

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

**MOTION TO STRIKE PORTIONS OF THE TRANSCRIPT OF EVIDENCE
AS TO THE WITNESS, FRED WEBB, AND AFFIDAVIT IN SUPPORT THEREOF**

Comes the Applicant, East Kentucky Network, LLC d/b/a Appalachian Wireless, by the Affidavit of its Counsel, William S. Kendrick, and states in support of the above Motion as follows:

A portion of the testimony of Fred Webb, P.E., should be stricken from the Transcript of Evidence, by reason of the fact that subsequent evidence shows such testimony to be inaccurate based on the attached map and notations thereon by J.W. Caudill, and dated December 10, 2009 (Exhibit "A").

The portions of the testimony to be stricken are marked upon the applicable pages from the Transcript at Exhibit "B".

In short, we believe that upon the basis of the map at Exhibit "A", Mr. Webb's testimony as to the existence of 150' solid block of coal underlying the Alternate Site 1 is incorrect.

This evidence came forth only recently, and could not have been produced at the hearing. In fact, Mr. Webb, as shown by the attached Transcript of Evidence, admitted that the initial map of Sapphire Coal Company, that was originally produced, was on such a small scale that the block of coal could not be detected, or at least that is what we take his testimony to mean.

At any rate, at the hearing, Mr. Webb did in connection with questioning from counsel, view and testifies from the map that was introduced by EKN as Exhibit 9 to the J.W. Caudill Deposition. It was on this map, which is a Sapphire Coal Mining map supplied to Mr. Caudill by Mr. Webb that Mr. Caudill, at the hearing, marked and designated the location of Alternate Site 1 and the proposed site during his testimony.

On or about December 9, 2009, in connection with preparation of the brief of the Applicant herein, the undersigned contacted PSC counsel, Hon. Allyson Honaker, and requested a reduced size version of the said Exhibit 9, which she furnished the same date in a scanned copy of the exhibit to the undersigned counsel. A copy of said map from the record and furnished to counsel by Ms. Honaker is attached hereto and made a part hereof as Exhibit "C".

Sure enough, on the face of it the map of Sapphire Coal Company does not depict the old mine works in a readable form, just as we interpret Mr. Webb's testimony about same as mentioned hereinabove.

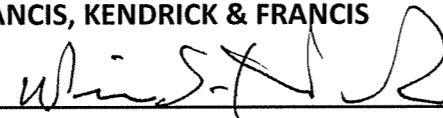
However, Exhibit "A" by Mr. Caudill depicts the old mine works referred at Exhibit 9 on a much larger, legible scale. The explanatory notes confirm to our satisfaction that Alternate Site 1 at the latitude and longitude given for same does not appear to be located on such a block of coal. The explanatory notes refer to an irregular shaped larger block of coal about 150' to the southeast of the Alternate Site 1. These notes also present questions as to the ownership of that particular area.

We admit surprise at the hearing on our part regarding Mr. Webb's testimony about the existence of the solid block of coal. However, we point out that same is not mentioned anywhere in his direct testimony of September, 2009 (Exhibit "D"), and his revelation

concerning this matter in his testimony at the hearing could not have been anticipated. Nor was there an opportunity to cross-examine him about it by reason of the small scale of the map. On the basis of the above, and in the interest of accuracy and correctness of the record, so that the PSC shall not use erroneous testimony and evidence herein with regard to the decision it is required to make in this matter, counsel respectfully requests that Mr. Webb's testimony on this subject and shown at Exhibit "B" be stricken from the record.

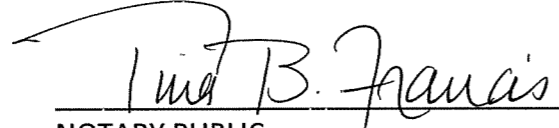
Counsel wishes to emphasize that he does not believe and does not even remotely imply that Mr. Webb's testimony is a misrepresentation on his part, but only that he may well be mistaken in his testimony.

WHEREFORE, the proper orders of the Commission are requested.

FRANCIS, KENDRICK & FRANCIS
BY: 
William S. Kendrick
Counsel for Applicant
311 North Arnold Avenue
P.O. Box 268
Prestonsburg, Kentucky 41653
606/886-2812
606/886-8833 – Fax

STATE OF KENTUCKY
COUNTY OF FLOYD

Subscribed and sworn to before me by the Affiant, William S. Kendrick, this 11th day of December, 2009.

