

**COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION**

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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

**MEMORANDUM BRIEF OF APPLICANT,
EAST KENTUCKY NETWORK, LLC d/b/a APPALACHIAN WIRELESS ("EKN")**

Comes the Applicant, EKN, and for its Memorandum Brief herein, states as follows:

Briefly, EKN filed its Application for a Certificate of Need ("CON") with the Public Service Commission (sometimes hereinafter the "PSC") about March 6, 2009 for the purpose of building, maintaining and operating its cellular tower at the Dry Fork Site situated on a reclaimed strip mine area on a large flat bench at the foot of a steep, rocky point on the ridge between Smoot Creek and Dry Fork in Letcher County, Kentucky. The purpose of the application is to meet the public need and convenience for cellular coverage along a three (3) mile section of Highway 15, the main east-west artery through Letcher County along a stretch of road between Whitesburg, the county seat of Letcher County and the community of Isom, Kentucky to the west. The area includes the community of Dry Fork, Kentucky, Smoot Creek, Hollybush and other minor roads leading up tributaries and hollows situated along this area of Highway 15. Cell coverage in the targeted area is a virtual "dead-spot".

Ex. 6 of the direct testimony of J.W. Caudill, PE, is perhaps the best depiction of the site and entire surrounding area.

FACTUAL and PROCEDURAL HISTORY

The Intervenor, Lee Etta Cummings, filed her Petition for Intervention in this matter on March 6, 2009, an Informal Conference was held on April 23, 2009, where she described her concerns about the proposed cell tower site. Essentially these were her fear that same would interfere with the development of her property, particularly a federal prison, and interfere with the recovery of coal thereon at some point in the future, and devalue her property by reason of the nearby location of the tower itself. PSC Memorandum 4/29/09.

At the Informal Conference Ms. Cummings also complained that EKN had used her road on the Smoot Creek side of the ridge, which was an old coal haul road, and had reworked a portion of it, all without her consent. It developed that EKN believed that it possessed a right of way for the tract over which the access road to the tower site was located from the owner of same, Ms. Linda Fields, when in fact Ms. Cummings owned an undivided one-half (50%) interest in the property and had not given her consent to EKN for any access or use of the road. Later, this oversight was explained by J.W. Caudill as resulting from his use of maps from the Letcher County PVA which carried the tract as owned by Ms. Fields, rather than as owned jointly by Ms. Fields and Ms. Cummings. (Caudill, Pp. 44-45, Ex. 5).

Upon learning of Ms. Cummings' ownership interest in Tract No. 7, EKN immediately ceased to use the Smoot Creek access road to the tower site on April 23, 2009, EKN submitted its Amended Application along with a new map which depicted a change in the access road from the Smoot Creek side of the property to the next watershed to the southeast, the Dry Fork side by virtue of grants it held from its Lessor, Raymond Brown and wife, Buell, from Mr.

Brown's son who previously granted EKN the use of a right of way over and across his property on the Dry Fork side by which to access the tower site. (See Exs. 1, 2, and 3, Thacker depo).

The issue of EKN's right of entry to the tower site is now a non-issue by reason of the fact that its Amended Application deletes Tract No. 7 (the Fields/Cummings' property) as the primary access.

On May 8, 2009, the Commission ordered the Intervenor to submit a list of alternate sites to the proposal site, which she did on May 28, 2008. The Applicant filed its response to same on June 12, 2009.

By Order entered August 14, 2009, the PSC scheduled a formal hearing in the case which was held on October 6, 2009. The same Order set forth the issues to be addressed at the formal hearing, and set the schedule for submission for prefiled testimony and exhibits.

LAW OF THE CASE

The statutory authority governing the jurisdiction of the PSC of the case is KRS 278.650. The applicable regulation promulgated pursuant to the above statute, and applicable herein is found in 807 KAR 5:063(1)(s) which provides that the contents of the application must include:

"A statement that the utility has considered the likely effects of the installation on nearby land uses and values and has concluded that there is no more suitable location reasonably available from which adequate service to the area can be provided, and that there is no reasonably available opportunity to co-locate, including documentation of attempts to co-locate..."

