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PUBLIC SERVICE  
COMMISSION

IN RE: CASE NO. 2009-00064

APPLICANT: EAST KENTUCKY NETWORK, LLC, d/b/a APPALACHIAN  
WIRELESS

INTERVENOR: LEE ETTA CUMMINGS

**BRIEF ON BEHALF OF INTERVENOR, LEE ETTA CUMMINGS**

Comes the Intervenor, Lee Etta Cummings, by counsel, and, in accordance with the Order of the Commission, files the following Brief on Behalf of Intervenor.

INTRODUCTION

East Kentucky Network [hereinafter "EKN"] proposes to locate a cellular tower in the Dry Fork region of Letcher County. Lee Etta Cummings, the Intervenor, owns a 50% interest in a 42-acre tract immediately adjacent to EKN's proposed tower site; and she owns a 100% interest in a 95-acre tract immediately adjacent to the proposed tower site. Ms. Cummings objects to EKN's proposed tower site because the location will decrease the value of Ms. Cummings' land; will interfere with the development potential and use of her land; and because the location will interfere with mining operations on her land. Ms. Cummings further objects to EKN's proposed tower site because she has identified an alternate tower site, Alternate Site #1, that is reasonably available to EKN and will provide adequate service coverage.

I. EKN'S PROPOSED TOWER LOCATION DECREASES THE VALUE OF MS. CUMMINGS' LAND.

The evidence is uncontroverted that EKN'S proposed tower location negatively impacts the value of Ms. Cummings' land. Vance Mosley, a licensed appraiser with

Kentucky Field Service Realty, Inc., in Hyden, Kentucky, inspected the 42-acre tract in which Ms. Cummings owns a 50% interest on April 15, 2009, and valued her 50% interest as worth \$200,000.00 prior to construction of the tower and \$150,000.00 after construction of the proposed tower for a loss to Ms. Cummings of \$50,000.00.<sup>1</sup> Based on comparable sales in the area, Mr. Mosley determined the per-acre value of the land is \$10,000.00 per acre, the same per-acre price he determined for this same property in 2001,<sup>2</sup> long before EKN's proposed tower. His appraisal report noted that the highest and best use of her land is for commercial and residential purposes and noted that the site has been considered for such purposes in the past. Mr. Mosley also noted that the location of the tower within 60-80 feet of the boundary line of the property would render the property less desirable for commercial or residential use. Mr. Mosley also stated that the tower location negatively affects and limits the use of approximately eight acres of flat land on Ms. Cummings' jointly owned property.

Dixon Nunnery appraised the property on behalf of EKN on May 14, 2009.<sup>3</sup> Mr. Nunnery noted that 6.73 acres of Ms. Cummings' jointly owned tract is encompassed within a 500' radius of the proposed tower, and is, therefore, affected by the tower. He further found that the overall value of Ms. Cummings' jointly owned tract will be diminished by the tower's proximity to a major portion of the level area of land. In

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<sup>1</sup> Mr. Mosley's 2009 appraisal was filed in the record following the informal conference in this matter on April 23, 2009. The parties stipulated to the admissibility of all appraisal reports at the Hearing on October 6, 2009. See Transcript of Evidence (hereinafter T.E.), pg. 5; and Mr. Mosley's report is Stipulated Exhibit 2.

<sup>2</sup> Mr. Mosley's 2001 appraisal report was filed of record as part of Intervenor's Notice of Filing of Exhibits List on September 24, 2009, and as part of the pre-filed Direct Testimony of Lee Etta Cummings.

<sup>3</sup> Mr. Nunnery's appraisal report is part of Stipulated Exhibit 1.

contrast to Mosley, Mr. Nunnery found the highest and best use of the property to be as recreational and pastoral land, but his report failed to note any prior interest in the property for commercial and residential development. He valued the property at \$52,000.00 before “taking” and \$45,000.00 after “taking” for a total loss of \$7,000.00.

