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JUL 20 2006

PUBLIC SERVICE
COMMISSION

July 21, 2006

Beth O'Donnell, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602

RE: Case No. 205-00320

Dear Ms. O'Donnell:

Attached are the original and 10 copies of the MOTION OF INTERVENORS GLENN AND SUE SHADOAN FOR REHEARING, AND MEMORANDUM IN SUPPORT THEREOF, Case No. 205-000320. This motion, filed yesterday, July 20, 2006, is being resubmitted due to formatting errors. The text remains unchanged.

Sincerely,



Becky Raff
Office Manager

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

APPLICATION OF BLUEGRASS WIRELESS,)
LLC FOR ISSUANCE OF A CERTIFICATE OF)
PUBLIC CONVENIENCE AND NECESSITY TO) CASE NO.
CONSTRUCT A CELL SITE (LILY II) IN RURAL) 2005-00320
SERVICE AREA #6 (LAUREL) OF THE)
COMMONWEALTH OF KENTUCKY)

JUL 20 2006

PUBLIC SERVICE
COMMISSION

* * * * *

MOTION OF INTERVENORS GLENN AND SUE SHADOAN
FOR REHEARING, AND MEMORANDUM IN SUPPORT THEREOF

Come the Intervenors, L. Glenn and Sue Shadoan, by counsel, and move the Commission to grant a rehearing and oral argument on the decision of the Commission to dismiss the application of Bluegrass Wireless for want of jurisdiction. In support of this motion, Intervenors provide the following memorandum.

I. Jurisdictional Statement

KRS 278.400 provides that any party may, within twenty (20) days of service of an order of the Commission, seek rehearing with respect to any matters determined by the Commission. By statute, service is deemed complete three (3) days after the date the order is mailed. This motion is timely filed, having been filed within thirty (30) days of the statutorily-established service completion date.

KRS 278.400 provides that an application for rehearing shall "specify the matters on which a rehearing is sought." The Commission is empowered by statute to "change,

modify, vacate, or affirm its former orders, and make and enter such order as it deems necessary.” Id.

II. Statement of Applicable Law

Three statutory provisions govern cell tower siting in Kentucky. The first, KRS 100.987(1), provides discretionary authority to planning units that elect to regulate cell tower siting by adopting planning and zoning regulations. The second, KRS 278.650, empowers and obligates the Public Service Commission (PSC) to review applications for siting such towers in all other instances. The third, KRS 278.020, is the general statute mandating that a certificate of public convenience and necessity be obtained by any utility prior to provision of service to the public and construction of any equipment or facility for doing so.

Previously, the Intervenor’s Response reviewed the past legislative approaches to regulation of cell tower siting, beginning with the earliest legislative effort to provide for regulation of the siting of cell towers in 1996, with the enactment of KRS 278.650 and amendment to KRS 100.324, through the present day. That discussion is incorporated herein by reference.

III. Statement of Facts

On September 2, 2005, Bluegrass Wireless made application to the Public Service Commission for approval of a cell tower site to be constructed on Shackle Road in London, Laurel County, Kentucky. In response to a notice sent to them concerning the application, on August 22, 2005, Glenn and Sue Shadoan, whose property is contiguous to that on which the cell tower was proposed and whose home is within 500 feet of the proposed tower, moved to intervene, and in response to a request by the Commission

staff to identify the specific grounds for seeking intervention, the Shadoans provided a letter dated September 27, 2005, identifying those concerns. The Commission granted full Intervenor status to the Shadoans by Order dated October 7, 2005.

On January 4, 2006, Bluegrass Wireless moved to hold further proceedings before the Commission in abeyance for a ninety-day period in order that the applicant might “evaluate the appropriate forum within which to pursue this matter.” That motion was granted by the Commission, and by Order dated January 11, 2006, the matter was held in abeyance until April 6, 2006, with Bluegrass Wireless directed to advise the Commission in writing no later than April 10, 2006 as to the status of the company’s position on whether the Commission had jurisdiction over the issuance of a Certificate of Public Convenience and Necessity for the proposed tower.

