



Mary K. Keyer
General Counsel
Kentucky Legal Department

AT&T Kentucky
601 W. Chestnut Street
Room 407
Louisville, KY 40203

T 502-582-8219
F 502-582-1573
mary.keyer@att.com

August 31, 2010

RECEIVED

SEP 01 2010

PUBLIC SERVICE
COMMISSION

VIA OVERNIGHT MAIL

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Re: Application of New Cingular Wireless PCS, LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct A Wireless Communications Facility at 2755 Princeton Road Hopkinsville Christian County, Kentucky, 42240 in the Wireless Communications License Area in the Commonwealth of Kentucky
Site Name: Longbow (083G0235)
PSC 2010-00031

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of Motion of New Cingular Wireless to Lift Abeyance of Uniform Application.

Should you have any questions, please let me know.

Sincerely,

Mary K. Keyer

Enclosures

845873

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 WIRELESS COMMUNICATIONS FACILITY AT)CASE: 2010-00031
2755 PRINCETON ROAD, HOPKINSVILLE)
CHRISTIAN COUNTY, KENTUCKY, 42240)
IN THE WIRELESS COMMUNICATIONS LICENSE AREA)
IN THE COMMONWEALTH OF KENTUCKY)

SITE NAME: LONGBOW (083G0235)

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

On April 7, 2010, New Cingular Wireless PCS, LLC ("New Cingular") filed with the Kentucky Public Service Commission (the "Commission") its application in this proceeding to construct the Longbow wireless communication facility to serve areas of Christian County, Kentucky. To meet current and projected service demands, New Cingular anticipated receiving Commission approval for the facility by June 2010 and completing construction no later than November 30, 2010.¹

By Order dated April 28, 2010, the Commission held Case Number 2010-00031 in abeyance pending a decision by the Kentucky Supreme Court in *Shadoan v.*

¹ If the Commission were to issue an order now approving the application, it would most likely be January or February 2011 before construction of the facility would be completed.

Kentucky Public Service Commission, Case No. 2009-SC-000053-DG (Ky. Disc. Rev. Granted Jan. 13, 2010) (hereinafter "Shadoan"). Order, 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 2755 Princeton, Hopkinsville, Christian County, Kentucky 42240 in the Wireless Communications Licensee Area in Kentucky, Case No. 2010-00031 at 2 (Ky. P.S.C. April 28, 2010) ("Abeyance Order"). Among the issues in *Shadoan* is whether the Commission has jurisdiction to act on an application for a certificate of public convenience and necessity to construct a wireless facility where the facility is located within the geographic boundaries of a local planning zoning unit that has not adopted regulations governing wireless facilities.

Presumably recognizing the burden that an open-ended abeyance might present², the Commission also invited New Cingular "to request that the Commission revisit this matter" if the Supreme Court did not issue its opinion in *Shadoan* within 60 days of April 28, 2010 (or by June 27, 2010). *Id.* By this motion, New Cingular accepts the Commission's invitation and respectfully requests that the April 28, 2010 abeyance be set aside and that the Commission proceed with the review of Case Number 2010-00031 and grant New Cingular's Application for a Certificate of Public Convenience and Necessity ("Application").

²*Cf., Estate of Cline v. Weddle*, 250 S.W.3d 332, 337 (Ky. 2008) (trial court abuses its discretion granting an indefinite stay absent a pressing need following a balancing of the parties' interests).

I. **THE PUBLIC WILL BE ADVERSELY AFFECTED BY FURTHER DELAY IN THE COMMISSION'S CONSIDERATION OF THE LONGBOW APPLICATION**

New Cingular respects the Commission's desire to husband its limited resources, particularly when the Commonwealth's straitened financial situation further circumscribes the Commission's ability to perform its duties. Indeed, New Cingular delayed an additional 60 days beyond the period imposed in the *Abeyance Order* before making this motion. Notwithstanding these considerations, the need for the Longbow wireless communication facility, as well as adverse effects on New Cingular's competitive position, means that further delay in the Commission's consideration of the Longbow Application will unduly affect the public and necessitates the setting aside of the *Abeyance Order*.

