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November 21, 2005

PUBLIC SERVICE
COMMISSION

Ms. Beth O'Donnell, Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40602-0615

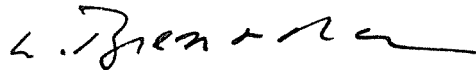
VIA HAND DELIVERY

RE: **Application of Celco Partnership d/b/a Verizon Wireless for Issuance of a Certificate of Public Convenience and Necessity to Construct an Additional Cell Facility on Burdette Road, Renfro Valley, Rockcastle County, Kentucky PSC Case No. 2004-00508 (Renfro II Site)**

Dear Ms. O'Donnell:

Enclosed please find the original and ten copies of Memorandum of Law on Inapplicability of Service Members' Relief Act of 2004 to Objections of Intervenor Major Jeffrey Stevens in the above-referenced case. Please file same with the Commission at your earliest convenience. Thank you for your assistance in this matter.

Sincerely,



W. Brent Rice

WBR/dkw
Enclosures

cc: Amy Harper/Verizon Wireless

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the matter of:

APPLICATION OF CELLCO PARTNERSHIP)
D/B/A VERIZON WIRELESS FOR ISSUANCE)
OF A CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY TO CONSTRUCT AN)
ADDITIONAL CELL FACILITY ON BURDETTE)
ROAD, RENFRO VALLEY, ROCKCASTLE,)
KENTUCKY (“RENFRO II CELL FACILITY”))

Case No. 2004-00508

*** **

**APPLICANT’S MEMORANDUM OF LAW ON
INAPPLICABILITY OF SERVICEMEMBERS’ RELIEF ACT OF 2004
TO OBJECTIONS OF INTERVENOR MAJOR JEFFREY STEVENS**

Comes the Applicant Cellco Partnership d/b/a Verizon Wireless (“Applicant”), by counsel, for its Memorandum Of Law on the inapplicability of the Servicemembers’ Relief Act of 2004 (the “Act”) to the objections of intervenor Major Jeffrey Stevens (“Major Stevens”), pursuant to the Commission’s November 14, 2005 request. For the following reasons, the Commission should find that the Act does not prevent a hearing on the Application in the absence of Major Stevens:

- Major Jeffery Stevens is not a plaintiff or defendant in this proceeding;
- As an intervenor, he is a merely permissive, as opposed to a necessary, party;
- His rights are adequately protected by counsel and other intervenors in this proceeding;
- This is an administrative proceeding not contemplated by the Act;
- No authority exists extending the Act to an hearing before the Public Service Commission (“PSC”) or similar administrative agency; and
- Major Stevens has failed to properly file and application for stay or otherwise comply with the Act’s requirements for stay.

Major Stevens, through counsel, has objected to any hearing or further proceedings in this matter because he is allegedly currently serving overseas in Kuwait. Previously, his counsel claimed that Major Stevens will return from Kuwait on or about

mid-December 2005. Even accepting these allegations as true, these circumstances do not justify staying this proceeding.

I. THE SERVICEMEMBERS' RELIEF ACT OF 2004

Section 502 of the Act provides for the temporary suspension of judicial proceedings that may adversely affect the civil rights of servicemembers during their military service. 50 App. U.S.C. § 502 (amended in December 19, 2003 at Pub.L. No. 108-189, 54 Stat. 1178). Section 522 of the Act sets forth the criteria necessary in order to stay such a proceeding:

§ 522. Stay of proceedings when servicemember has notice

(a) Applicability of section

This section applies to any civil action or proceeding in which the plaintiff or defendant at the time of filing an application under this section--

- (1) is in military service or is within 90 days after termination of or release from military service; **and**
- (2) has received notice of the action or proceeding.

(b) Stay of proceedings

...

(2) Conditions for stay

An application for a stay under paragraph (1) shall include the following:

- (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
- (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

50 App. U.S.C. § 522 (emphasis added). Thus, a stay should only be considered where the servicemember is a plaintiff or defendant to the original action and where he fulfils

the Application for stay requirements. In this case, neither of these has been satisfied by Major Stevens.