The Pre-Trial Order entered August 14, 2009, describes as the issues to be addressed at the formal hearing as follows: (1) public convenience and necessity; (2) design, engineering and construction, i.e., jurisdictional safety issues; (3) character of the general area concerned and

likely effects of the tower installation thereon; (4) suitable alternative sites or co-location sites; and (5) any other issues.

SUMMARY OF EVIDENCE

The evidence of the Applicant, EKN, may be summarized below:

1. **MARTY THACKER.** Mr. Thacker testified in a deposition dated September 15, 2009 that he has 32 years experience with one of the partners of EKN, that is Thacker-Grigsby Telephone Company, and that he has worked in connection with the cellular provider services with EKN since 1991 when it started. He is in charge of the investigation of possible sites, and seeing the entire project through the completion process of erection of the tower, construction of access roads and so forth. (Thacker, Pp. 1-5). He testified that the search began for a tower site in this area in 2008 (Thacker, P.6) by reason of the fact that there was virtually no coverage along Highway 15 in this area going from Whitesburg to Isom (Thacker, P.7). EKN received many complaints from residents, businesses, governmental agencies, schools, and particularly police, ambulance and emergency responders, and fire departments regarding the lack of service along a section of highway heavily traveled by coal trucks, school buses, and the public, on which numerous accidents occur. (Thacker, Pp.7, 32-35). Mr. Thacker further documented the public need, convenience and demand for adequate coverage in the area by radio frequency analysis the company conducted in support of EKN's Application at the time. Thacker Ex. 4 is a map showing the existing coverage of the Dry Fork area of Highway 15 which demonstrates either very weak or no cellular coverage along the targeted area. (Thacker, P. 31) It is the company's goal to provide seamless coverage throughout Highway 15 from Whitesburg to Isom. (Thacker, P.31). Thacker Ex. 5 is a map that portrays coverage of existing cell sites in

the area operated by EKN, which is at Whitesburg, Isom, and Dean, and that said exhibit shows that these existing sites cannot cover the area adequately. (Thacker, P.36). Exhibit 6 of Mr. Thacker is a map generated through CDMA Technology by EKN which demonstrates the projected grade of coverage from the proposed EKN Dry Fork Site as “excellent” in the targeted area from the proposed site. (Thacker Ex.6, Pp. 37-39).

In summary, Mr. Thacker testified that Exhibits 4 and 5 clearly demonstrate the need for coverage, and Exhibit 6 demonstrates that the proposed site fulfills that need in terms of cellular coverage. (Thacker P. 39).

Thacker Ex. 7 is a map and findings of a traffic survey in a 24 hour period along the target section of Highway 15. This exhibit demonstrates the demand for coverage in the area and shows 10,241 vehicles that passed through therein a single day.

In connection with the question of co-location, Mr. Thacker testified that no other cellular towers of EKN or other providers provide coverage for the target area. Co-location is thus not an option. (Thacker, Pp. 35-36).

Marty Thacker also testified to the jurisdictional safety issues, design, engineering, and construction related to the proposed facility. The tower specifications are shown at Ex. 8 and the foundation at Ex. 9. Both are designed by Chi Lee a professional registered engineer in this state who does the design work for the manufacturer, Allstate Tower, Inc., which sees to the design and manufacture of such all over this state (and no doubt others)(Thacker, Pp.45-47). Mr. Thacker testified the tower is designated for withstanding 70 mile an hour wind and is built to all strength and safety standards in accordance with applicable regulations.

With respect to the strength and safety features of the foundation, Mr. Thacker testified in a rebuttal deposition taken September 9, 2009 as to why this particular tower and foundation, as designed, should not collapse. The best technology available for the foundation is a slab with piers, as this tower. He testified that EKN has over 50 self-supporting towers with the slab and pier foundation with no failures to date. He further testified that in his opinion the tower chosen by EKN for this proposed site is safe from the standpoint of collapse or failure with respect to this site's particular conditions, reiterating that EKN has used this type of tower all over coal mining Eastern Kentucky, Virginia, and West Virginia. It is common, he testified, for the company to build over previously mined (both surface and deep mining), and in close proximity of current mining to cell towers. The key feature is the self supporting design which allows even settlement on all sides, rather than the leaning or pitching effect seen with inferior designs. He anticipated absolutely no problem to the tower, because of its design with respect to projected coal mining at or near the tower site on Ms. Cummings' property and felt that as long as the coal company followed its regulations any possible conflict between the tower site and the coal mining could be amicably resolved. (Thacker Rebuttal Depo 9/9/09).

