COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BLUEGRASS WIRELESS, LLC FOR ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A CELL SITE (LILY II) IN RURAL SERVICE AREA #6 (LAUREL) OF THE COMMONWEALTH OF KENTUCKY	))))))	CASE NO. 2005-00320

O R D E R

This matter is before the Commission on the Intervenors' Motion for Rehearing ("Motion"). The Applicant has filed a response and the Motion is now ripe for review.

The Commission dismissed this case by Order of June 27, 2006, on the basis that we lacked jurisdiction under KRS 278.650 to consider the application. The June 27 Order speaks for itself and its reasoning will not be restated at length here. The Intervenors request, pursuant to KRS 278.400, that the Commission reconsider the June 27, 2006 Order. The Intervenors base this request on the belief that the Commission has failed to effectuate the intent of the legislature in enacting KRS 278.650. They support their argument by claiming that the Commission failed to take into account KRS 446.080(1) and ignored the applicable rules of statutory construction, and that – even if the case is outside the Commission's jurisdiction under KRS 278.650 – the Applicant must still seek a Certificate of Public Convenience and Necessity ("CPCN") under the more general provisions of KRS 278.020. The

Intervenors' arguments are entirely legal in nature. They present no new evidence that was not in the record when the June 27, 2006 Order was entered.

The Applicant responds by stating that the Motion confuses the concept of jurisdiction with the concept of being statutorily authorized to promulgate regulations. The Applicant argues that KRS 100.987 plainly gives jurisdiction over the subject proposed cell tower to the local planning unit and that there is no default jurisdiction for the Commission under KRS 278.020.

It is well-settled that the best evidence of legislative intent is the language of the statute itself.[1] In construing KRS 278.650 in the June 27, 2006 Order, the Commission was guided by KRS 446.080 and the canons of statutory construction as articulated by Kentucky's courts. The Intervenors broadly allege that, in dismissing the case for lack of jurisdiction, the Commission has created a "regulatory gap" which will prevent "any review" of cell tower placement in communities that have established planning units but have not yet adopted specific cell tower regulations.[2] This supposition is not persuasive for at least three reasons.

---

[1] See Hale v. Combs, 30 S.W.3d 146, 151 (Ky. 2000) ("To determine legislative intent, a court must refer to 'the words used in enacting the statute rather than surmising what may have been intended but was not expressed.'" (citations omitted)); Kentucky Ass'n of Chiropractors, Inc. v. Jefferson County Medical Soc., 549 S.W.2d 817, 821 (Ky. 1977) ("In determining the intent of the General Assembly in enacting legislation, the primary rule is to ascertain the intention from the words employed in enacting the statute, rather than surmising what may have been intended but was not expressed"); Clay v. Board of Regents of Morehead State Teachers' College, 75 S.W.2d 550, 552 (Ky. 1934) ("The fundamental rule for the interpretation of statutes is to ascertain from the language employed the intention of the Legislature in enacting it, and to give to the terms employed their ordinarily accepted meaning, unless it is made to appear from the context that a different meaning was intended").

[2] See Motion at 5, 8.

First, there is no statutory impediment preventing an established planning unit from adopting regulations specific to cell towers at any time of its choosing. In fact, KRS 100.987(1) encourages such action by unambiguously authorizing such regulation. Any "gap" in regulatory oversight for cell towers is the result of local decision-making and not a deficiency in Kentucky law. This is confirmed by the fact that KRS 100.987(1) – which plainly gives *jurisdiction* to local planning units – does not require a local planning unit to adopt specific cell tower *regulations*, as the Intervenors claim.[3] The June 27, 2006 Order speaks to the difference between statutory jurisdiction and statutory authority to promulgate regulations when it finds that the Laurel County planning unit has jurisdiction even though it "has not yet availed itself of the grant of authority as set forth in KRS 100.987(1)."

