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May 23, 2006

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MAY 24 2006

PUBLIC SERVICE  
COMMISSION

Hon. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
P. O. Box 615  
Frankfort, KY 40601

**Re: *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 before the Public Service Commission of the Commonwealth of Kentucky, Case No. 2005-00320***

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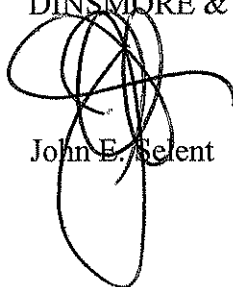
Dear Ms. O'Donnell:

Enclosed for filing in the above-styled case is the original and ten copies of Bluegrass Wireless LLC's reply to the response of intervenors Glenn and Sue Shadoan to suggestion of dismissal for want of jurisdiction.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP



John E. Selent

JES/jwn  
Enclosures  
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**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**

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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

**REPLY TO RESPONSE OF INTERVENORS GLENN AND SUE SHADOAN TO**  
**SUGGESTION OF DISMISSAL FOR WANT OF JURISDICTION**

Bluegrass Wireless LLC, for its reply to the response of intervenors Glenn and Sue Shadoan to suggestion of dismissal for want of jurisdiction, states as follows.

**BACKGROUND**

This matter arises from an application for issuance of a certificate of public convenience and necessity submitted by Bluegrass Wireless LLC ("Bluegrass Wireless") to the Public Service Commission of the Commonwealth of Kentucky (the "Commission"). On September 9, 2005, Bluegrass Wireless submitted its application to the Commission for a proposed cell site in Laurel County, Kentucky called the Lily II cell site. On September 28, 2005, Glenn and Sue Shadoan requested permission to intervene from the Commission, which the Commission granted. Thereafter, Bluegrass Wireless moved the Commission to hold an informal conference, to which the Shadoans responded. Subsequently, Bluegrass Wireless moved the Commission to hold the proceedings in abeyance to allow it time to determine whether the Commission or the London and Laurel County Planning Commission was the appropriate venue in which to proceed with its application.

Bluegrass Wireless then reviewed the applicable statutory and regulatory provisions and determined that, in fact, the London and Laurel County Planning Commission was the proper agency to review the application. Thereafter, Bluegrass Wireless informed the Commission of its findings by letter and submitted its application to the London and Laurel County Planning Commission. On May 15, 2006, the Shadoans responded to Bluegrass Wireless' letter, asserting that the Commission has jurisdiction because the London and Laurel County Planning Commission has not adopted regulations specific to the siting of cellular towers.

Nevertheless, the London and Laurel County Planning Commission does have jurisdiction of the Lily II application under the plain meaning of the applicable statutory and regulatory provisions. To have jurisdiction to review applications, the statutes and regulations require *only* that the London and Laurel County Planning Commission has adopted planning and zoning regulations in accordance with Chapter 100 of the Kentucky Revised Statutes. The statutes do not require promulgation of cellular communications-specific regulations. This conclusion makes sense. A local planning unit is in the best position to review an application for a proposed cell tower in light of its existing comprehensive plan. Giving the words of these provisions their plain meaning leads to neither an absurd nor wholly unreasonable result. Therefore, the Commission need look no further than that plain language.

### ARGUMENT

The Shadoans have argued that the relevant statutory and regulatory provisions create a void whereby neither the Public Service Commission nor the London and Laurel County Planning Commission has jurisdiction over the Lily II application. To the contrary, the London and Laurel County Planning Commission does have jurisdiction over the application, because it has "adopted planning and zoning administrative regulations in accordance with Chapter 100 [of the Kentucky

Revised Statutes]." 807 KAR 5:063(1). Nothing in the plain language of the provisions at issue requires that a local planning unit adopt regulations *specific to cellular communications services* in order to review an application "in light of its agreement with the comprehensive plan and locally adopted zoning regulations[.]" KRS § 100.987(4)(a).

It is a well-settled principle of law that when applying a statute or regulation, courts and administrative bodies "have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Bailey v. Reeves*, 662 S.W.2d 832, 834-835 (Ky. 1984) (citing *Department of Revenue v. Greyhound Corp.*, 321 S.W.2d 60 (Ky. 1959)). While the Shadoans go to great lengths to explain the legislative history of the statutes and regulations, this historical analysis need not be undertaken by the Commission. The statutory and regulatory provisions are clear and unambiguous, and according them their plain meaning does not result in an absurd or wholly unreasonable conclusion.

The statutory provisions in question are KRS §278.650 and KRS §100.987. KRS §278.650 states in pertinent part:

If an applicant proposes construction of an antenna tower for cellular communications services or personal communications services which is to be located in an area *outside the jurisdiction of a planning commission*, the applicant shall apply to the Public Service Commission for a certificate of public convenience and necessity . . . .

*Id.* (Emphasis added). KRS §100.987 states in pertinent part:

(1) A planning unit as defined in *KRS 100.111*<sup>1</sup> and legislative body or fiscal court that has adopted *planning and zoning regulations* may plan for and regulate the siting of cellular antenna towers in accordance with *locally adopted planning and zoning regulations in this chapter*.