Mr. Thacker also testified on direct as to the problems with Alternative Site 1 of Ms. Cummings, and the inadequacy of Michael Cornett's estimate of the scope, extent, and price of building a proposed road from the EKN proposed site to Ms. Cummings' site. As part of his work up, he submitted with his rebuttal testimony a map of Coleman Engineering prepared by Randall Coleman and J.W. Caudill that shows that for a safe road with no less than a grade 10 to 15 degrees, construction would entail some 2200 additional feet of road from the present site

to Alternate Site 1, together with switchbacks, drainage ditches at a cost of \$56,850.00 (Thacker Rebuttal Depo).

Mr. Thacker testified that the character of this property and general vicinity of the tower site is as previously mined over, reclaimed strip mine area suitable for recreation and pasturing of cattle with no residences, improvements, infrastructure or utilities with no changes in that expected from the presence of the tower at this site. (Thacker, Pp.50-52).

He had no knowledge of any proposed prison, had received no notice relating to the same or any indication that the cell tower should be any kind of objection to placement of a federal prison upon the property. (Thacker, Pp.53-54).

He emphasized that in the interest of the public welfare and the community and economic development in the way of providing jobs for the citizens of Letcher County, that if indeed the tower became a problem to the location of a prison on the site, then EKN is willing move it or work around any problem that such an issue might pose. (Thacker, P.53).

At the hearing on October 6, 2009, Mr. Thacker added on cross-examination from Respondent's attorney, that if the commission rejects EKN's application, then the Certificate of Need process would begin all over again, including the NEPA survey required by the National Environmental Protection Agency in connection with FCC approval of the new application. (T.E., P.21). Mr. Thacker confirmed that if another location became thus involved, it would be his choice as far as a suitable site to erect two smaller tower locations, one on the Smoot Creek side and one on the Dry Fork area, and that again the application process would have to start all over again. (T.E., P.26).

The Commission should note that the NEPA Report with the provider's statement to EKN to the tune of \$6,000.00 was filed into this record as a post-hearing filing.

2. **J.W. CAUDILL.** Mr. Caudill testified that he is a registered land surveyor and a professional engineer and is familiar cell tower site development and construction as well as all phases of mining, permitting and road construction associated with it here in Eastern Kentucky. (Caudill, Pp.4-5). He testified at the hearing that he has worked upon as many as 20 sites doing the survey and map work relative to application process, and 20-30 more sites for other types of work. He is familiar with Alternate Site 1 which he and Mr. Shepherd investigated initially sometime in the summer (or after) in 2008. He said his evaluation of Alternative Site 1 at that time was that it was a steep rocky ridge with no access with gas lines that had to be relocated and a generally difficult site due to the topography. For these reasons, Alternate Site 1 was rejected at that time for more favorable site that EKN selected. (Caudill, P. 12).

Mr. Caudill testified that the Hazard Number 4 seam at tower site and immediate area was almost completely removed in surface mining in the 1990's and was completed no later than the year 2000.

He stated that the Whitesburg seam of coal was completely deep mined under the proposed tower location and the immediate areas through a couple of deep mines. The final map in connection with the deep mining was signed February 27, 1990, so that mining is completed for some 20 years. (Caudill, Pp. 49-51)(Ex. 7).

Thus, both mineable seams of coal on the proposed site have been completely removed, and there is none left to cover. (Caudill, P. 67).

As a result, Mr. Caudill saw no problems with the construction of the tower on the EKN site as the coal was already removed and there was sufficient cover and support left in the old works from the remaining pillars of coal in the old mine works, with about 40 to 50 feet of the original rock cover over that, and further 60 to 70 feet of backfill material from the previous surface mining to the surface. (Caudill, Pp. 52-53).