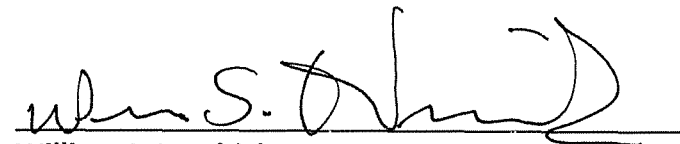

NOTARY PUBLIC
Commission Expires: 7-4-2012

CERTIFICATE OF SERVICE

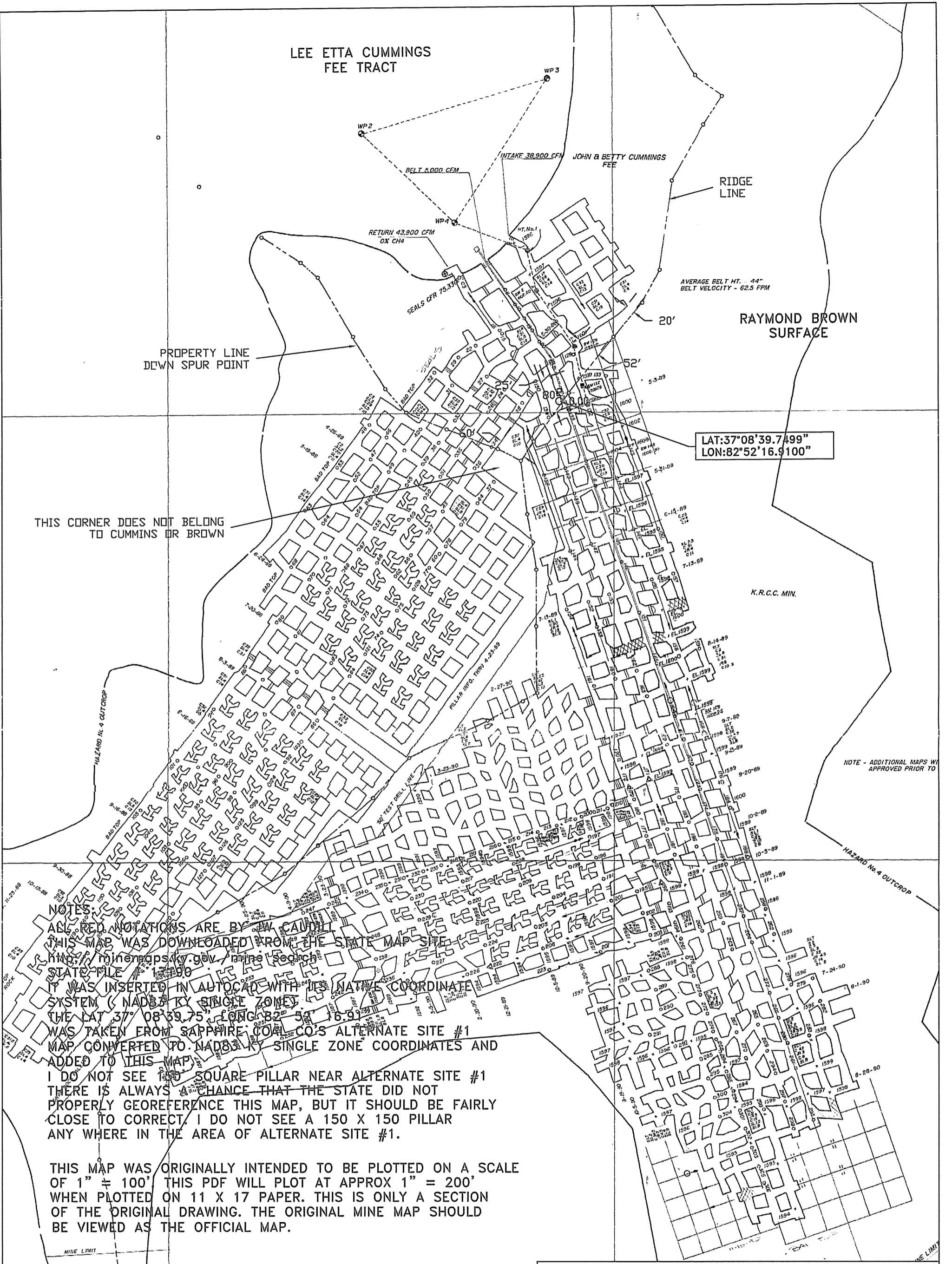
This is to certify that a true and correct copy of the foregoing Motion was served upon the following on this 11th day of December, 2009:

Hon. Nora J. Shepherd
P.O. Box 300
Richmond, Kentucky 40476-0300

Hon. Allyson Honaker
Counsel for Public Service Commission
211 Sower Blvd.
Frankfort, Kentucky 40602


William S. Kendrick

LEE ETTA CUMMINGS
FEE TRACT



LAT:37°08'39.7499"
LON:82°52'16.9100"

THIS CORNER DOES NOT BELONG
TO CUMMINS OR BROWN

NOTE - ADDITIONAL MAPS W/ APPROVED PRIOR TO

NOTES:
ALL RED NOTATIONS ARE BY JW CAULLI
THIS MAP WAS DOWNLOADED FROM THE STATE MAP SITE
<http://minemaps.ky.gov/mineSearch>
STATE FILE # 17190
IT WAS INSERTED IN AUTOCAD WITH ITS NATIVE COORDINATE
SYSTEM (NAD83 KY SINGLE ZONE)
THE LAT 37° 08' 39.75" LONG 82° 52' 16.91"
WAS TAKEN FROM SAPPHIRE COAL CO'S ALTERNATE SITE #1
MAP CONVERTED TO NAD83 KY SINGLE ZONE COORDINATES AND
ADDED TO THIS MAP
I DO NOT SEE THE SQUARE PILLAR NEAR ALTERNATE SITE #1
THERE IS ALWAYS A CHANCE THAT THE STATE DID NOT
PROPERLY GEOREFERENCE THIS MAP, BUT IT SHOULD BE FAIRLY
CLOSE TO CORRECT. I DO NOT SEE A 150 X 150 PILLAR
ANY WHERE IN THE AREA OF ALTERNATE SITE #1.

THIS MAP WAS ORIGINALLY INTENDED TO BE PLOTTED ON A SCALE
OF 1" = 100' THIS PDF WILL PLOT AT APPROX 1" = 200'
WHEN PLOTTED ON 11 X 17 PAPER. THIS IS ONLY A SECTION
OF THE ORIGINAL DRAWING. THE ORIGINAL MINE MAP SHOULD
BE VIEWED AS THE OFFICIAL MAP.

APPALACHIAN WIRELESS

DRAWN JWC	DATE 12/10/09	W & P COAL CO MINE #2 UNDERGROUND MINE MAP HAZARD #4 SEAM MAP DATED 11/19/90
APPROVED	DATE	
SCALE 1" = 200'	SHEET 1 OF 1	PROJECT NO. DRYFORK/17190B

EXHIBIT
A

1 and you heard J.W. Caudill testify with respect to the
2 exhibit map that was put in the record here today; is
3 that correct?

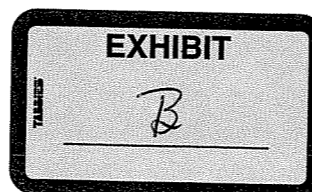
4 A. That's correct.

5 Q. And do you have any problem with anything that he
6 testified about there?

7 A. Well, I'd like to clarify one thing. The Alternate
8 Site No. 1 - there's a solid block of coal in that No.
9 4 seam in that abandoned mine that's directly under
10 Alternate Site No. 1. It's about a 150 foot block.
11 That's part of why we suggested Alternate No. 1. The
12 Whitesburg seam has not been undermined under that
13 block. The problem with - the first maps we submitted
14 were on a small scale and that dot was about 200 foot
15 in diameter, and, when you put it on a larger scale
16 map, it just covered deep mines, but the point we
17 intended - and, if you look carefully at the center of
18 that dot, it does hit in a solid block of coal in that
19 old deep mine.

20 Q. So, if I understand your testimony, you're saying it's
21 better to locate the tower on Alternate Site No. 1
22 where there remains some recoverable coal reserves in
23 the Hazard #4 seam. Is that what you're telling us?

