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**M. Todd Osterloh**  
Member  
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February 27, 2025

Hon. Governor Andy Beshear  
700 Capitol Avenue, Suite 100  
Frankfort, KY 40601

Re: **Appointment of Members to the Kentucky Siting Board**  
*Lost City Renewables LLC*

Dear Governor Beshear:

On behalf of Lost City Renewables LLC (“Lost City”), I am writing with additional information and perspective on an issue raised by a letter dated February 10, 2025, by Muhlenberg County Judge/Executive Mack McGehee. Specifically, he is seeking clarification as to whom should be appointed to the Kentucky State Board for Electrical Generation and Transmission Siting (“Siting Board”), pursuant to KRS 278.702(1)(d). My intent with this letter is not to advocate for a particular position to be appointed, but rather to ensure compliance with state statutes.

The Siting Board is a 7-member board with jurisdiction to consider certificates of construction for large-scale electric generating facilities. Pursuant to KRS 278.702, the Siting Board members are comprised of the three members of the Public Service Commission, the cabinet secretaries of the Energy and Environment Cabinet and Economic Development Cabinet (or their designees), and two local ad hoc members. KRS 278.702(1)(d) dictates that one of those local members be “the chairman of the planning commission with jurisdiction over an area in which a facility subject to board approval is proposed to be located. If the proposed location is not within a jurisdiction with a planning commission, then the Governor shall appoint either the county judge/executive of a county that contains the proposed location of the facility . . . .” I interpret this statute to indicate that if the location of the proposed facility is within the jurisdiction of a planning commission, the chair of that planning commission must be appointed to the Siting Board.

KRS 100.121 authorizes a county and cities therein to form a joint planning commission by agreement. In 1972, Muhlenberg County adopted and executed an agreement establishing the Joint City-County Planning Commission with the Cities of Central City, Drakesboro, Greenville, and Powderly. This agreement is attached as Exhibit 1 to this letter. Notably, the agreement indicates that “the jurisdiction of the joint city-county planning operation shall include . . . the County of Muhlenberg.” See Section II(2). It also established a Board of Adjustment for Muhlenberg County. See Section IV(1)(A)(e).

Judge/Executive McGehee’s letter suggests that the Muhlenberg Joint City-County Planning Commission does not have jurisdiction over the proposed site because the site is not

located within 5 miles of an incorporated City. Lost City’s electric generating facility is proposed to be located in southeastern Muhlenberg County approximately 0.4 miles east of the unincorporated community of Penrod and 1.25 miles northeast of the unincorporated community of Dunmor. It does not appear that the facility will be located within 5 miles of an incorporated City in Muhlenberg County at the time of construction.

There appears to be several flaws with the assertion that the Muhlenberg Joint City-County Planning Commission does not have jurisdiction over the proposed site. First and foremost, the 1972 agreement establishing the joint planning commission does not identify any such geographical limitation. Rather, as mentioned above, it indicates that “the jurisdiction of the joint city-county planning operation shall include . . . the County of Muhlenberg.” *See* Section II(2).

Second, Kentucky law does not allow a joint planning commission to exercise extraterritorial jurisdiction. Pursuant to KRS 100.131, an independent *city* planning commission or a joint planning commission comprised of two or more *cities* can exercise extraterritorial jurisdiction for up to 5 miles from an incorporated city with the consent of the county fiscal court. Notably, the concept of extraterritorial jurisdiction only is permissible when the local planning commission only has city members. Other language in KRS 100.131 further supports that a joint planning commission with a county member need not have extraterritorial jurisdiction, stating “[t]he jurisdiction of joint city-county and regional planning units shall be coterminous with their political boundaries.” Thus, there does not appear to be any authority limiting the Muhlenberg Joint City-County Planning Commission’s jurisdiction to within 5 miles of an incorporated City.

Third, any purported limitation based on implementation of subdivision regulations is not relevant to this determination. Subdivision regulations are merely a subset of zoning regulations that can be implemented by a local government. The primary statutory scheme for subdivision regulations is found in KRS 100.273-100.292; whereas, the authority for more general land use statutes are found in KRS 100.201-100.214. In other words, local government can implement land-use regulations regardless of whether it implements subdivision regulations.

Fourth, as mentioned in the attachment to Judge/Executive McGehee’s letter, the Muhlenberg Joint City-County Planning Commission has authority to review and approve cell tower applications for all cell towers in Muhlenberg County. In fact, the Muhlenberg County Fiscal Court has adopted county-wide regulations on the location of cell towers. A copy of this ordinance is attached as Exhibit 2. This county-wide assertion of jurisdiction further supports an argument that the joint planning commission has jurisdiction over Lost City’s proposed site.

Fifth, the 2019 Muhlenberg County Comprehensive Plan, which serves as a guide for local zoning regulations, does not indicate that there is any 5-mile legal limitation on the jurisdiction of the Joint City-County Planning Commission. In fact, there is language in the Plan that suggests a

broad interpretation.<sup>1</sup> For example, it specifically states that the Plan is designed “to enable Muhlenberg County to legally participate in the planning and zoning process.” *See* Plan at 1. It also addresses other issues in the unincorporated areas of the County, including tourism near Lake Malone, access to broadband for all citizens of the County, establishing a countywide list of historic properties, and planning for transportation within the County and cities. *See id.* at 58, 62, 65, and 67.

Sixth, Kentucky judicial and administrative decisions appear to conflict with the Judge/Executive’s position. Although there do not appear to be any cases directly interpreting KRS 278.702(1)(d), relevant guidance is found in the Kentucky Supreme Court in *Kentucky Public Service Com’n v. Shadoan*, 325 S.W.3d 360 (Ky. 2010). The *Shadoan* Court considered whether the Public Service Commission or a local planning commission had jurisdiction over the siting and construction of a cell tower. The Court interpreted KRS 100.987, 278.650, and 278.655 in rendering its decision. Most significantly, the Court pointed to the statutes in Chapter 278 as providing the Public Service Commission jurisdiction only in “areas outside the jurisdiction of a planning commission.” Thus, the issue in *Shadoan* was whether the local planning commission had jurisdiction over the proposed tower site.

In reaching its conclusion, the Court turned to the statutes regulating zoning in KRS Chapter 100 and determined that “a local planning unit is not required to enact any zoning regulations for its area, let alone regulations that specifically pertain to cellular antenna towers.” *Id.* at 365. Accordingly, even if a local planning commission had not adopted cell-tower regulations, the Court held that the local planning commission nevertheless had jurisdiction over the site and construction of the cell tower because the planning commission had been established.

At the time the *Shadoan* case was decided, another cell-tower construction case involving a site in Muhlenberg County was pending at the Public Service Commission. *See Powertel/Memphis, Inc. d/b/a TMobile Kentucky*, Case No. 2009-00022.<sup>2</sup> The Public Service Commission had to determine whether it had jurisdiction to consider an application for construction of a cell tower outside any city limits in Muhlenberg County. The Public Service Commission held: “By virtue of the Fiscal Court’s participation in the formation of the Muhlenburg Planning Commission [sic], the Muhlenburg Planning Commission’s jurisdiction would appear to be co-terminous with the political boundaries of the Fiscal Court. This is virtually indistinguishable from the factual situation presented in the *Shadoan* case.” *Powertel/Memphis, Inc. d/b/a TMobile Kentucky*, Case No. 2009-00022 at 7 (Ky. PSC Dec. 10, 2009)(attached hereto

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<sup>1</sup> Due to its voluminous nature, a copy of the Comprehensive Plan is not being attached hereto. A copy can be accessed at the following website: [https://drive.google.com/file/d/1tfjC6gjfTRrY-9YAXy5iWzGEeNRw\\_xh/view](https://drive.google.com/file/d/1tfjC6gjfTRrY-9YAXy5iWzGEeNRw_xh/view) (last visited Feb. 26, 2025).

