

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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SEP 29 2011

In the matter of:

FOREST CREEK, LLC

COMPLAINANT

vs.

JESSAMINE- SOUTH ELKHORN WATER DISTRICT

DEFENDANT

)  
) PUBLIC SERVICE  
) COMMISSION

) Case No. 2011-00297

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**FOREST CREEK'S RESPONSE TO MOTION TO HOLD IN ABEYANCE**

The Complainant, Forest Creek, LLC ("Forest Creek"), by counsel, for its response to the Motion to Hold in Abeyance submitted by the Defendant, Jessamine - South Elkhorn Water District ("Water District"), states as follows:

The Water District requests that the Public Service Commission ("the Commission") hold this action in abeyance pending the resolution of the Water District's appeal in a separate action filed in Jessamine Circuit Court. In that case the Water District filed a Petition for Declaration of Rights against Forest Creek, but pursuant to the Commission's motion filed upon intervening as a party defendant, the court dismissed the action. The court ruled that "the Plaintiff's Petition for Declaration of Rights involves issues of utility rates and service that, pursuant to KRS 278.040(2), are within the Commission's exclusive jurisdiction, and that this Court lacks subject matter

jurisdiction.” See “Order” entered August 24, 2011, attached as part of Exhibit A to Motion to Hold In Abeyance.

The Water District could not have been surprised by Jessamine Circuit Court’s ruling since it is consistent with the long line of cases holding that the Commission has exclusive jurisdiction over utility rates and services. See e.g., *Southern Bell Telephone & Telegraph Company v. City of Louisville*, 96 S.W.2d 695 (Ky. 1936); *Smith v. Southern Bell Telephone & Telegraph Company*, 104 S.W.2d 961 (Ky. 1937); *Com. ex rel. Stumbo v. Kentucky Public Service Commission*, 243 S.W.3d 374 (Ky.App. 2007). The Commission has been characterized as having “sweeping authority” over the regulation of public utilities. *Com. ex rel. Stumbo*, 243 S.W.3d at 378 (Ky. App. 2007). As the Jessamine Circuit Court noted, the Commission’s authority includes the “exclusive jurisdiction over the regulation of rates and service of utilities” as granted by KRS 278.040(2).

In its motion the Water District does not assert that the Jessamine Circuit Court mischaracterized the nature of the declaratory judgment action and does not dispute that the case involved issues related to utility rates and services or the applicability of KRS 278.040(2) to the Commission’s jurisdiction over utility rates and services. Instead, the Water District asserts that “the Commission’s jurisdiction is directly dependent upon the appellate court’s decision,” and the Water District cites to three other actions in which the Commission held the case in abeyance pending resolution of separate lawsuits before courts in the Commonwealth. None of those other cases, however, lend

support to the Water District's motion or to the assertion that the Commission's jurisdiction is dependant upon the appellate court's decision.

In the case styled *In the Matter of: Crestbrook Properties, LLC, v. Northern Kentucky Water District*, Case No. 2001-00202, the Commission decided to hold the case in abeyance pending resolution of an appeal from a decision of the Kenton Circuit Court that involved the same issue and the same parties that were before the Commission. In support of its decision, the Commission ruled:

The end result of an order deciding the issue would be whether Crestbrook must install a backflow-prevention device. However, the Kenton County Circuit Court already has ordered Crestbrook to install a backflow-prevention device. In light of this order, we reluctantly conclude that it would be inappropriate to enter a final ruling in this case prior to the determination by the Kentucky Court of Appeals, which currently has the case before it.

*In the Matter of: Crestbrook Properties, LLC, v. Northern Kentucky Water District*, Case No. 2001-00202, *Order* dated March 24, 2003, page 2. (Copy attached as Exhibit A to this motion.) Unlike the Crestbrook Properties case, the Jessamine Circuit Court has not issued a final order on the merits of the issues now pending before the Commission because the court correctly found that the Commission had exclusive jurisdiction over a utility's rates and services. Thus, even assuming that the Court of Appeals would rule that KRS 278.040(2) doesn't vest the Commission with exclusive jurisdiction over the regulation of rates and service of utilities, in spite of the clear statutory language to the contrary, such a ruling would not mean that the Commission lacks any jurisdiction over the merits of the action before it. In fact, while asserting that the Commission's

jurisdiction “is directly dependent” upon the Court of Appeal’s decision, the Water District never asserts that the Commission lacks jurisdiction and does not request that the Commission dismiss the case because of its own lack of jurisdiction. Therefore, the Commission has no reason to hold this action in abeyance pending a decision on whether the Jessamine Circuit Court has concurrent jurisdiction over the issues now pending before the Commission.