Second, the Intervenors claim that the June 27, 2006 Order allows cell tower placement to "escape any review" by government regulators (emphasis in original). This argument is factually incorrect. In the absence of specific cell tower regulations, KRS 100.987(4) provides specific and measurable criteria for local planning units to apply within a definitive timeframe. In other words, even in the absence of specific cell tower regulations, a local planning unit has statutory criteria to apply to all cell tower applications. Thus, in all areas outside the Commission's jurisdiction under KRS 278.650(1), every applicant proposing to build a cell tower *must* present its application before a duly constituted and statutorily authorized local agency with statutorily created default criteria.

[3] See Motion at 8.

Moreover, the General Assembly has expressly reserved state jurisdiction regardless of any local decision to specifically regulate or not regulate cell tower placement where there are overriding state interests in question, such as aviation safety.[4] The Kentucky Airport Zoning Commission (the "KAZC") exercises appropriate jurisdiction, pursuant to KRS 183.861 et seq. and administrative regulations promulgated thereunder,[5] of all structures within an area designated by the KAZC to present potential hazards to aviation safety.[6]

The division of labor between the Commission, local planning units, and the KAZC is a well-crafted legislative system that carries out the legislative intent of encouraging local decision-making regarding cell tower construction while reserving unqualified state oversight in matters of safety. There is no gap in the applicable statutes when they are construed harmoniously and each is given its full effect.[7]

The Intervenors' final argument is that, even if the Commission may not exercise jurisdiction over cell towers in jurisdictions with local planning units that have not enacted cell tower-specific zoning regulations, such facilities must still obtain a CPCN from the Commission pursuant to KRS 278.020. It is unclear from the Motion whether the Intervenors are claiming that a CPCN under KRS 278.020 must be sought from the

[4] See KRS 183.867(1).

[5] See 602 KAR 50:010 et seq.

[6] The Federal Aviation Administration and Federal Communications Commission also provide some regulatory oversight of cell towers, although neither agency specifically regulates the siting of such structures.

[7] See DeStock No. 14 v. Logsdon, 993 S.W.2d 952, 957 (Ky. 1999); Sumpter v. Burchett, 202 S.W.2d 735, 736 (Ky. 1947); see also KRS 446.080.

Commission in accordance with KRS 278.650(1) or whether the obligation to obtain a CPCN under KRS 278.020 is an obligation independent of the requirements of KRS 278.650(1). In either event, this argument is also unpersuasive.

The Commission acknowledges that the plain language of KRS 278.650(1) requires an applicant proposing to construct a cell tower to "apply. . .for a [CPCN] pursuant to KRS 278.020(1), 278.665, and this section." This portion of the statute is conditioned, however, upon the preceding phrase which limits the Commission's role to those applications related to "an area outside the jurisdiction of a planning commission."[8] Thus, to the extent the Intervenors are arguing that the obligation to obtain a CPCN under KRS 278.020(1) arises from the language of KRS 278.650(1), the Commission's June 27, 2006 Order speaks to that issue and there is no cause for rehearing.

If the Intervenors' argument is that there is an independent obligation for applicants to seek a CPCN from the Commission according to KRS 278.020(1), even where the Commission has no jurisdiction under KRS 278.650(1), the canons of statutory construction require that the Motion be denied. Specific statutes always predominate over general statutes.[9] Here, KRS 278.650(1) is a specific statute that displaces anything KRS 278.020(1) may more generally say about the subject.

[8] See KRS 278.650(1).

[9] See Lewis v. Jackson Energy Co-op. Corp., 189 S.W.3d 87, 92 (Ky. 2005) ("Where two statutes concern same or similar subject matter, specific statutes always prevail over general statutes") citing Withers v. University of Ky., 939 S.W.2d 340 (Ky. 1997).

Accordingly, KRS 278.020 provides neither a related nor independent basis for the Commission to grant rehearing.

On the basis of the foregoing and the Commission being otherwise sufficiently advised, IT IS HEREBY ORDERED that:

1. The Intervernors' Motion for Rehearing is denied.

2. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 8th day of August, 2006.

By the Commission

ATTEST:

Executive Director