Willie Prater also appraised Ms. Cummings’ jointly owned tract for EKN on May 18, 2009. He valued the property prior to the tower at \$55,000.00 and after the tower at \$49,000.00 for a total loss of \$6,000.00. Mr. Prater found the highest and best use of the property is for “hilly woodland, for mining or some type of development in the future, if the access was improved and the demand increases.” Mr. Prater also noted that approximately 7.21 acres of this land would be suitable for development purposes if it had better access and city utilities; yet, rather than finding a higher value than Mr. Nunnery found, Mr. Prater’s valuation of the property is similar to that of Mr. Nunnery who did not note a development potential for this land. Mr. Prater also noted that the location of the tower negatively impacts approximately 7 acres of this land.

Although the appraisers differ significantly as regards the value of Ms. Cummings’ jointly owned tract, they all agree that her land will be negatively affected by the location of the tower at EKN’s proposed site and that she will suffer a loss of value. All three appraisers noted a negative impact on at least a portion of the most valuable part of this land, the level part that would be most suitable for development purposes. All three appraisers noted a negative impact on and loss of approximately 7 to 8 acres of her land. And two of the appraisers, including one of EKN’s appraisers, noted the development potential of this land, which development potential tends to increase the value of land significantly as compared to most other uses. KRS 278.650 states that

the Commission “may take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values.” The uncontroverted loss of value to Ms. Cummings’ jointly owned tract, alone, is sufficient grounds to deny EKN’s application. In fact, the appraisal reports alone indicate that, if EKN is allowed to locate its tower at its proposed site, it will have taken approximately 7 acres of Ms. Cummings’ land without having paid just compensation to her. Neither the Commission nor EKN has the power to condemn Ms. Cummings’ land in this manner, and Ms. Cummings respectfully requests that the Commission deny EKN’s application and prevent this taking of her property.

II. EKN’S PROPOSED TOWER LOCATION INTERFERES WITH THE USE AND DEVELOPMENT OF MS. CUMMINGS’ PROPERTY.

Ms. Cummings testified that the Letcher County Board of Education considered her property for the location of a consolidated high school in 2001.<sup>4</sup> Her property has also been considered for location of a residential development. Ms. Cummings testified that, most recently, her jointly owned land has been under consideration as the potential location for a federal prison. In July of 2008, Elwood Cornett, the Letcher County Planning Commissioner, contacted her and obtained her permission and a right of entry for the performance of various technical studies to determine if her land is suitable for a federal prison.<sup>5</sup> EKN has questioned the truthfulness of whether or not

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<sup>4</sup> Pre-filed Direct testimony of Lee Etta Cummings, page 1.

<sup>5</sup> Pre-filed Direct testimony of Lee Etta Cummings, page 1.

Ms. Cummings' land is being considered for the location of a federal prison.<sup>6</sup>

Therefore, Ms. Cummings obtained and submitted a certified and authenticated copy of a map prepared by Summit Engineering at the direction of the Letcher County Planning Commission for use by the Federal Prison Board Committee.<sup>7</sup> The map shows the proposed layout of the federal prison on Ms. Cummings' land and surrounding tracts and indicates that the Federal Prison Board requires approximately 40 acres of land for its federal prison. Ms. Cummings has been informed that the loss of her acreage due to the location of the tower will render her site unsuitable for location of the prison.<sup>8</sup> Despite its claimed lack of knowledge at the hearing<sup>9</sup>, EKN knows Ms. Cummings' property is being considered by the Federal Prison Board as verified by the letter of Gerald Robinette, CEO of EKN, to Jim Ward, Letcher County Judge Executive, which letter acknowledges Mr. Robinette's awareness of the Prison Board's interest when he promises, "In the event that the Prison Board decides that this area is where they want to build, we will not hamper them in any way and, if needed, we will relocate the tower."<sup>10</sup> Despite the promise of its CEO in his letter to the Letcher County Judge

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<sup>6</sup> See EKN's "Reply to Response to Objection of East Kentucky Network" dated June 30, 2009, wherein EKN justified its submission of letters written by its President and CEO, Gerald Robinette, by stating that they were necessary, in part, to show that Ms. Cummings' allegations regarding the consideration of her site for location of a federal prison were not true.