By letter dated April 10, 2006, counsel for Bluegrass Wireless notified the Commission that “Bluegrass Wireless has reviewed the matter with legal counsel and has determined that the Public Service Commission does not have jurisdiction over this matter [and that t]he case should therefore be dismissed by order dismissing the case for lack of subject matter jurisdiction.”

In response to the April 10, 2006, letter, Intervenor Glenn and Sue Shadoan provided a memorandum in opposition to the suggestion of dismissal for want of jurisdiction, and argued that this Commission does have subject matter jurisdiction pursuant to KRS 278.650 since the Laurel County Planning and Zoning Commission had not elected to assert jurisdiction over the siting of cellular antenna towers in that county pursuant to KRS 100.987(1) by adopting zoning regulations for siting of cell towers.

The Intervenor made two legal arguments in support of PSC jurisdiction – first, that the phrase “outside the jurisdiction of a planning commission” in KRS 278.650 referred to the regulatory ambit of a planning unit rather than to a geographic area. This interpretation is necessary to avoid the creation of a regulatory gap where neither PSC review nor local planning review would occur for towers proposed within the boundaries of those planning units that have not elected to avail themselves of the authority over the siting of cellular antenna towers pursuant to KRS 100.987(1).

Intervenor also argued that where a local planning commission has not elected to adopt planning and zoning regulations specific to cell tower siting pursuant to the discretionary language of KRS 100.987(1), the authority to review the cell tower siting rests by virtue of KRS 278.650 with the PSC since KRS 100.987 requires adoption of planning and zoning regulation specific to cell towers as a prerequisite to attachment of planning commission jurisdiction.

Bluegrass Wireless responded in a May 24, 2006, filing, asserting that the London and Laurel County Planning Commission did have jurisdiction over cell tower applications since the Planning Commission had adopted general planning and zoning regulations in accordance with KRS Chapter 100 and “[t]he statutes do not require promulgation of cellular communications-specific regulations.” According to the company, “[n]o language in any of [the relevant statutes] mandates that the local planning unit adopt regulations specific to cellular communications systems before it may review applications[.]” and that “where 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.”
(Emphasis in original).

By Order entered and served by mail on June 27, 2006, the Commission granted the request of Bluegrass Wireless to dismiss the case for lack of jurisdiction. The Commission determined that the phrase “outside the jurisdiction of a planning commission” as found in KRS 278.650 described the geographical scope of the applicable planning commission’s jurisdiction rather than its subject matter jurisdiction, and that although the planning commission in Laurel County “apparently has not yet availed itself of the grant of authority set forth in KRS 100.987(1),” 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.”

This Motion and memorandum in support of motion for rehearing follow the Commission’s Order.

SUMMARY OF ARGUMENT

Rehearing is appropriate in order that the Commission may reconsider the decision in light of KRS 446.080(1), applicable rules of statutory construction, and the general prohibition of construction of facilities and equipment by utilities absent the grant of a Certificate of Public Convenience and Necessity (CPCN).

The Commission’s decision to decline jurisdiction where a cell tower is proposed in the geographic boundaries of a planning unit that has not “availed itself” of the authority under KRS 100.987(1), thwarts rather than effectuates the intent of the General Assembly that in all cases a governmental entity would review the proposed placement of a cellular tower in order to protect the rights and interests of nearby landowners. In holding that

the Commission lacks jurisdiction over siting and placement of a cell tower in a community that has adopted generally-applicable zoning and planning regulations but which the Commission acknowledges has “not availed itself of the grant of authority” to regulate cell towers under KRS 100.987, the Commission’s Order contravenes KRS 278.020, and KRS 446.080(1) which commands that “[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature.” The Commission’s acknowledgment that the London and Laurel County Planning Commission had not availed itself of the grant of authority under KRS 100.987, and the Commission’s dismissal of the case for want of jurisdiction, creates a significant gap in review of cell tower siting and leaves the Shadoans and landowners in all of those jurisdictions that have generally-applicable planning and zoning but have not availed themselves of the authority under KRS 100.9897(1) by adopting specific regulations for review of cell towers, without remedy or recourse, thus defeating the intent of the General Assembly and allowing cell tower placement to escape any review.

