

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)	CASE NO.
COMMUNICATIONS FACILITY AT 80)	2009-00022
PARKWAY LANE, CENTRAL CITY, KENTUCKY)	
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.¹ 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.

¹ 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 Order² 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

² The Court of Appeals Order affirmed a decision of the Franklin Circuit Court.

radius of those municipal boundaries.³ T-Mobile provided as an exhibit the affidavit of David Rhoades, Director of the Muhlenberg Planning Commission,⁴ wherein Mr. Rhoades states that Muhlenberg County has no future intention of regulating land uses outside of the aforementioned specific areas.⁵ 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.⁶

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.⁷

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

³ Motion at 2.

⁴ 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.

⁵ Exhibit A of Motion.

⁶ Motion at 2, 3.

⁷ Id. at 3.

Assembly.”⁸ 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.⁹ 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.

⁸ Id. at 7.

⁹ 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.¹⁰ 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

¹⁰ 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 Muhlenburg 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 Muhlenburg 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 Muhlenburg 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 Muhlenburg 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.¹¹

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:

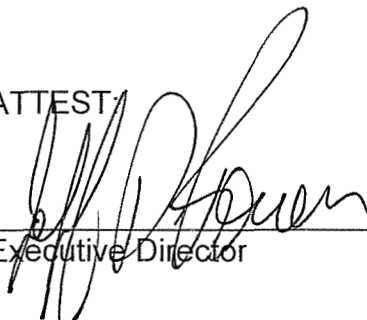
1. The Motion to Lift Abeyance is denied.
2. If a decision by the Kentucky Supreme Court has not been made within 60 days as to the Shadoan case or if new information becomes available, T-Mobile may file a motion to request that the Commission revisit this matter.

¹¹ 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:



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