He testified that there is sufficient support in the mine pillars remaining to hold up the rock and the overburden and that the old mine works will “not crush out.” Additionally, he said there is 70 feet of overburden on top of the old works that would cushion and dampen the effects on the surface. (Caudill, P. 54).

He noted that there are coal mines all over Eastern Kentucky and this type of issue exists where you build a tower almost any place in the area, and that it was a common practice to build a tower in a place like this, and was aware of other such towers. (Caudill, P. 54-55).

At the hearing, Mr. Caudill said there was no surface mining underneath the Alternate No. 1 site which was undisturbed as far as surface mining goes at that particular location. The Hazard No. 4 seam and the Whitesburg seam beneath Alternate Site 1 were previously deep mined. (T.E., P. __).

Mr. Caudill noted that future mining plans by Sapphire Coal Company and shown on Ex. 9 involves contour and auger mining to the southwest of the proposed tower site by some 3500 to 4000 feet (Depo., P. 63). Further, he stated that based on the maps, the proposed mining is closer to Alternate Site No. 1 than it is to the proposed EKN site. (T.E., P. 78).

In connection with blasting, Mr. Caudill testified that blasting at the 3500 to 4000 feet distance from the site, same should not affect EKN’s tower at all. (Caudill, P. 63).

He noted also that the blasting area buffer contained in the mining regulations, does not prevent mining around cell towers and other structures, but creates restrictions on the amount of the load that the blaster may use as operations progress toward a tower.¹

Mr. Caudill noted that Sapphire recently obtained a surface coal mining lease (actually around August 17, 2009) for Alternate Site 1 and all of the surface/auger mineable coal that was left on Tract No. 8. (T.E., P. 78). The area in Sapphire's newly acquired lease is closer to Alternate Site 1 than to the propose site. (T.E., P. 79).

In his rebuttal deposition filed herein on the ____ day of September, 2009, Mr. Caudill confirmed that the Lee Etta Cummings' coal and surface lease tract to Sapphire Coal indeed embraces entirely her Tract No. 8 which encompasses Alternate Site 1 and the rest of the tract. He stated that the distance from the leased tract to the tower site selected by EKN is 485' (Caudill Rebuttal Depo). He emphasized the importance of that measurement:

Q. So Sapphire, based upon this distance could not mine any closer to the tower site (proposed) then 485 feet if it mines to the limits of its leased boundary with Lee Etta Cummings...?

A. That is correct. Again, there should be no adverse consequences at all if Sapphire follows its blasting regulations nor should the tower location affect its (Sapphire) ability to recover any of the coal in the leased tract.

Mr. Caudill noted in his testimony that with respect to the area near the EKN proposed site, Sapphire's mining maps show no mining. (Caudill, P. 64). He stated that Sapphire's engineer, Fred Webb, discussed by telephone with him some possible (but questionable) mining within three small areas closer to the proposed tower site, one about 500 feet from it,

¹ Reference 405 KAR 16.120 regarding submission of blasting plans near utility facilities.

and another about 1500 feet, and another about 2000 feet from the tower. These are previously mined areas not displayed on the map and their mineability is therefore questionable.

Mr. Caudill testified that even with respect to these “iffy” mining areas near the tower that might (if ever) be mined later; the amount of coal recoverable from such areas should not be affected on account of the presence of EKN’s tower. It may make the recovery effort slightly more expensive by reducing the size of the shots, is all. (Caudill, P. 66).

Mr. Caudill explained that always, everyday, and around us, coal companies are mining near some structure or other, and almost all shots are weighted accordingly as a method of common practice. (Caudill, P. 66).

3. DIXON NUNNERY. Dixon Nunnery is a licensed appraiser and testified in accordance with his written report of May 14, 2009 filed in the record. The purpose of his evaluation of the site is to calculate what change, if any, results to Tract No. 7 (the Cummings/Fields co-owned tract) and Tract No. 8 (Lee Etta Cummings’ tract) by reason of the adjacent tower site. He estimated that -0- resulted to the Tract No. 8 (55 +/- acres) and that its estimated market value before was \$65,000.00 and exactly the same after such construction.