<sup>2</sup> Documents filed in this case are available at <https://psc.ky.gov/Case/ViewCaseFilings/2009-00022> (last visited Feb. 26, 2025).

as Exhibit 3)<sup>3</sup>(affirmed by subsequent PSC decision dated Dec. 29, 2020, the order of which is attached as Exhibit 4).

The *Powertel* administrative case (and *Shadoan*) further supports the position that the Muhlenberg Joint City-County Planning Commission has county-wide jurisdiction. Because KRS 278.702(1)(d) dictates that one of those local members be “the chairman of the planning commission with jurisdiction over an area in which a facility subject to board approval is proposed to be located,” there can be little debate as to which local official must statutorily be appointed to the Siting Board for Lost City’s case.

Finally, it is worth noting that it appears a prior governor appointed the Muhlenberg Joint City-County Planning Commission Chair to a Siting Board case in 2002. *See Thoroughbred Generating Company, LLC*, Case No. 2002-00150.<sup>4</sup> Although one might argue that this case is distinguishable because that proposed facility was within 5 miles from the Central City limits, this distinction is without a difference. Land use restrictions including corresponding setbacks for zoning are different than subdivision regulations. Subdivision of land is rarely, if ever, an issue in a case pending before the Siting Board. Accordingly, it is irrelevant as to whether the Muhlenberg Joint City-County Planning Commission regulates subdivisions within a 5-mile radius of an incorporated City.

Ultimately, as mentioned above, my intent with this letter is to ensure compliance with state statutes. Lost City is confident that its project meets the elements for approval of a certificate of construction, pursuant to KRS 278.710. Nevertheless, it seeks to ensure that all procedural and substantive decisions are made in accordance with Kentucky law.

Sincerely,  
STURGILL, TURNER, BARKER & MOLONEY, PLLC

  
M. Todd Osterloh

cc: Siting Board Case No. 2024-00406  
Matt Osborne ([Matt.Osborne@ky.gov](mailto:Matt.Osborne@ky.gov))  
Judge/Executive McGehee ([m.mcgehee@muhlenbergcountyky.org](mailto:m.mcgehee@muhlenbergcountyky.org))

<sup>3</sup> In this order, the Public Service Commission noted that no information was provided indicating an amendment to the 1972 agreement. *See id.* Similarly, Lost City has not obtained any information to indicate that the agreement has been amended.

<sup>4</sup> Documents filed in this case are available at <https://psc.ky.gov/Case/ViewCaseFilings/2002-00150> (last visited Feb. 26, 2025).

AGREEMENT ESTABLISHING A JOINT CITY-COUNTY  
PLANNING UNIT, A JOINT CITY COUNTY PLANNING  
COMMISSION AND BOARDS OF ADJUSTMENT

THIS AGREEMENT made and entered into this 8 day of Feb., 1972

by and between the Cities of Central City, Drakesboro, Greenville, and Powderly, Kentucky and the County of Muhlenberg, Kentucky, hereinafter referred to respectively as Cities and County.

WITNESSETH:

THAT WHEREAS, the Cities and the County have determined to establish a "Joint Planning Unit" within the purview of Chapter 100 of the Kentucky Revised Statutes, as amended, under terms and conditions mutually acceptable.

NOW THEREFORE, in consideration of the premises, and in conformity with the requirements of said Statutes, the Cities and the County agree and stipulate as follows:

SECTION 1 - PURPOSES AND OBJECTIVES

1. Purposes and Objectives - The Cities and the County hereby declare that in the execution of this agreement and in the fulfillment of their respective obligations hereunder, they are acting with the following purposes and objectives which shall not be considered exclusive, and which are stated merely for the purpose of demonstrating to some extent the intent of the parties.

A. To secure the maximum economical, physical, and social welfare for the Cities and County and their citizens through the thoughtful and planned use and development of land, buildings, thoroughfares, and public utilities.

B. To encourage the establishment of a planning program, the provision of facilities and personnel, therefore, the study of needs of the affected areas in the field of planning and implementation and enforcement of all regulations lawfully established and promulgated pursuant to the provisions of said Chapter 100 of the Kentucky Revised Statutes.



C. To encourage cooperation between Cities and County and the citizens and officials thereof.

D. The Cities and the County and the appropriate officials thereof shall lend their best efforts in the attainment and fulfillment of said purpose and objectives.

SECTION II - JOINT PLANNING UNIT

1. Joint Planning Unit Created - The Cities of Central City, Drakesboro, Greenville, and Powderly, and the County of Muhlenberg do hereby form a joint planning unit by combining their planning operations into a joint city-county planning program.

2. Area of Jurisdiction - The area of jurisdiction of the joint city-county planning operation shall include all of the City of Central City, the City of Drakesboro, the City of Greenville, and the City of Powderly, and the County of Muhlenberg.

SECTION III - JOINT PLANNING COMMISSION

1. Joint Planning Commission Created - A joint planning commission is hereby created which shall be known as the Muhlenberg Joint City-County Planning Commission.

Upon the appointment and subsequent approval of members, election of officers and adoption of its by-laws, its existence shall begin subject to the provisions of KRS Chapter 100. The Commission may engage in planning operations within its jurisdiction which shall include all of the City of Central City, the City of Drakesboro, the City of Greenville, and the City of Powderly, and the County of Muhlenberg except where otherwise provided for by KRS Chapter 100. This Commission shall have the powers, duties and responsibilities set forth in KRS Chapter 100.

One Muhlenberg County member for a term ending March 1, 1974

One Powderly member for a term ending March 1, 1974

One Muhlenberg County member for a term ending March 1, 1975

One Drakesboro member for a term ending March 1, 1975

One Greenville member for a term ending March 1, 1976

One Central City member for a term ending March 1, 1976

F. The Commission shall elect a Chairman, and any other officers which it deems necessary from among its citizen members. The term of office shall be one year with eligibility for re-election. The Commission may employ a staff as it may deem necessary for its work and may contract with professional planners and other parties for such services as it may require.

G. The Commission shall conduct each year at least six regular meetings for the transaction of its business. The by-laws adopted by the Commission shall reflect the schedule of regular meetings, the manner in which notice shall be given; date; time; place; and the subject or subjects to be discussed. All members, except the Chairman, shall be entitled to vote and five members of the total membership including the Chairman or acting Chairman shall constitute a quorum. After a quorum has been established, a simple majority of that can transact any official business except in those instances where there is to be an adoption or amendment of the Commission's by-laws or elements of the comprehensive plan or regulations, then a vote of the simple majority of the total membership shall be necessary. In any case of a tie vote or deadlock, the Chairman shall then have the power to vote and shall cast his vote and break the tie or deadlock. The Commission shall adopt and approve its by-laws before it may properly transact any business. The by-laws shall set forth the procedures, rules, and regulations necessary for the Commission to conduct its business.

