GOLDBERG SIMPSON

Paul B. Whitty, Esq.
Norton Commons
9301 Dayflower Street
Louisville, KY 40059
Phone: (502) 589-4440
Direct: (502) 585-8531
Fax: (502) 581-1344
pwhitty@goldbergsimpson.com

July 30, 2009

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, KY 40602

Re: Case No. 2009-00022

Dear Sir:

Please find enclosed one (1) original and five (5) copies of the Motion to Lift Abeyance of Uniform Application filed on behalf of Powertel/Memphis, Inc., d/b/a T-Mobile Kentucky.

Thank you for your assistance and cooperation.

Sincerely,

Paul B. Whitty

PBW/kmm
Cc: Justin Gerak, Esq.

78841.005
g:\zoning\t-mobile\muhlenberg county #1 -monsanto haul road\psc cover letter for mtn 073009 doc

COMMONWEATH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:

APPLICATION OF POWERTEL/MEMPHIS, INC. D/B/A T-MOBILE KENTUCKY FOR ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A WIRELESS COMMUNITACTINOS FACILITY AT 80 PARKWAY LANE, CENTRAL CITY, KENTUCKY 42330 IN THE WIRELESS COMMUNICATIONS LICENSE AREA IN THE COMMONWEALTH OF KENTUCKY IN THE COUNTY OF MUHLENBERG, SITE NAME: MONSANTO HALL ROAD	)	CASE NO. 2009-00022

MOTION OF T-MOBILE TO LIFT ABEYANCE OF UNIFORM APPLICATION

By Order dated May 22, 2009, the Kentucky Public Service Commission (the "Commission") held Case No. 2009-00022 in abeyance pending the outcome of Kentucky Public Service Commission and Bluegrass Wireless, LLC v. L. Glenn and Sue Shadoan, which is presently the subject of a Petition for Discretionary Review to the Kentucky Supreme Court (Case No. 2009-SC-000053-DR) (hereinafter "Shadoan"). This Order was supplemental by Order dated June 11, 2009 which prohibited any related motions before sixty (60) days subsequent to the original Order. This period having expired, the Movant requests that the Order be lifted. For the reasons and authorities cited hereinbelow Movant requests that Case No. 2009-00022 be allowed to proceed for consideration by the Commission.

I. BACKGROUND

On December 31, 2008, the Kentucky Court of Appeals issued an Opinion in which, in pertinent part, concluded that the Franklin Circuit Court had correctly decided that the failure of Laurel County to adopt local specific cell tower siting regulations required the Kentucky Public Service Commission to exercise jurisdiction over a proposed tower. This Commission filed a Petition for Discretionary Review on January 30, 2009 which is currently pending before the Kentucky Supreme Court.

II. SHADOAN CASE DISTINGUISHED

In consideration of this Motion, the Commission should note certain fundamental differences in the regulatory conditions between Laurel County and Muhlenberg County. Although both counties ostensibly have joint planning units pursuant to KRS 100.122, they actually differ in their regulation of land use within their respective jurisdictions as permitted by Kentucky law. Both counties have not adopted regulations for the siting of cell towers. The substantial difference between these counties is that, based upon the record in the Shadoan case, Laurel County does regulate land use throughout the county through its adopted comprehensive plan and the land use regulations. In contrast, Muhlenberg County regulates land uses only within the municipal boundaries of the cities of Greenville, Central City and Powderly. The Muhlenberg Planning Commission also regulates subdivisions within a five mile radius of these municipal boundaries pursuant to KRS 100.131. Muhlenberg County does not currently regulate land area outside of these specific municipalities and has no intention of doing so in the future. (See Affidavit of David Rhoades attached hereto as Exhibit "A"). Subdivision regulations and

land use regulation are separate and distinct activities. Subdivision regulates only the division of parcels of land [KRS 100.111(22)] as well as the "design of streets, blocks, lots, utilities, recreation areas, other facilities, hazardous areas and areas subject to flooding..." [KRS 100.281(3)]. The regulation of the underlying land uses is the province of land use regulations [KRS 100.203]. Kentucky law clearly gives counties and municipalities the option to regulate land uses both in terms of geographical and substantive jurisdiction. Resolution of the Shadoan case cannot alter the legislative prerogatives of the Muhlenberg Fiscal Court in its selection and scope of its land use regulations.