24 A. Well, this block of coal in the Hazard No. 4 seam is
25 inaccessible. It's surrounded by old deep mine works.



1 A. No. Most of the year. I'm not certain.
2 Q. Okay, but it wasn't something that just took place
3 August?
4 A. No.
5 Q. There had been talks about this prior to that?
6 A. Right. Yes.
7 Q. And you were testifying about Alternate Site No. 1 that
8 there's, apparently, I think you said, a 150-foot block
9 of coal that was inaccessible; is that correct?
10 A. Yes. There's a solid block of coal underneath.
11 Q. In the Whitesburg seam? Is that what you said?
12 A. Well, the Whitesburg hasn't been mined under Alternate
13 No. 1. The solid block is in Hazard No. 4, which is
14 over top of the Whitesburg, but it's underlying
15 Alternate No. 1.
16 Q. Okay, and you said that was inaccessible?
17 A. Yes.
18 Q. Why - how is that inaccessible?
19 A. The deep mine almost wraps around it. It's in such a
20 form that it wouldn't be touched.
21 Q. Okay.
22 A. MSHA wouldn't allow us to deep mine that close to an
23 abandoned mine.
24 Q. Okay, and you would have to deep mine in order to get
25 that remaining block of coal?

1 A. No.

2 MS. HONAKER:

3 I have nothing further at this time, Your Honor.

4 VICE CHAIRMAN GARDNER:

5 Ms. Shepherd?

6 MS. SHEPHERD:

7 Just a little bit, Your Honor. I think she
8 covered most of it.

9 REDIRECT EXAMINATION

10 BY MS. SHEPHERD:

11 Q. Mr. Webb, you testified about that core of coal left at
12 Alternate Site No. 1; correct?

13 A. Correct.

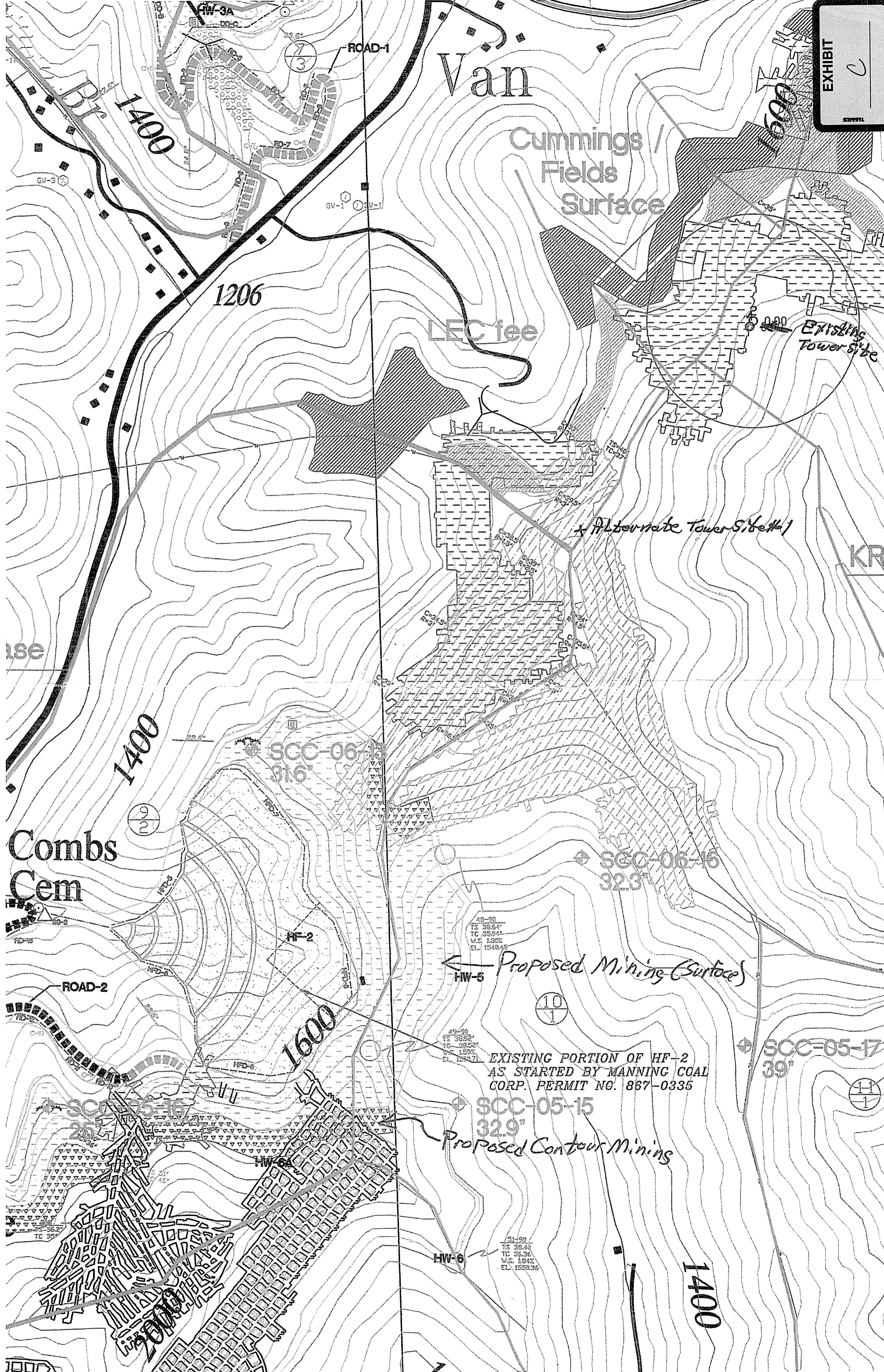
14 Q. Why is that such a big deal to you versus the proposed
15 tower site?