H. The Commission shall have general powers necessary to carry out its functions in accordance with this agreement and KRS Chapter 100. The Commission may be assigned any powers, duties and functions related to urban renewal or public housing by the legislative bodies of the participating cities or county. The Commission shall have the power to receive, hold, administer, and disburse funds which it may lawfully receive from any and every source. Expenditures of such funds shall be in accordance with the formal action of the Commission, or pursuant to regulations lawfully established by the Commission. Officials, appointed officials and employees of the Cities and County may be authorized and/or directed by the Mayors and the County Judge to attend meetings of the Commission.

2. Joint Planning Commission Membership - The Commission shall consist of a total of 9 members with at least 6 of the members being citizen members.

A. Non-citizen members may be any elected official, appointed official or public employee of the Cities or County.

B. Citizen members may be any citizen who is not an elected official, appointed official or public employee of the Cities or County.

C. The Mayors and County Judge shall appoint the members of the Commission with the approval of their respective legislative bodies. The citizen members appointed by the Mayors shall be residents within the corporate limits of their respective cities and the citizen members appointed by the County Judge shall be residents of the portion of the County lying outside the boundaries of all legally incorporated cities but inside the area comprising the territorial jurisdiction of the Commission.

D. Commission members shall be appointed according to the following:

<u>2</u>	Central City Members
<u>1</u>	Drakesboro Member
<u>2</u>	Greenville Members
<u>1</u>	Powderly Member
<u>3</u>	Muhlenberg County Members

E. The term of office of all elected public officials shall be the same as their official tenure in office. For other members, the term shall be four years, ending on March 1 of the designated year. The term of those first appointed shall be staggered so that a proportionate number serve one, two, three, and four years respectively, with later appointments or re-appointments continuing the staggered pattern. All vacancies whether by resignation, dismissal or expiration of the term of office shall be filled within sixty days by the appropriate appointing authority or as otherwise provided for in KRS Chapter 100.

The oath of office shall be administered to all members of the Commission before entering upon their duties. The oath shall be administered as provided by law. Any member may be removed by the appropriate appointing authority for inefficiency, neglect of duty, malfeasance, or conflict of interest. The removed members shall have the right to appeal in the manner prescribed by KRS Chapter 100.

The terms of those first appointed shall be staggered as follows:

One Muhlenberg County Member for a term ending March 1, 1973  
One Greenville Member for a term ending March 1, 1973  
One Central City Member for a term ending March 1, 1973



and otherwise to assist the Commission in advisory capacities, when deemed necessary by the members of the Commission, for the preparation of plans, and for the aids to help implement the plans and shall be as described in Chapter 100 of the Kentucky Revised Statutes and as may be amended in the future.

I. All cost incurred by the Commission not met by Federal and/or State monies, shall be paid by the participating cities and the county as follows: Muhlenberg County 55%, Central City 20%, Drakesboro 3%, Greenville 20%, and Powderly 2%. Special costs incurred by the Commission that are incurred primarily for the benefit of one or more participating units, shall be met by the political units directly benefited; provided that this exception shall not apply to planning services contracted by the Commission intended to study the entire land area of all participating units.

SECTION IV - BOARDS OF ADJUSTMENT

1. Boards of Adjustment Created - A Board of Adjustment is hereby created for each of the following political subdivisions; the City of Central City, the City of Drakesboro, the City of Greenville, and the City of Powderly, and the County of Muhlenberg, Kentucky. Each Board shall be known as the Board of Adjustment for the respective political subdivision that it serves. (i.e.) The Board of Adjustment for the City of Central City, the Board of Adjustment for the City of Drakesboro, the Board of Adjustment for the City of Greenville, and the Board of Adjustment for the City of Powderly, and the Board of Adjustment for the County of Muhlenberg. Each Board shall have the powers, duties and responsibilities as set forth in KRS Chapter 100.

A. The jurisdiction of the Boards of Adjustment shall be as follows:

a. The Board of Adjustment for the City of Central City. Jurisdiction shall be within the legal corporate limits of the City of Central City, as exists or may be amended in the future.

b. The Board of Adjustment for the City of Drakesboro. Jurisdiction shall be within the legal corporate limits of the City of Drakesboro, as exists or may be amended in the future.

c. The Board of Adjustment for the City of Greenville. Jurisdiction shall be within the legal corporate limits of the City of Greenville, as exists or may be amended in the future.

d. The Board of Adjustment for the City of Powderly.  
Jurisdiction shall be within the legal corporate limits of the City of Powderly, as exists or may be amended in the future.

e. The Board of Adjustment for the County of Muhlenberg.  
Jurisdiction shall be within all of the legal territorial boundaries of the County excluding the area within the legal corporate limits of the Cities of Central City, Drakesboro, Greenville, and Powderly, as exists or may be amended in the future.

B. The membership, appointment and term of office of the Board of Adjustment is as follows:

a. Board of Adjustment for the City of Central City.  
The Board shall consist of 3 citizen members, 1 of which shall be citizen member of the Planning Commission and resident of the City of Central City. The Mayor of Central City shall appoint the members of the Board with the approval of the City of Central City's legislative body. The term of office of members first appointed shall be staggered so that a proportionate number serve one, two, three, and four years respectively, with later appointments or re-appointments continuing the staggered pattern.

b. Board of Adjustment for the City of Drakesboro.  
The Board shall consist of 3 citizen members, 1 of which shall be citizen member of the Planning Commission and resident of the City of Drakesboro. The Mayor of Drakesboro shall appoint the members of the Board with the approval of the City of Drakesboro's legislative body. The term of office of members first appointed shall be staggered so that a proportionate number serve one, two, three, and four years respectively, with later appointments or re-appointments continuing the staggered pattern.

c. Board of Adjustment for the City of Greenville.  
The Board shall consist of 3 citizen members, 1 of which shall be citizen member of the Planning Commission and resident of the City of Greenville. The Mayor of Greenville shall appoint the members of the Board with the approval of the City of Greenville's legislative body. The term of office of members first appointed shall be staggered so that a proportionate number serve one, two, three, and four years respectively, with later appointments or re-appointments continuing the staggered pattern.

d. Board of Adjustment for the City of Powderly.

The Board shall consist of 3 citizen members, 1 of which shall be citizen member of the Planning Commission and resident of the City of Powderly. The Mayor of Powderly shall appoint the members of the Board with the approval of the City of Powderly's legislative body. The term of office of members first appointed shall be staggered so that a proportionate number serve one, two, three, and four years respectively, with later appointments or re-appointments continuing the staggered pattern.

e. Board of Adjustment for the County of Muhlenberg

The Board shall consist of 3 citizen members, 1 of which shall be citizen member of the Planning Commission and resident of the County of Muhlenberg living within the legal territorial boundaries of Muhlenberg County, excluding the area within the legal corporate limits of the City of Central City, the City of Drakesboro, the City of Greenville, and the City of Powderly, as exist or may be amended in the future. The County Judge of Muhlenberg County shall appoint the members of the Board with the approval of the County of Muhlenberg's legislative body. The term of office of all Board members first appointed shall be staggered so that a proportionate number serve one, two, three and four years respectively, with later appointments or re-appointments continuing the staggered pattern.

G. Reimbursement for expenses lawfully incurred by a member of the Boards of Adjustment in the performance of his duties may be authorized by formal action of the respective Board.

No member of the Board shall receive any compensation.