ARGUMENT

THE COMMISSION SHOULD EXERCISE JURISDICTION OVER THE SITING OF THE CELL TOWER UNDER EITHER KRS 278.650 OR 278.020 IN LIGHT OF THE DECISION OF THE LONDON AND LAUREL COUNTY PLANNING COMMISSION NOT TO AVAIL ITSELF OF THE AUTHORITY CONFERRED IN KRS 100.987

Intervenors and Bluegrass Wireless differ in their interpretation of the statutes at issue. *Intervenors* asserted that the elective nature of KRS 100.987(1) (providing that “[a] planning unit. . . may plan for and regulate the siting of cellular antenna towers[]”) and the inclusion of the second clause modifying the grant of authority (“in accordance with locally adopted planning and zoning regulations in this chapter”) provided planning units

the opportunity to elect to regulate such tower siting, and that in the absence of such an election, the Commission would review the placement of cell towers.

The company, in turn, asserted that the London and Laurel County Planning Commission “does have jurisdiction over the Lily II application” since the statutes require only that the planning unit has adopted general planning and zoning regulations and do not require “promulgation of cellular communications-specific regulations.”¹ According to Bluegrass, by virtue of having adopted general planning and zoning regulations the Planning Commission is “empowered, and in the best position, to evaluate the location of the Lily II cell site with respect to those regulations.” Bluegrass Reply, p. 5. Bluegrass goes further, arguing that when a cellular provider proposes to build a cell site in an area with a local planning unit that has adopted general planning and zoning regulations, the applicant “*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.” *Id.*, p. 4. (Emphasis original).

The Commission Order accepts the Intervenor’s argument that the mere adoption of general planning and zoning regulations does not in and of itself confer local planning commission jurisdiction over cell tower siting. The Commission observed that “[t]he planning commission in Laurel County apparently has not yet availed itself of the grant of authority set forth in KRS 100.987(1).” The Commission properly rejected Bluegrass’ interpretation of the statute as automatically conferring jurisdiction on planning units, since Bluegrass’ interpretation would convert the elective language of KRS 100.987(1) into mandatory language, and would make the second clause a redundancy.

¹ The record reflects that the London and Laurel County Planning Commission did not believe that it had jurisdiction over the siting of the cell tower at issue.

The Commission's acceptance of the interpretation of KRS 100.987(1) as requiring an affirmative act by a planning commission to "avail itself" of the grant of authority raises two questions – first, by what mechanism a planning commission would avail itself of that grant of authority, and second, in the absence of that action, whether the Commission has the duty to review the cell tower placement application or whether the placement decision will simply go unregulated and unreviewed.

The first question is answered by reference to the statute itself, since, giving effect to each word of the sentence, KRS 100.987(1) requires adoption of specific regulations for reviewing cellular tower applications.

Were it the case that adoption of general planning and zoning regulations were sufficient to invoke local planning jurisdiction, then the sentence in question would read "[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." Instead, the sentence continues by describing how the siting of cell towers may be "planned for and regulated" – i.e. "in accordance with locally adopted planning and zoning regulations in this chapter." Bluegrass Wireless's proposition that the statute requires the applicant to file with a local planning commission even if no specific cell tower planning and zoning regulations have been adopted, is inconsistent the discretionary language of the statute and leads to the anomalous situation where a cell tower is always or never in conformity with the comprehensive plan and zoning regulations since those regulations, by definition, do not plan for or address cell towers. Conversely, if the planning commission disclaims jurisdiction, as was the case here, no review would occur.