However, in the event a servicemember meets all of the foregoing criteria, then Section 525 provides for permissive (as oppose to mandatory) stay:

Duration and term of stays; codefendants not in service

(a) Period of stay

A stay of an action, proceeding, attachment, or execution made pursuant to the provisions of this Act [sections 501 to 596 of this Appendix] by a court may be ordered for the period of military service and 90 days thereafter, or for any part of that period. The court may set the terms and amounts for such installment payments as is considered reasonable by the court.

(b) Codefendants

If the servicemember is a codefendant with others who are not in military service and who are not entitled to the relief and protections provided under this Act [sections 501 to 596 of this Appendix], the plaintiff may proceed against those other defendants with the approval of the court.

50 App. U.S.C. § 525 (emphasis added). The Act was originally enacted by Congress for the protection and preservation of the civil rights of persons in the military service of the United States. See 54 Am.Jur.2d Military and Civil Defense § 301. Accordingly, the Act tolls the running of limitations during the period of military service by a serviceman who is a necessary party to an action or proceeding. Id. at § 302.

Application of the Act arises most often in divorce and separation proceedings, negligence actions, eviction, bankruptcy and collection cases, none of which are involved here. The ultimate “discretion” vested in the trial court regarding staying of proceedings under this section includes discretion as to whom the court may ask to come forward with facts needful to a fair judgment. Boone v. Lightner, 319 U.S. 561 (1943), reh’g denied 320 U.S. 809. See also Crowder v. Capitol Greyhound Lines, 51 A.2d 372 (D.C.Mun.App. 1947), aff’d 169 F.2d 674; Dismier v. White, 68 N.E.2d 382 (Ohio

1944); Semler v. Oertwig, 12 N.W.2d 265 (Iowa 1943). The Act leaves it to discretion of court as to what party must come forward with facts needed to determine whether ability of a party to present his cause is materially affected by reason of his military service. Sullivan v. Storz, 55 N.W.2d 499 (Neb.1952); McCoy v. McSorley, 168 S.E.2d 202 (Ga.App.1969).

II. MAJOR STEVENS IS NOT A PLAINTIFF OR DEFENDANT IN THIS ADMINISTRATIVE PROCEEDING.

As an initial matter, the servicemember seeking to stay an action must be a plaintiff or defendant. 50 App.U.S.C. § 522. See In re Baltimore & O.R. Co., 63 F.Supp. 542 (D.C.Md.1945), certiorari denied 328 U.S. 871, motion denied 329 U.S. 823, rehearing denied 329 U.S. 821 (The Act comprehends cases where soldiers and sailors are sued as defendants and does not apply to a railroad adjustment proceeding which is not against named defendant.); Case v. Case, 124 N.E.2d 856 (Ohio Prob.1955) (same).

Herein, Major Stevens is neither; rather, he is a merely an intervening party raising the same objections as other intervenors. He is not a mandatory party and his intervention is merely permissive in nature. He will not be evicted, rendered liable for any judgment, lose any parental rights, be subjected to alimony, lose any employment rights, be divested of any appeal rights, or be otherwise prejudiced should the Application be heard by the Commission. See 50 App.U.S.C. § 522 (annotations thereto). As such, he is not entitled to the benefits of the Act, as he is simply not a plaintiff or defendant, and is a mere intervenor.

Nevertheless, even if a liberal interpretation would be given to the words “plaintiff” and “defendant” under the Act, the court has discretion in determining whether the serviceman’s rights will be materially affected by a denial of the stay. Rauer’s Law &

Collection Co. v. Higgins, 174 P.2d 450 (Cal.App. 1st Dist. 1946). As noted previously, Major Stevens' objections to the application for construction of a cell facility will likely be the same as or substantially the same as those of other intervenors in this proceeding. For example, Lorretta Stevens Rowe, another intervenor in this proceeding, is related to Major Stevens. They are both represented by the same counsel, Hon. Rachel Rowe, and have previously filed joint pleadings in this matter, demonstrating Mrs. Loretta Rowe's ability, through counsel, to protect Major Stevens' interests. Applicant submits that, accordingly, Ms. Rowe, as counsel for both her mother Loretta Rowe and for Major Stevens, is competent counsel to represent both interests in this proceeding. See 50 App. U.S.C.A. §§ 519, 592.