D. The Boards of Adjustment shall have the power to receive, hold, administer and disburse funds which it may lawfully receive from any and every source. Prior to the beginning of each Board's fiscal year, the respective Board may adopt a budget which shall be presented to the legislative body of the political subdivision in which it has jurisdiction for the purpose of receiving funds for the cost of its operation.

Expenditures of such appropriations and funds shall be in accordance with the formal action of the Board or pursuant to the regulations lawfully established by the Board. All other details of the Board's operation which are necessary for the establishment and administration of the Boards shall be as described in KRS Chapter 100 and as may be amended in the future.

SECTION V - EFFECTIVE DATE AND PERIOD

1. Effective Date and Period - This agreement shall be in full force and effect when executed by the parties to the agreement and then filed in the office

of the County Court Clerk of Muhlenberg County. This agreement shall be in existence for as long as at least two of the original signators are operating under the combination despite the fact that other signators have withdrawn from the unit.

SECTION VI - SEPARABILITY CLAUSE

1. Separability Clause - Should any section or provision of this agreement be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of the agreement as a whole, or any part thereof other than the part so declared to be unconstitutional or invalid.

SECTION VIII - AMENDMENT AND EXECUTION

1. Amendment - This agreement may be amended from time to time by mutual agreement of all signators participating in the unit, with such amended agreement filed in the office of the County Clerk of Muhlenberg County.

2. Execution - IN WITNESS WHEREOF, the undersigned parties each acting by and through their duly authorized officials, have caused the Agreement to be executed as of this 8 day of Feb, 1972.

CITY OF CENTRAL CITY

BY [Signature]  
MAYOR

CITY OF GREENVILLE

BY [Signature]  
MAYOR

MUHLENBERG COUNTY FISCAL COURT

BY [Signature]  
COUNTY JUDGE

CITY OF DRAKESBORO

BY [Signature]  
MAYOR

CITY OF POWDERLY

BY [Signature]  
MAYOR

Adopted by the Central City Council on 2/8/72  
Adopted by the Drakesboro City Council on 2-7-72  
Adopted by the Greenville City Council on 2/7/72  
Adopted by the Powderly City Council on 2-5-1972  
Adopted by the Muhlenberg Fiscal Court on 1-27-1972

Filed in the office of the County Court Clerk of Muhlenberg County on



COMMONWEALTH OF KENTUCKY  
COUNTY OF MUHLENBERG  
ORDINANCE NO. 09-23-07

AN ORDINANCE RELATING TO THE REGULATION OF CELLULAR ANTENNA  
TOWERS IN MUHLENBERG COUNTY, KY

WHEREAS, KRS 100.985 to 100.987 and other applicable laws provide that Fiscal Court may enact ordinances and issue regulations relating to cellular antenna towers;

NOW, THEREFORE, BE IT ORDAINED BY THE FISCAL COURT OF THE COUNTY  
OF MUHLENBERG, COMMONWEALTH OF KENTUCKY, AS FOLLOWS:

I. DEFINITIONS

A. Cellular Antenna: Any structure or device used to collect or radiate electromagnetic waves, including both directional antennas, such as panels, microwave dishes and satellite dishes, and omni-directional antennas, such as whips, at frequencies on the electromagnetic spectrum as the FCC from time to time may designate, used for cellular telecommunications services and/or personal communications services, but not including such structures or devices when used for the broadcast of television of AM or FM radio stations or for citizens band or amateur radio use. Examples of cellular telecommunications or personal communications services include, but are not limited to, cellular telephone, paging, public safety, data transmission, Specialized Mobile Radio, Enhanced Specialized Mobile Radio, and other commercial private radio services.

B. Cellular Antenna Tower: Any structure that is designed and constructed primarily for the purpose of supporting one or more cellular antennas. This includes guyed towers, lattice towers, monopoles, alternative cellular antenna tower structures and towers taller than 15 feet constructed on the top of another building, along with any separate building on the lot used to house any supporting electronic equipment.

C. Co-Location: Locating one or more cellular antennas for more than one provider on a single cellular antenna tower or alternative cellular antenna tower structure on a single lot.

D. Height Antenna Tower: The distance from the anchored base of the tower, whether on the top of another building or at grade, to the highest point of the structure, even if the highest point is the top of an antenna.

E. Telecommunications Facility: The lot, tract, or parcel of land that contains the telecommunications antenna, its support structure, any accessory buildings, and parking, and may include other uses associated with and ancillary to telecommunications transmission.

## II. ANTENNA TOWERS (CELLULAR ANTENNA TOWERS OR ALTERNATIVE TOWER STRUCTURES)

An antenna tower for cellular telecommunications services or personal communications services may be allowed after receiving Planning Commission review and approval in accordance with this section. Co-location of service facilities is preferred. Co-location objectives may be satisfied by configuration of new facilities for multiple carriers or by co-location on existing facilities. Any request for review of a proposal to construct such an antenna tower or to re-configure, enlarge or re-construct an existing antenna tower, shall be made only in accordance with Section III.

However, if the property is subject to any encumbrances, zoning restrictions, conditional use permits, or the like, the property owner shall obtain all necessary approvals of any modification request, and submit proof of such approvals simultaneously with the antenna tower application

## III. GENERAL PROVISIONS

### A. Notice of Filing.

Notice of any request for approval of a uniform application to construct a cellular antenna tower filed under this section shall be sent by the applicant by United States Certified Mail to the owner of every parcel of property within five hundred (500) feet of the tower, to the owner of every parcel of property adjoining at any point the property from which the applicant proposes to create the tower site, and to the owner of every parcel of property directly across the street from said property. Notice shall also be sent by the applicant to the Mayor of the City in which the tower site is proposed, if the tower is proposed to be located within the corporate limits of a City or to the County Judge/Executive, if the tower is proposed to be located in the unincorporated area of Muhlenberg County.

Such notices shall include the Planning Commission Docket Number under which the request will be reviewed, the address and telephone number of the Planning Commission's office, and a statement that the recipient has the right to submit testimony to the Planning Commission, either in writing or by appearance at any Committee or Commission meeting scheduled for review of the request.

### B. Notification.

The applicant shall furnish to the Planning Commission with the attorney certification a copy of the notices required by subsection A above and the names and addresses of the owners of property and the governmental officials to whom the required notices will be sent. Records maintained by the Property Valuation Administrator may be relied upon to determine the identity and address of said owners. If the property is in a cooperative form of ownership or has co-owners, notice may be in the manner described in KRS 100.214 (2) for such ownership. The applicant shall obtain the name and address of the applicable governmental officials from the Planning Commission through its authorized representative.

C. Posting Property.

Notice of the filing of the request shall be posted conspicuously in a visible location on the proposed site of the telecommunications facility and in a visible location on the nearest public road at the same time that notice by first class mail is sent. The applicant shall certify that the postings have been made. The notices shall remain until the Planning Commission issues its final decision or 60 days has passed since acceptance of the request by the Planning Commission, whichever occurs first. The posting shall be as follows:

1. Each sign shall be at least two (2) feet by four (4) feet in size;
2. Each sign shall state: "(Name of applicant) proposes to construct a telecommunications tower and/or facility on this site. If you have questions, please contact (name and address of applicant). Information on the Planning Commission's review of this proposal may be obtained by calling the Planning Commission at (270) 754-5097. Please refer to the request name or number in all inquiries."
3. In both posted notices, the words "proposes to construct a telecommunications tower and/or facility" shall be printed in letters at least (4) inches in height, and the words "Joint Muhlenberg County Planning Commission at (270) 754-5097" shall be painted in letters at least one (1) inch in height. Both signs shall be constructed of durable, weatherproof material.
4. Any such signs may also include any notices required to be made by regulations of the Kentucky Public Service Commission including 807 KAR 5:063 (as now in effect, or as amended).