(2) Every utility or a company that is engaged in the business of providing the required infrastructure to a utility that proposes to construct an antenna tower for

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<sup>1</sup> KRS §100.987(15) defines a planning unit as "any city, county, or consolidated local government, or any combination of cities, counties, or parts of counties, or parts of consolidated local governments engaged in planning operations[.]"

cellular telecommunications services or personal communications within the jurisdiction of a planning unit that has adopted *planning and zoning regulations in accordance with this chapter shall*:

(a) Submit a copy of the applicant's completed uniform application *to the planning commission of the affected planning unit* to construct an antenna tower for cellular or personal telecommunications services.

...

(4) After an applicant's submission of the uniform application to construct a cellular antenna tower, the planning commission shall:

(a) Review the uniform application in light of its agreement with *the comprehensive plan and locally adopted zoning regulations*.

*Id.* (Emphasis added)

Finally, the administrative regulation at issue here is 807 KAR 5:063, which states in pertinent part:

Section 1. (1) To apply for a certificate of public convenience and necessity, a utility proposing to construct a telecommunications antenna tower in an area which is *not within the jurisdiction of a planning unit that has adopted planning and zoning administrative regulations in accordance with KRS Chapter 100*, shall file with the Public Service Commission . . . .

*Id.* (Emphasis added).

While the precise words used in each of these three provisions may be differ slightly, their meaning is consistent and it is plain: when a cellular provider proposes to build a cell site in an area with a local planning unit that has adopted planning and zoning regulations, it *must* submit its application to that local planning unit so that the local planning unit may review the application in light of the planning and zoning regulations already in place.

No language in any of these provisions mandates that the local planning unit adopt regulations specific to cellular communications systems before it may review applications. The provisions *only* require that the planning unit has adopted planning and zoning regulations in accordance with KRS Chapter 100. Giving these words their plain meaning "restricts [the Commission] from adding restrictive language . . . where it does not now exist." *Bailey*, 662 S.W.2d

at 834-835. While a local planning unit *may* adopt such regulations, it is certainly not required to do so by the statutes in order to review an application such as the one submitted by Bluegrass Wireless.<sup>2</sup>

When given their plain meaning, these provisions sustain the statutory requirement that a local planning unit adopt a comprehensive plan to monitor the growth of the community in which it is located. KRS §100.183 requires "[t]he planning commission of each unit shall prepare a comprehensive plan, which shall serve as a guide for public and private actions and decisions to assure the development of public and private property in the most appropriate relationships." To be sure, there is no entity in better position than the local planning unit to evaluate whether the location of a proposed cell tower comports with its own planning and zoning scheme. Reading the statutes and regulations to require this is neither absurd nor wholly unreasonable; arguably, any other conclusion would be illogical.

Applying this language to the case at bar confers jurisdiction upon the London and Laurel County Planning Commission to review Bluegrass Wireless' application regarding the Lily II cell site. The Lily II cell site will be located within the jurisdiction of the London and Laurel County Planning Commission. The London and Laurel County Planning Commission has adopted planning and zoning regulations in accordance with KRS Chapter 100. It is therefore empowered, and in the best position, to evaluate the location of the Lily II cell site with respect to those regulations. Accordingly, the London and Laurel County Planning Commission, not the Public Service Commission, has jurisdiction over the Lily II application.

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<sup>2</sup> This position is supported by the fact that the KRS provides adequate guidance for review of applications to a local planning unit which has not adopted cellular communications-specific regulations. KRS §100.985 sets forth the minimum standards in the requirements for the uniform application. KRS §100.986 sets forth the limits of what a local planning unit may do with respect to regulating placement of cellular towers. Therefore, a local planning unit need not formally adopt regulations in order to have guidance with respect to reviewing such applications.

**CONCLUSION**

For the foregoing reasons, the London and Lauren County Planning Commission has jurisdiction over Bluegrass Wireless' application for issuance of a certificate of public convenience and necessity to construct the Lily II cell site. Accordingly, the Public Service Commission of the Commonwealth of Kentucky should dismiss this matter for want of jurisdiction.

Respectfully submitted,



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John E. Selent

Jane W. Nall

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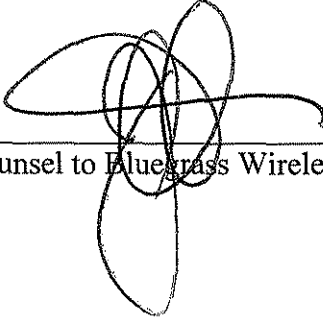
(502) 540-2300

**COUNSEL TO BLUEGRASS WIRELESS LLC**

**CERTIFICATE OF SERVICE**

It is hereby certified that a true and accurate copy of the foregoing was served by first class United States mail this 23rd day of May, 2006, upon the following:

Thomas J. FitzGerald  
Kentucky Resources Council, Inc.  
P.O. Box 1070  
Frankfort, Kentucky 40602  
*Counsel to Intervenors,  
Glenn L. & Sue Shadoan*

  
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Counsel to Bluegrass Wireless LLC



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