

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

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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,
IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF THE TRANSCRIPT OF
EVIDENCE OF THE WITNESS, FRED WEBB, AND AFFIDAVIT(S) IN SUPPORT THEREOF

Comes the Applicant, East Kentucky Network, LLC d/b/a Appalachian Wireless ("EKN"), by counsel, and for its Memorandum Brief in Support of its Motion to Strike (the "Motion"), states as follows:

At the hearing of October 6, 2009, Mr. Fred Webb, Professional Engineer, testifying for the Intervenor, stated as follows:

"Q. And do you have any problem with anything that he (J.W. Caudill) testified about there?

A. Well, I'd like to clarify one thing. The Alternate Suite No. 1 – there's a solid block of coal in that Hazard No. 4 seam in that abandoned mine that's directly under Alternate Site No. 1. It's about a 150 foot block. That's part of why we suggested Alternate No. 1. The Whitesburg seam has not been undermined that block. (T.E., P. 89. See also Exhibit "B" of the Motion for other portions of Mr. Webb's testimony related to the alleged block of coal directly underlying Alternative Site No. 1, sought to be struck. (T.E., P. 89).

Attached to this Memorandum as Exhibit "1" is a copy of the Alternate Site Map of Sapphire Coal Company, prepared by Mr. Webb, and previously filed in the record on or about May 27, 2009. This Alternative Site No. 1 referred to in the above quoted testimony of Mr.

Webb Alternate Site No. 1 is shown on such map as having an established location of "LAT 37° 08' 39.75", LONG 82° 52' 16.91", ELEV ~ 1860'"¹

According to Mr. Webb, this finding by him as to a solid block of coal remaining in the Hazard #4 seam works of that size is one of paramount significance:

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

A. Correct.

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

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

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

A. Yeah. We can just be uncertain of the effects the blasting might have on the abandoned mine." (T.E., P. 111).

However, the problem with Mr. Webb's entire testimony as to the existence of the 150' block of coal under the Alternate No. 1 Site is that nothing in the record supports Mr. Webb's conclusion. In fact, the discovery of subsequent evidence which was not available at the hearing squarely disputes Mr. Webb's testimony as to the existence of a 150' block of coal underlying Alternate Site No. 1.

The map of December 10, 2009, attached as Exhibit "A" to the Applicant's Motion to Strike and the comments (in red) of Mr. J.W. Caudill, P.E., RLS, thereon shows no such solid

¹ Alternative Tower Location Map at Ex. 1 hereof further shows the proposed EKN Tower Location, as well as other alternate sites which the Intervenor during the course of this matter appears to have abandoned as possible alternate sites.

block of coal “anywhere in the area of Alternate Site #1.” Mr. Caudill obtained this map from the State Map Site. (See Exhibit “A” of Motion).

The Affidavit of Mr. Caudill (Exhibit “E” to the Motion) states that some 150’ from Alternate Site 1 on his Exhibit “A” to the south or southwest there is a large barrier pillar block where the boundary lines of the Cummings’ tract, the Raymond Brown surface tract, and the property of an unidentified land owner converge at a common point, high on the ridge. (Exhibit “A”). In his Affidavit, Mr. Caudill notes that only about 60’ of this barrier block corners upon the land of Ms. Cummings (as shown upon Exhibit “A”), and that while the tower itself might fit in that small of a space “if it were flat, but due to shape and topography of the surface on this corner of land, a site adequate for construction of a tower could not be created (keeping the tower over solid coal) without use of the adjacent property which is owned by others.” (Caudill, Ex. E). That barrier pillar is not at Alternate Site No. 1 as shown on Mr. Webb’s Ex. 1 hereof.