With respect to Tract No. 7 (43 +/- acres) he estimated the fair market value as \$52,000.00 before and \$45,000.00 after such taking, for a difference of \$7,000.00, awarded one-half or \$3,500.00 to Ms. Cummings. Mr. Nunnery characterized the “highest and best use” of the subject tracts, due to its isolated location, access, limited access, and no infrastructure, as “recreational and/or pasture land”.

4. **WILLIE PRATER.** Willie Prater is also a license appraiser. His report is dated May 18, 2009. Mr. Prater also found no resulting damages as to Tract No. 8 of Ms. Cummings, which he valued at \$68,000.00, both before and after the taking. As to Tract No. 7, he assigned a \$55,000.00 before value and an after value of \$46,000.00 for a difference of \$6,000.00, and halved this amount and assigned \$3,000.00 to Ms. Cummings. Mr. Prater found the highest and best use of the property to be for hilly woodland for mining or some other type of development in the future if access is improved and if the demand increases.

EVIDENCE OF THE INTERVENOR, LEE ETTA CUMMINGS

1. **VANCE MOSLEY.** Mr. Mosley is a license appraiser, and his report is dated April 15, 2009. Mr. Mosley estimated the value of the property at \$200,000.00 before the tower and \$150,000.00 after construction for a difference of \$50,000.00. He noted the tract as containing 42 acres and Ms. Cummings' ownership at 50%, which of course would be \$25,000.00 (or ½ of the \$50,000.00). He stated the highest and best use of the property is commercial/residential. No appraisal is offered as to Tract No. 8.

2. **MICHAEL CORNETT.** Mr. Cornett has no professional qualifications or experience stated other than the witness does business as C & C Construction in Cornettsville, Kentucky, and his report is dated September 16, 2009. An estimate is attached on an invitation to bid for the construction of 1000' x 12' road to the proposed Alternate Site 1. He estimated that there would be no need for "ditches or pipes" as the road is constructed along the ridge. He gave an estimated ("low") of \$5,200.00, and a high estimate of \$6,800.00, should rock be encountered and need to be hammered. Notably, his report does not state that he visited or inspected the site.

3. **LEE ETTA CUMMINGS.** Lee Etta Cummings testified that she is the owner of Alternate Site 1. She admitted that it is a possibility that Alternate Site 1 could be on Mr. Brown, on her property or no both if the site were used as both property owners' boundary to a point on the ridge. She testified that in addition to the \$40,000.00 to \$50,000.00 she felt she would lose in devaluation of the property, that there are 50,000 plus estimated tons of coal that could be impacted at the rate of \$3.00 per ton or more for a potential \$150,000.00 to \$150,000.00 loss. She claims that this particular loss is related to her individually and not the jointly owned property she holds with Ms. Fields (T.E., P. 128).

The Intervenor admitted that the alleged federal prison site she hopes to attract to her property actually involves 40 + acres and in order to be developed would require agreement with several different property owners, and not her alone. (T.E., P. 129).

4. **FRED WEBB.** Mr. Webb is the chief engineer of Sapphire Coal Company. Mr. Webb admitted in his direct testimony of September 16, 2009 that Sapphire Coal entered into a Coal Mining Lease with Ms. Cummings on August 17, 2009 for her mineral and coal and that it planned to mine on her property near Alternate Site 1. (T.E., P. 87). He estimated the recoverable tons on the Cummings' tract at 54,445 tons. He estimated 100% loss of this amount of coal if the contract blaster, Virginia Drilling, refuses or resistant to blasting in the prescribed area. He claimed his company would need to blast within 25' of the proposed tower location in order to recover the coal from Ms. Cummings' tract. He indicated that the abandoned mine could potentially collapse due to the blasting and bring down the tower.

Mr. Webb admitted that he prepared the "Alternate Tower Location" submitted by Ms. Cummings. He felt that due to the negative affects of recoverable coal on the Cummings' Tract,

if left at the proposed location and its interference with the mining plan of Sapphire, that the Commission rules that EKN move the tower to Alternate Site 1 as a permanent location.

Interestingly, with respect to, and in conflict with his testimony as to his concerns about the proposed EKN site being built over abandoned mine lands, Mr. Webb testified in his deposition that:

“Towers are relatively new and usually follow in the footsteps of mining, not before. I have seen several towers go up after mining was completed and the site reclaimed, but none before.”

