

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 CONSTRUCT A WIRELESS)	CASE NO.
COMMUNICATIONS FACILITY AT 11096)	2009-00160
STATE ROUTE 109, STURGIS, UNION)	
COUNTY, KENTUCKY 42459)	
SITE NAME: STURGIS DT)	

O R D E R

On May 22, 2009, the Commission ordered ("May 22 Order") that this proceeding be held in abeyance pending a decision by the Kentucky Supreme Court in the matter of *Kentucky Public Service Commission v. L. Glenn Shadoan, et al.* Kentucky Supreme Court Case No. 2009-SC-000053-DR ("*Shadoan*"). The application filed by New Cingular Wireless PCS, LLC ("New Cingular") in this proceeding concerns a request for a Certificate of Public Convenience and Necessity ("CPCN") to construct a wireless communications tower in Union County, Kentucky. New Cingular proposes 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 *Shadoan* case, as filed before the Kentucky Supreme Court, centers on the question of whether or not the Commission has jurisdiction over certain applications, such as the one filed by New Cingular in this proceeding.

As of the date of this Order, the Court has not issued a ruling in the *Shadoan* case. In the May 22 Order, the Commission also held that, if a decision was not made within 60 days, New Cingular could file a motion to request that the Commission revisit this matter.

On December 10, 2009, New Cingular moved the Commission for a decision on the application in this proceeding. In support of its motion, New Cingular makes three arguments in support of a decision on the CPCN application. First, New Cingular argues that the Union County Planning Commission does not have county-wide jurisdiction but, rather, the local commission operates to administer the Municipal Zoning Ordinance only for the cities of Morganfield, Sturgis, and Waverly. Next, New Cingular states that the Commission's abeyance decision is contrary to the Telecommunications Act of 1996 because it prohibits the provision and the speedy deployment of wireless services. Lastly, New Cingular states that any delay in granting the CPCN will result in decreasing the effectiveness of emergency services.

The Union County Planning Commission's director, Mr. Sean Sheffer, submitted a letter in this proceeding on May 26, 2009 stating that the local commission operates to administer the Municipal Zoning Ordinance for the cities of Morganfield, Sturgis, and Waverly. The Union County Planning Commission was formed as a joint city-county planning commission in 1972 by the Union County Fiscal Court and the cities of Morganfield, Sturgis, Uniontown, and Waverly, in accordance with KRS Chapter 100.¹

¹ See Appendix to the September 21, 2009 Sheffer letter. The Appendix contains a recitation of the Union County Planning History. Information within the Planning History indicates that the city of Uniontown withdrew from participation in the commission in 1979. See Appendix at 1.

On September 21, 2009, Mr. Sheffer submitted another letter to the Commission stating:

The Union County Planning Commission is responsible for the County Wide Comprehensive Plan and the oversight of zoning administration in the incorporated cities of Morganfield, Sturgis and Waverly. The Union County Fiscal Court voted against zoning within the limits of their jurisdiction; therefore no county wide zoning exists in Union County.

The Commission's jurisdiction over cell towers is very narrow in view of the express limitations set forth in KRS 278.650, which states:

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 convenience and necessity pursuant to KRS 278.020(1), 278.665, and this section. . . .

Despite the evidence proffered by New Cingular and the information provided by the Union County commission that its jurisdiction currently extends only over the incorporated cities of Morganfield, Sturgis, and Waverly, the evidence also demonstrates that this planning unit is, at its core, a "joint city-county planning commission." It was established by the Union County Fiscal Court in accordance with KRS 100. The Fiscal Court has chosen not to authorize the local commission to zone portions of Union County beyond the borders of those three named cities; however, as evidenced by the minutes from the March 29, 2005 Union County Fiscal Court meeting,² wherein the county magistrates addressed the issue of expanding zoning jurisdiction into the remainder of Union County, the Fiscal Court specifically chose not to address it due to its controversial nature. However, at no point does the Fiscal Court or the

² See New Cingular's Motion at Exhibit A.

Planning Commission actually indicate that either entity is without jurisdiction to expand zoning.

