

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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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 CONSTRUCT )  
A WIRELESS COMMUNICATIONS FACILITY AT )CASE: 2009-00160  
11096 STATE ROUTE 109, STURGIS )  
UNION COUNTY, KENTUCKY, 42459 )

SITE NAME: STURGIS DT (135G0234)

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**MOTION OF NEW CINGULAR WIRELESS TO LIFT ABEYANCE  
OF UNIFORM APPLICATION**

By Order dated May 22, 2009, the Kentucky Public Service Commission (the "Commission") held Case Number 2009-00160 in abeyance pending a decision by the Kentucky Supreme Court in the Petition for Discretionary Review in the matter of L. Glenn Shadoan, et al. v. Kentucky Public Service Commission, et al. (Kentucky Supreme Court Case Number 2009-SC-000053-DR) (hereinafter "Shadoan"). This 60 day period having expired, Applicant respectfully requests that the Order dated May 22, 2009 be lifted and that the Commission proceed with the review of Case Number 2009-00160.

## **I. Case History**

On December 31, 2008, the Kentucky Court of Appeals issued an Opinion which stated that the Franklin Circuit Court had correctly held that the failure of Laurel County to adopt regulations regarding the siting of cellular communication towers shifted the jurisdiction from Laurel County to the Kentucky Public Service Commission. The Commission filed a Petition for Discretionary Review with the Kentucky Supreme Court on January 30, 2009 and is currently pending a decision.

## **II. UNION COUNTY / LAUREL COUNTY**

In consideration of this Motion, the Commission should note certain fundamental differences in the application of the respective regulations of Union County and Laurel County. Laurel County planning unit was created pursuant to KRS 100.122 and is considered a county-wide planning unit. The substantial difference with Case Number 2009-00160 and the Shadoan case is that Union County Planning Commission does NOT have county-wide jurisdiction. The Union County Planning Commission operates to administer the Municipal Zoning Ordinance for the Cities of Morganfield, Sturgis and Waverly. Mr. Sean P. Sheffer, Union County Planning Director, has verified the above argument in two separate written communications. In a letter dated May 26, 2009 and addressed

to the Kentucky Public Service Commission, Mr. Sheffer stated, "All other property in Union County is not governed by zoning regulations, including the property located at 11096 State Route 109..." In a second letter dated September 13, 2009 addressed to the Kentucky Public Service Commission, Mr. Sheffer further states, "The Union County Fiscal Court voted against zoning within the limits of their jurisdiction; **therefor no county wide zoning exists in Union County.**" (emphasis added) I have enclosed a copy of the minutes from the Union County Fiscal Court meeting dated March 29, 2005 (Exhibit A) whereby the Fiscal Court members voted to "table countywide zoning for an undermined (sic) amount of time..." Magistrate Clements read a prepared statement concerning his opposition to the countywide zoning.<sup>1</sup>

The written evidence is conclusive in that no county-wide zoning exists in Union County and that the Union County Planning Commission exercises jurisdiction only within the Cities of Morganfield, Sturgis and Waverly. The jurisdiction, in this case, solely rests with the Kentucky Public Service Commission as provided in KRS § 278.650.

### III. TELECOMMUNICATIONS ACT OF 1996

Congress intended the Telecommunications Act "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of

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<sup>1</sup> Union County Fiscal Court Meeting Minutes dated March 29, 2005.

new telecommunications technologies”.<sup>2</sup> The Telecommunications Act further provided a “pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services...by opening all telecommunications markets to competition”.<sup>3</sup> Indeed the 1996 Act reflects a careful balancing of state and local authority, on the one hand, and federal policy objectives on the other.<sup>4</sup> The Telecommunications Act works like a scale that attempts to balance two objects of competing weight: on one arm sits the need to accelerate the deployment of telecommunications technology, while on the other arm rests the desire to preserve state and local control over zoning matters.<sup>5</sup> This balance strengthens the decision making authority of local zoning boards, while protecting wireless service providers from unsupported decisions that stymie the expansion of telecommunication technology.<sup>6</sup>

The first relevant limitation set forth in 47 U.S.C. § 332(c)(7)(B)(i)(II) provides that in regulating the placement and construction of facilities, a state or local government or instrumentality “shall not prohibit or have the effect of prohibiting the provision of wireless services.” Several courts have held that local zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services violate the statute.<sup>7</sup>

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<sup>2</sup> Communications Co. v. Albermarle County, 211 F.3d 79, 85-86 (4th Cir. 2000).

<sup>3</sup> Id.

<sup>4</sup> City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 127-129 (2005); Verizon MD, Inc. v. Global NAPS, Inc., 377 F.3d 355, 384 (4<sup>th</sup> Cir. 2004).