Even if the Commission's legal position in the Shadoan case is correct, i.e. that mere adoption of general zoning regulations deprives the Commission of jurisdiction, in light of Muhlenberg County's refusal to apply such regulations except in limited areas, the Commission does now have and will have jurisdiction to review uniform applications where there are no tower specific regulations or even general land use regulations.

III. APPLICATION OF THE TELECOMMUNICATIONS ACT OF 1996

Section 332(c)(7) if the Telecommunications Act of 1996 "imposes specific limitations on the traditional authority of state and local authorities to regulate the location, construction and modification" of the facilities necessary for wireless communications.[1] These "limitations" are set forth in Section 332(c)(7)(B) of the Act:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

[1] *City of Rancho Palos Verdes v, Abrams,* 544 U.S. 113, 115 (2005).

(I) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

As numerous courts have recognized, the 1996 Act reflected a careful balancing of state and local authority, on the one hand, and federal policy objectives, on the other.[2] Section 332(c)(7) was designed to retain state and local zoning prerogatives, but only to the extent they did not conflict with Congress' desire "to provide for pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunication markets to competition..."

Section 332(c)(7) created a framework in which states and localities could make zoning decisions "subject to minimum federal standards – both substantive and procedural – as well as federal judicial review."[3] Specifically, that section preserves "the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," but only insofar as that authority is exercised in accordance with various limitations. [4] Among other things, zoning authorities may

---

[2] *See, e.g. City of Ranchos Palos Verdes v. Abrams,* 544 U.S. 113, 127-29 (2005) (Breyer, J., concurring); *Core Communs, Inc., v. Verizon Pa., Inc.,* 493 F.3dd 333, 335 (3d Cir. 2007); *Verizon MD, Inc., v. Global NAPS, Inc.,* 377 F.3d 355, 384 (4th Cir. 2004); *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.,* 189 F.3d 1, 8 (1st Cir. 1999).

[3] H.R. Conf. Rep. No. 104-458 at 113 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

[4] *City of Ranchos Palos Verdes v. Abrams,* 544 U.S. 113, 128 (2005) (Breyer, J., concurring). As the First Circuit has held: "[T]he [1996 Act] reflects Congress' intent to expand wireless services and increase competition among those providers. Congress sought to accomplish this goal by reducing the regulation and bureaucracy that stood in

not render decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services" or "unreasonably discriminate among providers of functionally equivalent services." They are required to act "within a reasonable period of time...taking into account the nature and scope of such request." [5] Moreover, Section 332(c)(7)(B) permits parties alleging a violation of any of its requirements to bring suit in court within thirty (30) days after an "action or failure to act."[6]

Section 332(c)(7) "is a deliberate compromise between two competing aims – to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over the siting of towers." [7] Indeed, Section 332(c)(7)'s legislative history reveals that Congress was concerned about the "inconsistent and, at times, conflicting patchwork" of state and local zoning requirements, believing that this patchwork threatened "the deployment of wireless communications", [8] and that it sought a framework that would "speed deployment and the availability of competitive wireless telecommunications services which ultimately w[ould] provide consumers with lower costs as well as with a greater range and options for such services". [9] As one Federal court correctly stated, this provision "represents a congressional judgment that local zoning decisions harmless to the FCC's greater regulatory scheme- and *only those proven to be harmless* – should be allowed to stand.[10]

---

the way of steady and rapid expansion of personal wireless services." *Southwester Bell Mobile Systems Inc., v. Todd,* 244 F.3d 51, 57 (1st Cir. 2001) (internal citation omitted).

[5] 47 U.S.C. § 332(c)(7)(A).

[6] 47 U.S.C. § 332(c)(7)(B)(i)(II), (i)(I), (ii).