A. The Need for the Longbow Wireless Communication Facility and the Effect of Further Delay.

The proposed Longbow wireless communication facility would be located approximately 2.4 miles northwest of downtown Hopkinsville, Kentucky. Although the area to be served by the facility itself is generally rural, it is traversed by Highways 80, 91, and 68 as well as the Hopkinsville Bypass (Hwy 1682). The area to be served by the Longbow facility is shown on the map attached hereto as **Exhibit 1** and includes neighborhoods and businesses along Canton Pike to the south and along Highway 68 and Dawson Springs Rd to the east and southeast (the "Affected Area").

The Longbow facility is designed to improve existing coverage in the Affected Area. New Cingular began considering the need for what eventually became the Longbow wireless facility as a result of customer requests and complaints over a three-to-four year period regarding existing coverage in the area. Indeed, New Cingular's

current RF studies indicate that signal strength in the Affected Area is insufficient for indoor use for a substantial number of New Cingular customers.

Absent construction of the Longbow wireless communication facility, New Cingular subscribers in the Affected Area will continue to be unable to use their wireless devices indoors. In addition, slow data speeds and a reduction in E-911 location services are likely to continue until the facility is constructed.

B. The Adverse Effect on Investment and Economic Development in Kentucky.

Beyond the effect on New Cingular and its subscribers, each wireless facility typically involves the expenditure of hundreds of thousands of dollars. A not insignificant portion of the total budget for each facility involves the local expenditure of funds for the purchase of materials like concrete, gravel and fencing, as well as local construction services. So long as the *Abeyance Order* is in effect, New Cingular's ability to invest these funds in the Commonwealth will be materially hampered. In these economic times, with nearly double digit unemployment in Kentucky, this inability to invest is more than a trivial concern.

It is not just the loss of the expenditures on materials and services to build the tower; it is also the commerce that availability of good wireless service enables. A delay in investment in these areas of Kentucky may also have other economic ramifications. For example, a business considering relocation to another state may compare the infrastructure in Kentucky with that of other states and choose another state because Kentucky's infrastructure is lagging. The availability and quality, or lack thereof, of wireless service could be a factor in whether a business decides to locate in Kentucky.

C. The Adverse Effect on New Cingular's Competitive Position.

As intended by Congress and the Federal Communications Commission ("FCC") in developing the regulatory framework governing the provision of wireless service, the wireless communication industry in the Commonwealth is extremely competitive. As of December 2008, there were at least 12 competing facilities-based and 10 resale wireless carriers in the Commonwealth providing service in areas served by New Cingular.³

Quality of coverage within coverage areas is an important determinant of subscribers' choice of carriers. The *Abeyance Order* in this case, particularly when coupled with the effect of similar orders in the five other pending cases in which they have been issued in Kentucky (2009-0160, 2009-0432, 2010-00015, 2010-00024, and 2010-00125), restricts New Cingular's ability to compete in the Commonwealth by hampering its ability to make the capital investments necessary to improve its service and effectively compete for subscribers.

D. The Uncertainty of a Decision in *Shadoan*.

Shadoan has been pending before the courts since 2006, and before the Kentucky Supreme Court since January 30, 2009. Although the matter has been briefed and sent out for assignment, there is no means of knowing whether the Court will render its decision next month – or next year. While the Supreme Court undoubtedly uses its best efforts to decide cases expeditiously, it is not uncommon for substantial periods to elapse between the time when all steps have been taken and the case is ready for decision, and the date the Supreme Court renders its decision.

³ Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2008*, Table 17. The report can be downloaded at www.fcc.gov/wcb/stats.

Moreover, any opinion by the Court is subject to additional delay if one of the parties seeks rehearing pursuant to CR 76.32.