<sup>5</sup> Southwestern Bell Mobile Sys. V. Todd, 244 F.3d 51, 61 (1<sup>st</sup> Cir, 2001).

<sup>6</sup> Brehmer v. Planning Bd. Of Wellfleet, 238 F.3d 117, 122 (1<sup>st</sup> Cir. 2001).

<sup>7</sup> Cellular Tel. Co. v. Zoning Bd. Of Adjustment, 197 F.3d 64, 68-70 (3d Cir. 1999); Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 643 (2d Cir. 1999); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 Supp. 2d 108, 117 (D. Mass. 2000).

A second limitation requires local government to “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 instrumentalities, taking into account the nature and scope of such request.”<sup>8</sup>

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 control over the siting of towers.”<sup>9</sup> In drafting the 1996 Act, 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.”<sup>10</sup>

The current order of the Commission to place Case Number 2009-00160 in abeyance would seem to be in contrary to the Act’s intent of speedy deployment of wireless communications and indeed seem to prohibit said service.

#### **IV. KENTUCKY REVISED STATUTES**

The Kentucky General Assembly in KRS 278.650 provides, in part, as follows: “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 the jurisdiction of a planning commission, the applicant shall apply to the Public Service Commission for a certificate of public

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<sup>8</sup> 47 U.S.C. §332(c)(7)(B)(ii)

<sup>9</sup> Id § 332(c)(B)(v)

<sup>10</sup> Town of Amherst v. Omnipoint Communications Enterprises 173 F.3d 9, 13 (1<sup>st</sup> Cir.1999).

convenience and necessity pursuant to KRS 278.020(1), 278.665, and this section.” In KRS 100.986 certain actions by planning commissions are specifically forbidden and includes instituting a moratorium upon the siting of cellular antenna towers.<sup>11</sup> Furthermore, KRS 100.987(4) requires planning commissions to act upon a uniform application within sixty (60) days of filing with the additional provision of deeming the application “approved” that are not acted upon within that timeframe. Even temporary moratoria have been found to cause a deprivation of property rights.<sup>12</sup>

The intention of the Kentucky General Assembly is clearly to support the goals of the Telecommunications Act of 1996 and to provide a means to rapidly deploy wireless telecommunications facilities throughout the Commonwealth.

The Kentucky General Assembly envisioned the possibility that under some circumstances, an application for a proposed wireless telecommunication facility would fall outside the regulatory authority of a local planning commission.<sup>13</sup> In this case, the Union County Planning Commission does not hold jurisdiction over, the parcel of land that the proposed wireless telecommunication facility, subject to Case Number 2009-00160, is located upon. Therefore, jurisdiction lies with the Commission.

The Commission’ orders not only have the affect of placing a moratorium upon the siting of cellular antenna towers, but thwarts the intent of both the United States Congress and the Kentucky General Assembly.

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<sup>11</sup> KRS 100.986(2)

<sup>12</sup> First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

<sup>13</sup> KRS 100.987(1) and KRS 278.650

## V. PUBLIC POLICY

The Telecommunications Act of 1996 not only provided a framework for the rapid deployment of wireless telecommunication facilities, it also has provided basis for the importance of such wireless services to all the people of the United States. Congress articulated that such service was essential “for the purpose of promoting safety of life and property.”<sup>14</sup> In furtherance of this policy, Section 7 of the Telecommunications Act states, “it shall be the policy of the United States to encourage the provision of new technologies and services to the public.”<sup>15</sup> Essential to achieving the policy goals of the United States Congress and those of the Federal Communications Commission (“FCC”) would certainly be the ability of wireless telecommunication providers to construct wireless telecommunication facilities without undue hardship and delay. Section 706 of the Telecommunications Act of 1996 directed the FCC to encourage deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis. Clearly, Congress realized the importance of providing wireless telecommunication services not only to a few Americans who may be lucky enough to live in an area that has wireless service, but to all Americans.