<sup>7</sup> See the Summit Engineering map and certification attached to Notice of Filing of Exhibits List entered into the record on September 29, 2009; and see the same map and certification attached to the prefiled Direct Testimony of Lee Etta Cummings herein.

<sup>8</sup> See Direct Testimony of Lee Etta Cummings.

<sup>9</sup> See e.g., testimony of Marty Thacker, T.E., pg. 19-20.

<sup>10</sup> See letter of Gerald Robinette to Judge Jim Ward dated May 18, 2009, and filed of record herein on May 20, 2009.

Executive, EKN has not offered to stipulate on the record its promise to relocate the tower. Instead, EKN argues that, since there is no definite decision by the Prison Board to use Ms. Cummings' property and no definite timeline in regards to when the Prison Board will make its decision, the Commission should just ignore the Prison Board's interest in Ms. Cummings' property. However, Ms. Cummings is not required to show that her property will definitely be chosen by the Prison Board in order to prove the negative effect of EKN's proposed tower location on her property. The Prison Board's interest alone shows the value of her property for commercial development purposes, a development potential that will be forever lost if EKN is allowed to locate its tower in its proposed location. Good, flat land for development purposes is hard to come by in the mountains of Letcher County, Kentucky, and the need for new industry and job opportunities in this area cannot be overstated. EKN's CEO, Mr. Robinette, acknowledged the job opportunities this prison could provide to this area in his letter when he stated, "Let it be known that East Kentucky Network, aka Appalachian Wireless, would not hurt or harm any project that could possibly impact jobs for our area" and then promises to move his tower so as not to impact the prison project.<sup>11</sup> Ms. Cummings respectfully requests that the Commission require EKN to move its tower now and remove the negative impact the proposed location of the tower will have on the Prison Board's consideration of her property and the loss of this development opportunity for her property.

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<sup>11</sup> Id.

III. EKN'S PROPOSED TOWER LOCATION INTERFERES WITH MINING OPERATIONS ON MS. CUMMINGS' PROPERTY.

Fred Webb, the chief engineer for Sapphire Coal Company, testified that Sapphire Coal has leased the minerals rights on the tract of land adjacent to the proposed tower location and which Ms. Cummings' owns exclusively.<sup>12</sup> He testified there are 54,445 tons of recoverable coal on that land which Sapphire plans to mine. He testified that EKN's proposed tower location will limit Sapphire's blasting capability near the tower to the point of rendering mining operations there impractical and uneconomical for a potential loss of the ability to mine any of the recoverable coal on Ms. Cummings' land. Blasting is restricted within a quarter mile of any structure, and the closer blasting is to occur to a structure, the less charge which can be used, which increases the cost of the blasting.<sup>13</sup> However, the primary concern regarding Sapphire's blasting capability near the tower is the great potential that blasting may not be permitted at all due to the fact that EKN's proposed tower is located directly on top of an abandoned deep underground mine which is about 50 feet directly underneath the proposed tower. Mr. Webb testified that there is less than 100' of cover over that abandoned mine, and blasting is guaranteed to cause settling and subsidence and will likely cause some collapses of the mine's roof and subsidence and cracks in the ground above that could ultimately bring down the tower.

Although EKN's engineer, J.W. Caudill, downplayed the potential effect of blasting on the integrity of the tower, he, too, acknowledged the potential for collapses

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<sup>12</sup> Prefiled Direct Testimony of Fred Webb, page 1.

<sup>13</sup> See, for e.g., Testimony of J.W. Caudill, T.E. pg. 58, line 25 through pg. 60, line 7.

in the underground mine due to blasting and the limits on blasting within range of the proposed tower.<sup>14</sup> Mr. Caudill testified that he believed there is sufficient rock and overburden over the underground mine to support the tower.<sup>15</sup> However, EKN submitted the report of a geologist, Wendell R. Holmes, with its application, and Mr. Holmes' report states, "Tests were not conducted to determine the load-bearing strength of the mine fill. However, it is apparent that the tower will be constructed on the unconsolidated mine fill."<sup>16</sup>