Further adding to the uncertainty is that one of the other issues pending before the Court in *Shadoan*, whether the landowners complied with KRS 278.410, and if not, the effect of such failure, might eliminate the necessity for the Court to decide the jurisdictional issue. Certainly, the Supreme Court's very recent decision in *Louisville Gas & Electric Co. v. Hardin & Meade County Property Owners for Co-Location*, 2008-SC-000354-DG (Ky. August 26, 2010) suggests that the Court is vitally interested in the meaning of KRS 278.410.⁴

In sum, whatever the prudential considerations underlying the *Abeyance Order*, its continued effectiveness more than 120 days after the Longbow Application was filed will unduly harm both the public and New Cingular. Moreover, the fact that there may be further substantial lapse of time before a final decision by the Supreme Court, and that the case may be decided on grounds other than the Commission's jurisdiction, counsel in favor of ending the abeyance period.

II. THE PENDENCY OF *SHADOAN* DOES NOT SUPPORT THE CONTINUANCE OF THE *ABEYANCE ORDER*

KRS 278.390 provides in pertinent part that: “[e]very order entered by the Commission shall continue in force until the expiration of time, if any, named by the Commission in the order, or until revoked or modified by the commission, ***unless the order is suspended, or vacated in whole or part, by order of decree of a court of***

⁴ Although *Hardin & Meade County Property Owners for Co-Location* is not a final decision, it is not being cited as binding precedent. Cf. CR 76.28; CR 76.30(2)(a).

competent jurisdiction.⁵ To the extent the Commission's *Abeyance Order* is premised upon its June 27, 2006 Order in case underlying *Shadoan*,⁶ that order has been vacated and is no longer effective. Specifically, the Commission's June 27, 2006 Order in case underlying *Shadoan* was vacated in whole by the Franklin Circuit Court's March 8, 2007 Opinion and Order reversing the Commission's decision.⁷ As a result, the Commission's Order no longer "continue[s] in force" by operation of statute.

Absent a stay of the underlying decisions,⁸ which has not been obtained, the fact *Shadoan* is now pending before the Supreme Court does not alter the effectiveness of the Franklin Circuit Court Opinion and Order, or its operation under KRS 278.390.⁹

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 the rapid deployment of new telecommunications technologies."¹⁰ The Telecommunications Act therefore establishes a "pro-competitive, deregulatory national policy framework designed to

⁵ (Emphasis supplied).

⁶ See, *Abeyance Order* at 1.

⁷ Opinion and Order, *Shadoan v. Kentucky Public Service Commission*, 06 CI-1213 (Franklin Circuit Court March 8, 2007). The Circuit Court's determination, in turn, was affirmed by the Kentucky Court of Appeals on December 31, 2008. *Kentucky Public Service Commission v. Shadoan*, 2007-CA-000697 (Ky. App. December 31, 2008), *discretionary review granted* (January 13, 2010).

⁸ CR 62.03(2) and CR 81A are not to the contrary. Both relieve a governmental body such as the Commission from giving a supersedeas bond to stay judgments pending appeal. But supersedeas bonds are effective to stay judgment for the recovery of money or the disposition of property. CR 73.04(2); CR 73.04(3).

⁹ New Cingular expressly premised its submission to the Commission of its Application for the Longbow wireless facility upon the determinations by the Franklin Circuit Court and the Court of Appeals that the Commission and not the local planning and zoning body had jurisdiction. Application at ¶ 3. Indeed, but for the opinion of the Franklin Circuit Court and the Court of Appeals, New Cingular would have pursued approval of the wireless communications facility with the Hopkinsville-Christian County Planning Commission.