The FCC has also furthered the intentions of Congress by repeatedly emphasizing the importance of wireless emergency 911 services for the greater public safety. The daily average of 911 calls made using wireless services has steadily increased with a continuing trend as numbers of wireless subscribers are

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<sup>14</sup> 47 U.S.C. § 151

<sup>15</sup> 47 U.S.C. § 157

increasing. In furtherance of this trend, personal landline telephone subscribers are decreasing as the public “switches off their home telephones” and singly rely on their wireless telephone service. Moreover, federal, state and local public safety authorities routinely rely on wireless network infrastructure to deploy wireless communication equipment necessary for essential emergency services and supporting homeland security.<sup>16</sup>

The availability of wireless service for Americans to utilize local emergency 911 services and for the use of network infrastructure to federal, state and local authorities is dependent upon the construction of wireless telecommunication facilities. Indeed, a rapid deployment of wireless telecommunication services is dependent upon the construction of tower sites and the “speed” of deploying is affected by many factors; one of which is gaining zoning approval. The Federal Communication Commission has previously acknowledged that “site acquisition and zoning approval for new facilities is both a major cost component and a major delay in deploying wireless systems.”<sup>17</sup> Any delay in deploying said facilities fails to abide by the intentions of Congress and the FCC of promoting public safety for all Americans.

The Telecommunications Act of 1996 was also designed to further competition among wireless telecommunication providers, to improve the quality

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<sup>16</sup> 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 (2004).

<sup>17</sup> 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 (1997).



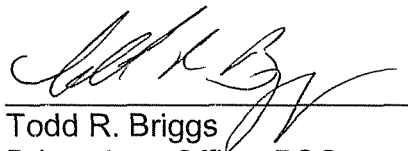
of their services, and to encourage the introduction of new technologies without obstruction or delay.<sup>18</sup>

New technologies are constantly being developed and introduced by members of the wireless industry along with of billions of dollars invested in providing wireless telecommunication services to underserved and unserved areas of the United States, including millions of dollars annually spent in the Commonwealth of Kentucky. This expansion of service and the addition of new technologies has proven to enhance public safety through the Commonwealth. Any delay in acting upon the application of Case Number 2009-00160 will hinder the effectiveness of the emergency services of both the citizens of the Commonwealth as well as the state and local emergency authorities.

## VI. CONCLUSION

Based upon the foregoing arguments and authorities, the Applicant respectfully requests the Commission to lift the abeyance and to review the application subject to Case Number 2009-00160.

Respectfully submitted,



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<sup>18</sup> City of Rancho Palos Verdes v. Abrams 544 U.S. 113, 115 (2005).

## Exhibit A

132

**Union County Fiscal Court March 29, 2005**

The Union County Fiscal Court met in regular session with the Honorable Larry Joe Jenkins presiding. Magistrates present were VEATCH, FLOYD, DOSSETT, WELLS AND CLEMENTS.

The meeting opened at 5.30 P.M. with prayer by Magistrate Dennis Dossett and the pledge to the American Flag.

The Minutes of the previous meeting and approved.

Judge Jenkins read a Resolution adopting and approving the execution of a County Road Aid Coop Program between the Transportation Cabinet and the Union County Fiscal Court for the FY 2005-2006. A motion to adopt this Resolution was made by Magistrate Clements, seconded by Magistrate Floyd, motion carried.

Magistrate Wells made a motion to allow the claims against the General, Road and LGEA Funds, seconded by Magistrate Floyd, motion carried.

Judge Jenkins reported on the rumors concerning the hiring of a Regional Economic Development Director. At this time no decision has been made as Union County's participation in the matter. Judge Jenkins stated that with the outstanding loans the county has made through the Industrial Authority and other possible activity in our county, he was not ready to close the office here and not have our own director.

Treasurer, Lissa Braddock, gave the court a proposed budget with the anticipated revenues for the upcoming budget preparation time.

Judge Jenkins told the court that in the jail budget that has been accepted by the court, that the deputies and matrons salaries are increased by \$10,000.00 and the contract with other counties is decreased by \$10,000.00 therefore the budget is not changed.

Magistrate Clements read a prepared statement concerning his opposition to the countywide zoning. He felt that this highly controversy issue was not being supported by the people in District 5 and he would like to see the issue placed on the ballot for a county wide vote. County Attorney, Brucie Moore, stated that she felt that this issue would not meet the requirements necessary to be placed on the ballot. Magistrate Clements made a motion to table countywide zoning for an undermined amount of time, seconded by Magistrate Wells. After much discussion the court agreed to talk to the committee members who represent their district and let them decide if they will continue to meet. Question called for: Magistrate Floyd, Veatch, Dossett, Wells and Clements voted aye, motion carried.

A motion to enter into Executive Session to discuss the sale of county property was made by Magistrate Floyd, seconded by Magistrate Dossett, motion carried.

A motion to return to regular session was made by Magistrate Veatch, seconded by Magistrate Clements, motion carried.

There being no further business to come before the court, a motion to adjourn was made by Magistrate Wells, seconded by Magistrate Dossett, motion carried.

Vicki V. O'Neil  
Fiscal Court Clerk

Larry Joe Jenkins  
Larry Joe Jenkins  
County Judge/Executive