Under KRS 100.131, which is entitled "Area of Jurisdiction", the jurisdiction of a joint city-county and regional planning unit is coterminous with its political boundaries. Union County Fiscal Court, by and through its planning commission, has enacted zoning regulations for the three cities of Morgantown, Waverly and Sturgis, but has left the remainder of the county unzoned (by choice). However, KRS 100.987(2)-(10) makes clear the mandatory obligations upon local commissions to make the final decisions on cell tower construction requests when that planning unit has enacted any zoning regulations under its authority. The procedures and criteria for this review are set forth in KRS 100.985 to KRS 100.987. At the center of the *Shadoan* case is the question of whether a local commission has any discretionary authority in this matter when it has adopted regulations in accordance with KRS Chapter 100. Clearly, Union County has a Fiscal Court and, clearly, as the record demonstrates, the Fiscal Court, in conjunction with the three cities, created a local planning commission and enacted zoning regulations for those three cities. A Fiscal Court maintains county-wide authority but, in the instance of Union County, has simply chosen not to move forward in enacting zoning regulations for land outside those three cities. Whether New Cingular can simply get this Commission to render a decision on a CPCN for a cell tower to located in a geographic area which the Union County Fiscal Court and local commission *could* zone and regulate (because they have the statutory authority) but have simply chosen not to zone and regulate (because they do not want to address the controversy of the

decision)³ is an issue that has led to *Shadoan's* having a direct effect upon this application.

The Commission acknowledges the importance of the deployment of wireless communications facilities and the extension of wireless service across the Commonwealth. However, at this juncture, there exists a crucial legal question regarding the proper jurisdiction for certain wireless applications for proposed sites within the political boundaries of local planning commissions that have adopted planning and zoning regulations in accordance with KRS Chapter 100. The Commission finds that, to ensure the most efficient and effective use of the resources of the Commission and the parties and to avoid unnecessary costs and proceedings, no ruling upon New Cingular's application should be made until such time as the Kentucky Supreme Court has issued a ruling in the *Shadoan* matter. While statements in the current motion and letters in the record are informative, they neither dissuade nor divert the Commission from its position that abeyance is the proper procedure to apply to CPCN applications that are substantively related to the *Shadoan* case.

Having reviewed New Cingular's request for a decision, the Commission finds that this matter should continue in abeyance pending a decision by the Kentucky Supreme Court in the *Shadoan* case. If a decision has not been made by the Court

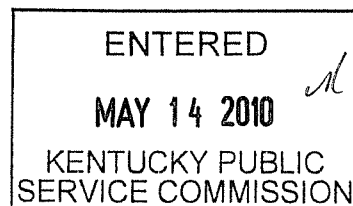
³ See New Cingular's Motion at Exhibit A, which states, "Magistrate Clemens read a prepared statement concerning his opposition to the countywide zoning. He felt that this highly controversy [sic] issue was not being supported by the people in District 5 and he would like to see the issue placed on the ballot for a county wide vote . . . Magistrate Clemens made a motion to table countywide zoning for an undermined [sic] amount of time, seconded by Magistrate Wells."

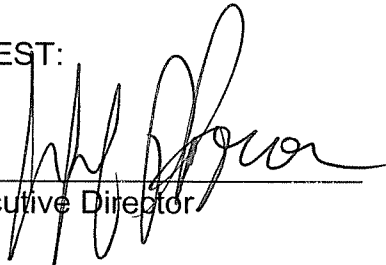
within 60 days of the date of this Order, New Cingular may file another motion to request that the Commission revisit this matter.

IT IS THEREFORE ORDERED that:

1. New Cingular's request for a decision in this proceeding is denied.
2. This matter shall continue to be held in abeyance for a period of not less than 60 days commencing from the date of this Order and pending a final decision in Kentucky Supreme Court Case No. 2009-SC-000053-DR.
3. At the conclusion of 60 days, New Cingular may file another motion to request that the Commission revisit this matter.
4. New Cingular may seek review and approval of its application with the Union County Planning Commission during this abeyance period.

By the Commission



ATTEST:


Executive Director

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