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October 1, 2009

Commonwealth of Kentucky  
Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, KY 40602

RECEIVED

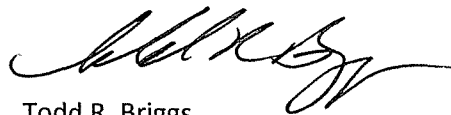
OCT 8 2009

PUBLIC SERVICE  
COMMISSION

**RE: Case Number 2009-00034**

Please find enclosed one(1) original and five(5) copies of the Motion of New Cingular Wireless to Lift Abeyance of Uniform Application.

Sincerely,



Todd R. Briggs

Counsel for New Cingular Wireless PCS, LLC

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**

OCT 8 2009

PUBLIC SERVICE  
COMMISSION

In the Matter of:

APPLICATION OF NEW CINGULAR WIRELESS PCS, LLC )  
FOR ISSUANCE OF A CERTIFICATE OF PUBLIC )  
CONVENIENCE AND NECESSITY TO CONSTRUCT )  
A WIRELESS COMMUNICATIONS FACILITY AT ) CASE: **2009-00034**  
1707 2<sup>nd</sup> STREET, CITY OF HENDERSON )  
HENDERSON COUNTY, KENTUCKY, 42420 )

SITE NAME: LARUE (135P0085)

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

By Order dated March 17, 2009, the Kentucky Public Service Commission (the "Commission") held Case Number 2009-00034 in abeyance pending a decision by the Kentucky Supreme Court in the Petition for Discretionary Review in the matter of L. Glenn Shadoan, et al. v. Kentucky Public Service Commission, et al. (Kentucky Supreme Court Case Number 2009-SC-000053-DR) (hereinafter "Shadoan"). This Order was supplemented by Commission Order dated July 6, 2009 which continued the abeyance period for 60 days from the date of the order and pending a final decision in Shadoan. This 60 day period having expired,

Applicant respectfully requests that the Order dated July 6, 2009 be lifted and that the Commission proceed with the review of Case Number 2009-00034.

### **I. Case History**

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

### **II. CITY OF HENDERSON / LAUREL COUNTY**

In consideration of this Motion, the Commission should note certain fundamental differences in the application of the respective regulations of the City of Henderson and Laurel County. Both units of government have planning units pursuant to KRS 100.122, and both units have not adopted regulations for cellular communication towers. The substantial difference with Case Number 2009-00034 and the Shadoan case is that the City of Henderson zoning regulations do not apply to the parcel that is subject to Case Number 2009-

00034. As evidenced by the letter dated December 8, 2008 from the City of Henderson which states, "If the owner of the property as stated in correspondence is the Henderson County Board of Education they are *exempt* from planning and zoning regulations imposed by the City of Henderson." (*emphasis added*)(see letter attached hereto as Exhibit "A"). Laurel County does regulate land use throughout the entire county through its adopted comprehensive plan and land use regulations. In contrast, the City of Henderson regulates land uses within their municipal boundaries but chooses not to regulate those parcels of land dedicated for educational purposes. Those said parcels or areas of land within the city limits of the City of Henderson are void of any zoning regulation and therefore differs from those areas throughout Laurel County. It is the absence of any zoning regulations that distinguishes the City of Henderson from Laurel County and therefore Case Number 2009-00034 does not fall within the scope of Shadoan. The resolution of Shadoan cannot alter the current zoning regulations or lack thereof for which the City of Henderson exercises their jurisdiction. The jurisdiction, in this case, solely rest with the Commission as provided in KRS § 278.650.

### **III. TELECOMMUNICATIONS ACT OF 1996**

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

new telecommunications technologies”.<sup>1</sup> The Telecommunications Act further provided a “pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services...by opening all telecommunications markets to competition”.<sup>2</sup> Indeed the 1996 Act reflects a careful balancing of state and local authority, on the one hand, and federal policy objectives on the other.<sup>3</sup> The Telecommunications Act works like a scale that attempts to balance two objects of competing weight: on one arm sits the need to accelerate the deployment of telecommunications technology, while on the other arm rests the desire to preserve state and local control over zoning matters.<sup>4</sup> This balance strengthens the decision making authority of local zoning boards, while protecting wireless service providers from unsupported decisions that stymie the expansion of telecommunication technology.<sup>5</sup>

The first relevant limitation set forth in 47 U.S.C. § 332(c)(7)(B)(i)(II) provides that in regulating the placement and construction of facilities, a state or local government or instrumentality “shall not prohibit or have the effect of prohibiting the provision of wireless services.” Several courts have held that local zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services violate the statute.<sup>6</sup>

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<sup>1</sup> Communications Co. v. Albermarle County, 211 F.3d 79, 85-86 (4th Cir. 2000).

<sup>2</sup> Id.

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

<sup>4</sup> Southwestern Bell Mobile Sys. V. Todd, 244 F.3d 51, 61 (1<sup>st</sup> Cir, 2001).

<sup>5</sup> Brehmer v. Planning Bd. Of Wellfleet, 238 F.3d 117, 122 (1<sup>st</sup> Cir. 2001).

<sup>6</sup> Cellular Tel. Co. v. Zoning Bd. Of Adjustment, 197 F.3d 64, 68-70 (3d Cir. 1999); Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 643 (2d Cir. 1999); Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 Supp. 2d 108, 117 (D. Mass. 2000).

