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July 31, 2006

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

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JUL 31 2006

PUBLIC SERVICE
COMMISSION

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*


Dear Ms. O'Donnell:

Enclosed for filing in the above-styled case is the original and ten copies of Bluegrass Wireless LLC's response to the motion of intervenors Glenn and Sue Shadoan for rehearing on the issue of jurisdiction of the Lily II application.

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

Very truly yours,

DINSMORE & SHOHL LLP



Jane W. Nall

JWN
Enclosures

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bcc: Ron Smith
Scott McCloud
Doug Updegraff

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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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

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PUBLIC SERVICE
COMMISSION

RESPONSE TO MOTION OF INTERVENORS
GLENN AND SUE SHADOAN FOR REHEARING

Bluegrass Wireless LLC, by counsel, for its response to the motion of intervenors Glenn and Sue Shadoan for rehearing, 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 (the "Shadoans") requested permission to intervene from the Commission, which the Commission granted. Thereafter, Bluegrass Wireless and the Shadoans were given the opportunity to present their respective positions relating to the appropriate jurisdiction of the Lily II application. (*See generally* Shadoans' response to suggestion of dismissal for want of jurisdiction and reply of Bluegrass Wireless to the Shadoans' response.)

Following briefing of the issue by Bluegrass Wireless and the Shadoans, the Commission issued an Order dismissing the Lily II application for want of jurisdiction. (*See generally*

Commission's June 27, 2006 Order.) In its Order, the Commission properly held that the plain language of the applicable statutes conferred jurisdiction upon the London and Laurel County Planning Commission (the "Planning Commission") because jurisdiction is determined based on the "geographical scope of the applicable planning commission's jurisdiction - not its subject-matter jurisdiction." (Order at p. 3.) Furthermore, the Commission held that even if the statutes were found to be ambiguous, the Planning Commission would have jurisdiction regardless of the fact that it has not adopted cellular specific regulations because, under KRS 100.987, "the mere creation of a county-wide planning commission effectuates the General Assembly's intent to promote the local regulation of cell tower placement." (*Id.* at p. 4.) The Shadoans motion for rehearing followed the Commission's Order.

SUMMARY OF THE ARGUMENT

In their motion for rehearing, the Shadoans have presented no new substantive arguments which would necessitate a rehearing on the issue of jurisdiction over the Lily II application. First, the Shadoans restate their earlier position that the relevant statutory provisions provide for subject matter jurisdiction rather than geographical jurisdiction. Now, the Shadoans argue that discretionary language contained in KRS 100.987(1) creates an implied jurisdiction in the Commission to review applications when a local planning has not adopted cellular specific regulations as part of its comprehensive plan. However, as the Commission properly held, under KRS 278.650 and KRS 100.987, a local planning unit's jurisdiction to review cell tower applications is not dependent on its adoption of cellular specific regulations.

Second, the Shadoans argue that the generally applicable KRS 278.020 creates an "overarching" jurisdiction in the Commission to review all applications for certificates of public convenience and necessity ("CPCN"), whether or not within the Commission's jurisdiction.

However, the specific statutes relating cellular communications prevail over the generally applicable statute, and these specific statutes contemplate no such "default" jurisdiction in the Commission. As a result, the Shadoans have stated no grounds upon which the Commission should grant a rehearing and, accordingly, their motion should be denied.

ARGUMENT

I. THE PLAIN LANGUAGE OF KRS 100.987 DOES NOT RENDER JURISDICTION DEPENDENT UPON THE ADOPTION OF REGULATIONS SPECIFIC TO CELLULAR COMMUNICATIONS.

The Shadoans argue that local planning units must adopt cellular specific regulations in order to have jurisdiction over cell tower applications. In so arguing, the Shadoans merge two distinctly different concepts, namely, jurisdiction (the authority to review cell tower applications) and the authority to promulgate regulations. They are not the same, and nothing in KRS 100.987 renders jurisdiction over cell tower applications *dependent* upon adoption of cellular specific regulations.

KRS 100.987 states in pertinent part:

(1) A planning unit as defined in *KRS 100.111* 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 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*[*Chapter 100*] 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).

As the Commission stated, "[t]he 'plain meaning' of statutes controls when interpreting statutory language." (Order at p. 3)(citing *Lamb v. Holmes*, 162 S.E.3d 902, 909 (Ky. 2005)). The plain language of this provision only requires that the planning unit has adopted planning and zoning regulations in accordance with KRS Chapter 100. This reading of the statutes is harmonious with the regulatory provision on point, 807 KAR 5:063, which specifically sets forth that the Commission only has jurisdiction over applications for cell towers which are "not in within the jurisdiction of a planning unit that has adopted planning and zoning administrative regulations in accordance with *KRS Chapter 100*. . . ." (Emphasis added). Giving these words their plain meaning prohibits the Commission from "adding restrictive language . . . where it does not now exist." *Bailey v. Reeves*, 662 S.W.2d 832, 834-835 (Ky. 1984).

Under KRS 100.987(1), the discretionary language relied upon by the Shadoans applies to a local planning unit's authority to adopt regulations specific to the placement of cellular towers, *not* its jurisdiction to review cell tower applications. While a local planning unit may adopt such regulations to aid its review of applications, it is not required to do so in order to have *jurisdiction* to review an application.¹ The Commission recognized this distinction in its Order when it stated that "[t]he planning commission in Laurel County apparently has not yet availed itself to the grant of authority set forth in KRS 100.987(1), but the mere creation of a county-wide planning commission effectuates the General Assembly's intent to promote the local regulation of cell phone tower placement." (Order at p. 4.)

¹ Moreover, while it may be helpful, it is not actually necessary for a local planning unit to adopt cellular specific regulations. The KRS provides ample guidance for the review of applications without the formal adoption of cellular specific regulations. *See generally* KRS 100.985 through KRS 100.9865.