D. Uniform Application Documentation.

Any request filed under this Section III for review of a proposal to construct a cellular antenna tower shall include the following:

1. The full name and address of the applicant;
2. The applicant's articles of incorporation, if applicable;
3. A geotechnical investigation report, signed and sealed by a professional engineer registered in Kentucky, that includes boring logs and foundation design recommendations;
4. A written report, prepared by a professional engineer or land surveyor, of findings as to the proximity of the proposed site to flood hazard areas;
5. Clear directions from the county seat to the proposed site, including highway numbers and street names, if applicable, with the telephone number of the person who prepared the directions;

6. The lease or sale agreement for the property on which the tower is proposed to be located, except that, if the agreement has been filed in abbreviated form with the county clerk, an applicant may file a copy of the agreement as recorded by the county clerk and, if applicable, the portion of the agreement demonstrating compliance with KRS 100.987(2);

7. The identity and qualifications of each person directly responsible for the design and construction of the proposed tower;

8. A site development plan or survey, signed and sealed by a professional engineer registered in Kentucky, that shows the proposed location of the tower and all easements and existing structures within five hundred (500) feet of the proposed site on the property on which the tower will be located, and all easements and existing structures within two hundred (200) feet of the access drive, including the intersection with the public street system;

9. A vertical profile sketch of the tower, signed and sealed by a professional engineer registered in Kentucky, indicating the height of the tower and the placement of all antennas;

10. The tower foundation design plans and a description of the standard according to which the tower was designed, signed, and sealed by a professional engineer registered in Kentucky;

11. A map, drawn to scale no less than one (1) inch equals two hundred (200) feet, that identifies every structure and every owner of real estate within five hundred (500) feet of the proposed tower;

12. A statement that every person who, according to the records of the property valuation administrator, owns property within five hundred (500) feet of the proposed tower or property contiguous to the site upon which the tower is proposed to be constructed, has been:

- a) Notified by certified mail, return receipt requested, of the proposed construction, which notice shall include a map of the location of the proposed construction;
- b) Given the telephone number and address of the local planning commission; and
- c) Informed of his or her right to participate and submit testimony, either in writing or by attendance at the planning commission's proceedings on the application.

13. A list of the property owners who received the notice, together with copies of the certified letters sent to the listed property owners;



14. A statement that the chief executive officer of the affected local governments and their legislative bodies have been notified, in writing, of the proposed construction;

15. A copy of the notice sent to the chief executive officer of the affected local governments and their legislative bodies;

16. A statement that:

a) A written notice, of durable material at least two (2) feet by four (4) feet in size, stating that "[Name of applicant] proposes to construct a telecommunications tower on this site" and including the addresses and telephone numbers of the applicant and the planning commission, has been posted and shall remain in a visible location on the proposed site until final disposition of the application; and

b) A written notice, at least two (2) feet by four (4) feet in size, stating that "[Name of applicant] proposes to construct a telecommunications tower near this site" and including the addresses and telephone numbers of the applicant and the planning commission, has been posted on the public road nearest the site;

17. A statement that notice of the location of the proposed construction has been published in a newspaper of general circulation in the county in which the construction is proposed;

18. A brief description of the character of the general area in which the tower is proposed to be constructed, which includes the existing land use for the specific property involved;

19. A statement that the applicant has considered the likely effects of the installation on nearby land uses and values and has concluded that there is no more suitable location reasonably available from which adequate service to the area can be provided, and that there is no reasonably available opportunity to locate its antennas and related facilities on an existing structure, including documentation of attempts to locate its antennas and related facilities on an existing structure, if any, with supporting radio frequency analysis, where applicable, and a statement indicating that the applicant attempted to locate its antennas and related facilities on a tower designed to host multiple wireless service providers' facilities or on an existing structure, such as a telecommunications tower or other suitable structure capable of supporting the applicant's antennas and related facilities; and

20. A map of the area in which the tower is proposed to be located, that is drawn to scale, and that clearly depicts the necessary search area within which a cellular antenna tower should, pursuant to radio frequency requirements, be located.

21. An indication that the information that the applicant is required by 807 KAR 5:063, (as now in effect, or as amended) to submit to the Commonwealth of Kentucky Public Service Commission is available to be sent promptly to the Planning Commission upon its written request;

22. A copy of the applicant's FCC license, or, if the applicant is not an FCC license holder, a copy of at least one letter of commitment from an FCC license holder to locate at least one antenna on the applicant's tower.

23. Unless co-locating, certification, supported by evidence, that co-location of the proposed telecommunications facility with an existing approved tower or facility cannot be reasonably accommodated or that a new facility configured for multiple carriers. The applicant's certification shall include a listing of all existing towers and facilities within a one (1) mile radius of the proposed site, a description of each existing site, and a discussion of the ability or inability to reasonably co-locate on each existing site.

Reasons for not co-locating on a site would include, but not be limited to, the following:

1. No existing towers or facilities are located within the above radius of the site;
2. Existing towers or facilities are not of sufficient height to meet the applicant's engineering requirements;
3. Existing towers or facilities do not have sufficient structural strength to support applicant's proposed antenna and related equipment;
4. Applicant's planned equipment would cause radio frequency interference with other existing or planned equipment of the tower or facility, or the existing or planned equipment of the tower or facility would cause interference with the applicant's planned equipment which cannot be reasonably prevented;
5. Unwillingness of the owner of the existing tower or facility to entertain a reasonable co-location proposal;
6. Existing towers or facilities do not provide an acceptable location for requisite coverage for the applicant's communications network.

24. Unless co-locating, certification that there is no other site which is materially better from a land use perspective within the immediate area for the location of the telecommunications facility. The applicant's certification shall include a listing of potential sites within a one (1) mile radius of the proposed site, a description of each potential site, and a discussion of the ability or inability of the site to host a telecommunications facility.

25. Reasons for not locating on a potential site would include, but not be limited to, the following:

1. Unwillingness of the site owner to entertain a telecommunications facility;
2. Economically impractical;
3. Topographic limitations of the site;
4. Adjacent impediments that would obstruct adequate cellular telecommunications and/or personal communications transmission;
5. Physical site constraints that would preclude the construction of a telecommunications facility;
6. Technical limitations of the telecommunications system;
7. Existing potential sites do not provide an acceptable location for requisite coverage for the applicant's communications network;

26. At the time the applicant files an application for review under these regulations, a listing of the present locations of the applicant's telecommunications towers and/or facilities in Muhlenberg County, to include co-location sites.

27. A pictorial representation, such as a silhouette drawing, photograph, etc. of the proposed telecommunications facility from a point 150 to 600 feet from the facility for at least two of the four compass directions, (to the extent practicable considering vegetation, buildings, or other obstructions) showing the relationship of the tower and/or facilities against the massing of surrounding structures, trees, and other intervening visual masses. Notwithstanding the foregoing, the applicant shall not be required to purchase temporary easement or license rights to allow it to make drawings or photographs from particular vantage points. A reasonable pictorial representation of the site may be substituted for the aforementioned specified compass direction representations if it is not practical to comply with the express terms of this paragraph and the Planning Commission is notified in writing of such practical difficulty.

