

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

|                                       |   |            |
|---------------------------------------|---|------------|
| APPLICATION OF NEW CINGULAR           | ) |            |
| WIRELESS PCS, LLC FOR ISSUANCE OF A   | ) |            |
| CERTIFICATE OF PUBLIC CONVENIENCE     | ) |            |
| AND NECESSITY TO CONSTRUCT A          | ) | CASE NO.   |
| WIRELESS COMMUNICATIONS FACILITY AT   | ) | 2009-00160 |
| 11096 STATE ROUTE 109, STURGIS, UNION | ) |            |
| COUNTY, KENTUCKY, 42459               | ) |            |
|                                       | ) |            |
| SITE NAME: STURGIS DT (135G0234)      | ) |            |

O R D E R

On April 27, 2009, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“AT&T Mobility”) filed an application for a Certificate of Public Convenience and Necessity to construct a wireless communications facility at 11096 State Route 109, Sturgis, Union County, Kentucky. On May 22, 2009, the Commission issued an Order holding this case in abeyance pending a ruling by the Supreme Court of Kentucky in Case No. 2009-SC-00053, *Kentucky Public Service Commission v. L. Glenn Shadoan, et.al.* (“Shadoan”).

On December 10, 2009, AT&T Mobility filed a motion to lift the abeyance in this matter. The motion to lift the abeyance was denied by Order on May 14, 2010. An informal conference was held between Commission Staff and AT&T Mobility on September 24, 2010 to discuss this case as well as other AT&T Mobility pending

cases.<sup>1</sup> The discussions at the informal conference led to the filing of a Joint Stipulation of Facts and Settlement Agreement (collectively referred to as “Settlement Agreement”). The Settlement Agreement, attached hereto as the Appendix and incorporated herein by reference, sets forth AT&T Mobility and Commission Staff’s agreement with the facts of this case. The Settlement Agreement also discusses the impact of the deadlines for processing applications for the siting of cell towers established by the Federal Communications Commission in *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, WT Docket No. 08-165 ¶¶ 4, 45, 46, 48 (FCC rel. Nov. 18, 2009) (“Shot Clock Order”) and the mutual agreement to extend these deadlines.

In determining whether the terms of the Settlement Agreement are in the public interest and are reasonable, the Commission has taken into consideration the comprehensive nature of the Settlement Agreement and AT&T Mobility’s cooperation in achieving a resolution of the timelines that the Shot Clock Order invoked.

Based on the evidence of the record and being otherwise sufficiently advised, the Commission finds that the Settlement Agreement is in accordance with the law and does not violate any regulatory principle. The Settlement Agreement is a product of arm’s-length negotiations among capable, knowledgeable parties, is in the public interest, and results in a reasonable resolution of the issues raised at the September 24, 2010 informal conference.

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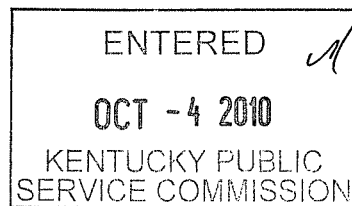
<sup>1</sup> An informal conference memorandum was filed into the record on September 28, 2010.

IT IS THEREFORE ORDERED that:

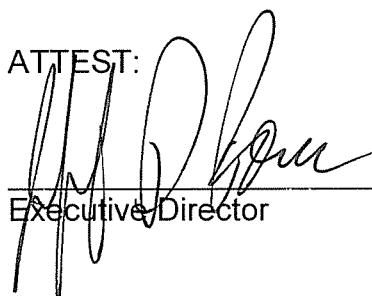
1. The Joint Stipulation of Facts and Settlement Agreement is adopted and approved in its entirety as a resolution of the issues that the Shot Clock Order raised.

2. The Shot Clock Order deadline which requires the Commission to act upon the application in this matter is extended until November 8, 2010, or 30 days after the Kentucky Supreme Court issues a decision in *Shadoan*, whichever comes earlier. If the Commission does not render a decision in this matter within this time frame, AT&T Mobility shall have 30 days from this deadline extension to file an action in court.

By the Commission



ATTEST:

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

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2009-00160 DATED **OCT - 4 2010**

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**STIPULATION OF FACTS AND SETTLEMENT AGREEMENT**

This agreement is formally known as a Stipulation of Facts and Settlement Agreement (“Settlement Agreement”). The parties to this Settlement Agreement are New Cingular Wireless PCS, LLC (“AT&T Mobility”) and Staff of the Kentucky Public Service Commission (“Commission Staff”). It is the intent and purpose of the parties hereto to express their agreement on a mutually satisfactory resolution of deadlines established by the Federal Communications Commission (“FCC”) for processing applications for the siting of cell towers as prescribed in *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, WT Docket No. 08-165 ¶¶ 4, 45, 46, 48 (FCC rel. Nov. 18, 2009) (“Shot Clock Order”).