The Bluegrass Wireless argument renders the second clause redundant at best and superfluous at worst. Each word and clause in a statute is to be given effect, and to read the second clause “in accordance with locally adopted planning and zoning regulations in this chapter” as merely echoing the first clause “that has adopted planning and zoning regulations” would render the second reference to “planning or zoning regulations” in KRS 100.987(1) a meaningless redundancy; an outcome to be avoided in construction of a legislative act. Kidd v. Board of Education of McCreary County, Ky. App., 29 S.W.3d 374 (2000).

The position of Bluegrass Wireless that the applicant *must* submit an application to any local planning unit in existence in the geographic area where the tower is sought to be located even where the planning unit and legislative body have not availed themselves of the authority under KRS 100.987(1) to “plan for and regulate the siting of cellular antenna towers” by amending the local comprehensive land use plan and zoning regulations, has the effect of making mandatory what the General Assembly left discretionary with the planning commission and legislative bodies. The process outlined in KRS 100.987(2)-(10), including the obligation to file the application with the planning commission is prefaced by the same prerequisite act of the planning unit – the adoption of planning and zoning regulations in specific furtherance of the grant of authority in KRS 100.987(1). To read the phrase “that has adopted planning and zoning regulations in accordance with this chapter” as it appears in KRS 100.987(2) as referring only to general zoning and planning provisions would vitiate the discretionary nature of the grant of authority in subsection (1).

Under the plain language of the statute, where a planning commission has not adopted specific revisions to the comprehensive plan and zoning regulations addressing cellular tower placement, KRS 100.987(1) has not been triggered. The Commission's Order properly acknowledges that the mere adoption of generally-applicable zoning regulations *is not in itself sufficient to allow a planning unit to exercise jurisdiction over cell tower siting applications* , and that further action is required for a planning unit to "avail itself of the grant of authority" in KRS 100.987.

Where the Intervenors differ from the Commission's Order and where the Intervenors request rehearing and reconsideration of the Commission's interpretation and application of statutory provisions, is in determining what the statutes require of the Commission in cases where the local planning unit has not availed itself of the statutory authority under KRS 100.987(1).

The Commission suggests that the outcome of this and similarly-situated cases, i.e. that no entity will review the cell tower placement, is consistent with the General Assembly's intent "to promote the local regulation of cell phone tower placement." It is difficult to see how the Commissions' abdication of regulatory responsibility to a local planning unit that the Commission acknowledges has not "availed itself of the grant of authority" and which is not obligated to do so, *satisfies the goal of "promoting local regulation of cell phone tower placement."* Instead, the Commissions' failure to assert jurisdiction contradicts legislative intent by providing *less* protection for residents in counties *with* planning and zoning than those *without*. The Commission's declination of jurisdiction will cause cell tower siting to go unreviewed by any governmental entity in communities within the physical boundaries of a planning unit whose planning

commission has not “availed itself” of the authority granted by KRS 100.987(1), and punishes landowners in jurisdictions that have not elected to assert the discretionary jurisdiction under that section. The absurd result of dismissal of this application is that applicants will make application to planning units who disclaim jurisdiction under KRS 100.987(1) and who will decline to act on the applications, resulting in default approval after sixty days without review by either the planning unit (which believes it lacks authority to act or chooses not to under KRS 100.987) or the PSC – in direct derogation of legislative intent.

In order to avoid a regulatory gap, the Commission should reconsider its interpretation of KRS 278.650 as allowing cell tower construction proposals that are within the geographic jurisdiction of a planning commission that has not adopted cell tower zoning as described in KRS 100.987(1), to proceed to construction without obtaining a Certificate of Public Convenience and Necessity (CPCN) from the Commission or any local approval, creating a significant loophole for wireless communication tower siting.

