“TCA”), 47 U.S.C. § 332(c)(7)(B)(v).

NATURE OF THE MATTER

1. This is an action for injunctive relief to establish that the Village’s denial of Viaero’s application for a zoning change necessary to construct a wireless communications facility violates the TCA and the United States and Nebraska Constitutions. The Village failed to issue a written denial, the denial was not based on substantial evidence in the written record, and the denial prohibits Viaero from providing personal wireless services in the Village of Doniphan, Nebraska and vicinity.

PARTIES

2. NE Colorado Cellular, Inc. is organized and existing under the laws of the State of Colorado with its principal place of business in Fort Morgan, Colorado. NE Colorado Cellular, Inc. conducts business as Viaero Wireless and is referred to herein as "Viaero." Viaero is authorized to conduct business in Nebraska.

3. Viaero is licensed by the Federal Communications Commission ("FCC") to provide personal wireless services in various parts of Colorado and Nebraska, including the Village of Doniphan, Nebraska and surrounding area. Viaero is currently expanding its infrastructure to offer personal wireless services throughout southeastern Nebraska.

4. The Village is a body corporate and politic located in Doniphan, Nebraska, and has been vested with the power to sue and be sued. Neb. Rev. Stat. § 17-501.

JURISDICTION AND VENUE

5. This action arises under the TCA, 42 U.S.C. §1983, the Fourteenth Amendment to the United States Constitution, and Nebraska law. Section 704 of the TCA provides that:

Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

47 U.S.C. § 332(c)(7)(B)(v).

6. Jurisdiction over the subject matter of this action is founded upon: (a) 28 U.S.C. §§ 1331 and 1337, with respect to Claims for Relief I through IV, which are disputes arising under the TCA and the United States Constitution; and (b) 28 U.S.C. § 1367(a), with respect to the Fifth

Claim for Relief, which is a pendant claim arising under state law that is part of the same case or controversy as the federal question claims.

7. Venue is proper in the District of Nebraska under 28 U.S.C. § 1391(b), because the property affected is in, the acts complained of occurred in, and the defendants are located, in this district.

BACKGROUND

8. Viaero provides personal wireless services over a network of wireless telecommunications facilities via microwave technology, pursuant to a license from the FCC. Viaero's microwave technology is a wireless technology that uses digital transmission to improve the quality, reliability and variety of personal wireless services. This technology allows Viaero to provide expanded service to rural customers including wireless telephone and data coverage, and provides competitive choice to consumers of voice and data communications services.

9. Under FCC regulations, Viaero operates its personal wireless service for the general public as a common carrier.

10. Personal wireless service operates through the sending and receiving of signals transmitted between a mobile device, such as a wireless phone, and antennas mounted on towers, poles, buildings or other structures.

11. Although many providers of personal wireless services utilize wire facilities provided by other telecommunications carriers to connect their antennas to their larger network, Viaero's antennas are interconnected through inter-tower microwave connections. This technology requires a line of sight between Viaero's antennas.

12. Viaero's engineers use complex computer programs to determine precisely where an antenna must be located. The analysis includes factors such as the topography of the land, physical obstructions, location of other Viaero towers, and other factors. At a minimum, each antenna location and design must meet the two-fold purpose of providing (1) adequate coverage in the desired coverage area, and (2) a line of sight to another Viaero tower connected to Viaero's network. A location that does not meet both objectives is not viable for Viaero's network and would prohibit the provision of personal wireless services.

13. Viaero does not currently provide sufficient coverage in the Village of Doniphan, Nebraska area because it does not have the infrastructure available to do so. In order to provide service, Viaero performed a comprehensive site analysis of the area to identify suitable locations for a telecommunications tower. This analysis and cooperation yielded a viable location within the Village limits, on the 200 Block of North First Street, legally described as: Pt. W 1/2, SE 1/4, 5-9-9 & Pt. Lot 1, 3-D Ammunition Sub & Pt. Lot 2, Doniphan Railroad 3rd Sub., Village of Doniphan, Hall County, Nebraska. Viaero negotiated the purchase of a 104 foot by 174 foot parcel from the existing owner (the "Site").

14. The Site is zoned I-2, a zoning classification eligible for the placement of a telecommunications tower after application, and receipt, of a Conditional Use Permit ("Permit"), which must be approved by the Village's Board of Trustees ("Board").

15. The Site was carefully chosen to provide adequate coverage to the Village of Doniphan and the surrounding area and provide a line of sight to neighboring Viaero towers, which is essential to maintain communication between the towers by microwave transmission. No other locations 1) were appropriate locations for telecommunications towers from a land use

perspective; 2) provided adequate coverage to the area; and 3) allowed for line of sight to Viaero's existing network of towers.

16. Viaero submitted an application for Conditional Use Permit for the purpose of constructing a 80 foot telecommunications tower and other related structures (the "Facility") on January 22, 2010 (the "Permit Application"). The Board considered the application at its meeting on February 8, 2010, and no action was taken. Viaero representatives inquired as to whether the Village planned on ruling definitively on its Permit Application, and the item was placed on the Board's March 8, 2010 meeting agenda. At that meeting, the Board voted unanimously to deny the Permit Application.

17. Written minutes were kept of the meeting. No discussion of the merits of the Permit Application was recorded in those minutes, there is no record of any public comment, and no written decision was issued following the Board's denial of the Permit Application.