In the New Cingular Wireless case cited by the Water District, the issue was whether the Commission had jurisdiction over an application pending before the Commission, and in deciding to hold the case in abeyance, the Commission stated that “the question of whether or not the Commission has jurisdiction over such an application is currently pending [before the Kentucky Supreme Court]. The Commission’s jurisdiction over New Cingular’s application is largely dependent upon the Supreme Court’s decision.” *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 114 Rising Son Lane, Prestonsburg, Floyd County, Kentucky, 41653, Case No. 2009-00093, Order dated April 3, 2009, page 1.* (Copy attached as Exhibit B.) Again, in this action the Water District does not argue that the Commission lacks jurisdiction over the present case, and consequently, the New Cingular Wireless case offers no support for holding the present case in abeyance.

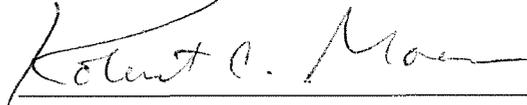
In the Southeast Telephone, Inc., case cited in the Water District’s motion, the Commission noted that the same issue pending before the Commission was also the

subject of litigation in federal court. Consequently, the Commission stated that “given that this matter is pending in litigation, in which briefs have been filed and an oral argument is scheduled, the Commission finds that it would be inappropriate for it to speak further on these issues.” *In the Matter of: Southeast Telephone, Inc.’s Motion to Compel Bellsouth Telecommunications, Inc. to Comply with the Commission’s August 16, 2006 Order and Bellsouth Telecommunications, Inc.’s Response Thereto*, Case No. 2007-0071, Order dated February 28, 2007, page 2. (Copy attached as Exhibit C.) The Water District has not asserted that the Court of Appeals is expected to rule shortly on the merits of the appeal, and consequently, the rationale cited by the Commission for holding the case in abeyance has no application to the present facts.

Because the Commission is a “creature of statute” any analysis of its conduct must begin with a review of its statutory authority. *Kentucky Public Service Com'n v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 377 (Ky. 2010). The Jessamine Circuit Court cited KRS 278.040 in support of its order to dismiss the Water District’s lawsuit, and none of the cases cited by the Water District call into question the soundness of that ruling or offer support for the request to hold this case in abeyance. The Commission has the exclusive authority pursuant to KRS 278.040(2) to decide issues related to utility rates and services, and consequently, the Commission must deny the Water District’s motion and proceed to address the merits of the action. The arbitrary and capricious actions of the Water District have already delayed Forest Creek from constructing its

water system for several years, and the Commission must not allow the Water District's to delay further the Water District's attempt to build its system.

Respectfully submitted,

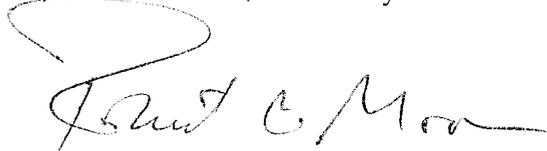


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#### CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by first class mail, postage prepaid, this the 2<sup>8th</sup> day of September, 2011, to, Hon. Bruce E. Smith, **BRUCE E. SMITH LAW OFFICES, PLLC**, 201 South Main Street, Nicholasville, Kentucky 40356.



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Robert C. Moore



whether Northern Kentucky's cross-connection policy, or the application thereof, is unreasonably discriminatory pursuant to KRS 278.170. The end result of an order deciding the issue would be whether Crestbrook must install a backflow-prevention device. However, the Kenton County Circuit Court already has ordered Crestbrook to install a backflow-prevention device. In light of this order, we reluctantly conclude that it would be inappropriate to enter a final ruling in this case prior to the determination by the Kentucky Court of Appeals, which currently has the case before it. Crestbrook Properties, LLC v. Northern Kentucky Water District, 2001-CA-001852.

IT IS THEREFORE ORDERED that this case is held in abeyance pending the ruling of the Kentucky Court of Appeals.

Done at Frankfort, Kentucky, this 24th day of March, 2003.

By the Commission

ATTEST:

  
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Executive Director

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

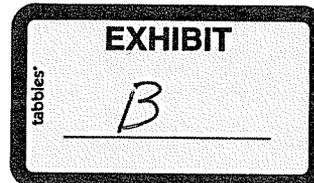
APPLICATION OF NEW CINGULAR WIRELESS	)	
PCS, LLC FOR ISSUANCE OF A CERTIFICATE	)	CASE NO.
OF PUBLIC CONVENIENCE AND NECESSITY	)	2009-00093
TO CONSTRUCT A WIRELESS	)	
COMMUNICATIONS FACILITY AT 114 RISING	)	
SON LANE, PRESTONSBURG, FLOYD	)	
COUNTY, KENTUCKY, 41653	)	

O R D E R

On March 25, 2009, New Cingular Wireless PCS, LLC ("New Cingular") filed an application for a Certificate of Public Convenience and Necessity ("CPCN") to construct a wireless communications tower in Prestonsburg, Kentucky. New Cingular proposes to build the tower at a location within the political boundary of a local planning commission that has adopted planning and zoning regulations in accordance with KRS Chapter 100.

The question of whether or not the Commission has jurisdiction over such an application is currently pending in the matter of *L. Glenn Shadoan, et al. v. Kentucky Public Service Commission, et al.*, Kentucky Supreme Court Case No. 2009-SC-000053-DR. The Commission's jurisdiction over New Cingular's application is largely dependent upon the Supreme Court's decision.