Ex. 9 of Mr. Caudill’s direct testimony is entitled Mining and Reclamation Map – Sapphire Coal Company, and was supplied to Mr. Caudill by Mr. Webb which purports to show Sapphire’s planned mining in the area. Mr. Caudill used Ex. 9 at the hearing of October 6, 2009 in his testimony and marked thereon in his own handwriting the “Existing Tower Site” as well as “Alternative Tower Site #1”. A copy of the relevant portion of the Sapphire Mine Plan Map, Ex. 9 is shown at Ex. C of EKN’s Motion to Strike. However, as explained by Mr. Caudill in his Affidavit (Ex. E of the Motion) in reference to Ex. 9: “On this map, the mine entries and other details of the coal mine are not shown. An outline of the mine area is shown.” In short, the old mine works map that references date, pillars, entries, etc., are not shown. Whereas same are shown on map Exhibit “A” which is a copy of all the mining data and detail through November,

1990, when the mine was mined out in the Hazard #4 seam. Exhibit "A" unfortunately is not part of the record herein.

Nothing in the record herein supports Mr. Webb's testimony that the Alternate Tower Site #1 is located on the surface directly over a 150' solid block of coal. Not Sapphire's mine Map (Ex. 9) and not Webb's Alternate Site Location Map which does not and is not intended to show coal mining. Mr. Webb's pre-filed direct testimony also fails to mention the 150' square block of coal as a basis for his opinion that Alternate Site #1 is superior to that of the proposed site. Not so much as a single word appears on this subject in the record except Mr. Webb's hearing testimony. (Webb's direct pre-filed testimony appears at Ex. D of the Motion to Strike in its entirety). Nothing appears of record, except the bare unsupported testimony of Mr. Webb himself regarding the existence, location and, in his mind, the significance of the 150' solid block of coal.

Such bare testimony is insufficient for the purpose of admissible expert testimony and must be disallowed. The introduction of same is not permissible pursuant to KRE 702, which conforms to the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In order to admit such evidence, the trial court (the Commission here) must first engage in its role as "gatekeeper" to determine if the proffered testimony meets the necessary requirements of KRE 702 and the *Daubert* rule. See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), by which the *Daubert* rule is expanded to include technical and other specialized knowledge as well as scientific testimony by an expert as dealt with by *Daubert*. These cases should apply to Mr. Webb's area of expertise as a professional mining engineer here.

Daubert is much more than a simple statement from an expert saying that something is true. “As noted by the Kumho Court, neither Daubert nor the rules of evidence require a trial court ‘to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert’”. Goodyear Tire & Rubber Co. v. Thompson, Ky. 11 S.W.3d 575, 581 (2000). That is exactly the case here. No data (here mine maps) connecting Mr. Webb’s bare assertion to evidence of record exists here.

True, no objection was made to Mr. Webb’s testimony by counsel of EKN at the hearing. That is understandable, however, because prior to the hearing, in his pre-filed testimony Mr. Webb gave absolutely no indication of this assertion. Further, absolutely no evidence was introduced at the hearing which supports his contention as to the 150’ solid block of coal. Mr. Webb, if anyone, clearly was in a position to provide a map to show the previous mining in support of his assertion prior to the hearing. He apparently chose not to do so.

Likewise, no opportunity existed to cross-examine him about it because none of the maps in the record contain any information as to the 150’ solid block of coal whatsoever with which to cross-examine him.

CONCLUSION

On the basis of the record and the law as recounted above, the Commission should strike Mr. Webb’s testimony regarding the 150’ solid block of coal at all places it appears of record. Accordingly, the Applicant’s Motion to Strike should be GRANTED.

Respectfully submitted,

FRANCIS, KENDRICK & FRANCIS



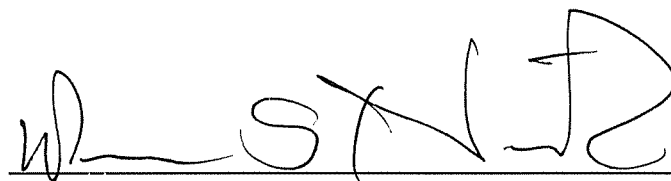
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was served upon the following on this 8th day of December, 2009:

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