Marty Thacker, the technical person with Thacker Grigsby Telephone, the subcontractor for EKN, also attempted to downplay the effects of blasting on the tower's integrity by pointing out that EKN is using a slab and pier foundation. He testified that 75% of all tower failures are caused by the ground moving. A slab and pier foundation distributes the weight of a tower over a larger area and "it tied all the legs of the tower together so that if one of them settled the other two legs move the same amount."<sup>17</sup> However, Mr. Webb is not warning of mere settling of the ground as will occur in any construction endeavor. Rather, Mr. Webb is concerned with the instability caused by the location of this tower over an unstable underground deep mine and placement of the tower near planned mining and blasting operations, a condition he has never encountered before since most cell towers he has encountered have gone up after

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<sup>14</sup> See Prefiled Direct Testimony of J.W. Caudill, pg. 54.

<sup>15</sup> Id.

<sup>16</sup> EKN's Application filed herein on March 6, 2009, at pg. 28.

<sup>17</sup> See Prefiled Rebuttal Testimony of Marty Thacker, pg. 2.



completion of mining operations in the vicinity, not before.<sup>18</sup> Mr. Caudill, likewise has never dealt with the effect of mining operations and blasting near a tower after placement of the tower.<sup>19</sup> Mr. Thacker, as a technical employee of the telephone company, has no expertise with regard to mining or blasting or the effect of nearby blasting or mining on a tower or its foundation or on the abandoned underground deep mine beneath its foundation.

EKN has suggested that this entire issue can be addressed by EKN providing a blasting waiver. However, no such waiver has been presented to Sapphire Mining or its blasting contractor by EKN even though EKN has been aware of this issue since Ms. Cummings first intervened in this matter. Although blasting waivers are relatively common in the mining industry, Mr. Webb has never seen one that allows mining near a tower.<sup>20</sup> Any waiver would need to meet the requirements of Sapphire's blasting contractor and, at this point, Sapphire's blasting contractor is resistant to blasting due to the proposed location of the tower. Moreover, even with a blasting waiver from EKN, Sapphire still may not be able to mine Ms. Cummings' property. As part of its permitting process, Sapphire must inform the permitting authorities that it plans to mine near a cell tower located on an abandoned, underground deep mine, and the potential for subsidence and danger to the tower would be considered in regards to whether or not Sapphire could get a permit to mine near the tower.<sup>21</sup> Therefore, even a blasting waiver

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<sup>18</sup> Prefiled Direct testimony of Fred Webb, pg. 2.

<sup>19</sup> See testimony of J.W. Caudill, T.E., pg. 71.

<sup>20</sup> See testimony of Fred Webb, T.E, pg. 99, line 5.

<sup>21</sup> Id at pg. 111-112.

from EKN may not be enough to satisfy the permitting authorities and allow Sapphire to proceed with its mining plans.<sup>22</sup>

Any restriction on Sapphire's ability to mine Ms. Cummings' property will have a direct and substantial economic effect on her and a potential loss of \$100,000.00 to \$150,000.00.<sup>23</sup> Sapphire would experience an even greater financial loss. Coal mining is the heart of the economy of Letcher County, Kentucky. Although EKN says it does not wish to interfere with Sapphire's mining capabilities or hamper the very livelihood of Letcher County<sup>24</sup>, locating its tower at its proposed site does just that. And unnecessarily so considering that EKN has a viable alternative that will not interfere with Sapphire's mining operations. Ms. Cummings respectfully requests that the Commission deny EKN's application due to the potential adverse effect its proposed tower location will have on the ability of Sapphire Mining to recover coal from her adjacent property.

#### IV. PROPOSED ALTERNATE #1 IS A VIABLE AND REASONABLE ALTERNATIVE FOR LOCATION OF EKN'S TOWER.

Fred Webb, chief engineer for Sapphire Mining, at the request of Ms. Cummings, has identified five alternate locations for EKN's tower that will not interfere with Sapphire's mining operations.<sup>25</sup> Of those five alternate locations, Alternate Site #1 clearly presents a viable and reasonable alternative for the location of EKN's tower.

