

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY)
CGSA, INC. FOR ISSUANCE OF A)
CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO)
CONSTRUCT AN ADDITIONAL CELL)
SITE IN MIDDLETOWN, KENTUCKY) CASE NO. 96-434
FOR THE PROVISION OF DOMESTIC)
PUBLIC CELLULAR RADIO)
TELECOMMUNICATIONS SERVICE TO)
THE PUBLIC IN JEFFERSON COUNTY,)
KENTUCKY AND THE LOUISVILLE MSA)

O R D E R

On December 11, 1996, Rye & Shaughnessy Properties ("R&S") filed a motion for an extension of time in which to file comments on the facility proposed by Kentucky CGSA, Inc. ("Kentucky CGSA"). As grounds for its motion, R&S stated that it had requested, and had been granted, an earlier motion to file its comments after the Jefferson County Planning and Zoning Commission ("Zoning Commission") had filed its decision regarding the proposal, or after the statutorily-mandated sixty days for the Zoning Commission to consider the proposal had passed, whichever came first. Kentucky CGSA filed its proposal with the Zoning Commission on September 27, 1996. Consequently, the sixty-day period expired on Tuesday, November 26, 1996. As R&S states, the Zoning Commission had not, as of that date, issued a report as to whether the proposed construction is in accordance with its comprehensive plan and locally adopted zoning rules. However, R&S states that the Zoning Commission verbally informed R&S counsel that additional information had been requested of Kentucky CGSA. R&S therefore requests that the time in which it may

file its comments not begin until this Commission has determined that the Zoning Commission has issued a report or has failed to issue a report within the sixty-day period provided by KRS 278.650.

Kentucky CGSA filed a response ("Kentucky CGSA Response") on December 19, 1996, stating once again that its proposal was filed with the Zoning Commission on September 27, 1996. Exhibit A to the Kentucky CGSA Response is a copy of its Application for Community Facility Review with attached topographical survey and site and elevation plan, description of lease area and variable access easement and vicinity map. The documents are stamped "received" by the Planning & Development Services unit of the Zoning Commission. Kentucky CGSA states that, pursuant to statute, the proposal must be deemed approved because the Zoning Commission failed to issue its final decision within the sixty-day period beginning on September 27, 1996. Kentucky CGSA requests that the motion for extension of time be denied, that a hearing on this matter be set, and that R&S be permitted to file its comments in the interim before the hearing date.

On December 26, 1996, R&S filed its reply to the Kentucky CGSA Response ("R&S Reply"), stating that Kentucky CGSA may not have recognized that, absent an extension, R&S could lose its opportunity to comment. By Order dated November 11, 1996, the Commission required R&S to file its comments within twenty days after issuance of the Zoning Commission decision or within twenty days after the expiration of the sixty-day period, whichever was sooner. If the sixty-day period has indeed expired, it could be held that R&S has lost its opportunity to comment. Thus, in stating that R&S may file comments during the period prior to the hearing, Kentucky CGSA appears to acquiesce in the request for extension of time.

In addition, R&S questions whether the sixty-day period prescribed in KRS 278.650 was actually triggered by the filing submitted to the Zoning Commission on September 27, 1996. R&S points out that the documents submitted by Kentucky CGSA are stamped "received" rather than "filed." Moreover, R&S states that the Zoning Commission staff has indicated that the submission is not complete.

On December 3, 1996, the Executive Director of this Commission received, by facsimile, a letter, with attachments, from Melanie Byers of the Zoning Commission. The letter states that Kentucky CGSA has been informed of several requirements it must meet to receive approval and has not met those requirements. For example, the Zoning Commission demands that Kentucky CGSA apply for a minor plat and lower its proposed fence to seven feet or lower. The letter states that Kentucky CGSA has "verbally assured" Ms. Byers that the required changes will be made. However, the changes have not been made and therefore "the site does not comply with the zoning regulations of the Jefferson County Development Code." The Zoning Commission has not merely requested information, as R&S states. It has imposed substantive requirements for approval, and it has informed Kentucky CGSA by letter, see attachment to December 3, 1996 letter to Executive Director Don Mills, that its review process will be delayed by failure to comply.

Next, on January 3, 1997, the Commission received a copy of a letter from Ms. Byers to Lawrence Hester of Kentucky CGSA. The letter, dated December 31, 1996, states that the "proposal is approved on condition" that Kentucky CGSA obtain "approval of the necessary minor plat prior to beginning any construction activity on the site." It is not clear that either of these letters constitutes the "final decision" required by KRS 100.324. Both are dated later than sixty days after Kentucky CGSA submitted its documents to the

Zoning Commission. Pursuant to KRS 100.324, the Zoning Commission is required to advise the utility in writing of its final decision within 60 days. Moreover, the approval in the December 31 letter is conditional. Finally, it is not clear that the statutes confer upon the Zoning Commission the authority to make demands such as those described herein upon applicants who wish to construct telecommunications towers. KRS 278.650 states only that the utility must "submit the proposal" to the Zoning Commission prior to applying to this Commission. KRS 100.324 also requires the utility to "submit the proposal to the planning commission. . . ." No details regarding the nature of the "proposal" to be submitted are given by either statute. However, within sixty days of the "submission," the Zoning Commission is required to issue its decision. Id. Further, "[i]f the planning commission fails to issue a final decision within sixty (60) days, it is presumed to have approved the proposal, and may not later appeal a decision of the Public Service Commission" regarding the proposed construction. Thus, the sixty day cutoff appears mandatory. Neither statute provides that the Zoning Commission may hold the proposal in abeyance beyond sixty days until its specifications are met. Nor does either statute provide for conditional approval. The Zoning Commission may, however, "make suggestions which, in its opinion, better accomplish the objectives of the comprehensive plan and the locally adopted zoning regulations." Id.

The question is one of first impression for this Commission. However, it appears that the "proposal" to build a tower, including maps and a description of the proposed facility, was "submitted" to the Zoning Commission on September 27 and that, pursuant to statute, the deadline for the Zoning Commission's final decision was November 26. The period during which R&S was directed to file its comments thus expired on December 16.

However, the motion for extension was filed prior to that date and, given the uncertainty inherent in construing the new amendments to the statutes, the motion is reasonable and should be granted.

However, a copy of this Order should be served on the Zoning Commission to notify it of the decisions reached herein so that it may, at its discretion, file for the record any comments that it deems appropriate. The Commission will hold in abeyance for thirty days Kentucky CGSA's motion for hearing in order to receive any comments the Zoning Commission deems pertinent. Thirty days from the date of this Order, Kentucky CGSA may renew its motion for a hearing. In the meanwhile, R&S should file its comments for the record as soon as possible.

IT IS THEREFORE ORDERED that:


1. The motion of Rye & Shaughnessy Properties for an extension of time in which to file comments is granted.
2. The motion of Kentucky CGSA, Inc. for a hearing is hereby held in abeyance.
3. A copy of this Order shall be served upon the Jefferson County Planning and Zoning Commission.

Done at Frankfort, Kentucky, this 9th day of January, 1997.

PUBLIC SERVICE COMMISSION


For the Commission

ATTEST:


Executive Director