

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) CASE NO.
TO CONSTRUCT A WIRELESS) 2009-00034
COMMUNICATIONS FACILITY AT 1707)
SECOND STREET, HENDERSON,)
HENDERSON COUNTY, KENTUCKY 42420)

O R D E R

On February 4, 2009, New Cingular Wireless PCS, LLC ("New Cingular") filed an application for the issuance of a certificate of public convenience and necessity to construct a wireless tower at 1707 Second Street, Henderson, Henderson County, Kentucky. In the application, New Cingular stated:

Applicant proposes construction of an antenna tower within the city limits of Henderson, Henderson County, Kentucky, which is outside the jurisdiction of a planning commission as defined by Commonwealth of Kentucky Court of Appeals in opinion for No. 2007-CA-000697 and Applicant submits the Application to the PSC for a CPCN pursuant to KRS §§ 278.020(1), 278.650 and 278.665.

Application at ¶ 3.

By Order dated March 17, 2009, the Commission placed this matter in abeyance pending a decision by the Kentucky Supreme Court in the Petition for Discretionary Review in the matter of L. Glenn Shadoan, et al. v. Kentucky Public Service

Commission, Case Number 2009-SC-00053-DR ("Shadoan").¹ On June 1, 2009, New Cingular moved the Commission for a decision on the application. By Order dated July 6, 2009, the Commission denied the motion, as the Supreme Court had not rendered a decision on the request for discretionary review. The Commission held that Shadoan centers on the question of whether or not the Commission has jurisdiction over certain applications, such as the one filed by New Cingular in this proceeding.

On July 7, 2009, New Cingular submitted supplemental documentation to its application, which consists of a letter from the city of Henderson's Code Administrator. On October 8, 2009, New Cingular submitted a motion to lift the abeyance and, on February 1, 2010, New Cingular submitted additional documentation in support of its motion.

In its motion to lift the abeyance, New Cingular relies upon the statements of the city of Henderson's Code Administrator in the letter filed in this case on July 7, 2009 regarding the Henderson County Board of Education's property being exempt from the planning and zoning regulations of the city of Henderson. The city of Henderson relies upon KRS 100.361(2) as the statutory authority for exempting this property from local siting authority. KRS 100.361(2) states:

Nothing in this chapter shall impair the sovereignty of the Commonwealth of Kentucky over its political subdivisions. Any proposal affecting land use by any department, commission, board, authority, agency, or instrumentality of state government shall not require approval of the local planning unit

¹ In Case No. 2007-CA-000697, the Kentucky Court of Appeals held that the Commission had to accept and issue decisions on applications for wireless towers to be constructed within political boundaries of a local planning and zoning commission if that local commission had not enacted regulations specific to the construction of wireless towers under the authority of KRS 100.987(1).

New Cingular submitted the deed to the proposed site on February 1, 2010, demonstrating that the owner of the property where New Cingular's proposed tower is to be constructed is the Henderson County Board of Education. For this reason, New Cingular contends that its application is not dependent upon the Commission's motion for discretionary review before the Supreme Court in the Shadoan proceeding, but, rather, the application can be relieved of the abeyance status and moved forward for review and final decision by the Commission. In short, New Cingular contends that the proposed cell tower is exempt from local planning commission review as a matter of law.

The Commission notes that the Henderson County Board of Education's ownership of the property is further constrained by KRS 162.010, which provides that actual ownership is vested in the Commonwealth. KRS 162.010 reads as follows:

162.010 Title to school property

The title to all property owned by a school district is vested in the Commonwealth for the benefit of the district board of education. In the acquisition of land for school purposes, whether by purchase or condemnation, or otherwise, the title obtained shall be in fee simple, except that title to land received from the federal government or any agency thereof can be received in other than fee simple with the approval of the Attorney General of the Commonwealth. Any reversionary interest in any land held by boards of education on June 14, 1934, shall not deprive such boards of the ownership of the buildings or other improvements thereon.

As to the scope and application of this law, Kentucky's highest court has found that, under broad powers given to the local boards of education by statute to control, buy, and sell real estate for school sites, local boards, as agents of the states, have power to convey good title to school property although title to school property is technically

vested in the commonwealth.² However, KRS 156.070 provides, in part, that the state board of education may designate local boards of education to act with discretion in furtherance of their duty to act in the best interest of the schools.³

Having reviewed New Cingular's motion, the additional information submitted and the arguments contained therein, as well as other relevant portions of the record for this proceeding, the Commission hereby finds:

1. The proposed cell tower will be physically located on property owned by the Henderson County Board of Education.

2. The title of the property of the Henderson County Board of Education is vested in the Commonwealth of Kentucky, pursuant to KRS 162.010.

3. The Henderson County Board of Education is an agency of the state pursuant to KRS 156.070.

4. KRS 100.361(2) exempts state-owned property from local planning and zoning commission regulations.

5. Pursuant to KRS 278.650, the Commission has the jurisdiction to review the application and issue a certificate of public convenience and necessity for the proposed cell tower site.

6. That the proposed cell tower site is not affected by the outcome of Shadoan.

7. There is no basis to keep this proceeding in abeyance.

² Bellamy v. Board of Education of Ohio County, 74 S.W. 2d 920, 921 (Ky. 1934).

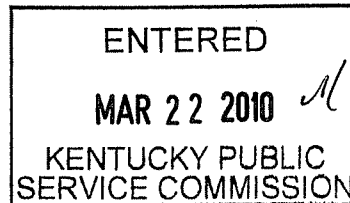
³ See also Gearhart v. Kentucky State Board of Education, 355 S.W.2d 667 (Ky. 1962) (Court held the General Assembly intended that local school administration is subject to controls vested in the state board of education).

As New Cingular's tower will be located outside the jurisdictional boundaries of a local planning and zoning commission, this proceeding shall be removed from abeyance status as of the date of this Order and shall proceed for final decision.

IT IS HEREBY ORDERED that:

1. New Cingular's motion to lift the abeyance is granted.
2. The case will stand submitted to the Commission for a decision on the application.
3. The Commission's final decision upon this application shall be addressed by a separate Order.

By the Commission



ATTEST:



Executive Director

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