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<sup>22</sup> Id. at 112.

<sup>23</sup> See Testimony of Lee Etta Cummings, T.E. at pg. 128.

<sup>24</sup> See letter of EKN CEO, Gerald F. Robinette to Fred Webb, filed in the record on May 22, 2009.

<sup>25</sup> See map identified as "Alternate Tower Location" and attached to Fred Webb's Prefiled Direct Testimony.

Alternate Site #1 is located on Ms. Cumming's solely owned tract. Therefore, it does not interfere with the development potential and use of her jointly owned tract and would leave that location available for use by the Federal Prison Board.

Alternate Site #1 will not interfere in any way with Sapphire Mining's proposed mining operations.<sup>26</sup>

EKN's engineer, J.W. Caudill, has opined that Alternate Site #1 is located on an abandoned underground mine and is closer to Sapphire Mining's proposed future mining operations than is EKN's proposed site and, therefore, the problems Fred Webb has identified regarding blasting near EKN's proposed site are the same for Alternate Site #1. This is simply not accurate. Alternate Site #1 is not located on an abandoned underground mine as is EKN's proposed site. Alternate Site #1 is located on a solid block of coal that will provide ample support for any tower that would be located on it. Therefore, Alternate Site #1 would not be affected by any blasting Sapphire may have to do near it in order to mine the coal on Ms. Cummings' land.<sup>27</sup>

Alternate Site #1 was the first site considered by EKN when it was investigating sites for placement of its tower.<sup>28</sup> EKN has conceded that Alternate Site #1 provides adequate cellular phone service coverage for the area targeted by EKN in its application.<sup>29</sup>

EKN has tendered many objections to Alternate Site #1 as a reasonable

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<sup>26</sup> See Prefiled Direct Testimony of Fred Webb, pg. 2.

<sup>27</sup> See Testimony of Fred Webb, T.E. at pg. 89

<sup>28</sup> See Testimony of Marty Thacker, T.E. at pg. 13.

<sup>29</sup> Id at. pg. 14.

alternative, and most of its objections simply have not panned out:

A. NEPA AND SHIPA OBJECTIONS DUE TO ALLEGED CABIN: Marty Thacker testified extensively regarding his belief that Alternate Site #1 would not pass a NEPA inspection or a SHIPA inspection because of the location of some historically significant cabin allegedly within view of Alternate Site #1.<sup>30</sup> Mr. Thacker claimed this cabin did not affect EKN's proposed tower site but did affect Alternate Site #1 because it allegedly sat on a hill and could be seen from Alternate Site #1.<sup>31</sup> Ms. Honaker, counsel for the Commission, requested that EKN provide any written record it might have that this cabin is listed as an historical property.<sup>32</sup> EKN submitted its full NEPA report into the record post-hearing, and EKN has placed a yellow stickie note on a document prepared by the Kentucky Heritage Council which lists a Willy Caudill Cabin identified as Site Number LR-23 by the KHC along with a map showing the believed location of the cabin. However, if the Commission flips back a few pages, it will find the beginning of Appendix IV of the NEPA report which contains the full Section 106 (SHPO) documentation regarding the historical issues related to EKN's proposed tower site. The very first document under Appendix IV, is a letter dated July 6, 2009, by Mark Dennen, Director of the Kentucky Heritage Council and State Historic Preservation Officer. Mr. Dennen states, "One previously recorded above-ground cultural historic property (LR-23) was located during the records review but was found to be no longer extant during the field survey." In fact, EKN's NEPA report tates throughout that the

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<sup>30</sup> See Marty Thacker's Prefiled Direct Testimony, at pg. 22; T.E. at pg. 19 and 25.

<sup>31</sup> See Marty's Thacker's testimony, T.E. at pg. 25.

<sup>32</sup> See T.E. at pg. 24.

cabin about which Mr. Thacker testified no longer exists. Contrary to Mr. Thacker's testimony, there is simply no evidence of any historical impediment or NEPA impediment in regards to Alternate Site #1.