Finally, accepting for the sake of argument that the Intervenors were incorrect in construing KRS 278.650 to mean *regulatory* jurisdiction rather than *geographic* jurisdiction, the Commission should still assert jurisdiction over the cell tower application pursuant to KRS 278.020.

To the extent that a proposed cell tower site is excluded from KRS 278.650 under the Commission’s interpretation of that statute as applying to cell tower siting in geographic areas outside of the geographic jurisdiction of planning commissions, and is likewise outside of the scope of review under KRS 100.987(1) where a planning commission has not modified its comprehensive plan and zoning regulations to “avail itself” of the

discretionary grant of authority under KRS 100.987(1) to regulate cell tower siting, *the siting of the cell towers clearly falls within the more general and overarching ambit of KRS 278.020.*

First, as indicated in the caption of KRS 278.650, “Procedures for proposals to construct antenna towers in an area outside the jurisdiction of a planning commission,” the statute applies to proposals outside the jurisdiction of a planning commission. Nothing in the language of the caption or the text suggests that a cell tower siting proposal in a geographic area within a planning commission’s geographic jurisdiction, where the commission has not “availed itself” of the authority under KRS 100.897, is *not* subject to the CPCN requirement of KRS 278.020.

KRS 278.020, captioned “Certificate of public convenience and necessity required for construction provision of utility service or of utility,” by its terms requires applicants to obtain CPCNs for cell tower construction. KRS 278.020 states that “[n]o person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010” until the party has obtained a certificate of public convenience and necessity from the Commission.

The “services” enumerated in KRS 278.010 include wireless phone services, since KRS 278.010(3)(e) defines the term “utility” to include “[t]he transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation,” and (13) defines the term “service” to include “any practice or requirement in any way relating to the service of any utility.”

Nothing in KRS 100.987(1) excuses the applicant from the requirement to obtain a CPCN where the tower is located within the geographic boundaries of a planning commission that has not asserted jurisdiction, nor is there any language in KRS 278.650 that provides such excuse (particularly since, under the Commission's interpretation of the latter statute, it is inapplicable). To the extent that the Commission is correct that the General Assembly's intent was to foster local regulation of cell tower regulation, that goal is not advanced by the Commission's failure to assert jurisdiction under KRS 278.020 where the planning commission declines to avail itself of the discretionary authority provided by the General Assembly. Rather than merely advancing local regulation, which could have been more cleanly advanced by mandating cell tower regulation as a component of the comprehensive plan and zoning regulations, the history of legislative enactments summarized in the Intervenor's Response reflects an overarching intent that some entity review the siting of cell towers in order to protect landowners.

The Commission's failure to assert jurisdiction under KRS 278.020, in light of its conclusion regarding KRS 278.650, creates a significant gap that thwarts legislative intent and violates the plain and unambiguous mandate of KRS 278.020(1). While it will likely be argued by Bluegrass Wireless that KRS 278.54611 *constrains the continued* applicability of KRS 278.020, the former statute speaks of the retention of jurisdiction over cell towers and does not preclude continued application of KRS 278.020, and KRS 278.650 recognizes the continued applicability of KRS 278.020 to cell tower siting notwithstanding the adoption of KRS 278.54611 and KRS 278.665.

According to KRS 446.080(1) "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." Here, it

is clear that the General Assembly did not intend for cell towers to be sited and constructed without any type of administrative approval. The General Assembly has through various enactments since 1996 attempted to assure that some governmental review of a proposed cell tower siting would occur prior to construction. The provisions of KRS 278.650 and 278.665 address one subset of siting situations (those outside of the jurisdiction of planning commissions); while KRS 100.987(1) has been recognized as being an elective grant of authority rather than a mandate for another subset of siting situations (those within the jurisdiction of planning commissions).