28. All new telecommunications facilities shall be configured to accommodate at least two telecommunications providers.

#### E. Processing of Applications.

Applications for the construction of cellular antenna towers shall be processed as follows:



1. The Planning Commission shall review the uniform application to determine whether it is in agreement with these Cellular Antenna Tower Regulations.
2. At least one public hearing on the proposal shall be held, at which hearing interested parties and citizens shall have the opportunity to be heard. Notice of the time and place of such hearing shall be published at least once, in The Leader News, provided that one publication occurs not less than seven calendar days nor more than 21 calendar days before the occurrence of such hearing.
3. Upon holding the hearing, the Planning Commission shall, within 60 days commencing from the date that the application is received by the Planning Commission, or within a date specified in a written agreement between the Planning commission and the applicant, make its final decision to approve or disapprove the uniform application. If the Planning Commission fails to issue a final decision within 60 days, and if there is no written agreement between the Planning Commission and the utility to a specific date of the Planning commission to issue a decision, it shall be presumed that the Planning Commission has approved the utility's uniform application.
4. If the Planning Commission disapproves of the proposed construction, it shall state the reasons for disapproval in its written decision and may make suggestions which, in its opinion, better accomplish the objectives of the Planning Commission and the applicant. No permit for construction of a cellular antenna tower shall be issued until the Planning Commission approves the uniform application or the sixty (60) day time period has expired, which ever occurs first.
5. Upon approval of an application for the construction of a cellular antenna tower by a Planning Commission, the applicant shall notify the Public service Commission within ten (10) working days of the approval. The notice to the Public Service Commission shall include a map showing the location of the construction site. If an applicant fails to file notice of an approved uniform application with the Public Service Commission, the applicant shall be prohibited from beginning construction on the cellular antenna tower until such notice has been made.

F. Design Standards.

At the time of filing of a request under this Section III, the applicant shall provide information demonstrating compliance with the requirements listed below. Where the Planning Commission finds that the conditions or circumstances relating to the particular application are such that one or more of the requirements listed below are not necessary or desirable for the protection of surrounding property or the public health, safety, or welfare, either at the time of application or in the foreseeable future, and that such special conditions and circumstances make one or more said requirements unduly burdensome, the Planning Commission may modify or waive such requirement, either permanently or on a temporary basis. Any such modification or waiver shall be requested



by the applicant, and the applicant shall submit a written justification for each requested modification or waiver.

1. If the site is an easement, the boundaries of the tract on which the easement is located shall be treated as the property boundaries.
2. Any monopole, guyed, lattice, or similar type cellular antenna tower and any alternative cellular antenna tower structure similar to these towers, such as light poles, shall be maintained in either galvanized steel finish or be painted light gray or light blue in color. Alternate sections of aviation orange and aviation white paint may be used only when the FAA finds that none of the alternatives to such marking are acceptable.
3. Towers shall not be artificially lighted except as required by the Federal Aviation Administration (FAA). Upon commencement of construction of a cellular antenna tower, in cases where there are residential uses located within a distance which is three hundred (300) percent of the height of the tower from the tower and when required by federal law, dual mode lighting shall be requested from the FAA.
4. The site shall not be staffed. Authorized personnel may periodically visit the site for maintenance, equipment modification, or repairs. There shall be provided on site an area sufficient to accommodate the parking of an authorized service vehicle.
5. The site shall be enclosed by a security fence, and the fence may be located in any required yard at no less than eight feet.
6. If the use of any cellular antenna or cellular antenna tower or alternative cellular antenna tower structure is discontinued, the owner shall provide the Planning Commission with a copy of the notice to the FCC of intent to cease operations within 30 days of such notice to the FCC. If the cellular antenna or cellular antenna tower or alternative cellular antenna tower structure will not be reused, the owner shall have 180 days from submittal of the FCC notice to the Planning Commission to apply for a demolition permit and remove the antenna or tower that will not be reused. If the cellular antenna or cellular antenna tower or alternative cellular antenna tower structure is to be reused, the owner shall have no more than twelve (12) months from submittal of the FCC notice to the Planning Commission in which to commence new operation of the antenna or tower to be reused, unless an extension of time has been granted by the Planning Commission. Upon failure to commence new operation of the antenna or tower that is to be reused within twelve (12) months, the cellular antenna or cellular antenna tower or alternative cellular antenna tower structure shall be presumed abandoned, and the owner shall apply within 90 days of the expiration of the twelve (12) month period, a demolition permit and remove the antenna or tower that is presumed abandoned within 60 days of obtaining the demolition permit. If the owner fails to remove an antenna or tower in the time provided by this

paragraph, the Planning Commission may, on grounds of public safety, health, and welfare, cause the demolition and removal of the antenna or tower and recover its costs of demolition and removal. The Planning Commission, at time of application for construction, may require posting of a bond covering the cost of removal of the antenna or tower; the bond to be forfeited to the Planning Commission upon failure to remove the antenna or tower in a timely manner as required above.

The only signs allowed shall be emergency information signs, owner contact information, warning or safety instructions, and signs required by a federal, state, or local agency. Such signs shall not exceed five (5) square feet in area.

7. The site shall be landscaped in a manner consistent with the surrounding landscape, as determined by the owner of the property or at the direction of the planning commission.

#### G. Existing Telecommunications Facilities.

Telecommunications facilities in existence on the date of the adoption of this ordinance which do not comply with this ordinance ("existing telecommunications facilities") are subject to the following provisions:

1. Existing telecommunication facilities may continue in use for the purpose now used, but may not be expanded or replaced without complying with this ordinance, except as further provided in this section.
2. Existing telecommunications facilities which are hereafter damaged or destroyed due to any reason or cause may be repaired and restored to their former use, location and physical dimensions.
3. The owner of any existing telecommunications facility may replace, repair, rebuild and/or expand such telecommunications facility to accommodate co-located antennas or facilities, or to upgrade the facilities to current engineering, technological or communications standards by obtaining a building permit therefore, without having to request local zoning approvals, so long as such facilities are not increased in height by more than 50% and or setbacks are not decreased by more than 50%.
4. Any such replacement, repair, reconstruction or enlargement shall not violate the design standards described in subsection E above beyond that existing at the date of the adoption of this ordinance.

#### H. Confidentiality.

With the exception of the map or other information that specifically identifies the proposed location of the cellular antenna tower then being reviewed, all other information contained in the uniform application and any updates shall be recognized as confidential

and proprietary within the meaning of KRS 61.878. The Planning Commission shall deny any public request for the inspection of such information, whether submitted under Kentucky's Open Records Act or otherwise, unless ordered to disclose such records by a court of competent jurisdiction or unless confidentiality is waived in writing by the applicant.

I. Application Fee.

An applicant for the construction of cellular antenna towers shall pay an application fee of \$2,500.00 per application.

IV. SEVERABILITY.

If any clause, section, or other part of this Ordinance shall be held invalid or unconstitutional by any court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby, but shall remain in full force and effect.

V. CONFLICTS.


All ordinances or parts of ordinances in conflict herewith are hereby repealed.

VI. Effective Date.

This ordinance shall be read on two separate days and will become effective upon publication pursuant to KRS Chapter 424.

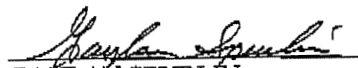
Upon motion by David James, seconded by Keith Dukes, and approved at first reading by the Muhlenberg County Fiscal Court, on the 23<sup>rd</sup> day of July, 2009.