[7] *Id.* § 332(c)(7)(B)(v).

[8] *Town of Amherst v. Omnipoint Communications Enterprises,* 173 F.3d 9, 13 (1st Cir. 1999). *See also Sprint Spectrum, L.P. v. Willoth,* 176 F.3d 630, 639 (2d Cir. 1999) (quoting *Abrams*).

[9] *City of Ranchos Palos Verdes v. Abrams,* 544 U.S. 113, 128 (2005).

[10] H.R. Rep. No. 104-204, pt. 1 at 94 (1995).

The jurisdictional balance effectuated by Section 332(c)(7) has been disrupted by zoning authorities that have refused to act promptly on siting requests. These entities have frustrated federal goals concerning swift deployment of advanced telecommunications services while effectively robbing applicants of the opportunity to invoke their statutory right to judicial review and consumers of their rights to rapidly deployed wireless network as envisioned by the Act. Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government" that is inconsistent with the terms of Section 332(c)(7)(B) may bring suit in court "within 30 days after such action or failure to act." But the Act does not explain when a "failure to act" accrues, and such a failure – unlike an "action"- has thus been impossible to pinpoint. Applicants therefore face an impossible choice: they can endure further delay in the futile hope that action will be forthcoming and possibly miss the 30-day window to "commence an action in any court of competent jurisdiction." [11] Alternatively, they can incur the substantial costs and additional time associated with initiating litigation, risking a judicial determination dismissing the suit on the basis that insufficient time has passed for the siting authority to have "fail"[ed] to act." By withholding action on siting requests, states and localities have been able to evade the judicial oversight contemplated by 332(c)(7), and to disturb the balance of state, local and federal power envisioned by Congress.

In KRS 100.986 the Kentucky General Assembly prohibited certain actions by planning commissions, specifically forbidding instituting a moratorium upon the siting of cellular antenna towers [KRS 100.986(2)]. This evinces a clear intent by the legislature of this Commonwealth

[11] Section 332(c)(7)(B)(v).

to further the goal of the Telecommunications Act in ensuring the provision of wireless communications throughout the nation.

Similarly, and consistent with Section 332(c)(7)(B), the Kentucky General Assembly promulgated KRS 100.987(4)(c) which requires planning commissions to act upon a uniform application within sixty (60) days of filing with the further provision of granting "deemed approval" for applications that are not acted upon within that timeframe. Even temporary moratoria causes a deprivation of property rights. [12] The Commission's Orders have the effect of thwarting the intent of both the United States Congress and the Kentucky General Assembly. The Commonwealth of Kentucky can ill afford to be placed at a disadvantage relative to other states in the provision of wireless services.

IV. PUBLIC POLICY CONSIDERATIONS

The Federal Communications Commission ("FCC") was created in part "to make available, so far as possible, to all the people of the United States...a rapid, efficient, i.e. nation-wide...radio communication service with adequate facilities..."[13] Congress deemed the availability of such service essential "for the purpose of promoting safety of life and property."[14] Consistent with this objective, Section 7 of the Telecommunications Act states: [i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public.[15]

---

[12] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).
[13] Communications Act of 1934, as amended § 1, reproduced in 47, U.S.C. § 151 (2007) ("Act").
[14] *Id.*
[15] 47 U.S. C. § 157.

The Telecommunications Act of 1996 ("1996 Act")[16] was designed to foster competition among telecommunications providers, to improve the quality of their services, and to encourage the rollout of new technologies without delay. [17] To further these objectives, Congress adopted numerous provisions designed to spur the deployment of new facilities. For example, Section 706 directed the FCC to "encourage the deployment *on a reasonable and timely basis* of advanced telecommunications capability to all Americans."[18] Congress also enacted Section 254(b), which instructs the FCC to establish universal service support mechanisms with the goal of ensuring the delivery of affordable telecommunications services- including wireless- to all Americans.[19]