Thus, Major Stevens' interests will be adequately and fairly represented and will not be materially affected by a hearing because any objections he may raise are likely to be substantially similar to those raised by his own family members, Mrs. Loretta Stevens Rowe, and by counsel for other intervenors in this proceeding.

III. A STAY IS NOT APPROPRIATE IN ADMINISTRATIVE PROCEEDINGS LIKE THE ONE AT HAND.

Further, it has long been held that "administrative proceedings" akin to the instant Application are not "actions" that fall within the purview of the Act. In these situations, administrative bodies have refrained from staying proceedings before them under the Act. See Polis v. Creedon, 162 F.2d 908 (Em.App.1947) (Proceedings before Area Rent Director and Price Administrator to fix maximum rents were not "actions or proceedings before court" within this section.). Where proceedings can be adjudicated without prejudicing the civil rights of a serviceman, and where conduct of serviceman's defense is not materially affected by reason of his military service, such as herein, the Act may

not be used for delay. See Keefe v. Spangenberg, 533 F.Supp. 49 (W.D.Okla.1981). See also 36 A.L.R. Fed. 420 TOLLING PROVISION OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT. Moreover, generally, courts have held that the Act is only applicable in limited circumstances, such as where:

- serviceman as the father and guardian ad litem of his minor child brings on his own behalf and on behalf of the minor child, an action based on personal injuries sustained by the minor child;
- serviceman brings wrongful death action in his capacity as the administrator of the decedent's estate were he was the sole beneficiary of any recovery;
- serviceman, in his capacity as administrator of an estate, brings an action to foreclose a mortgage owned by the estate;
- heirs of a deceased serviceman sue on his behalf;
- subrogee brings serviceman's claim against a negligent tortfeasor;
- person named as sole beneficiary in a deceased serviceman's will initiates action;
- person named as sole beneficiary in a serviceman's insurance policy files suit; and
- one member of a partnership, which includes serviceman, commences action.

See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 512 (1993) ("The [Relief Act] ... suspends various civil liabilities of persons in military service."); Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459, 1462 (5th Cir.1995) ("The purpose of the Relief Act is to suspend enforcement of civil liabilities of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation."); Omega Indus., Inc. v. Raffaele, 894 F.Supp. 1425, 1434 (D.Nev.1995) (quoting Patrikes v. J.C.H. Serv. Stations, Inc., 180 Misc. 917, 41 N.Y.S.2d 158, 165 (N.Y.City Ct.1943)) ("It is readily ascertained that the primary desire of Congress is to give protection to the soldier.... The object is to relieve the soldier from the consequences of his handicap in meeting financial and other obligations incurred prior to his call to duty, so that his energies may be devoted to his military duties, unhampered by mental distress occasioned by the consequences to him or to his dependents flowing from his inability to meet his obligations."); In re Watson, 292 B.R. 441 (Bkrtcy.S.D.Ga.2003)

(Act applies in context of bankruptcy case, even though interests of creditors may be affected); Lavender v. Gernhart, 92 A.2d 751 (Md.1952) (Act is applicable to caveat proceedings). None of the foregoing is present in this case.

Similarly, proceedings involving property rights where the servicemember is not a plaintiff or defendant have also been excluded from the Act's provisions. For example, *in rem* proceedings are not subject to a stay under the Act. See In re Baltimore & O.R. Co., 63 F.Supp. 542 (D.C.Md.1945), cert. denied 328 U.S. 871, reh'g denied 329 U.S. 821 (Act does not apply an action *in rem* where servicemember is not a defendant.); Borough of East Rutherford v. Sisselman, 97 A.2d 431, 26 N.J.Super. 133 (N.J.Super.Ch.1953) (requiring an affidavit as to military service, but finding that Act had no application to tax foreclosure proceeding which was strictly *in rem*); Case v. Case, 124 N.E.2d 856 (Ohio Prob.1955) (Act not applicable to proceedings *in rem*).

Like *in rem* proceedings against a specific property, this is a purely administrative proceeding before the Commonwealth of Kentucky Public Service Commission in which Major Stevens is neither a plaintiff nor defendant. This type of proceeding protects the interests of the public at large and adjudicates disputes regarding specific applications, and, like *in rem* proceedings, serves to resolve issues superior to those made by an intervenor.

