

# Kentucky Resources Council, Inc.

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May 15, 2006

Docket Clerk  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, Kentucky 40601

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Re: Case No. 2005-00320

Dear Docket Clerk:

Enclosed please find for filing the original and ten (10) copies of an *Entry of Appearance*, and of the *Response of Intervenors Glenn and Sue Shadoan To Suggestion of Dismissal for Want of Jurisdiction*. All parties have been served through counsel by mail today. Thank you for your assistance in filing these.

Cordially,



Tom FitzGerald  
Counsel for Intervenors

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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 )

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COMMISSION

\* \* \* \* \*

ENTRY OF APPEARANCE

Come the undersigned and enters an appearance on behalf of Intervenors, L. Glenn  
and Sue Shadoan.

Respectfully submitted,



Thomas J. Fitzgerald  
Kentucky Resources Council, Inc.  
P.O. Box 1070  
Frankfort, Kentucky 40602  
(502) 875-2428

Counsel for Intervenors  
Glenn Shadoan and Sue Shadoan

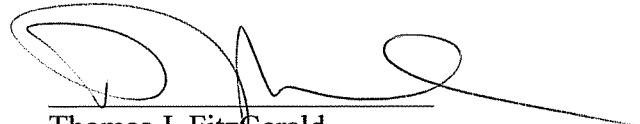
Certificate of Service

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

John E. Selent, Esq.  
Dinsmore and Shohl, LLP  
1400 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202

Dale Wright, Esq.  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, Kentucky 40601

and that the original and (10) copies of this Entry of Appearance were mailed to the Docket Clerk, Kentucky Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40601 this 15<sup>th</sup> day of May, 2006.



Thomas J. Fitzgerald

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BLUEGRASS WIRELESS, )  
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RESPONSE OF INTERVENORS GLENN AND SUE SHADOAN  
TO SUGGESTION OF DISMISSAL FOR WANT OF JURISDICTION

Come the Intervenors, L. Glenn and Sue Shadoan, by counsel, and in response to the suggestion contained in the April 10, 2006 letter from attorney John E. Selent of Dinsmore and Shohl, LLP 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[,]” provide this memorandum in opposition to the suggestion of dismissal for want of jurisdiction. For the reasons stated below, Intervenors L. Glenn and Sue L. Shadoan (“Shadoans”) believe that this Commission does have subject matter jurisdiction pursuant to KRS 278.650 since the Laurel County Planning and Zoning Commission has not elected to assert jurisdiction over the siting of cellular antenna towers in that county pursuant to KRS 100.987(1).

## Argument

This case presents a question of the appropriate construction of and relation between two statutory provisions governing cell tower siting – KRS 100.987(1), which provides discretionary authority to planning units that elect to regulate cell tower siting by adopting planning and zoning regulations; and KRS 278.650, which empowers and obligates the Public Service Commission (PSC) to review applications for siting such towers in all other instances.

In order to place current statutes in their proper context, a review of the past legislative approaches to regulation of cell tower siting and the changes that have occurred to those laws is necessary. The earliest legislative effort to provide for regulation of the siting of cell towers occurred in 1996, with the enactment of House Bill 20, creating a new KRS 278.650 and amending KRS 100.324. The first statute provided that for cellular antenna towers to be located within a county containing a city of the first class, the utility would be required to submit a proposal to the planning commission of that affected planning unit prior to seeking a certificate of public convenience and necessity (CPCN) from the PSC. KRS 278.650(1) (1996). The PSC would not grant a certificate until after the planning commission had taken final action or until 60 days had elapsed. *Id.* If the planning commission rejected the proposal, the PSC could override that decision if the PSC determined that “there is no acceptable alternate site and that the public convenience and necessity requires the proposed construction.” KRS 278.650(2)(1996). For towers to be located “outside the area of a county containing a

city of the first class,” the Commission was empowered to take into account “the character of the general area concerned, and the likely effects of the installation on nearby land uses and values.” *Id.*, at subsection (4).

The amendment to KRS 100.324 effected by House Bill 20 outlined that same procedure and time line for utilities proposing to construct cellular antenna towers within counties containing a city of the first class.

Notably, the 1996 legislation did not first require adoption of a resolution or of zoning regulations by the planning unit or legislative body within the county or city of the first class in order to trigger the assertion of jurisdiction under Chapter 100 over cell tower siting.

The Legislature revisited the issue in 1998, with the enactment of House Bill 168, which again amended KRS 100.324 and codified two new sections of KRS Chapter 100 and KRS Chapter 278. New KRS 100.985 provided new definitions of the terms used in KRS 100.987, a new section of KRS Chapter 100 that provided *discretionary* authority for planning units and legislative bodies or fiscal courts that has adopted planning and zoning regulations” other than counties containing cities of the first class, to “plan for and regulate the siting of cellular antenna towers in accordance with locally adopted planning or zoning regulations][.]” KRS 100.987(1)(1998). The statute made clear that “[n]othing in this section shall *require* a planning unit and legislative body or fiscal court to plan for and regulate the siting of cellular antenna towers” (italics added) but those planning units and legislative bodies or fiscal courts that *did* were required to pass a formal resolution indicating an intention to so regulate, and to register that resolution with the Public

Service Commission. KRS 100.987(1) (1998). Siting within counties containing a city of the first class remained governed by KRS 100.324(5) and KRS 278.650.