The ability to deploy wireless systems is dependent, however, upon the availability of sites for the construction of towers and transmitters. [20] Before a location can be utilized as a wireless tower or antenna site, zoning approval is generally required at the local level – a process that can be extremely time-consuming. Indeed, the Commission has previously acknowledged

---

[16] Pub. L. No. 104-104, 110 Stat 153.
[17] *City of Rancho Palos Verdes v. Abrams*, 544, U.S. 113, 115 (2005).
[18] Telecommunications Act of 1996 § 706 (emphasis added), reproduced in 47 U.S.C. § 157(c) ("1996 Act"); *see Promotion of Competitive Networks in Local Telecommunications Markets,* WT Docket No. 99-217, *Notice of Proposed Rulemaking and Notice of Inquiry,* 14 FCC Rcd 12673, 12691 ¶ 33 (1999).
[19] 47 U.S.C. § 254(b); *see Universal Service Contribution Methodology,* WD Docket No. 06-122, *Report and Order and Notice of Proposed Rulemakig,* 21 FCC Rcd 7518,m 7521 ¶ 5 (2006).
[20] *See, e.g., Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10833 ¶ 90 (1997) (describing site acquisition and zoning as a "major cost component" and a "major delay factor" of wireless deployment); *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073, 1077 ¶ 6 (2004) (describing delays in Section 106 tower site approvals as a threat to wireless deployment); *Applications of AT&T Wireless Services, Inc., and Cingular Wireless Corporation*, WT Docket No 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21576 ¶ 137 (2004) (describing the difficulty of acquiring tower siting permits as a possible obstacle to effective competition in wireless communications).

that "site acquisition and zoning approval for new facilities is both a major cost component and a major delay factor in deploying wireless systems."[21]

Congress expressly recognized local zoning as one of the key impediments to the rapid deployment of wireless service to all Americans. In drafting the provision that ultimately became Section 332(c)(7), the U.S. House of Representatives concluded that "current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network."[22]

Shortly before enactment of the 1996 Act, there were approximately 33.8 million wireless subscribers. By the end of 2007, that number had grown exponentially, to more than 255.4 million subscriptions.[23] During the same period, wireless penetration increased from 13% of the U.S. population to 84%.[24] The number of subscribers with wireless broadband capability grew by 220% between June 2006 and June 2007.[25] Whereas DSL and cable modem services grew by approximately 4.6 million lines combined during this period, wireless broadband grew by nearly 25 million lines. [26] By 2016, it is estimated that 83% of business users will be using

---

[21] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10833 ¶ 90 (1997).
[22] H.R. Rep. No. 104-204, pt. 1, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61.
[23] *See* CTIA, *Wireless Quick Facts*, available at http://www.ctia.org/advocacy/research/index.cfm/AID/10323, *last visited* July 11, 2008.
[24] *Id.*
[25] Industry Analysis and Technology Division, Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2007*, Table 1 (March 2008), *available at* http://www.fcc.gov/wcb/stats, *last visited* July 11, 2008.
[26] *Id.*

wireless broadband. [27] But wireless broadband requires the deployment of new facilities- not only in unserved areas but also in areas currently served by wireless networks that require upgrades for the provision of high-speed data services.

The FCC has repeatedly emphasized the importance of wireless E911 to the nation's public safety.[28] The availability of these critical emergency services, however, is inextricably linked to wireless service coverage. [29] If there is no wireless coverage in a particular area, there will be no E911. Moreover, tower siting issues also frustrate efforts by federal, state and local public safety authorities to construct their network infrastructures as well.

> The construction of communications towers and other infrastructures improvements is essential to the rapid deployment to the American public of ubiquitous, advanced and competitive communications services, as well as for public safety and homeland security.[30]

To advance these policies, the wireless industry is constantly engaged in constructing wireless infrastructure and upgrading technologies. Just prior to adoption of the 1996 Act, there were 22,633 cell sites serving fewer than 34 million subscribers. [31] Due in large part to flourishing innovation and robust competition, wireless carriers invested heavily in the deployment of new systems and the expansion of existing networks. As a result, by the end of

---

[27] *See* Ovum. *The Increasingly Important Impact of Wireless Broadband Technology and Services on the U.S. Economy,* 7 (2008), *available at* http://files.ctia.org/pdf/Final_OvumEconomicImpact_Report_5_21_08.pdf, *last visited* July 11, 2008.

