

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

|                                       |   |            |
|---------------------------------------|---|------------|
| APPLICATION OF NEW CINGULAR           | ) |            |
| WIRELESS PCS, LLC FOR ISSUANCE OF A   | ) |            |
| CERTIFICATE OF PUBLIC CONVENIENCE     | ) |            |
| AND NECESSITY TO CONSTRUCT A          | ) | CASE NO.   |
| WIRELESS COMMUNICATIONS FACILITY AT   | ) | 2009-00160 |
| 11096 STATE ROUTE 109, STURGIS, UNION | ) |            |
| COUNTY, KENTUCKY 42459                | ) |            |
|                                       | ) |            |
| SITE NAME: STURGIS DT (135G0234)      | ) |            |

O R D E R

By this Order, the Commission lifts the abeyance for this proceeding. On April 27, 2009, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“AT&T Mobility”) filed an application for a Certificate of Public Convenience and Necessity (“CPCN”) to construct a wireless communications facility at 11096 State Route 109, Sturgis, Union County, Kentucky. On May 22, 2009, the Commission issued an Order holding this case in abeyance.<sup>1</sup> In support of its decision for abeyance, the Commission stated that it would render a decision on the application once the Supreme Court of Kentucky issued a ruling in *Kentucky Public Service Commission v. L. Glenn Shadoan, et al.* (“Shadoan”), Case No. 2009-SC-00053. The Commission sought discretionary review of the decision by the Kentucky Court of Appeals, wherein that court had held, inter alia,

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<sup>1</sup> On December 10, 2009, New Cingular moved the Commission to lift the abeyance. By Order dated May 14, 2010, the Commission denied the motion.

that, under KRS 278.665, the Commission has jurisdiction over wireless tower siting applications for facilities to be located in geographic areas where local planning and zoning commissions exist. On November 18, 2010, the Kentucky Supreme Court rendered a decision in *Shadoan*. The Supreme Court reversed the Court of Appeals, agreeing with the Commission's interpretation of KRS 278.650 and concluding that the Commission does not have jurisdiction over wireless tower siting applications for facilities to be located within geographic areas where planning and zoning commissions exist.

On November 18, 2009, the Federal Communications Commission ("FCC") issued *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, WT Docket No. 08-165 ("Shot Clock Order"), wherein it set forth deadlines for processing applications for the siting of cell towers by state and local commissions. The Order was the subject of a motion for rehearing, which was denied by the FCC on August 4, 2010.

An informal conference was held between Commission Staff and AT&T Mobility on September 24, 2010 to discuss this case and other AT&T Mobility pending cases. The discussions at the informal conference led to the filing of a Joint Stipulation of Facts and Settlement Agreement (collectively referred to as "Settlement Agreement"). In the Settlement Agreement, AT&T Mobility and Commission Staff agreed to give the Commission until November 8, 2010 or until the Supreme Court issued a ruling on *Shadoan*, whichever came earlier, to act upon the siting tower request, thereby extending the amount of time allotted by the Shot Clock Order. Under the Settlement Agreement, if the Commission failed to act upon the application by the deadline, AT&T

Mobility would have 30 days from November 8, 2010 to file an action in court. The Commission adopted the Settlement Agreement, by Order, on October 4, 2010.

#### DISCUSSION

In the *Shadoan* case before the Supreme Court, the Commission's position was that the Commission's jurisdiction is exclusively set forth in KRS 278.650, which states:

If an applicant proposes construction of an antenna tower for cellular telecommunications services or personal communications services which is to be located in an area outside the jurisdiction of a planning commission, the applicant shall apply to the Public Service Commission for a certificate of public convenience and necessity pursuant to KRS 278.020(1), 278.665 and this section.

Based on the Commission's interpretation of the statute, the Commission had argued before the Supreme Court that it believed it did not have the jurisdiction to accept or approve CPCN applications for towers to be geographically located inside the jurisdictional boundaries of existing local planning commissions. Although the Supreme Court issued a ruling on November 18, 2010 in *Shadoan*, the FCC has, in the interim, issued the Shot Clock Order, which definitively requires state and local commissions to render final rulings upon CPCNs submitted within a certain time frame. Pursuant to the Commission's October 4, 2010 Order adopting the Settlement Agreement between AT&T Mobility and Commission Staff, and the Shot Clock Order, AT&T Mobility has until December 8, 2010 to file a complaint in the United States District Court to compel the Commission to go forward with the construction application. However, the Supreme Court's decision in *Shadoan* concluding that the Commission does not have jurisdiction over wireless tower siting applications for facilities to be located within geographic areas

where planning and zoning commissions exist becomes final on December 9, 2010 at the earliest.<sup>2</sup>

The Commission still has jurisdiction over AT&T Mobility's tower application until the Supreme Court's decision in *Shadoan* becomes final. AT&T Mobility, as discussed, *supra*, has until December 8, 2010 to file a complaint under the Shot Clock Order; otherwise, AT&T Mobility waives its right to sue the Commission. The earliest that the decision in *Shadoan* can become final is December 9, 2010. Therefore, if AT&T Mobility wants to preserve its rights under the Shot Clock Order and this case has not been moved out of abeyance, it must file its complaint prior to the decision in *Shadoan* becoming final. However, once the Supreme Court's decision is final and the Commission no longer has jurisdiction, AT&T Mobility's complaint will be moot.

The Commission, in order to avoid AT&T Mobility having to file unnecessary suits in United States District Court and imposing costs and expenditures of resources upon both AT&T Mobility and the Commission, finds that it should lift the abeyance on this case. The lifting of the abeyance should toll the time in which AT&T Mobility may file a complaint under the Shot Clock Order. Barring a rehearing and reversal by the Supreme Court in *Shadoan*, the Commission will issue an Order dismissing this application for want of jurisdiction once the decision in *Shadoan* is final.

IT IS THEREFORE ORDERED that:

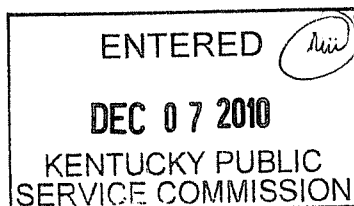
1. The abeyance status for this proceeding is hereby lifted.

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<sup>2</sup> CR 76.30(2). If a petition for rehearing is filed in *Shadoan*, the date of finality will be later than December 9, 2010.

2. A final decision dismissing AT&T Mobility's application to construct a wireless tower facility shall be issued by separate Order.

By the Commission



ATTEST:

  
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Executive Director

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