That happens to be the very situation in this case – mining is completed on the proposed location site, while some 50,000 tons remain nearer to the Alternate Site 1 (about 250’).

At the hearing, on cross-examination, Mr. Webb could provide the Commission no date as to when Sapphire Mining in the areas would begin. He admitted that Sapphire had no mining permit for its planned future mining on the Lee Etta Cummings’ Tract No. 8, and could not say when or if a permit would be issued, and noted substantial questions pending regarding surface mining permits by reason of the policies of the Corp of Engineers. He admitted the possibility that because of these problems it is possible that the area would not be mined at all. (T.E., P. 84).

Mr. Webb admitted that all of the planned mining was basically a “clean-up operation” to recover coal that was remaining from prior mining, and that both of the tower sites had been mined over. (T.E., P. 95). This is especially true he stated of the area next to the proposed site on the Cummings/Fields property where only 5,000 tons remain, and that mining in this area was merely a possibility.

With regard to blasting, he admitted that mining around structures is a common practice in Eastern Kentucky, and has dealt with such conflicts many times before with respect to structures, residences, gas wells and so forth. He admitted that a blasting waiver, if presented to his blasting contractor, would solve the problem. (T.E., P. 97). He further admitted that the blasting regulations do not prevent the recovery of coal, but provide that the operator must reduce the amount of charge for such purpose as it nears the tower. (T.E., P. 98).

Mr. Webb admitted that Ms. Cummings and her co-tenant did not own the coal on the Fields/Cummings Tract. That coal is leased from others. He admitted also that the company has no permit on this tract, nor does it have a lease on the tract from Cummings/Fields. He admitted that he could not tell the Commission that it was even likely that this tract would be mined. He said there is only about 5,000 tons at most recoverable coal on it and that is questionable. (T.E., P. 101-103).

5. DUANE LESTER of Kinzer Drilling. Mr. Lester testified that under his company's agreement with Ms. Cummings for the Lease of her gas mineral, his company was required to move the gas lines one time at its own expense. Admittedly, the gas lines that interfered with EKN's initial evaluation of Alternate Site 1 appear to have satisfactorily been resolved as to the relocation question, and consideration of same by the PSC herein is now moot.

ARGUMENT

The Applicant, EKN, has carried its burden of proof here in support of its Application. Its evidence herein, as summarized above shows the public necessity and convenience that will be served by construction of the project at this site. Similarly, the evidence presented establishes

all jurisdictional safety issues, the design, engineering, construction and the suitability and preparation involved for the proposed Cell Facility. It is noted that the Intervenor presented no evidence to the contrary. Nonetheless, we point out that EKN clearly carried its burden of proof as to these matters.

Likewise, the evidence concerning co-location was not rebutted, and EKN further established that co-location, which is generally preferred, was not an option in this case because there were no other facilities in the area.

The evidence is also clear that EKN explored various sites in the area, and seriously looked at two others, including the area on top of the ridge where the Alternate Site 1 was investigated both on the grounds, and by review of data including the old mine maps and various other data. Alternate Site 1 was rejected at the time, long before this controversy here began, because the use of it entailed substantial additional environmental damage to a steep rocky undisturbed area, the presence of gas lines (which issue is now moot), ownership in the affected area by multiple landowners and particularly access problems which required building an expensive stretch of road to a difficult site that would present problems and hazards in use and maintenance.

At this date, it is a pure waste to require the Applicant to go through the whole application process again as to Alternate Site 1, and only delays and frustrates the serious needs of the public for cell service.

The regulation stated above does not require that the selected site be the only site available or that it be the best site, but only that it be a "suitable location" so that it may be

reasonably concluded by the utility that there is “no more suitable location *reasonably* available.”

In light of the problems and extra expense involved at Alternate Site 1, as documented in the evidence herein, it may not be said that it is a “more suitable location” that is “reasonably available” to provide coverage to the targeted area. The factors mentioned above can safely rule it out by the criteria of the applicable regulation.

Further, with respect to the claimed loss of value and land use by Ms. Cummings, there is absolutely no reason for the Commission to deny EKN’s Application on such grounds. This entire area is mined over, reclaimed strip mined land which contains no commercial, residential or other structures and buildings that could possibly be affected by the presence of the tower. That’s what it was before the tower site was planned, and that is the use of the entire area, including the Cummings’ Tract after construction.