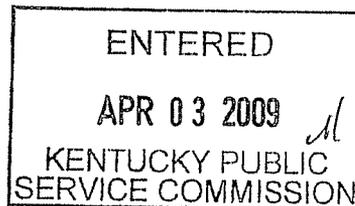
We find that, to ensure the most efficient and effective use of the resources of the Commission and the parties and to avoid unnecessary costs and proceedings, New Cingular's current application should be held in abeyance pending a decision by the



Kentucky Supreme Court If a decision has not been made within 60 days New Cingular may file a motion to request that the Commission revisit this matter.

IT IS THEREFORE ORDERED that this matter shall be held in abeyance for a period of not less than 60 days commencing from the date of this Order and pending a final decision in Kentucky Supreme Court Case No. 2009-SC-000053-DR.

By the Commission



ATTEST:

  
Executive Director

Honorable Todd Briggs  
Attorney at Law  
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Senior Manager  
New Cingular Wireless PCS, LLC dba AT&T  
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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SOUTHEAST TELEPHONE, INC.'S	)	
MOTION TO COMPEL BELLSOUTH	)	
TELECOMMUNICATIONS, INC. TO	)	CASE NO.
COMPLY WITH THE COMMISSION'S	)	2007-00071
AUGUST 16, 2006 ORDER AND	)	
BELLSOUTH TELECOMMUNICATIONS,	)	
INC.'S RESPONSE THERETO	)	

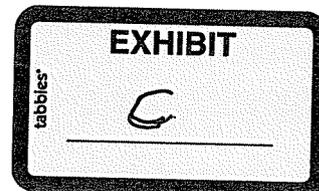
O R D E R

On January 4, 2007, SouthEast Telephone, Inc. ("SouthEast") filed a motion with the Commission seeking to compel BellSouth Telecommunications, Inc. ("BellSouth") to comply with an August 16, 2006 Order issued in closed cases.<sup>1</sup>

SouthEast's motion to compel asserts that BellSouth has failed to implement the Order, which required access to switching and transport elements pursuant to 47 U.S.C. § 271 commingled with unbundled loops provided pursuant to 47 U.S.C. § 251. According to SouthEast, the Order necessarily mandated that these elements be made available through an ordering system similar to that used by BellSouth for its unbundled network elements. Currently, SouthEast must use BellSouth's resale ordering system to obtain these three elements on a commingled basis.

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<sup>1</sup> SouthEast filed its motion to compel in Case No. 2005-00519, BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect SouthEast Telephone, Inc. for Non-Payment; and Case No. 2005-00533, SouthEast Telephone, Inc. v. BellSouth Telecommunications, Inc. As these two dockets are closed, the Commission docketed this motion to compel and response thereto in a new case (Ky. PSC, Aug. 16, 2006).



On January 22, 2007, BellSouth filed its response to SouthEast's motion to compel, including a cross-motion to compel. BellSouth claims that the Commission did not mandate specific provisioning or service arrangements for the switching, transport, and loop elements. Thus, BellSouth asserts that it has complied with the Order. Moreover, according to BellSouth, SouthEast is paying amounts less than those ordered by the Commission. On February 12, 2007, SouthEast filed a response to BellSouth's cross-motion.

As the parties note, the Order for which SouthEast and BellSouth both seek to compel compliance from the other is the subject of litigation in federal court.<sup>2</sup> Given that this matter is pending in litigation, in which briefs have been filed and an oral argument is scheduled, the Commission finds that it would be inappropriate for it to speak further on these issues. These motions will, therefore, be held in abeyance pending the outcome of the litigation. SouthEast correctly asserts that BellSouth has neither sought nor received a temporary restraining order. Accordingly, the Commission's August 16, 2006 Order remains in full force and effect. However, at this time the Commission declines to address matters which are pending in litigation.

IT IS THEREFORE ORDERED that this case be held in abeyance until the Court rules on the litigation in Case No. 3:06-cv-00065-KKC.

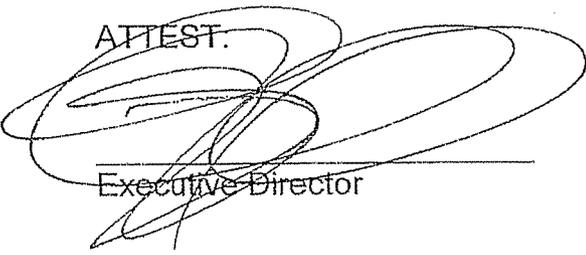
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<sup>2</sup> Case No. 3:06-cv-00065-KKC, BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission; Mark David Goss, in his official capacity as Chairman of the PSC; Teresa J. Hill, in her official capacity as Vice Chairman of the PSC; and SouthEast Telephone, Inc. (E.D. Ky.).

Done at Frankfort, Kentucky, this 28th day of February, 2007.

By the Commission

ATTEST.



Executive Director

Case No. 2007-00071