

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF NEW CINGULAR WIRELESS)	
PCS, LLC FOR ISSUANCE OF A CERTIFICATE OF)	
PUBLIC CONVENIENCE AND NECESSITY TO)	CASE NO.
CONSTRUCT A WIRELESS COMMUNICATIONS)	2009-00034
FACILITY)	
SITE NAME: LARUE (135P0085))	

O R D E R

On February 4, 2009, New Cingular Wireless PCS, LLC ("Applicant") filed an application seeking a Certificate of Public Convenience and Necessity to construct and operate a wireless telecommunications facility. The proposed facility consists of a monopole antenna tower not to exceed 160 feet in height, with attached antenna, to be located at 1707 2nd Street, Henderson, Henderson County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 49' 55.47" by West Longitude 87° 34' 3.55".

The Applicant has provided information regarding the structure of the tower, safety measures, and antenna design criteria for the proposed facility. Based upon the application, the design of the tower and foundation conforms to applicable nationally recognized building standards, and a Licensed Professional Engineer has certified the plans.

Pursuant to 807 KAR 5:063, the Applicant has notified the County Judge/Executive of the proposed construction. Since the proposed tower is less than

200 feet in height, the Applicant was not required to file applications with the Federal Aviation Administration or the Kentucky Airport Zoning Commission for approval for the construction and operation of the proposed facility.

The Applicant has filed evidence of the appropriate notices provided pursuant to 807 KAR 5:063. The notices solicited comments and informed the recipients of their right to request intervention. To date, no public comments have been filed with the Commission.

By Order dated March 17, 2009, the Commission placed this matter in abeyance, as the Applicant proposed to build the tower at a location within the political boundary of a local planning commission that has adopted planning and zoning regulations in accordance with KRS Chapter 100. The question of whether or not the Commission has jurisdiction over applications of this nature is currently pending before the Kentucky Supreme Court in Case No. 2009-SC-000053-DR, *Kentucky Public Service Commission v. L. Glenn Shadoan, et al.* In the March 17, 2009 Order, the Commission held that abeyance was an appropriate procedural decision for this matter, as the Commission's jurisdiction over this application was deemed to be largely dependent upon the Supreme Court's decision.

On June 1, 2009, the Applicant moved the Commission for a decision on this matter. On July 6, 2009, the Commission denied the motion, as no legal argument or new evidence had been submitted to persuade the Commission that lifting the abeyance status was warranted.

In response to a September 25, 2009 Open Records Request submitted by the Commission, on September 30, 2009, the Henderson County Attorney submitted a copy of the agreement establishing the Henderson County Joint Planning Unit and provided information on the Planning Unit's ordinances, regulations and comprehensive plans. On February 1, 2010, the Applicant submitted a copy of the deed to the property where the proposed tower is to be constructed. The deed demonstrates that title to the property is held by the Henderson County Board of Education, pursuant to a property transfer executed in August 1949.

After reviewing the filings made by the Henderson County Attorney and the Applicant, as well as applicable law, the Commission issued an Order on March 22, 2010 lifting this proceeding from abeyance. In that Order, the Commission referenced the state law exempting certain property from the authority of local planning units when the property is owned by the Commonwealth. In that Order, the Commission also discussed the state law which provides that the Commonwealth serves as the fully vested owner of property controlled by Kentucky's local school boards. The Commission held that, as the Applicant's proposed tower will be constructed on property deeded to the Henderson County Board of Education and that, by law, the Commonwealth serves as the ultimate, vested owner of that property, it follows that the Henderson County Planning Unit does not have the statutory authority to render decisions on Applicant's request to construct a wireless tower. Pursuant to KRS 278.650, the Commission held that Applicant's proposed tower is to be constructed in an area outside the political boundary of the Henderson County Planning Unit and,

therefore, would not be affected by the Kentucky Supreme Court's decision in *Shadoan, supra*, and the application would be lifted from abeyance and moved forward for a final decision.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that the Applicant has demonstrated that a facility is necessary to provide adequate utility service and that, therefore, a Certificate of Public Convenience and Necessity to construct the proposed facility should be granted.

Pursuant to KRS 278.280, the Commission is required to determine proper practices to be observed when it finds, upon complaint or on its own motion, that the facilities of any utility subject to its jurisdiction are unreasonable, unsafe, improper, or insufficient. To assist the Commission in its efforts to comply with this mandate, the Applicant should notify the Commission if it does not use this antenna tower to provide service in the manner set out in its application and this Order. Upon receipt of such notice, the Commission may, on its own motion, institute proceedings to consider the proper practices, including removal of the unused antenna tower, which should be observed by the Applicant.

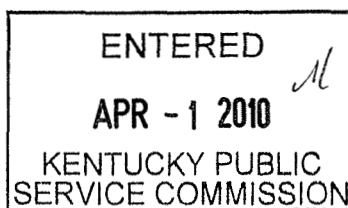
IT IS THEREFORE ORDERED that:

1. The Applicant is granted a Certificate of Public Convenience and Necessity to construct a wireless telecommunications facility. The proposed facility consists of a monopole antenna tower not to exceed 160 feet in height, with attached

antenna, and is to be located at 1707 2nd Street, Henderson, Henderson County, Kentucky. The coordinates for the proposed facility are North Latitude 37° 49' 55.47" by West Longitude 87° 34' 3.55".

2. The Applicant shall immediately notify the Commission in writing if, after the antenna tower is built and utility service is commenced, the tower is not used for a period of three months in the manner authorized by this Order.

By the Commission



ATTEST:



Executive Director

Case No. 2009-00034

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