On the other hand, jurisdiction under KRS 100.987(2) is not discretionary. There, the General Assembly set forth that entities engaged in the provision of cellular communication services "shall" submit applications to local planning units which have adopted regulations in accordance with KRS Chapter 100. *Id.* The local planning unit's jurisdiction is made more evident when read in connection with KRS 278.650, which provides the limits on the Commission's jurisdiction. As the Commission stated, "statutes relating to the same subject should be construed harmoniously wherever possible so as to give effect to each." (Order at p. 4)(citing to *Sumpter v. Burchett*, 202 S.W.2d 735, 736 (Ky. 1947). Under these statutes, if a proposed cell tower is to be constructed within the geographical jurisdiction of a local planning unit, the local planning unit has jurisdiction over the application. If not, the Commission has jurisdiction over the application.

Therefore, failure of a local planning unit to "[avail] itself of the grant of authority set forth in KRS 100.987(1)[,]" (*id.*) does not create some kind of implied jurisdiction in the Commission to review applications which are properly within the jurisdictions of those planning units. The Commission only has jurisdiction in accordance with KRS 278.650, which "presents no ambiguity and clearly limits the Commission's jurisdiction to *areas outside the jurisdiction of a planning commission. . . .*" (Order at p. 4)(Emphasis added). Because "[s]tatutes may not be amended by implication[,]" *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87, 94 (Ky. 2005), the Commission may not read an implied jurisdiction into the plain language of KRS 100.987 and KRS 278.650. Had the General Assembly intended for jurisdiction to be dependent on adoption of cellular specific regulations, it would have expressly so required.

II. THE COMMISSION DOES NOT HAVE DEFAULT JURISDICTION OVER ALL APPLICATIONS FOR A CPCN.

Next, the Shadoans argue that the generally applicable statute, KRS 278.020, creates an "overarching" jurisdiction in the Commission over all applications. In construing Chapter 278 in a

different context, the Kentucky Supreme Court stated that "[a] general statute which relates to utilities is of no consequence. Where two statutes concern same or similar subject matter, specific statutes *always* prevail over general statutes. Chapter 278 may govern utilities generally . . . , however, the specific . . . statute still controls." *Lewis*, 189 S.W.3d at 94-95(citing *Withers v. University of Ky.*, 939 S.W.2d 340, 344 (Ky. 1997)(emphasis added).

This principal is particularly applicable here. KRS 278.020 stands for the general principal that utilities must receive a certificate of public convenience and necessity ("CPCN") in order to construct facilities or provide services. *Id.* It governs all utility services over which the Commission has authority, including electric, gas, water, sewer, telephone and telecommunications services. *Id.* Conversely, KRS 100.987 and KRS 278.650 deal *specifically* with regulation of cellular antenna towers, including which entity properly has jurisdiction over an application for a CPCN. Therefore, KRS 100.987 and KRS 278.650 prevail over KRS 278.020 with respect to the issue of jurisdiction of the Lily II application.

Here, Bluegrass Wireless submitted its application to the appropriate entity, and the responsibility then fell with the Planning Commission to review the application in light of its "comprehensive plan and locally adopted zoning regulations." KRS 100.987(4)(a). The Shadoans suggest that the Planning Commission's choice not to act on the Lily II application creates a kind of implied jurisdiction in the Commission to review applications over which it would not otherwise have jurisdiction. However, as set forth above, previously in Bluegrass Wireless' reply, and in the Commission's Order, the Commission's jurisdiction is limited by the plain language contained in KRS 100.987 and KRS 278.650, neither of which create "default" jurisdiction, express or implied, in the Commission over applications upon which local planning units choose not to act.

To the contrary, the statutes contemplate local control. KRS 100.987 specifically provides that when a local planning unit "fails to issue a final decision within sixty (60) days [of receipt of the application] . . . , the uniform application shall be deemed approved." *Id.* at (4)(c). The Commission does not have the authority in that instance to re-review the application, but defers to the review by the local planning unit, *whatever* it may have entailed. This reading of the statute "effectuates the General Assembly's intent to promote the local regulation of cell phone tower placement." (Order at p. 4.) Furthermore, because either a local planning unit or the Commission will have jurisdiction over every application for a CPCN relating to cell towers, the broader purpose of KRS 278.020 is also effectuated.

Lastly, the Shadoans cite to recently enacted KRS 278.54611 specifically relating *only* to commercial mobile radio services. Bluegrass Wireless fails to see how this provision implicates jurisdiction over the issuance of a CPCN for cellular towers, and would not argue that it repeals by implication, or otherwise, KRS 278.020 with respect to the application at issue here. Its existence, however, supports the legal principal cited above that a specific statute will prevail over a general statute dealing with the same subject matter. Like KRS 278.54611 as it relates to the regulation of commercial mobile radio services, KRS 100.987 and KRS 278.650 prevail over the generally applicable KRS 278.020 with respect to cellular telephone services. Thus, the jurisdiction of the Commission is limited to those applications for cell towers which will be constructed in "*areas outside the jurisdiction of a planning commission. . . .*" (Order at p. 4)(Emphasis added).

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. Furthermore, the Shadoans have stated no grounds

which necessitate a rehearing on this issue and, accordingly, the Public Service Commission of the Commonwealth of Kentucky should deny their motion for a rehearing.

Respectfully submitted,



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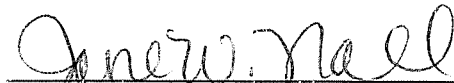
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COUNSEL TO BLUEGRASS WIRELESS LLC

CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of Bluegrass Wireless LLC's response to the Intervenor's motion for rehearing was served by first class United States mail this 31st day of July, 2006, upon the following:

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