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June 20, 2016

PSC STAFF OPINION 2016-013

Mr. David A. Pike
Pike Legal Group, PLLC
1578 Highway 44 East, Suite 6
Shepherdsville, Kentucky 40165-0369

RE: Request for Legal Staff Opinion

Senate Bill 90 -- Commission Jurisdiction Over and Processing of Applications for New Cellular Antenna Towers on Property Owned by an "Instrumentality of the State"

Dear Mr. Pike:

Commission Staff acknowledges receipt of your letter dated April 21, 2016, requesting a staff advisory opinion to address issues relating to Commission jurisdiction over, and the processing of, applications for authority to construct cellular antenna towers on property owned by an entity deemed an "instrumentality of the state" in the wake of the passage of Senate Bill 90. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

You specifically request a legal staff opinion on the following questions:

1. Whether Senate Bill 90 applies to transfer jurisdiction to the Commission for proposed cellular antenna towers on the property of cities, counties, water districts organized pursuant to KRS Chapter 74, fire protection districts organized pursuant to KRS Chapter 75, sanitation districts, etc. organized under KRS Chapter 76, and other special districts which may be characterized as "instrumentalities of the state."
2. Whether, assuming that Senate Bill 90 does transfer jurisdiction to the Commission of proposed cellular towers on local government property, a planning commission will conduct the advisory review detailed in KRS 100.361(2) and who is to

notify a planning commission and what information is to be provided, and by whom, for any such review to be conducted.

3. Whether a planning commission should expect that proposed cellular towers will be referred by the Commission for planning commission public facilities review pursuant to KRS 100.324.

4. Whether the Commission will require compliance with local government land use ordinances as well as KRS Chapter 278.

You state that your firm represents wireless clients that undertake real estate transactions with public entities, and that in particular, one of your clients will likely be filing an application which would be impacted by Senate Bill 90. You also state that planning commissions around the Commonwealth could soon be required to interpret Senate Bill 90 and would benefit from Commission Staff guidance on the issue to remove ambiguity regarding which entity has jurisdiction over cellular tower applications. You state that doing so would alleviate due process and equal protection concerns.

You state that case precedent has held that Kentucky cities, counties, and fire protection districts are "instrumentalities of the state." You cite to several Kentucky cases in support of your position. *Edelen, et al v. County of Nelson, et al*, 723 S.W.2d 887, 889 (Ky. App. 1987) ("A city or county is an instrumentality of state government, and as such, is immune from complying with zoning regulations.") *City of Louisville Board of Zoning Adjustment v. Allen K. Gailor, et al*, 920 S.W.2d 887, 888 (Ky. App. 1996) (City or county is an instrumentality of state government); *Pewee Valley Fire Protection District v. South Oldham Fire Protection District*, 570 S.W.2d 290, 292 (Ky. App. 1978)("A fire protection district is an instrumentality of the state."); *City of Worthington Hills v. Worthington Fire Protection District, et al* 140 S.W.3d 584, 589 (Ky. App. 2004) ("A sixth class city clearly constitutes an instrumentality of state government under KRS 101.361(2) and thus, is immune from complying with planning and zoning regulations."). You state that, based on these cases, once Senate Bill 90 becomes effective, a new cellular tower on property owned by a city, county or fire protection district would fall under Commission jurisdiction.

Senate Bill 90 added a new section to KRS 100.987. This section states:

(11) Application for approval of cellular antenna towers on property owned by any state agency, university electing to perform financial management of its real estate pursuant to KRS 164A.555 to 164A.630, department, board, commission authority or any other instrumentality of the state that is exempt from zoning regulations under KRS 100.361, other than property for which the use is controlled by the secretary

of the Finance and Administration Cabinet pursuant to KRS 56.463(4)(a), shall be submitted to the Public Service Commission for approval under KRS 278.650.

KRS 100.361(2), which exempts certain property from local zoning regulations, states:

Nothing in this chapter shall impair the sovereignty of the Commonwealth of Kentucky over its political subdivisions. Any proposal affecting land use by any department, commission, board, authority, agency, or instrumentality of state government shall not require approval of the local planning unit. However, adequate information concerning the proposals shall be furnished to the planning commission by the department, commission, board, authority, agency, or instrumentality of state government

The Commission is a state agency empowered to regulate utilities and enforce the provisions of KRS Chapter 278. One provision of that Chapter is KRS 278.650, which requires Commission authorization of the "construction of an antenna tower for cellular communications services or personal communications services which is to be located outside the jurisdiction of a planning commission...." Thus, as this statute has been interpreted by our Supreme Court in *Kentucky Public Service Comm'n. V Shadoan*, 325 S.W. 3d 360(KY. 2010), the construction of a cellular tower will be outside the jurisdiction of local planning commission only when the area does not have such a commission. It is Commission Staff's opinion that Senate Bill 90 was not a transfer of authority from any local planning and zoning entity to the Commission over the construction of cellular towers. Rather, Senate Bill 90 amended KRS 100.987 to reflect the Commission's prior existing authority to authorize construction of cellular towers on state owned property since state owned property has for many years been exempt for planning commission jurisdiction under KRS 100.361(2). The Commission has previously exercised its authority over the construction of cellular towers on state property since such construction is exempt from jurisdiction of a planning commission.¹ However, Senate Bill 90 also created an exemption from Commission jurisdiction over the construction of cellular towers on property either owned by a university not electing to perform financial management of its real estate pursuant to KRS 164A.555 to 164A.630, or controlled by the secretary of the Finance and Administration Cabinet pursuant to KRS 56.463(4)(a).

¹ See, PSC Case No. 2015-00090, *Application of Tower Access Group, LLC, for Declaratory Ruling As to Jurisdiction Over a 190-Foot Monopole Constructed On the Campus of Eastern Kentucky University* (Ky. PSC May 5, 2015), see also, Case No. 2009-00034, *Application of New Cingular Wireless PCS, LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Telecommunications Facility*, (Ky. PSC Apr. 1, 2010).

With regard to your second question as to whether a planning commission will conduct an advisory review of a proposed cellular tower in accordance with KRS 100.361(2), Commission Staff is unable to address that issue since it is beyond the scope of our jurisdiction under KRS Chapter 278.

As to your third question, the Commission will give notice to the local planning and zoning unit pursuant to KRS 100.324 of any hearing affecting the location or relocation of a cellular tower.

Your fourth question asks whether the Commission will require compliance with local government land use ordinances and KRS Chapter 278. In those instances where the local planning commission has no jurisdiction under the provision of KRS 100.361(2), there is no provision in KRS Chapter 278 that requires the construction of a cellular tower to comply with local land use ordinances, and no provision of recently enacted Senate Bill 90 requires such compliance.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Staff Attorney J.E.B. Pinney at 502-782-2587 or at jeb.pinney@ky.gov.

Sincerely,



Aaron D. Greenwell
Acting Executive Director

JP/ph