Under the 1998 legislation, a planning commission that decided to regulate such towers was required by KRS 100.987(4) to review and pass on an application for siting within 60 days and to inform the PSC by that time, after which an application was presumed approved if not acted upon. The PSC was authorized under KRS 100.987(5) to approve the site notwithstanding a planning commission rejection of a site as inconsistent with the comprehensive plan or zoning regulations if the PSC determined that “there is no acceptable alternate site and that the public convenience and necessity requires the proposed construction.” KRS 100.987(5)(a) (1998).

The 1998 law also added KRS 278.660, establishing rules for confidentiality of most information supplied by the utility to the commission, and directed that the PSC develop regulations for the minimum content of a “uniform application” for siting a cellular antenna towers.

Thus, after 1998, planning commissions within counties containing cities of the first class had the authority without registering with the Commission or adopting a resolution, to pass on the consistency of the proposed tower with the local comprehensive plan and zoning regulations, and outside of those counties, any planning unit wishing to regulate the siting and any legislative body was first obligated to register a resolution to that effect with the Commission and to adopt zoning and planning regulations for siting of cellular towers. For counties other than those containing a city of the first class who determined not to enact and register such a resolution with the PSC, KRS 278.650 empowered the

PSC to consider the character of the area and effect on land uses and values as part of the CPCN review process.

The General Assembly visited the issue of cell tower construction in 2000, amending KRS 278.665 to provide for the type of landowner notice to be given for those areas outside of an incorporate city or within a rural service area of an urban county (i.e. Lexington). This amendment did not affect unincorporated areas of counties containing a city of the first class.

In 2002, through the enactment of House Bill 659, the General Assembly reacted to the Louisville – Jefferson County merger by amending KRS 278.650 and 278.665 to include both cities of the first class and counties containing a “consolidated local government” (i.e. Metro Louisville). A separate bill enacted in 2002 made several substantive changes to KRS 100.324, 100.985, 100.987, 178.650, 278.660 and 278.665, and enacted a new KRS 100.986 and 100.9865.

The new sections, KRS 100.986, further defined and circumscribed the Commission’s authority with respect to cell antenna towers, and statutorily defined and limited the contents of the cell tower application in new KRS 100.9865 and the amendment to KRS 100.987.

KRS 100.324 was amended to remove subsection 5, which had created separate and distinct rules for counties containing cities of the first class and which the other 2002 bill had sought to expand to consolidated governments. The statute compiler harmonized the conflicting bills by eliminating the subsection entirely. With the enactment of the 2002 amendments, and the harmonization by the statute compiler of 2002 Ky. Acts Chapter 343 Section and Chapter 346, Section 223, the siting of cellular antenna towers in



counties with cities of the first class or consolidated local governments became governed by the same rules that applied to other counties.

The amendments to KRS 100.985 eliminated the reference to obtaining a CPCN, so that a “uniform application” became one that was submitted to a planning commission in conformity with this Act. As explained below, for those proposals for construction of an antenna tower for cellular telecommunications outside of the “jurisdiction of a planning commission” the applicant would continue to apply for a CPCN to the Public Service Commission in accordance with KRS 278.020 and KRS 278.650, 660 and 665.

KRS 100.987 was amended to remove the requirement for a planning unit and legislative body or fiscal court to first adopt a resolution and to register with the Public Service Commission in order to regulate siting of cell antenna towers, and likewise removed the sentence providing that “nothing in this section shall require” the planning unit to plan for or regulate the siting. These changes did not alter the underlying discretionary nature of KRS 100.987(1), which as amended remains elective with the planning unit and legislative body and still requires that *if* a planning unit and legislative body or fiscal court wishes to plan for and regulate the siting of cellular antenna towers it must do so “in accordance with locally adopted planning or zoning regulations in this chapter.”

Finally, the PSC ability to override a determination by the planning commission which had been contained in former KRS 100.987(5)(a), was eliminated, so that a planning commission decision to disapprove the uniform application after their “review [of] the uniform application in light of its agreement with the comprehensive plan and locally

adopted zoning regulations” would be final unless appealed to a court of law. KRS 100.987(1).

As mentioned above, for those proposals for construction of an antenna tower for cellular telecommunications outside of the “jurisdiction of a planning commission”, the 2002 changes to KRS Chapter 278 provided that the applicant would continue to apply for a CPCN to the Public Service Commission in accordance with KRS 278.020 and KRS 278.650, 660 and 665. Specifically, the amended KRS 278.650 eliminated subsections 1-3 and provided in the former subsection 4, that:

If an applicant proposes construction of an antenna tower for cellular telecommunications services or personal communications services which is to be located in an area outside of the jurisdiction of a planning commission, the applicant shall apply to the Public Service Commission for a certificate of public convenience and necessity pursuant to KRS 278.020(1), Section 7 of this Act, and this section.