16 A. Well, the tower would be on solid rock all the way
17 down. There would be no chance of subsidence from the
18 nearby blasting.

19 Q. And that's a concern with their proposed tower site; is
20 that correct?

21 A. Yeah. We can just be uncertain of the effects the
22 blasting might have on the abandoned mine.

23 Q. Would that potential for subsidence and danger to the
24 tower, would that come into play with any of your
25 blasting permits or your mining plan permits? Would



Van

Cummings /
Fields
Surface

LEC fee

Alternate Tower Site #1

Existing
Tower Site

KRF

Combs
Cem

Proposed Mining (Surface)

EXISTING PORTION OF HF-2
AS STARTED BY MANNING COAL
CORP. PERMIT NO. 867-0335

Proposed Contour Mining

1400

1600

1400

1206

1400

1500

ROAD-1

ROAD-2

HW-6

HW-6

HF-2

HW-5

SCC-06-13
316'

SCC-06-16
323'

SCC-05-17
39'

SCC-05-15
32.9'

SCC-05-16
25'

49-90
TS 38.64'
TC 35.04'
W.S. 1302'
EL. 1548.15'

49-90
TS 38.64'
TC 35.04'
W.S. 1302'
EL. 1548.15'

51-90
TS 38.40'
TC 36.36'
W.S. 1304'
EL. 1550.36'

1000

DIRECT TESTIMONY OF FRED WEBB
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION
CASE NO. 2009-00064

I. INTRODUCTION

Q. Please state your name and business address.

A. My name is Fred Webb. My business address is 147 Big Blue Boulevard, Whitesburg, KY 41858.

Q. By whom are you employed and what is your position?

A. I am Chief Engineer at Sapphire Coal Company.

Q. Please outline your work experience.

A. I have been involved in mining engineering since 1980.

Q. What is your educational background?

A. I have a degree in Civil Engineering from the University of Kentucky.

Q. Have you previously testified before regulatory commissions?

A. No.

Q. What is the purpose of your direct testimony?

A. To discuss the negative impact regarding loss of coal on the Cumming's tract located at Smoot Creek in Letcher County in East Kentucky Network/Appalachian Wireless is successful in placement of a cellular tower at that proposed location.

II. LEASE AGREEMENT

Q. Does Sapphire Coal have a current coal mining lease with Ms. Cummings?

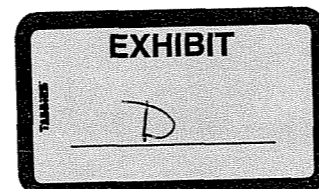
A. Yes, on 8-17-09 Sapphire Coal Company leased Ms. Cumming's mineral and has plans to mine the coal on her property adjacent to the proposed tower location at Smoot Creek.

Q. Are you prepared to share your calculations of remaining/recoverable tons of coal in place on the Cumming's tract?

A. Yes, the remaining/recoverable tons on the Cumming's tract is 54,445 recoverable tons.

Q. Are you familiar with the May 27, 2009, letter generated by Sapphire Coal Company's President, John Schroder, to Gerald Robinette, general manager of East Kentucky Network?

A. Yes.



Q. Can you further explain the concerns Sapphire Coal Company has with leaving the tower at the location proposed by Eastern Kentucky Network?

A. Leaving the tower at the proposed location would so limit blasting, mining would be impractical, uneconomical. The key problem with the proposed tower location is it overlies a previously mined area. There is less than 100' of cover and there is an abandoned deep mine directly under the proposed location. The blasting is guaranteed to cause settling and subsidence.