¹⁰ *Communications Co. v. Albemarle County*, 211 F.3d 79, 85-86 (4th Cir. 2000).

accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services,” including the wireless services affected by the Commission’s *Abeyance Order*.¹¹

The Act reflects a careful balancing of state and local authority, on the one hand, and federal policy objectives on the other.¹² 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 and in particular wireless technology, while on the other arm rests the desire to preserve state and local control over zoning matters.¹³ This balance preserves the decision-making authority of local zoning boards, while protecting wireless service providers from unsupported decisions that stymie the expansion of telecommunications technology.¹⁴

While recognizing traditional local interests in zoning, the Telecommunications Act and decisions of the FCC interpreting the Act recognize that “[w]ireless services are central to the economic, civic, and social lives of over 270 million Americans” and that “a crucial requirement for providing those services is obtaining State and local governmental approvals for constructing towers or attaching transmitting equipment to pre-existing structures.”¹⁵ The Telecommunications Act therefore places several limitations on local regulation of wireless services.

The first relevant limitation is set forth in 47 U.S.C. § 332(c)(7)(B)(i)(II), which provides that in regulating the placement and construction of facilities, a state or local

¹¹ *Id.*

¹² *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127-129 (2005); *Verizon MD, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 384 (4th Cir. 2004).

¹³ *Southwestern Bell Mobile Sys. v. Todd*, 244 F.3d 51, 61 (1st Cir. 2001).

¹⁴ *Brehmer v. Planning Bd. Of Wellfleet*, 238 F.3d 117, 122 (1st Cir. 2001).

¹⁵ *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, 24 FCC Rcd. 13994, ¶ 3 (rel. Nov. 18, 2009) (“*Shot Clock Order*”).

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.¹⁶

A second limitation requires local governments 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.”¹⁷ To “promote[] the deployment of broadband and other wireless services” and “reduc[e] delays in the construction and improvement of wireless networks,”¹⁸ the FCC has interpreted this provision to hold that a “reasonable period of time” is, presumptively, 90 days to process applications requesting “collocations” (the attachment of transmission equipment to an existing structure) and 150 days to process all other applications (such as building a new structure).¹⁹ The FCC issued this ruling in light of evidence that “personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services.”²⁰ The FCC also recognized that “the deployment of facilities without unreasonable delay is vital to promote public safety” and the availability of wireless 911 service.²¹ Accordingly, if a state or local government does not act upon an application within the required 90- or

¹⁶ *Cellular Tel. Co. v. Zoning Bd. of Adjustment*, 197 F.3d 64, 68-70 (3d Cir. 1999); *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 Supp. 2d 108, 117 (D. Mass. 2000).

¹⁷ 47 U.S.C. §332(c)(7)(B)(ii).

¹⁸ *Shot Clock Order* ¶ 1.

¹⁹ *Id.* ¶¶ 4, 45, 46, 48.

²⁰ *Id.* ¶ 32.

²¹ *Id.* ¶ 36.

150-day period, then a “failure to act” has occurred and the affected wireless carrier may seek relief in federal district court within 30 days, as authorized by 47 U.S.C. § 332(c)(7)(B)(v). Typically, the relief in such a case would be an injunction ordering the local regulatory authority to grant the carrier’s application.²²

The Application at issue in this proceeding has been pending in the Commission since April 7, 2010. Since the Application involves new construction, the appropriate time period under the *Shot Clock Order* within which the Commission has to act on it is September 4, 2010, 150 days after the Application was filed. Neither the Franklin Circuit Court’s nor the Appellate Court’s order has been stayed or reversed. Nor has any opposition been raised from the property owner or any other citizens or government officials in the local area. In fact, they want and support expanded cell service coverage in that area. See Statements from Senator Joey Pendleton and Judge Executive Steve Tribble, attached hereto as **Exhibits 2 and 3**.²³ Therefore, there is no practical reason for the Commission to continue to hold in abeyance New Cingular’s Application and not process it in accordance with the timing requirements prescribed by federal law. The current order of the Commission to hold Case Number 2009-00031 in abeyance is both unnecessary and contrary to the Telecommunications Act’s intent that wireless communications services be deployed without delay.

²² See, e.g., *New Par v. City of Saginaw*, 301 F.3d 390, 400 (6th Cir. 2002) (“We therefore agree with the district court that remanding to the Board would serve no foreseeable useful purpose, and we conclude that the district court did not abuse its discretion in issuing an injunction ordering the Board to grant New Par’s variance request”).

