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IN RE: CASE NO. 2009-00064

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

INTERVENOR: LEE ETTA CUMMINGS

REPLY BRIEF OF THE APPLICANT EKN  
REGARDING SUBSTRUCTURE OF TOWER SITE

For purposes of this Reply Brief, we will take no issue with the testimony of Fred Webb, the mining engineer for Sapphire Coal, at the hearing as to the possible existence of a solid block of coal of 150' underlying the surface of Alternate Site No. 1 in the old, abandoned deep mine in the Whitesburg seam of coal, and the Commission may assume that Mr. Webb's testimony on this issue is correct. However, we do take serious issue that the mere existence of such a block of coal in and of itself suggests that it makes Alternate Site No. 1 a "more suitable location that is reasonably available" in accordance with the applicable law. See 807 KAR 5:063(1)(s). Clearly, it does not, and Mr. Webb's testimony should have no material bearing in deciding whether EKN has complied with the foregoing regulation in selecting the site for which the CON is sought here.

Nowhere in the regulation is it required that the substructure under the tower site must consist of solid, undisturbed soil. If that is the standard for a "suitable location," then none exists on this mountainside (or on most of the mountains in Eastern Kentucky). Both sites at issue here overlay old abandoned mine-works. Alternate Site No. 1 is over deep-mine works left from deep mining in the Hazard #4 seam, and also deep mining in the Whitesburg seam

below it. The Hazard #4 seam has been completely surface mined on the EKN site, and the recoverable deep mine coal in the Whitesburg seam beneath it has been extracted. (Map Exs. 7, 8 and 9, Caudill).

Basically, the entire mountain has seen extensive mining and is honeycombed throughout with old abandoned mine works. J.W. Caudill, PE, emphasized this point in his testimony at the hearing. (TE, pp. 73, 74).

EKN has already stated in its original brief that Alternate Site No. 1 was rejected during the initial search for a suitable tower location back in the late summer of 2008 for sound reasons, including unnecessary environmental disturbance and the difficulty in cutting a safe road through rock to a steep problematic site, and the extra expense involved in such construction. Mr. Webb's testimony about the 150' block of solid coal does not correct any of these negative factors with regard to the Alternate Site. All of these negatives remain unchanged as to Alternate Site No. 1.

Mr. Caudill acknowledged at the hearing that both Alternate Site No. 1 and the EKN proposed site are suitable from the standpoint that each should be safe from blasting effects from the proposed mining because both are above adequate cover and support from pillars remaining in the underlying deep mine works.(TE, p.74). This statement was made by Caudill before and without reference to Mr. Webb's own testimony at the hearing about the existence of the 150' block of coal. Mr. Webb had not even taken the witness stand as yet to introduce his evidence as to the block of coal.

Thus, in reality the 150' block of coal is not a determinative factor either way as to the selection of a suitable tower site. EKN's selection of its site is based upon a comparison of the

sites in terms of their overall suitability for cellular coverage, construction and operations factors and the least environmental impact and the least presence on adjoining land as possible, given the conditions present with the available site which is that of mined over, reclaimed mountain land.

In choosing the EKN site, EKN is simply following the advice of Fred Webb himself propounded in his prefiled direct testimony:

“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 Elkon, 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 complete and the site reclaimed, but none before.*”

We agree. Mr. Webb’s reversal of course from this recommendation at the hearing to suggest moving the cellular tower to Alternate Site No. 1 is most puzzling. That site is even nearer (only some 250’ from) the planned mining of Sapphire Coal, and is wholly upon Tract No 8, which Ms. Cummings only recently leased to Sapphire for coal mining purposes. Some 54,000 tons of coal, the great bulk of recoverable coal remains, according to Mr. Webb.

In contrast only some 5,000 tons, of coal remain on the Cummings/Fields jointly owned tract near the EKN proposed site (See Site Map, Tract No. 7). Mr. Webb himself admitted that the prospect of mining such coal was not even likely, and that Ms. Cummings and Fields do not even own that coal and therefore have no economic loss if it is never mined. (TE, pp. 103, 115).

From the standpoint of future mining and the blasting it entails, it makes no sense at all to move the tower from a site where mining is completed and where mining and blast disturbance on a nearby tract is merely a possibility (as the EKN site) to a site (the Alternate Site

No. 1) even nearer to where additional coal mining is probable and where ten (10) times the amount of recoverable mineable coal reserves are located. In view of these factors, Mr. Webb's assumption that the tower may be accurately centered—and thus better protected—atop a specific 150' block of solid coal in an abandoned deep mine below the surface of the site is just not justified on the basis of the record. This is especially true in light of his previous testimony that the coal mining should be finished before the site is considered for cell tower purposes.

Mr. Webb lacks the professional qualifications to speak on the issue of suitability of a particular site for construction and operation of a cellular tower. For that reason his testimony may be discounted. Mr. Webb is a professional mining engineer who speaks only from the point of view of the mine operator mining near any structure, whether it be a cell tower, residence, gas well or any other improvement. The record fails to disclose that he is familiar with cellular towers and of this particular tower and its foundation design to withstand collapse from uneven settlement.

On the other hand, Mr. Caudill is an engineer familiar not only with all aspects of coal mining, as Mr. Webb, but with extensive experience with cell towers. Marty Thacker, the EKN supervisor is by training and experience familiar with cell towers since they were introduced in our area in 1991. Both Caudill and Thacker testify from knowledge and experience in the cellular industry. Webb does not. Thacker testified his company has used the slab and pier foundation at 50 or more sites in the coal mining regions of Eastern Kentucky, West Virginia, and Virginia, including former deep and surface mine sites, or a combination of both (some of which he named in the record) without any failures to date.(Thacker, Rebuttal depo.).

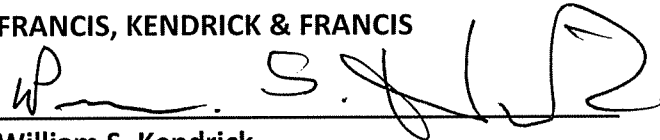
The Commission should give greater weight to these witnesses familiarity and actual experience here rather alarmist notions about the stability of the tower site.

CONCLUSION

EKN has carried its burden of proof here as to the suitability of its selected site. Accordingly, the PSC should on the basis of these facts and the law, grant the request of EKN for its CON.

Respectfully submitted,

**FRANCIS, KENDRICK & FRANCIS**



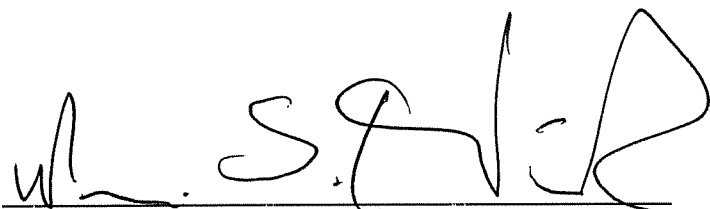
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Memorandum Brief was served upon the following on this 6<sup>th</sup> day of January, 2010:

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