[28] *See, e.g., Revision of the Commission's Rule to Ensure Compatibility With Enhanced 911 Emergency Calling Systems,* CC Docket No. 94-102, *Second Report and Order,* 19 FCC Rcd 16964, 16965 ¶ 2 (2004).

[29] *See, e.g., Applications of AT&T Wireless Services, Inc, and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations,* WT Docket No. 04-70, File Nos. 0001656065, et al., *Memorandum Opinion and Order,* 19 FCC Rcd 21522, 21609 ¶ 229 (2004) (noting deleterious effect of wireless coverage gaps on first responders and the public in times of emergency).

[30] *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, Separate Joint Statement of Chairman Michael Powell and Commissioner Jonathan S. Adelstein,* WT Docket No. 03-128, *Report and Order,* 20 FCC Rcd 1073, 1227 (2004).

[31] *See* CTIA, *Wireless Quick Facts,* available at http://www.ctia.org/advocacy/research/index.cfm/AID/10323, *last visited* July 11, 2008.

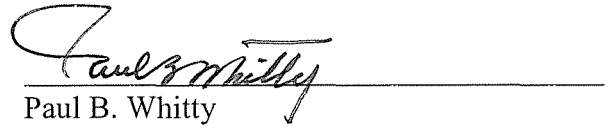
2007, there were more than 213,299 cell sites serving 255 million subscribers. [32] This expansion of service also has enhanced public safety, as reflected in the number of wireless 911 calls made per day – 55,000 per day in 1995 as compared with about 275,000 per day in 2006.[33]

More specifically, the failure to promptly act on pending applications threatens to slow the growth of wireless services in contravention of the specific limits set forth in Section 332(c)(7)(B), jeopardizes the Commission's broadband and public safety priorities, and potentially puts countless wireless licenses at risk by undermining their ability to deploy the facilities necessary to comply with the Commission's wireless build-out requirements.

V. CONCLUSION

Based upon the foregoing arguments and authorities, the Movant respectfully requests that the Commission lift the Order of Abeyance to permit review of Case Number 2009-00022.

Respectfully submitted,



Paul B. Whitty
GOLDBERG SIMPSON, LLC
Norton Commons
9301 Dayflower Street
Louisville, KY 40059
Phone: (502) 585-8531
Fax: (502) 581-1344

[32] *Id.*

[33] *See* National Emergency Numbering Association, *Cellular Wireless,* available at https://www.nena.org/pages/ContentList.as:?CTID=10 (estimating 100 million wireless E911 calls placed in 2006), *last visited* July 11, 2008.

AFFIDAVIT OF DAVID RHOADES

Comes the Affiant, David Rhoades, and states as follows:

1. My name is David Rhoades and I live at 325 BENNETT LN in BREMEN _____, Kentucky.

2. I am presently the Director of the Muhlenberg County Planning Commission and have been in this position since JANUARY 1, 2001.

3. The Muhlenberg Planning Commission has NOT adopted cell tower regulations of any kind for application within its jurisdiction nor for extraterritorial jurisdiction.

4. The Muhlenberg Planning Commission does not now, never has and does not intend to, regulate land uses anywhere outside the municipal limits of the cities of Greenville, Central City, and Powderley.

5. Only subdivision regulations are applied pursuant to the extraterritorial jurisdiction of KRS 100.131.

Further Affiant sayeth not.

David Rhoades
Director of the Muhlenberg County Planning Commission

COMMONWEALTH OF KENTUCKY)
)ss
COUNTY OF MUHLENBERG)

SUBSCRIBED AND SWORN to before me by David Rhoades as Director of the Muhlenberg County Planning Commission on this the 25 day of JUNE, 2009.

Notary Public, State-at-Large, KY

My Commission expires: July 21, 2012