

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	)	2009-00093
COMMUNICATIONS FACILITY AT 114 RISING	)	
SON LANE, PRESTONSBURG, FLOYD	)	
COUNTY, KENTUCKY, 41653	)	

O R D E R

On March 25, 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 114 Rising Son Lane, Prestonsburg, Floyd County, Kentucky. In the application, New Cingular stated:

Applicant proposes construction of an antenna tower in Floyd 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 April 3, 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”).<sup>1</sup> On June 11, 2009, New Cingular moved the Commission for a decision on the application. By Order dated July 7, 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 December 10, 2009, New Cingular submitted an amendment to its application wherein it stated that it was deleting paragraph 3 in its entirety and replacing it with the following paragraph:

Applicant proposes construction of an antenna tower in Floyd County, Kentucky which is outside the jurisdiction of a planning commission and Applicant submits the Application to the PSC for a CPCN pursuant to KRS §§ 278.020(1), 278.650 and 278.665.

Amendment at 2.

In the amendment filing, New Cingular states that:

[it] was incorrect in the determination that the [wireless tower] was within the jurisdictional boundaries of the City of Prestonsburg and therefore was bound by its planning and zoning ordinances . . . .

Upon further investigation it has been discovered that although the physical address of the subject parcel lies within the city’s jurisdiction, said jurisdiction ends at the eight hundred foot (800’) elevation mark of said parcel. The survey that was included as Exhibit B of said Application

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<sup>1</sup> 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 has adopted planning and zoning regulations under KRS Chapter 100 but has not enacted regulations specific to the construction of wireless towers.

clearly indicates that the proposed [wireless tower] is above the eight hundred foot (800') elevation mark and therefore is outside the jurisdiction of the City of Prestonsburg.<sup>2</sup>

In response to an open records request by the Commission, Mr. Robert Marshall, the County Judge/Executive for Floyd County, filed a letter in this proceeding on September 28, 2009. In that letter, County Judge/Executive Marshall stated that the city of Prestonsburg has a planning and zoning commission, but Floyd County does not. In its amendment, New Cingular relies upon the statements of the County Judge/Executive regarding the lack of a planning commission for Floyd County in conjunction with its determination that, due to the elevated location of the proposed tower, it falls outside the political boundaries of the Prestonsburg City Planning Commission. The site survey in Exhibit B demonstrates that the proposed tower will be constructed at 1,080 feet. According to the survey, the tower will be located on fairly steep terrain where the bottom of a hill lies within the jurisdiction of Prestonsburg, but the top of the hill belongs to Floyd County. According to New Cingular, the jurisdiction of the land changes based on the elevation. New Cingular states that, as the tower will be completely constructed at the 1,080-foot level, the tower falls within the boundaries of Floyd County, which does not have any type of planning commission. New Cingular contends that, for these reasons, 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 abeyance status and moved forward for review and final decision.

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<sup>2</sup> Id. Exhibit B of the Application contains a detailed site development plan and survey.

Having reviewed New Cingular's amendment and the arguments contained therein, as well as other relevant portions of the record for this proceeding, the Commission finds that, since Floyd County does not have a planning commission and the proposed tower will be physically located in Floyd County instead of the city of Prestonsburg, the proposed tower site is not affected by Shadoan and there is no legal basis to keep this proceeding in abeyance. As New Cingular's tower will be located outside the geographic 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.

#### REQUEST FOR INTERVENTION

On April 1, 2009, Mr. Floyd Skeans filed public comments and a request for intervention regarding the proposed wireless tower. In his letter, Mr. Skeans expressed concerns about the location of the proposed tower in relation to his property. According to Exhibit J of New Cingular's application, Mr. Skeans is one of several owners with property within a 500-foot radius of the proposed site or contiguous to the proposed site. Pursuant to 807 KAR 5:063, Section 1, applicants such as New Cingular are required to notify, by certified mail, all persons who own property within 500 feet of the proposed site.

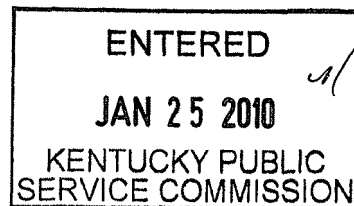
On April 6, 2009, the Commission notified Mr. Skeans by letter that this proceeding was placed in abeyance and his comments and request for intervention would be addressed once this proceeding became active again. As the Commission has ended the abeyance status for this proceeding, the Commission finds that New Cingular must address the comments and concerns outlined by Mr. Skeans in his letter.

Within 20 days of the date of this Order, New Cingular shall submit a written response to Mr. Skeans' request for information, with an original and five copies submitted to the Commission. Within 10 days after receiving New Cingular's response, Mr. Skeans shall notify the Commission, by letter, of whether New Cingular has satisfied his concerns or whether he continues to have objections to the proposed tower and desires to become an intervenor in this proceeding. Mr. Skeans shall submit a copy of his letter to New Cingular and shall submit an original and five copies of his letter to the Commission.

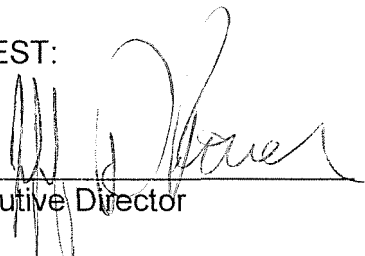
IT IS HEREBY ORDERED that:

1. The Motion to Lift the Abeyance is granted.
2. The Executive Director shall serve a copy of this Order upon Mr. Floyd Skeans, P.O. Box 0248, Dwale, Kentucky 41621.
3. New Cingular shall submit a written response to Mr. Skeans as provided within this Order.
4. After receiving New Cingular's response, Mr. Skeans shall file a reply as provided within this Order.

By the Commission



ATTEST:

  
Executive Director

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