It is understood by the parties that this Settlement Agreement is not binding upon the Public Service Commission (“Commission”). The Commission must independently

approve and adopt this Settlement Agreement before this matter can be deemed concluded and the deadlines extended. The parties have expended considerable efforts to reach a stipulation as to the facts of this matter, as well as in developing a proposal for settlement. AT&T Mobility and Commission Staff agree that this Settlement Agreement, viewed in its entirety, constitutes a reasonable resolution to the deadlines prescribed in the Shot Clock Order.

In addition, the adoption of this Settlement Agreement will eliminate the need for the Commission, Commission Staff, and AT&T Mobility to expend significant resources in litigating this proceeding.

### **FACTS**

AT&T Mobility and the Commission Staff submit this stipulation of facts for the Commission's consideration in rendering a decision in this proceeding. On April 27, 2009, AT&T Mobility filed an application for a Certificate of Public Convenience and Necessity ("CPCN") to construct a wireless communications facility at 11096 State Route 109, Sturgis, Union County, Kentucky. On May 22, 2009, The Commission issued an order holding this case in abeyance pending a ruling by the Supreme Court of Kentucky in case number 2009-SC-00053, *Kentucky Public Service Commission v. L. Glenn Shadoan, et al.* ("Shadoan")

At issue in the *Shadoan* case is whether or not the Commission has jurisdiction over cell tower applications when a local planning commission exists but has not adopted specific regulations governing the construction of wireless communications facilities. The Kentucky Court of Appeals ruled on December 31, 2008, that the Commission must exercise jurisdiction in this situation. The Commission sought

discretionary review with the Supreme Court and discretionary review was granted on January 13, 2010. The *Shadoan* case has been fully briefed and the parties are now awaiting a ruling by the Supreme Court.

On November 18, 2009, the FCC issued the Shot Clock Order which set parameters on the amount of time to consider applications for siting of cell towers. The Shot Clock Order states that the Commission has 90 days to process applications for collocation and 150 days to process all other applications. The Shot Clock Order also states the parties can agree to extend the time periods on a case-by-case basis and if a decision is not made within the time limits then it is presumed to be a failure to act by the Commission and the applicant can file an action in court within 30 days of the failure to act. Paragraph 51 of the Shot Clock contains transitional rules that apply if the application was filed prior to the Order being issued and the time limits have run. The FCC's final order, which denied a motion for reconsideration, was issued on August 4, 2010. If the parties agree to extend the time period, then the time to file suit is tolled. The Shot Clock Order also states that the presumption of reasonableness of the time limits may be rebutted on a case-by-case basis.

On, December 10, 2009, AT&T Mobility filed a motion to lift the abeyance in this matter. The motion was denied on May 14, 2010.

An informal conference was held between Commission Staff and AT&T Mobility on September 24, 2010, to discuss the impact of the Shot Clock Order on this case as well as other AT&T Mobility pending cases.

## SETTLEMENT AGREEMENT

As a result of discussions held during the informal conference, AT&T Mobility and the Commission Staff submit the following settlement agreement for the Commission's consideration in rendering its decision in this proceeding:

1. AT&T Mobility and Commission Staff agree that the Shot Clock Order deadline which requires the Commission to act upon the application in this matter is extended until November 8, 2010, or 30 days after the Kentucky Supreme Court issues a decision in *Shadoan*, which ever comes earlier. If the Commission does not render a decision in this matter within this timeframe, AT&T Mobility shall have 30 days from November 8, 2010 to file an action in court.

2. In the event that the Commission does not accept this Settlement Agreement in its entirety, AT&T Mobility and Commission Staff reserve their rights to withdraw from it and that none of the provisions contained in this Settlement Agreement shall be binding upon the parties, nor used as an admission of any wrongdoing in any legal proceeding, administrative proceeding or lawsuit arising out of the facts of this matter or otherwise used as an admission by either party.

3. This Settlement Agreement is for use in Commission Case No. 2009-00160, and no party to this matter shall be bound by any part of this Settlement Agreement in any other proceeding, except that this Settlement Agreement may be used in any proceedings by the Commission to enforce the terms of this Settlement Agreement. AT&T Mobility shall neither be precluded nor estopped from raising any issue, claim or defense therein by reason of the execution of this Settlement Agreement.

4. AT&T Mobility and Commission Staff agree that this Settlement Agreement is reasonable, is in the public interest, and should be adopted in its entirety by the Commission.



**NEW CINGULAR WIRELESS PCS, LLC**

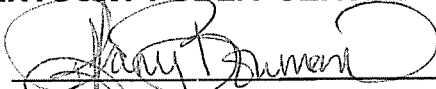
By: (print name) TODD R BRIGGS

By: (sign name) 

Title: Counsel

Date: 9/30/2010

**STAFF OF THE KENTUCKY PUBLIC SERVICE COMMISSION**

By: (print name) 

By: (sign name) Tiffany Bowman

Title: Staff Attorney

Date: 9/30/2010

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