Q. Can you identify loss of coal on Cumming's tract if the tower is left at the proposed location?

A. The loss from our point of view would be 100% if Virginia Drilling, our blasting subcontractor, is resistant to blast.

Q. You received a letter dated May 20, 2009, from Gerald Robinette, CEO of East Kentucky Network, which discussed the possibility of East Kentucky Network granting a blasting release?

A. Yes.

Q. Are you aware of any signed blasting release, waiver of liability or any agreement between Sapphire Coal Company or your blasting subcontractor and East Kentucky Network/Appalachian Wireless that would permit you, at least as far as East Kentucky Network is concerned, to blast within 25 feet of the proposed tower location?

A. No.

Q. Would your company need to blast within 25 feet of the proposed tower location in order to recover the coal from the Cummings' tract?

A. Yes.

Q. Are you aware of other any other coal companies that have signed waivers to blast within 25 feet of a cellular tower?

A. No. I consulted with other coal companies, TECO, Nally and Hamilton, and Pemier Elkorn, none of which have ever blasted near a tower. 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.

Q. If blasting is permitted within 25 feet of the proposed tower location should there be any reason for concern?

A. The reason for concern for blasting within 25 feet of the proposed tower location is not the direct impact on the tower which is probably designed to withstand the mild airblast, but the effects of the blast on the abandoned underground mine. We can't be certain of the mine's condition. We can't inspect the mine. Therefore, we can only assume the nearby blast will likely

cause some collapse. The collapse will certainly affect the roof of the mine, and it will set down some. Just how much movement will occur, we can't be sure. Cracks and subsidence will likely occur. It is the subsidence that will ultimately bring down the tower in the end. Again, we are not doubting the tower can stand the effects of the blast. We are worried about the abandoned underground mine located about about 50' below this tower and its effects on the tower.

Q. Did Sapphire Coal Company assist Ms. Cummings in generating alternate tower site locations that will not interfere with Sapphire's mining plan or recovery of coal from Cummings' tract?

A. Yes.

Q. Was the attached topo map entitled "Alternate Tower Location" prepared by you?

A. Yes.

Q. Do you adopt the attached topo map as part of your testimony to the Commission?

A. Yes.

Q. Are you familiar with Alternate Site #1 on the map entitled "Alternate Tower Location?"

A. Yes.

Q. If Alternate Site #1 was selected as the permanent tower location would Sapphire Coal Company have the same concerns regarding the mining plan and blasting?

A. No.

Q. If Alternate Site #1 was selected as the permanent tower location would there be the same issues with loss of coal on the Cummings' tract?

A. No.

Q. Based on your credentials as a PE, PLS and Chief Engineer at Sapphire Coal Company, would you prefer this tower be located at Alternate Site#1?

A. Yes. Due to the negative effects of recoverable coal on the Cummings' tract if the tower is left at the proposed location and interference of the proposed tower location with the mining plan of Sapphire Coal Company, I would request the commission rule that Appalachian Wireless move the tower to Alternate Site #1 as a permanent location.

Q. Does this conclude your testimony?

A. Yes.

I hereby verify that the foregoing testimony is true and accurate to the best of my knowledge and belief.