Upon motion by Tommy Watkins, seconded by David James, and enacted at a meeting of the Muhlenberg County Fiscal Court, on this the 13<sup>th</sup> day of August, 2009.



RICK NEWMAN  
MUHLENBERG COUNTY JUDGE-EXECUTIVE

ATTEST:



GAYLAN SPURLIN  
MUHLENBERG COUNTY CLERK

COMMONWEALTH 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	)	
COMMUNICATIONS FACILITY AT 80	)	CASE NO.
PARKWAY LANE, CENTRAL CITY, KENTUCKY	)	2009-00022
42330 IN THE WIRELESS COMMUNICATIONS	)	
LICENSE AREA IN THE COMMONWEALTH OF	)	
KENTUCKY IN THE COUNTY OF	)	
MUHLENBERG	)	
SITE NAME: MONSANTO HAUL ROAD	)	

O R D E R

By Order dated May 22, 2009 ("May 22 Order"), the Commission ordered this proceeding placed into abeyance.<sup>1</sup> The Applicant, Powertel/Memphis, Inc. d/b/a T-Mobile Kentucky ("T-Mobile"), filed an application with the Commission on March 23, 2009 for a Certificate of Public Convenience and Necessity to construct a wireless communications tower facility in Central City, Muhlenberg County, Kentucky. T-Mobile proposes to build a tower within the political boundary of a local planning board that has adopted planning and zoning regulations in accordance with KRS Chapter 100.

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<sup>1</sup> On May 28, 2009, the Commission inadvertently reissued the May 22, 2009 Order. On June 11, 2009, the Commission issued an Order striking the May 28, 2009 Order and stating that T-Mobile may file a motion to revisit the abeyance issue no less than 60 days from May 22, 2009.



On December 28, 2008, the Court of Appeals issued an Opinion and Order<sup>2</sup> finding that KRS 278.650 required the Commission to exercise jurisdiction when a local planning board had formally declined to do so because that board had not affirmatively enacted regulations specifically dealing with the construction of cell towers pursuant to KRS 100.987(1). The Commission is seeking discretionary review with the Supreme Court in a proceeding styled Kentucky Public Service Commission v. L. Glenn Shadoan, et al., case number 2009-SC-00053 (hereinafter, "Shadoan").

In the May 22 Order in this proceeding, the Commission stated that the question of whether or not the Commission has jurisdiction over applications in which an applicant seeks to construct a wireless tower within the political boundary of a local planning board is at the center of the issue presented in Shadoan. The Commission's jurisdiction over T-Mobile's application in this current administrative proceeding is, therefore, largely dependent upon the Supreme Court's ruling. As of the date of this Order, the Kentucky Supreme Court has not issued a decision on that matter.

#### T-MOBILE'S MOTION TO LIFT THE ABEYANCE

On August 3, 2009, T-Mobile moved the Commission to lift the abeyance and have the application proceed for consideration and final decision by the Commission. In support of the motion, T-Mobile argues that the Shadoan case should be distinguished from the facts in the current application. The specific address for T-Mobile's proposed tower is 80 Parkway Lane in Central City, Muhlenberg County, Kentucky. T-Mobile states that Muhlenberg County only regulates land uses within the municipal boundaries of the cities of Greenville, Central City, and Powderly and subdivisions within a five-mile

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<sup>2</sup> The Court of Appeals Order affirmed a decision of the Franklin Circuit Court.

radius of those municipal boundaries.<sup>3</sup> T-Mobile provided as an exhibit the affidavit of David Rhoades, Director of the Muhlenberg Planning Commission,<sup>4</sup> wherein Mr. Rhoades states that Muhlenberg County has no future intention of regulating land uses outside of the aforementioned specific areas.<sup>5</sup> In support of its argument, T-Mobile also states:

Subdivision regulations and land use regulation are separate and distinct activities. Subdivision regulates only the division of parcels of land . . . 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.<sup>6</sup>

T-Mobile states that, because Muhlenberg County has refused to apply general zoning regulations except in limited areas, the Commission has the jurisdiction to review and approve wireless tower applications where there are no tower-specific regulations or even general land use regulations.<sup>7</sup>

T-Mobile also argues that the Commission’s Order of abeyance has the effect of “thwarting the intent of both the United States Congress and the Kentucky General

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<sup>3</sup> Motion at 2.

<sup>4</sup> The Commission notes that, although Mr. Rhoades states that his Commission only regulates planning issues within three cities, it is titled as a County Commission.

<sup>5</sup> Exhibit A of Motion.

<sup>6</sup> Motion at 2, 3.

<sup>7</sup> Id. at 3.

Assembly.”<sup>8</sup> T-Mobile states that 47 U.S.C. § 332 of the 1996 Telecommunications Act requires state and local authorities to act within a reasonable period of time in addressing requests for the siting of wireless communications facilities. T-Mobile states that, in enacting Section 332, Congress was concerned about the inconsistent and conflicting “patchwork” of state and local zoning requirements and desired to set forth a pro-competitive, deregulatory national policy framework to accelerate the private sector deployment of telecommunications technologies.<sup>9</sup> For these reasons, *inter alia*, T-Mobile requests that the Commission lift the Order of abeyance to permit a review of this application.

#### DISCUSSION

The Commission recognizes that, as an agency established by statute, its jurisdiction is limited to that “conferred expressly or by necessity or by fair implication.” Boone Co. Water and Sewer District v. Public Service Com’n, 949 S.W.2d 588, 591 (Ky. 1997); See also Public Service Com’n v. Jackson County Rural Electric Cooperative, et al., 50 S.W.3d 764, 767 (Ky. App. 2000). With regard to review of the proposed siting of cell towers, the Commission’s jurisdiction is 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.

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<sup>8</sup> Id. at 7.

<sup>9</sup> Id. at 3-5.

Pursuant to 47 U.S.C. § 332(c)(7)(A), the Telecommunications Act of 1996 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,” subject only to the limitations set forth in 47 U.S.C. § 332(c)(7)(B). 47 U.S.C. § 332(c)(7)(B)(ii) provides that a “[s]tate 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.”

The Commission finds that T-Mobile has failed to clearly state whether the proposed tower will be located outside the geographic boundaries of Central City or within the five-mile radius of the city’s boundaries. The Commission will presume the latter to be true and to be the basis of the motion to lift the abeyance. T-Mobile argues that the subdivision regulations applying to construction within the five-mile radius of Central City differ from the land use regulations that would be applicable to cell tower constructions. T-Mobile argues that Kentucky gives local boards the “option” to regulate land uses in terms of both geographical and substantive jurisdiction.

On September 25, 2009, the Commission submitted an open records request, pursuant to KRS 61.878 *et seq.*, to the Muhlenberg County Planning Commission through the Office of the County Attorney. In that request, the Commission stated:

... information and documents requested relate to the formation and scope of the geographic jurisdiction of the local Planning and Zoning Commission. The requested records include:



1. All ordinances, regulations and comprehensive plans related to the local Planning and Zoning Commission in Muhlenberg County and the scope of its geographic jurisdiction.
2. Any other documents related to the establishment of the Planning and Zoning Commission in Muhlenberg County and the scope of its geographic jurisdiction.