KRS 278.650 (2002).

As amended, KRS 278.650 retained the standards for PSC consideration of “the character of the general area concerned, and the likely effects of the installation on nearby land uses and values” in evaluating whether to issue a CPCN.

Similarly, KRS 278.665 was amended to eliminate PSC authority to promulgate regulations for “uniform applications,” since the approval process under KRS 100 had become free-standing for those jurisdictions that elected to exercise the authority under 100.987 by adopting zoning regulations, and other than a notice to the PSC, no longer involved PSC review or approval. Under the amended KRS 278.665(1), the commission was directed to adopt regulations establishing the minimum content of an application “for a certificate of convenience and necessity to construct cellular antenna towers for areas outside the jurisdiction of a planning commission.” KRS 278.665(1)(2002).

Those regulations are found at 807 KAR 5:063, which provides the content requirements for applications for “a certificate of public convenience and necessity . . . 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[.]” 807 KAR 5:063(1).

The question posed by this application and the motion to dismiss filed by the company is a question of statutory interpretation and construction – does the phrase “outside the jurisdiction of a planning commission” in KRS 278.650 refer to a geographic area, or to the regulatory ambit of a planning unit. Read in the former manner, great violence is done the legislative intent of assuring that in all circumstances that either the necessity and effects of cell tower siting would be reviewed by a planning unit or the PSC, and a significant gap is created allowing cell tower siting with neither PSC review nor local planning review for towers proposed within the boundaries of those planning units that have not elected to adopt regulations under KRS 100.987(1). Read as the Shadoans suggest, which is that “outside the jurisdiction of a planning commission” refers to the regulatory jurisdiction rather than physical boundaries of a planning unit, no such gap exists and either the PSC or a planning unit review will occur in all cases, as intended by the General Assembly.

The text of both KRS 100.987 and KRS 278.650 suggest that the phrase “outside the jurisdiction of a planning commission” must be construed as referring not to *physical* boundaries of a planning unit but instead jurisdiction over the subject matter. KRS 100.987, after amendment in 2002, no longer requires notification to the PSC of intention to adopt regulations governing the subject matter, (since the PSC no longer has override

authority in that instance) but remains elective (i.e. “may” plan) and requires adoption of planning and zoning regulations governing cell towers as a prerequisite to regulation wherein it provides that the planning unit “may plan for and regulate the siting of cellular antenna towers in accordance with locally adopted planning or zoning regulations[.]” KRS 100.987(1)(2002) (Emphasis added). Absent such assertion of discretionary authority through adoption of planning and zoning regulations specific to cell tower siting, under KRS 278.650, the authority to review rests with the PSC since, by the planning unit declining to exercise the discretionary authority, the tower is to be located in an area “outside the jurisdiction of a planning commission[.]”

*If* the General Assembly had not intended that the planning unit adopt specific regulations governing cell towers as a prerequisite to assertion of jurisdiction, the second reference to “planning or zoning regulations” in KRS 100.987(1) would be rendered 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).

Pursuant to KRS 446.080(1), statutes are to be “liberally construed with a view to promote their objects and carry out the intent of the legislature[.]” Construction of the phrase “in an area outside the jurisdiction of a planning commission” to allow cell tower siting to go unreviewed in areas within the physical boundaries of a planning unit whose planning commission has not adopted zoning or planning regulations pursuant to KRS 100.987(1), defeats the legislative intent that the siting of cell towers be reviewed and interferes with the proper application of KRS 100.987(1) by, in effect, punishing the landowners in jurisdictions that have not elected to assert the discretionary jurisdiction under that section. This construction of KRS 278.650 also causes the absurd result of

applicants making application to planning units who disclaim jurisdiction under KRS 100.987(1) and who will decline to act on them, resulting in default approval after sixty days without review by either the planning unit (who believes it lacks authority to act or has chose not to under KRS 100.987) or the PSC – in direct derogation of legislative intent.

**Conclusion and Prayer for Relief**

For these reasons, Intervenors Glenn and Sue Shadoan respectfully request that the Commission reject the suggestion that dismissal for want of subject matter jurisdiction is appropriate, and that the Commission enter an order affirming the statutory jurisdiction of the PSC under KRS 278.650 over the siting of cellular antenna towers in this and in all those instances in which a planning commission has elected not to assert jurisdiction over a proposed tower by adopting local zoning or planning regulations specific to such towers under KRS 100.987.

Respectfully submitted,



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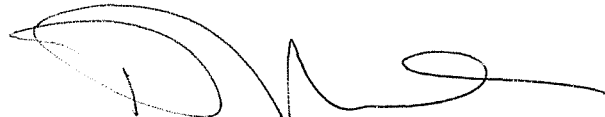
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1400 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202

Dale Wright, Esq.  
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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 15<sup>th</sup> day of May, 2006.



Thomas J. FitzGerald