B. ROAD TO ALTERNATE SITE #1. EKN argued that construction of a road to Alternate Site #1 is impracticable, unsafe and prohibitively expensive.<sup>33</sup> Based on this allegation, Ms. Cummings obtained a bid from Michael Cornett of C&C Construction to extend the coal haul road already existing on Ms. Cummings' property to Alternate Site #1. Mr. Cornett testified that he is familiar with the location of Alternate Site #1 and the terrain surrounding it.<sup>34</sup> He said it is possible to extend a road to Alternate Site #1, and he estimated the need for a road 1,000 feet long and 12 feet wide. He provided a low estimate of \$5,200.00 if there is no need to hammer rock and a high estimate of \$6,800.00 if he must hammer rock.<sup>35</sup> He further testified that there is no need for additional drainage because his proposed road is located on a ridge that provides for natural drainage.

Prior to obtaining an estimate for EKN, Marty Thacker first testified that he estimated a cost of approximately \$25,000.00 to build a road to Alternate Site #1.<sup>36</sup> Mr. Thacker thereafter obtained an estimate from Coleman Engineering. Coleman Engineering has been an engineering contractor for EKN for more than 17 years and,

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<sup>33</sup> See EKN's "Response of Applicant to Filing of Alternate Tower Locations of the Intervener" dated June 11, 2009.

<sup>34</sup> See Prefiled Direct Testimony of Michael Cornett, pg. 1.

<sup>35</sup> See Michael Cornett's road construction estimate attached to his Prefiled Direct Testimony herein.

<sup>36</sup> See Prefiled Direct Testimony of Marty Thacker, pg. 18.

according to Mr. Thacker, certainly wishes to continue enjoying the benefits of EKN's business. Not surprisingly, Coleman Engineering significantly increased the distance of the road Mr. Thacker originally claimed was needed for access to Alternate Site #1 to 2,300 feet.<sup>37</sup> Not surprisingly, Coleman Engineering also significantly increased the price to construct the road to \$56,850.00, and its price assumed, without testing<sup>38</sup>, the need to excavate extensive amounts of rock over the course of a month.

EKN has acquired the opinion it wanted regarding the cost of the road from one of its long-term business associates. If it truly would cost this much for 2,200 feet of unpaved coal haulage road, it is hard to imagine that any of the access roads already in place to EKN's proposed site and to Ms. Cummings' property could ever have been built in the first place. At the Informal Conference in this matter on April 23, 2009, Ms. Cummings submitted several photographs, some of which included pictures of the road on her property which EKN initially used to reach its proposed tower site and which was the access road initially chosen by EKN in its application for its proposed tower site.<sup>39</sup> This road across Ms. Cummings' property, which is obviously sufficient for EKN's purposes, is the road Ms. Cummings requested that Mr. Cornett review and use to prepare a bid to extend it to Alternate Site #1. Mr. Cornett was aware of the condition of this existing road and the terrain surrounding Alternate Site #1. There are no

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<sup>37</sup> Id. at pg. 13 wherein Mr. Thacker originally estimated an additional 1,200 to 1,500 feet of road.

<sup>38</sup> See testimony of Marty Thacker, T.E. at pg. 17.

<sup>39</sup> EKN initially used a road on Ms. Cummings' jointly owned property to get to its proposed tower site. When Ms. Cummings' pointed out that EKN did not have her permission to use this road, EKN began using an access road located exclusively on Raymond Brown's property and changed its application to reflect the new access road to its proposed site.

grounds for EKN assuming his road would not be sufficient to meet EKN's needs.

C. GAS LINES. EKN objected to Alternate Site #1 due to the location of gas lines on Ms. Cummings' property.<sup>40</sup> However, Ms. Cummings' agreements with the gas companies contain provisions requiring the gas companies to remove their gas lines one time at their own expense.<sup>41</sup> Ms. Cummings also confirmed, beyond her written agreements, that the gas companies would have to remove their gas lines and presented that evidence to the Commission.<sup>42</sup> Therefore, the existence of gas lines on Ms. Cummings' property is no impediment to EKN's ability to use Alternate Site #1 for its tower.