²³ Judge Executive Tribble sent his original statement dated August 27, 2010, directly to the Commission, so a copy of his statement is attached hereto as Exhibit 3.

IV. PUBLIC POLICY

The Telecommunications Act of 1996 not only provides a framework for the rapid deployment of wireless telecommunications facilities, it also provides a 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.”²⁴ In furtherance of this policy, Section 7 of the Telecommunications Act states that “it shall be the policy of the United States to encourage the provision of new technologies and services to the public.”²⁵ Essential to achieving the policy goals of the United States Congress and those of the FCC would certainly be the ability of wireless telecommunications providers to construct wireless telecommunication facilities without undue hardship and delay. Section 706 of the Act 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. For instance, the FCC recognized in its *Shot Clock Order* that “[t]he importance of wireless communications for public safety is critical, especially as consumers increasingly rely upon their personal wireless service devices as their primary method of communication.”²⁶ In furtherance of this trend, personal landline telephone subscribers are decreasing as the public “switches off their home telephones” and singly rely on

²⁴ 47 U.S.C. § 151.

²⁵ 47 U.S.C. § 157.

²⁶ *Shot Clock Order* ¶ 36.

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.²⁷

As both the FCC and the National Emergency Number Association (“NENA”) have recognized, “[i]ncreased availability and reliability of commercial and public safety wireless service, along with improved 9-1-1 location accuracy, all depend on the presence of sufficient wireless towers.”²⁸ In turn, the speed with which towers can be constructed is affected by carriers’ ability to gain zoning approval. The FCC has previously acknowledged that “[s]ite acquisition and zoning approval for new facilities is both a major cost component and a major delay in deploying wireless systems.”²⁹ 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 was also designed to further competition among wireless telecommunication providers, to improve the quality of their services, and to encourage the introduction of new technologies without obstruction or delay.³⁰ New technologies are constantly being developed and introduced by members of the wireless industry along with 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

²⁷ 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).

²⁸ *Shot Clock Order* ¶ 36 (quoting comments from NENA).

²⁹ 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).

³⁰ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

expansion of service and the addition of new technologies have proven to enhance public safety through the Commonwealth. Any delay in acting upon the Application in this case will hinder the effectiveness of the emergency services of both the citizens of the Commonwealth as well as the state and local emergency authorities.

V. THE KENTUCKY REVISED STATUTES LIKEWISE RECOGNIZE THE NEED FOR THE TIMELY DEPLOYMENT OF WIRELESS COMMUNICATIONS FACILITIES

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 convenience and necessity pursuant to KRS 278.020(1), 278.665, and this section.” Certain actions by planning commissions are specifically forbidden by KRS 100.986(2), including instituting a moratorium upon the siting of cellular antenna towers. Furthermore, KRS 100.987(4) requires planning commissions to act upon a uniform application within 60 days of filing and deems the application “approved” if not acted upon within that timeframe. Even temporary moratoria have been found to cause a deprivation of property rights.³¹

The intention of the Kentucky General Assembly in these statutory provisions is to support the goals of the Telecommunications Act 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

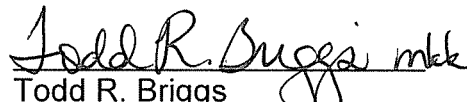
³¹ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

regulatory authority of a local planning commission.³² The Commission's orders not only have the effect 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.

VI. CONCLUSION

Based upon the foregoing arguments and authorities, the Applicant respectfully requests the Commission to set aside the abeyance and to review the Application subject to Case Number 2010-00031.

Respectfully submitted,


Todd R. Briggs
Briggs Law Office, PSC
1301 Clear Springs Trace
Suite 205
Louisville, KY 40223
Telephone 502-412-9222

Mary K. Keyer
601 W. Chestnut Street, Room 407
Louisville, KY 40203
Telephone 502-582-8219

Counsel for New Cingular Wireless PCS, LLC

846195

³² KRS 100.987(1) and KRS 278.650.