Further, the Act is also clear and unambiguous on its face - there is simply no provision in the Act (or any other authority) extending its stay protections to administrative proceedings like the one at hand before the Public Service Commission. In fact, Applicant's research has not revealed a single case from any state which has extended the Act's provisions to similar administrative proceedings.

Accordingly, considering the dearth of authority on this issue, no rationale argument exists in favor of staying administrative proceedings which exist to protect the rights of the public at large, like the one at hand, in favor of a sole individual, whose rights are already protected by counsel and other intervening parties. As a result, there can be no good faith dispute that the Act is simply not applicable to this case.

III. HIS COUNSEL HAS FAILED TO PROPERLY FILE AN APPLICATION FOR STAY

Finally, even assuming that Major Stevens was a plaintiff or defendant and that the Act extended to this proceeding (both of which are not true in this case), Major Stevens has not properly filed an application for stay. Under Section 522 of the Act, he must set forth via letter the manner in which his current military assignment “material affects” his rights. He must also provide a letter from his commanding officer stating that his current military duty prevents him from appearing. 50 App.U.S.C. § 522. He has done neither in this case. Thus, on its face, his request to stay is void *ab initio*.

Additionally, at least one treatise states that a servicemember who claims entitled to stay a proceeding should adduce the following evidence and set forth the facts and circumstances entitling him to relief:

- Enlistment contract showing date and term of enlistment; for officers, a copy of the officer’s commission;
- Orders placing servicemember on active duty;
- Orders assigning servicemember to current base of assignment;
- Leave and Earnings Statement (LES) showing servicemember’s monthly pay and deductions, as well as amount of accrued leave;
- Statement by servicemember showing monthly living expenses;
- When the servicemember has a significant amount of leave accrued, a statement from the servicemember’s commanding officer denying a request for leave and explaining why the servicemember’s duties are such that leave cannot be granted;
- When the servicemember does not have a significant amount of leave accrued, a statement from the servicemember's commanding officer denying an application for advance leave;

- Statement by servicemember as to when he or she could be available;
- Statement by servicemember as to geographic distance between base of assignment and the forum court;
- Cost of airfare between base of assignment and the forum court;
- Statement by servicemember of his or her desire to personally attend hearing or trial;
- Statement by servicemember's attorney showing need to have servicemember personally attend hearing or trial;
- Statement by servicemember, commanding officer, or transportation officer that military transportation is not available from servicemember's base of assignment;
- Length of time between filing of suit and servicemember's application for stay; and
- Length of time servicemember had notice of hearing or trial date;

See 35 Am. Jur. Proof of Facts 3d 323 Entitlement To a Stay or Default Judgment Relief Under the Soldiers' and Sailors' Civil Relief Act (2004).

At this point, all Applicant has received regarding Major Stevens' request is a mere statement by his counsel in a prior brief that he is serving overseas in Kuwait and would not be available until in or around December 2005. Counsel did not set forth the manner in which his current military assignment "material affects" his rights or what interests might be allegedly affected by a hearing. Further, counsel did not provide any correspondence from his commanding officer stating that his current military duty prevents him from appearing. In other words, Major Stevens has failed to appropriately demonstrate that he is unavailable for the hearing.

V. CONCLUSION

In summary, Applicant appreciates and respects Major Stevens' commitment to serving in the military and thanks him for such service. However, military service, whether at home or abroad, is simply insufficient grounds to stay this proceeding under the Act. Thus, the Commission should not deny Applicant its statutorily-guaranteed

administrative hearing and should press forward with a resolution of the instant Application.

Wherefore, the Applicant respectfully petitions the Commission to reject the (incomplete) request for stay and to hear intervenor's objections.

Respectfully Submitted,



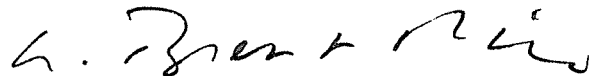
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VERIZON WIRELESS

CERTIFICATE OF SERVICE

I certify to mailing via pre-paid U.S. mail a true and accurate copy of the foregoing this 21st day of November, 2005, to the following:

Ms. Rachael A. Rowe
Keating Muething & Klekamp, PLLC
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