D. PRIOR CONSTRUCTION BY EKN. Throughout this proceeding, EKN has argued that all of the work and expenditures it has already made in regards to its proposed tower location should be considered by the Commission and weighed against denying its application for its proposed site. If such were a valid consideration by the Commission, then the Commission could never deny an application since the applicant will always have expenditures related to its proposed site that it will lose if its application is denied. However, there is an even greater reason for the Commission to decline to consider the cost to EKN if the Commission denies its application. The vast majority of the losses EKN will incur if the Commission denies its application result from EKN's

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<sup>40</sup> Testimony of Marty Thacker, T.E. at pg. 56.

<sup>41</sup> Testimony of Lee Etta Cummings, T.E. at pg. 134.

<sup>42</sup> See June 18, 2009, letter from Troublesome Creek Gas to Lee Etta Cummings submitted into the Commission's record by letter dated June 19, 2009. See also the Prefiled Direct Testimony of Duane Lester of Quality Natural Gas Properties, LLC.

decision to commence construction<sup>43</sup> prior to the granting of its application and to continue that construction even after Ms. Cummings' objection and intervention in this matter.<sup>44</sup> The work EKN has performed is more than mere site prep work. EKN has poured its slab and pier foundation, installed its tower building, and even placed the steel for the tower on site.<sup>45</sup> And EKN has done so in clear violation of the law. KRS 278.020(1) states, "No...corporation...shall...begin the construction fo any plant, equipment, property or facility for furnishing to the public any of the services enumerated in KRS 278.010...until that person has obtained from the Public Service Commission a certificate that public convenience or necessity require the service or construction." Having commenced construction prior to obtaining a Certificate from this Commission, EKN has violated the law, and its losses are its own fault and not a proper consideration by this Commission in ruling on its application.

### CONCLUSION

Make no doubt about it, EKN has chosen a site for placement of its tower that is most convenient and advantageous to it. However, the significant cost and loss to Ms. Cummings if EKN's application is granted cannot be ignored. The statutes urge the Commission to consider "the likely effects of the installation on nearby land uses and values." KRS 278.650. Ms. Cummings has demonstrated that she will lose the use of approximately 7 acres of her land and the development potential of her land if this

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<sup>43</sup> See Marty Thacker's testimony, T.E. at pg. 22.

<sup>44</sup> Id. at 29.

<sup>45</sup> Id. at 22. See also the Prefiled Direct Testimony of Lee Etta Cummings at pg. 4 and the pictures submitted with that testimony.

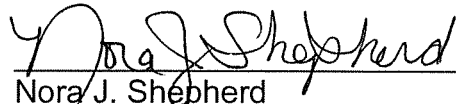


application is granted. Ms. Cummings has demonstrated that planned mining on her property is threatened and she may lose in excess of 50,000 tons of recoverable coal from her property if this application is granted. The regulations require that EKN show that there is "no more suitable location reasonably available from which adequate service to the area can be provided...." 807 KAR 5:063 Section 1(1)(s). Despite its every effort to prove otherwise, Alternate Site #1 is reasonably available to EKN and will provide adequate service to the area. And EKN's use of Alternate Site #1 for its tower will not interfere with Ms. Cummings' property values, the development potential of her land, the planned mining on Ms. Cummings' land, and will not result in an unlawful taking of any of Ms. Cummings' property.

Based on the foregoing and the evidence submitted in this matter, the Intervenor, Lee Etta Cummings, respectfully requests that the Commission deny East Kentucky Network's application for a Certificate of Public Convenience and Necessity to Construct a Tower in Letcher County, Kentucky.

SWORD, FLOYD & MOODY, PLLC

BY:



Nora J. Shepherd

Counsel for Intervenor

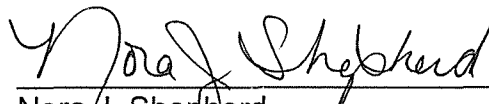
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **BRIEF ON BEHALF OF INTERVENOR, LEE ETTA CUMMINGS** was served upon the following on this the 10<sup>th</sup> day of December, 2009:

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