Both of EKN’s appraisers found only nominal negative affect as to Ms. Cummings’ land from the tower with respect to Tract No. 7 and none as to Tract No. 8. The relatively large amount of damages awarded by her appraiser, Mr. Mosley, must be taken with a grain of salt because he characterized the highest and best use of the property as commercial, when in fact there is absolutely no commercial development in this area, and it is all lying vacant since reclamation in the year 2000.

We note that Ms. Cummings is the only affective landowner who protests the site location – even her co-tenant, Ms. Fields, did not join with her in her protest. Presumably, if the tower site impacted all of the affected landowners to the amount of monetary loss as claimed by Ms. Cummings, all of them would be lined up to intervene in this case. None did.

No competent evidence has been presented herein that a federal prison is headed to Letcher County in the near future, and certainly none presented that this particular site is designated for any such development. In addition, there is absolutely no evidence that the small tower site, which takes up only one-half acre of this vast mountain area, would in and of itself prevent or even slightly interfere with its selection for an entire prison complex.

The Commission may rest assured that if it were otherwise, the County Judge of Letcher County would quickly have intervened in this action on behalf of the citizens of Letcher County. No member of the general public intervened herein to voice even the slightest outcry against the selected site.

The above statute and regulation do not enumerate mining development as one of the required considerations in a CON application. No competent evidence was introduced by the Intervenor that the tower site of EKN prevents such use of her land or in any manner reduce the value of the land. It should be noted that no appraisal evidence whatsoever was presented as to this point, and the appraisals that were submitted herein are explicitly limited to the surface land. Obviously, since Ms. Cummings leased Tract No. 8 for coal mining purposes, a mere 2 months ago, including the Alternate Site 1, she anticipates the use of her land for both purposes, coal mining and a tower site. She should not be heard to complain that the EKN site somehow interferes with the use of her property for mining development when she has executed recently a coal mining lease on the very tower site (Alt. No. 1) that she proposes for construction of a cell tower. These actions are in contradiction, and the Commission should consider this anomaly, and others in her position, in reviewing this matter.

Both engineers acknowledge that blasting regulations do not prevent mining near a cell tower, but simply accommodate same for safety purposes by reducing the amount of charge in the blast as the tower is approached. Both engineers acknowledge some increase in the expense of mining due to the regulations but agree that the coal may be recovered if such regulations are followed.

Therefore, the record discloses loss of mining reserves resulting from the presence of the tower at its selected site.

The erection and construction of the tower has not begun work to date is in preparation of that eventually. Therefore, EKN is not in violation of the regulations against construction in advance of the approval of CON.

The evidence herein demonstrates that EKN's Application is complete and technically correct in all aspects, as required by the applicable law. The selected site provides "excellent" coverage, and you cannot improve on excellence. It should be noted that the NEPA report filed herein, as related by Marty Thacker, is an extremely thorough investigation of the selected site, and was submitted to the FCC, which has approved construction of the tower on this site within its jurisdictional limits. This honorable Commission should do the same.

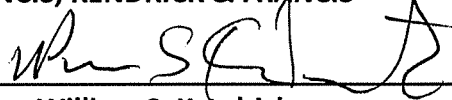
The reality of the situation here is that no planning authority exists for Letcher County, and this Commission has no jurisdictional authority over private landowner conflicts mineral versus surface use and estates, which are at the heart Ms. Cummings' complaints here. Her remedy lies not with the Commission but with the government authority of Letcher County and its Courts.

CONCLUSION

For the reasons stated above, the Certificate of Need applied for by EKN herein should be granted.

Respectfully submitted,

FRANCIS, KENDRICK & FRANCIS

BY:  _____

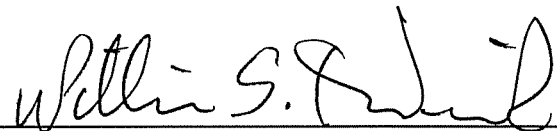
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Memorandum Brief was served upon the following on this 11th day of December, 2009:

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