On September 29, 2009, Muhlenberg County submitted its response.<sup>10</sup> The response contains the “Agreement Establishing a Joint City-County Planning Unit, a Joint City County Planning Commission and Boards of Adjustment,” created in February 1972 (hereinafter, “1972 Agreement”). The 1972 Agreement was made and adopted by the cities of Central City, Drakesboro, Greenville and Powderly and the Muhlenberg County Fiscal Court. Section II of the 1972 Agreement states, “The [c]ities of Central City, Drakesboro, Greenville, and Powderly, and the County of Muhlenberg do hereby form a joint planning unit by combining their planning operations into a joint city-county planning program.” Section II also provides that the area of jurisdiction for the Muhlenberg Commission includes all of the cities of Central City, Drakesboro, Greenville and Powderly and the County of Muhlenberg. However, in the Affidavit included with T-Mobile’s Motion, as signed on June 25, 2009, Mr. Rhoades states:

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 Powderly.

The evidence of the 1972 Agreement creating the local Muhlenberg Planning Commission and the evidence of Mr. Rhoades’ sworn statements are in conflict. On the one hand, the Muhlenberg Planning Commission appears to have been formed in part

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<sup>10</sup> Muhlenberg County’s Response was placed into the record for this proceeding, by memorandum, on November 18, 2009.

by action of the Muhlenburg County Fiscal Court. On the other hand, the Muhlenburg Fiscal Court also appears to have essentially deprived the Muhlenburg Planning Commission of engaging in planning and zoning activities outside the municipal boundaries of the participating cities. By virtue of the Fiscal Court's participation in the formation of the Muhlenburg Planning Commission, the Muhlenburg Planning Commission's jurisdiction would appear to be co-terminous with the political boundaries of the Fiscal Court. This is virtually indistinguishable from the factual situation presented in the Shadoan case. The Commission has not received any additional evidence from Muhlenberg County or T-Mobile to clarify the scope of jurisdiction of the local commission or evidence indicating when the 1972 Agreement was amended, if at all.

Based on the information provided, the Commission finds that T-Mobile proposes to build its tower within the geographical area subject to the jurisdiction of the Muhlenberg County Planning Commission, which, according to the 1972 Agreement establishing that Commission, has county-wide jurisdiction. However, based on the information provided to the record, the Muhlenberg Commission has adopted planning and zoning regulations in accordance with KRS Chapter 100 but has declined to adopt regulations for cell tower construction. There is nothing in the record to suggest that an application has been filed by T-Mobile to construct the proposed cell tower in accordance with KRS 100.985 to KRS 100.987 and that the Muhlenberg County Planning Commission has refused to accept or act upon such an application.

Until the Supreme Court renders a decision on the Motion for Discretionary Review concerning this jurisdictional issue, the Commission finds that keeping T-

Mobile's application in abeyance is necessary under the Commission's regulatory duties under 47 U.S.C. § 332 and KRS 278.650. The Supreme Court's decision will enable the Commission and all planning boards in Kentucky to have a clear, unambiguous, established, and uniform standard for administrative review of cell tower construction requests. As it stands today, there is a lack of definitive evidence in the record of this proceeding giving cause for the Commission to find that T-Mobile's application falls outside the scope of Shadoan and is entitled to have the abeyance lifted.<sup>11</sup>

Therefore, for the reasons provided herein, the Commission shall deny T-Mobile's Motion and this matter shall remain in abeyance. If a decision by the Kentucky Supreme Court has not been made within 60 days as to the Shadoan case, T-Mobile may file a motion to request that the Commission revisit this matter.

IT IS HEREBY ORDERED that:

1. The Motion to Lift Abeyance is denied.
2. If a decision by the Kentucky Supreme Court has not been made within 60 days as to the Shadoan case or if new information becomes available, T-Mobile may file a motion to request that the Commission revisit this matter.


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<sup>11</sup> The Commission also notes that T-Mobile's application is not the only matter currently placed in abeyance due to the unresolved legal question of jurisdiction. Including T-Mobile's application, seven cell tower applications (for several counties) are currently held in abeyance by Commission Order, as each of those proposed towers would be constructed within the political boundary of a local planning board that does not have specific cell tower regulations.

By the Commission

ENTERED *ew*  
DEC 10 2009  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
\_\_\_\_\_  
Executive Director



Garnet Hanly  
Senior Corporate Counsel  
Powertel/Memphis, Inc. dba T-Mobile  
401 9th Street NW, Suite 550  
Washington, DC 20004

Honorable Paul B Whitty  
Attorney At Law  
Goldberg Simpson LLC  
9301 Dayflower Street  
Louisville, KY 40059

COMMONWEALTH 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	)	
COMMUNICATIONS FACILITY AT 80	)	CASE NO.
PARKWAY LANE, CENTRAL CITY, KENTUCKY	)	2009-00022
42330 IN THE WIRELESS COMMUNICATIONS	)	
LICENSE AREA IN THE COMMONWEALTH OF	)	
KENTUCKY IN THE COUNTY OF	)	
MUHLENBERG	)	
	)	
SITE NAME: MONSANTO HAUL ROAD	)	

O R D E R

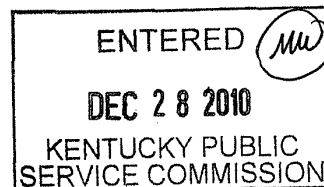
On March 23, 2009, Powertel/Memphis, Inc. d/b/a T-Mobile Kentucky filed an application for a Certificate of Public Convenience and Necessity ("CPCN") to construct a wireless communications facility in Muhlenberg County, Kentucky, within the geographical boundaries of a local planning and zoning commission. On May 22, 2009, the Commission issued an Order holding this case in abeyance. In support of its decision for abeyance, the Commission stated that it would render a decision on the application once the Supreme Court of Kentucky issued a ruling in *Kentucky Public Service Commission v. Shadoan*, \_\_\_ S.W.3d \_\_\_, 2010 WL 4679513 (Ky. Nov. 18, 2010). The Commission sought discretionary review of the decision by the Kentucky Court of Appeals wherein that court had held, *inter alia*, that, under KRS 278.665, the Commission has jurisdiction over wireless tower siting applications for facilities to be

located in geographic areas where local planning and zoning commissions exist. On November 18, 2010, the Supreme Court issued a decision in *Shadoan* stating that the Commission does not have jurisdiction to accept or approve CPCN applications for towers to be geographically located inside the jurisdictional boundaries of existing local planning commissions. The Supreme Court's decision became final on December 8, 2010. Based upon the Supreme Court decision in *Shadoan*, the Commission finds that it does not have jurisdiction over the application contained in this proceeding, since the proposed site is within the geographical boundaries of a local planning and zoning commission, and that this case should be dismissed for lack of jurisdiction and removed from the Commission's docket.

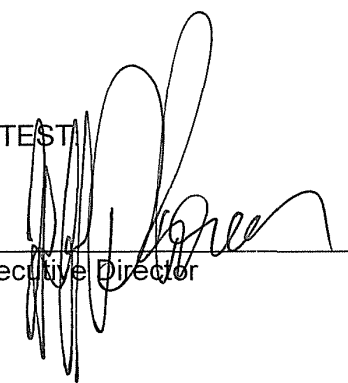
IT IS THEREFORE ORDERED that:

1. This case is lifted from abeyance.
2. This case is dismissed and removed from the Commission's docket.

By the Commission



ATTEST

  
\_\_\_\_\_  
Executive Director

Garnet Hanly  
Senior Corporate Counsel  
Powertel/Memphis, Inc. dba T-Mobile  
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