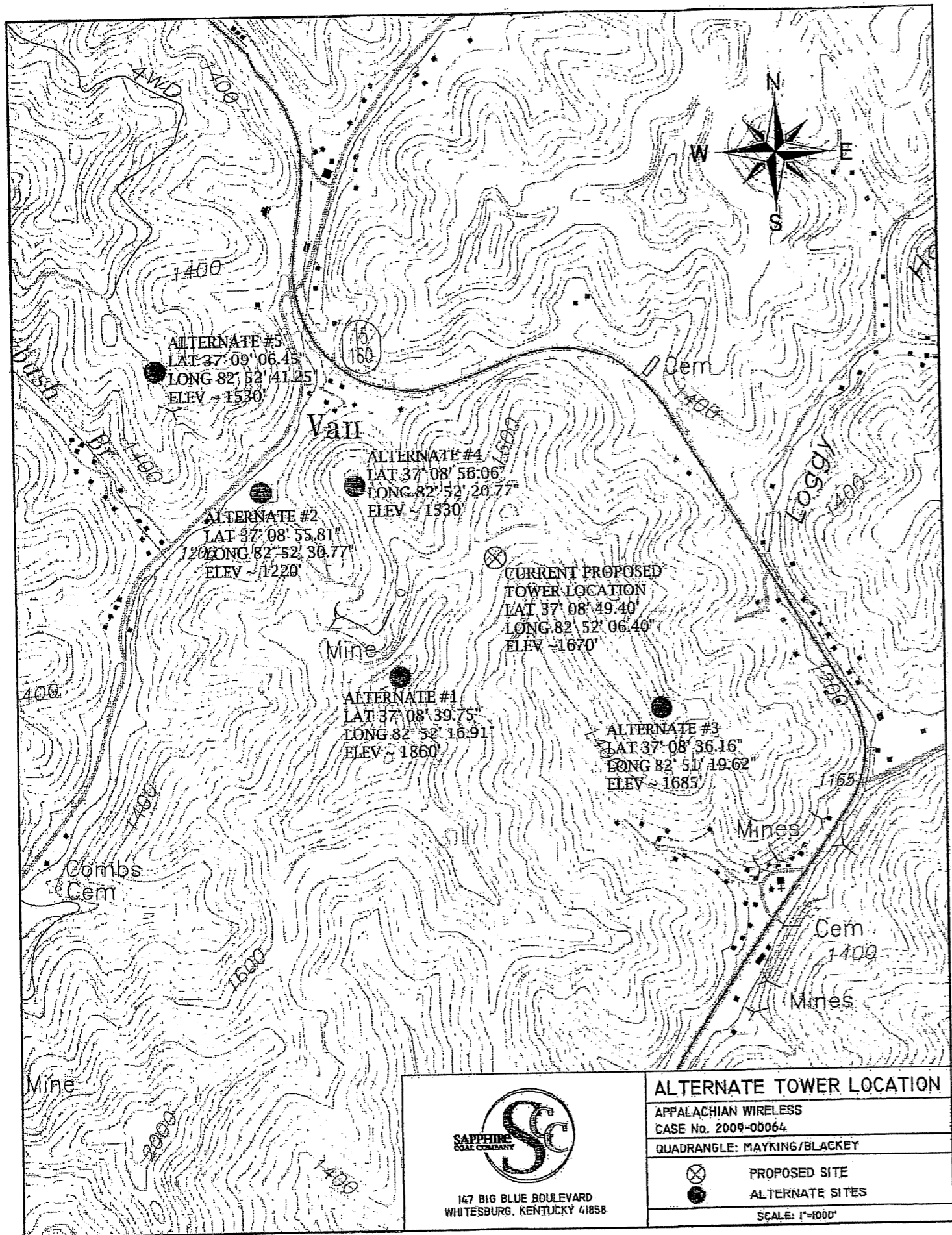
Fred Webb
Fred Webb,
Chief Engineer for Sapphire Coal

STATE OF KENTUCKY)
COUNTY OF LETCHER)

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me by Fred Webb, to me known, in his capacity as Chief Engineer for Sapphire Coal on this the 10th day of SEPTEMBER, 2009.

Clayton, Kentucky
Notary Public, State at Large

My commission expires 8-22-12




 147 BIG BLUE BOULEVARD
 WHITESBURG, KENTUCKY 41858

ALTERNATE TOWER LOCATION
 APPALACHIAN WIRELESS
 CASE No. 2009-00064
 QUADRANGLE: MAYKING/BLACKEY
 ⊗ PROPOSED SITE
 ● ALTERNATE SITES
 SCALE: 1"=1000'

COAL MINING LEASE

THIS COAL MINING LEASE (the "Lease") is made and effective this the 17th day of August, 2009 (the Effective Date), by and between Lee Etta Cummings, single, of P.O. Box 1254 Richmond, Kentucky 40476, hereinafter referred to as "Lessor", and Sapphire Coal Company, a Virginia corporation, with its principal office located at 147 Big Blue Boulevard, Whitesburg, KY 41858, hereinafter referred to as "Lessee".

WHEREAS, Lessor owns that certain property located in Letcher County, Kentucky, said property being more particularly described in Deed of Conveyance from John Cummings dated October 25, 1988 and recorded in Deed Book 289, page 255, in the Letcher County Clerk's Office ("Leased Premises"), and Lessor has the right to convey use of the Leased Premises to the Lessee in the manner described herein; and,

WHEREAS, Lessor desires to lease said Leased Premises to Lessee; and

WHEREAS, Lessee desires to lease said Leased Premises from Lessor.