FIRST CLAIM FOR RELIEF

TELECOMMUNICATIONS ACT
(SUBSTANTIAL EVIDENCE)

18. Paragraphs 1 through 17 above are incorporated herein by reference.

19. Section 704 of the TCA provides:

Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

47 U.S.C. § 332(c)(7)(B)(iii).

20. The Village's denial of the Permit Application is not supported by any evidence, let alone substantial evidence. If anything can be discerned from the minutes of the meeting, it is that denial was a foregone conclusion.

21. The Village violated Section 704 of the TCA because the denial of the Permit Application was not supported by substantial evidence contained in a written record, contrary to 47 U.S.C. § 332(c)(7)(B)(iii).

SECOND CLAIM FOR RELIEF

TELECOMMUNICATIONS ACT
(PROHIBITION ON PROVISION OF PERSONAL WIRELESS SERVICES)

22. Paragraphs 1 through 21 above are incorporated herein by reference.

23. Under the TCA, it is unlawful for any State or local government or instrumentality thereof to "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

24. The Village's denial of the Permit Application has the effect of prohibiting Viaero from providing personal wireless services to the Village of Doniphan and surrounding areas in violation of the TCA, including 47 U.S.C. § 332(c)(7)(B)(i)(II).

THIRD CLAIM FOR RELIEF

TELECOMMUNICATIONS ACT
(FAILURE TO ISSUE WRITTEN DECISION)

25. Paragraphs 1 through 24 above are incorporated herein by reference.

26. Section 332(c)(7)(B)(iii) of the TCA provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless facilities shall be in writing...."

27. To date, the Village has not provided a written decision supporting its vote to deny the Permit Application.

28. The Village violated the TCA because 1) to date, it has failed to issue any written decision; and 2) the Board's decision denying the Permit Application is not separate from the written minutes, does not describe the reasons for denial of the Permit Application, and does not contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons. *See USOC of Greater Iowa, Inc. v. City of Bellevue*, 279 F.Supp.2d 1080, 1084-85 (D. Neb. 2003).

FOURTH CLAIM FOR RELIEF

FEDERAL DUE PROCESS

29. Paragraphs 1 through 28 above are incorporated herein by reference.

30. There is no substantial evidence in the record to support the Village's denial of the Permit Application.

31. The Village's denial of the Permit Application was not valid under any zoning regulation or the TCA, and such denial was arbitrary, capricious and irrational, and not made in good faith.

32. The Village's actions were not rationally related to a legitimate public purpose.

33. Viaero met all requirements of law for the approval of the Permit Application.

34. Rather than approve the Permit Application, the Board denied it without creating any public record as to the reasons for the denial, if any. In fact, the Board's minutes indicate that it did not actually consider the merits of Permit Application.

35. Under 47 U.S.C. § 332(c)(7)(B)(iii), The Village's denial should have been in writing and supported by substantial evidence contained in a written record.

36. The Village failed to follow the requirements of 47 U.S.C. § 332(c)(7)(B)(iii), and The Board's denial was not in writing or based on substantial evidence.

37. Denial of the Permit Application under these circumstances is a violation of Viaero's substantive and procedural due process rights granted by the Fourteenth Amendment of the United States Constitution.

FIFTH CLAIM FOR RELIEF

STATE DUE PROCESS

38. Paragraphs 1 through 37 above are incorporated herein by reference.

39. The Village's actions also constitute a violation of Viaero's rights to substantive and procedural due process rights granted by Neb.Const.Art. I, Sec. 3.

PRAYER FOR RELIEF

WHEREFORE, Viaero prays that the Court find the Village in violation of one or more provisions of the TCA and the United States and Nebraska Constitutions. Accordingly, Viaero asks that the Court:

1. Vacate the decision of the Board unlawfully denying the Permit Application;
2. Issue a preliminary and permanent injunction directing the Village to approve the Permit Application on the evidence provided by Viaero, allowing Viaero to construct, maintain and operate the Facility at the Site;

3. Direct the Village to issue the Permit without further delay or obstacle to Viaero and, in any event, not later than 7 days after issuance of this Court's order;
4. Require the Village to promptly grant any and all additional permits necessary for the Facility and to otherwise comply with the TCA;
5. Maintain jurisdiction over this matter following issuance of its Order to insure full compliance;
6. Enter judgment against the Village for such sum as will fairly and justly compensate Viaero for its damages;
7. Award Viaero its costs incurred in filing this action, including attorney's fees; and
8. Award Viaero such other legal and equitable relief as the Court deems just and appropriate.

Pursuant to NECivR 40.1(b), Viaero requests trial in Lincoln.

RESPECTFULLY SUBMITTED this 7th day of April, 2010.

NE COLORADO CELLULAR, INC., a
Colorado corporation, d/b/a VIAERO
WIRELESS, Plaintiff

By: /s/ Shawn D. Renner
Shawn D. Renner (Nebraska No. 17784)
Cline, Williams, Wright,
Johnson & Oldfather, L.L.P.
1900 US Bank Building
233 South 13th Street
Lincoln NE 68508

and

Andrew R. Newell (Colorado No. 31121)
General Counsel
1224 W. Platte Ave.
Fort Morgan, CO 80701
Attorneys for the Plaintiff