A second limitation requires local government to “act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentalities, taking into account the nature and scope of such request.”<sup>7</sup>

Section 332(c)(7) “is a deliberate compromise between two competing aims; to facilitate nationally the growth of wireless telephone service and to maintain substantial control over the siting of towers.”<sup>8</sup> In drafting the 1996 Act, Congress was concerned about the “inconsistent and, at times, conflicting patchwork of state and local zoning requirements, believing that this patchwork threatened “the deployment of wireless communications.”<sup>9</sup>

The current order of the Commission to place Case Number 2009-00034 in abeyance would seem to be in contrary to the Act’s intent of speedy deployment of wireless communications and indeed seem to prohibit said service.

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

The Kentucky General Assembly in KRS 278.650 provides, in part, as follows: “If an applicant proposes construction of an antenna tower for cellular telecommunications services or personal communications services which is to be located in an area outside the jurisdiction of a planning commission, the applicant shall apply to the Public Service Commission for a certificate of public

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

<sup>8</sup> Id § 332(c)(B)(v)

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

convenience and necessity pursuant to KRS 278.020(1), 278.665, and this section.” In KRS 100.986 certain actions by planning commissions are specifically forbidden and includes instituting a moratorium upon the siting of cellular antenna towers.<sup>10</sup> Furthermore, KRS 100.987(4) requires planning commissions to act upon a uniform application within sixty (60) days of filing with the additional provision of deeming the application “approved” that are not acted upon within that timeframe. Even temporary moratoria have been found to cause a deprivation of property rights.<sup>11</sup>

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

The Kentucky General Assembly envisioned the possibility that under some circumstances, an application for a proposed wireless telecommunication facility would fall outside the regulatory authority of a local planning commission.<sup>12</sup> In this case, the City of Henderson does not regulate, i.e. hold jurisdiction over, the parcel of land that the proposed wireless telecommunication facility, subject to Case Number 2009-00034, is located upon. Therefore, “jurisdiction” lies with the Commission.

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

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<sup>10</sup> KRS 100.986(2)

<sup>11</sup> First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

<sup>12</sup> KRS 100.987(1) and KRS 278.650

## V. PUBLIC POLICY

The Telecommunications Act of 1996 not only provided a framework for the rapid deployment of wireless telecommunication facilities, it also has provided basis for the importance of such wireless services to all the people of the United States. Congress articulated that such service was essential “for the purpose of promoting safety of life and property.”<sup>13</sup> In furtherance of this policy, Section 7 of the Telecommunications Act states, “it shall be the policy of the United States to encourage the provision of new technologies and services to the public.”<sup>14</sup> Essential to achieving the policy goals of the United States Congress and those of the Federal Communications Commission (“FCC”) would certainly be the ability of wireless telecommunication providers to construct wireless telecommunication facilities without undue hardship and delay. Section 706 of the Telecommunications Act of 1996 directed the FCC to encourage deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis. Clearly, Congress realized the importance of providing wireless telecommunication services not only to a few Americans who may be lucky enough to live in an area that has wireless service, but to all Americans.

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

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<sup>13</sup> 47 U.S.C. § 151

<sup>14</sup> 47 U.S.C. § 157



increasing. In furtherance of this trend, personal landline telephone subscribers are decreasing as the public “switches off their home telephones” and singly rely on their wireless telephone service. Moreover, federal, state and local public safety authorities routinely rely on wireless network infrastructure to deploy wireless communication equipment necessary for essential emergency services and supporting homeland security.<sup>15</sup>

The availability of wireless service for Americans to utilize local emergency 911 services and for the use of network infrastructure to federal, state and local authorities is dependent upon the construction of wireless telecommunication facilities. Indeed, a rapid deployment of wireless telecommunication services is dependent upon the construction of tower sites and the “speed” of deploying is affected by many factors; one of which is gaining zoning approval. The Federal Communication Commission has previously acknowledged that “site acquisition and zoning approval for new facilities is both a major cost component and a major delay in deploying wireless systems.”<sup>16</sup> Any delay in deploying said facilities fails to abide by the intentions of Congress and the FCC of promoting public safety for all Americans.

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

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<sup>15</sup> See e.g. Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, File Nos. 0001656065, et.al., Memorandum Opinion and Order, 19 FCC Rcd 21522, 21609 (2004).

<sup>16</sup> Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10833 (1997).

of their services, and to encourage the introduction of new technologies without obstruction or delay.<sup>17</sup>

New technologies are constantly being developed and introduced by members of the wireless industry along with of billions of dollars invested in providing wireless telecommunication services to underserved and unserved areas of the United States, including millions of dollars annually spent in the Commonwealth of Kentucky. This expansion of service and the addition of new technologies has proven to enhance public safety through the Commonwealth. Any delay in acting upon the application of Case Number 2009-00034 will hinder the effectiveness of the emergency services of both the citizens of the Commonwealth as well as the state and local emergency authorities.

## VI. CONCLUSION

Based upon the foregoing arguments and authorities, the Applicant respectfully requests the Commission to lift the abeyance and to review the application subject to Case Number 2009-00034.

Respectfully submitted,



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<sup>17</sup> City of Rancho Palos Verdes v. Abrams 544 U.S. 113, 115 (2005).