WITNESSETH

NOW, THEREFORE, IN CONSIDERATION of the promises, the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Lessor and Lessee agree as follows,

Demise, Appurtenant Rights

1. Lessor hereby leases, lets and demises to Lessee:

(a) All of the mineable and merchantable coal in Whitesburg seam and all seams above the Whitesburg seam only, in, upon and under the Leased Premises, together with the right to use the surface overlying said property for mining purposes defined herein.

(b) The exclusive right to extract by all mining methods, including, but not limited to, deep, auger, contour and any other mining methods now being used in the coal industry and all methods that may be developed hereafter, all coal from all seams on the Leased Premises without liability for subsidence or

damage to the surface resulting from high extraction underground mining or "high-wall mining".

(c) The exclusive right to use the Leased Premises for any and all purposes appurtenant to mining on the Leased Premises or other lands including, without limitation, the construction and operation of portals, airshafts, drillholes, stockpile areas, haul roads, fill areas and ponds.

(d) The exclusive right to transport coal, earth, rock, men, machinery, equipment and supplies across the surface of the Leased Premises or through underground mine works on, to and from the Leased Premises or to and from any other lands owned by third parties.

Lessee understands that the oil and gas rights on the Leased Premises are currently leased out to other parties. Lessee agrees that its operations on the Leased Premises shall be conducted so as not to interfere with any existing or future drilled oil and gas well. Provided, however, Lessor agrees to allow gas pipelines be relocated to new locations on the Leased Premises in the event such pipelines interfere with the mining operations of Lessee.

2. Reservations: Lessor reserves all merchantable trees and timber upon the Leased Premises except those which Lessee cuts in the reasonable exercise of the rights granted it under this Lease.

3. No Warranty of Title or Acreage: Lessor hereby leases unto Lessee only such coal mining rights and surface rights and privileges as Lessor owns and has the right to grant or lease. This Lease is made without warranties of title, or covenants of rights to lease, or of quiet or peaceful possession, express or implied. In the event there should be any deficiency of acreage in the property, such deficiency shall not impose any liability upon Lessor or in any way affect any provision of this Lease, except that Lessee shall not be obligated to pay royalties to Lessor for any portion of the Leased Premises not owned by Lessor. Lessee shall take reasonable steps to assure itself of the sufficiency of Lessor's title prior to commencing mining operations on the Leasehold. In the event a question arises as to the ownership of the surface or mineral rights and Lessor and Lessee can not agree as to the rightful owner, Lessee agrees to pay all royalties to an escrow agent agreeable to the parties until such time as the surface or mineral title is determined by

the opinion of a reputable attorney or by a final judgment of a court of competent jurisdiction.

4. No Warranty as to Coal: Lessor makes no implied or express warranty or representation concerning the existence, quantity, quality, mineability or merchantability of the leased coal underlying the premises or title thereto, and Lessee acknowledges and agrees that no representations, statements or warranties, express or implied, have been made by or on behalf of Lessor regarding the premises, its condition, the use or occupation that may be made thereof or the income therefrom.

5. Term: The primary term of this lease shall be for a period of five (5) years from the effective date or until terminated as hereinafter provided. Provided there are no uncured defaults under this lease and further provided that Lessee is actively mining coal or hauling coal across the Leased Premises at the expiration of the primary term, the term may be extended for an additional five (5) years at Lessee's option by giving written notice to Lessor at least sixty (60) days prior to expiration of the initial term. At the end of the five (5) year extension, if any, provided there are no uncured defaults under this lease and further provided the Lessee is actively mining coal on or hauling coal across the Leased Premises, the term may be extended for an additional two (2) years at Lessee's option by giving written notice to Lessor at least sixty (60) days prior to expiration of the first extension period. Lessee may terminate this lease at any time during the first or second extension periods by giving written notice to Lessor at least sixty (60) days prior to termination.

6. Tonnage, Minimum Royalties and Wheelage

(a) For each ton of coal mined and removed from the Leased Coal Premises by underground mining methods, Lessee shall pay to Lessor Actual Royalty in the sum of seven (7%) percent of the Gross Sales Price of such leased coal or one dollar and fifty cents (\$1.50), whichever is greater. For each ton of coal mined and removed from the Leased Premises by strip mining methods, Lessee shall pay to Lessor the sum of ten (10%) percent of the Gross Sales Price of such leased coal or two dollars (\$2.00), whichever is greater. For each ton of coal mined and removed from the Leased Premises by the auger or highwall mining method, Lessee shall pay to Lessor twelve (12%) percent of the Gross Sales Price of such leased coal or two dollars and fifty cents (\$2.50), whichever is greater.