In order to prevent the anomalous results that will follow from the Commission's construction of KRS 278.650, that interpretation should be reevaluated or KRS 278.54611 should be construed so as not to repeal or modify KRS 278.020 by implication. "It is well established that repeal by implication is strongly disfavored and will not be discovered unless the statutes are disharmonious and a subsequent enactment negates the former." Commonwealth v. Reynolds, Ky., 136 S.W.3d 442 (2004). See also: Caterpillar, Inc. v. Brock, Ky., 915 S.W.2d 751 (1996) ("[r]epeal by implication finds no favor within the courts."). Absent a clear intent to extinguish the broad grant of authority under KRS 278.020, and in light of the continued reference to that authority in KRS 278.650 notwithstanding the language of KRS 278.54611, KRS 278.54611 should not be construed to extinguish by implication the obligations of KRS 278.020 in cases not governed by either KRS 278.650 or KRS 100.987(1). The statutes are not disharmonious, and the enactment of KRS 278.54611 does not negate the continued effect of KRS 278.650 or KRS 278.020, so that repeal by implication should not be found.

The Commission should reconsider and rehear so much of the Order as dismissed the case for want of jurisdiction. In light of the Commission's conclusion that KRS 100.987(1) is elective and has not been invoked in this instance, KRS 278.650 should be construed as a constraint on *regulatory* rather than *geographic* jurisdiction and the PSC should recognize jurisdiction over the application.² If the Commission reaffirms its interpretation of KRS 278.650 as being inapplicable given the location of the tower within a geographic boundaries of a planning unit that has disclaimed jurisdiction and has not availed itself of KRS 100.987(1), then the more general obligation of KRS 278.020 should be applied to demand that the applicant seek a CPCN.

Conclusion and Prayer for Relief

For these reasons, Intervenors Glenn and Sue Shadoan respectfully request that the Commission rehear so much of the case as dismissed the application for want of subject matter jurisdiction, and that the Commission enter an order affirming the statutory jurisdiction of the PSC under KRS 278.020 or KRS 278.650 over the siting of cellular antenna towers in instances such as this where a planning commission has elected not to avail itself of the grant of authority to plan for and regulate the siting of cell towers

² The Commission's obligation is 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 (Ky. 1984). . . [The] main objective is to construe the statute in accordance with its plain language and in order to effectuate the legislative intent." Cabinet for Families & Children v. Cummings, Ky., 163 S.W.3d 425 (2005). Construction of KRS 278.650 as connoting geographic jurisdiction, in light of the Commission's acknowledgment that KRS 100.987(1) provides an elective grant of regulatory jurisdiction within the geographic area of a planning commission's ambit with respect to cell tower siting, leads to the absurd results described earlier, including the scenario presented here where the company has applied to the planning commission, the commission has failed to act within the prescribed time (due to a lack of regulatory jurisdiction, no entity has conducted a review, and the Commission believes that the intent of the General Assembly has been effectuated.

through local zoning or planning regulations under KRS 100.987.³

³ Intervenors reiterate and request rehearing also on the issue of *regulatory v. geographic* jurisdiction. To the extent that the Commission continues to view KRS 278.650 as embracing the latter rather than the former, KRS 278.020 should be applied to fill the gap otherwise created and to avoid the anomalous results of applications submitted to planning commissions that disclaim authority, or which lack standards against which to measure compliance with the comprehensive plan and zoning regulations.

Respectfully submitted,



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Counsel for Intervenors
Glenn Shadoan and Sue Shadoan

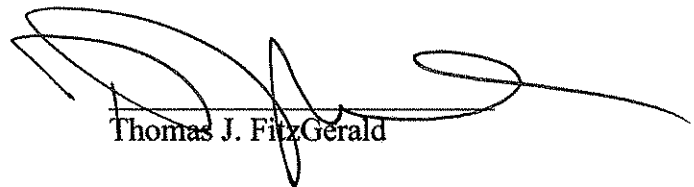
Certificate of Service

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing was served by first class mail upon:

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and that the original and (10) copies of this Response were mailed to the Docket Clerk, Kentucky Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40601 this 20th day of July, 2006.



Thomas J. FitzGerald