

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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April 1, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING
	:	
	:	Docket No. PENN 2010-339-E Citation No. 7000116
	:	
ORCHARD COAL COMPANY, Respondent.	:	Primrose Slope Mine Mine ID 36-08346
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING
	:	
	:	Docket No. PENN 2010-340-E Citation No. 7000440
	:	
S & M COAL COMPANY, Respondent.	:	Buck Mountain Slope Mine Mine ID: 36-02022
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING
	:	
	:	Docket No. PENN 2010-342-E Citation No. 7000117
	:	
ALFRED BROWN COAL COMPANY, Respondent.	:	7 Ft. Slope Mine Mine ID: 36-08893
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING
	:	
	:	Docket No. PENN 2010-343-E Citation No. 7000115
	:	
B & B COAL COMPANY, Respondent.	:	Rock Ridge No. 1 Slope Mine Mine ID: 36-7741

**DECISION**

Appearances: Stephen D. Turow, Esq., Mary Forrest-Doyle, Esq., Matthew Babington, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, on behalf of the Secretary of Labor.

Alfred J. Brown, Foreman, Alfred Brown Coal Company, Hegins, Pennsylvania; Darryl Koperna, Superintendent, S & M Coal Company, Tower City, Pennsylvania, *pro se*, on behalf of the Respondents.

Before: Judge Paez

These consolidated cases are before me on referrals of Emergency Response Plan disputes by the Secretary of Labor (“Secretary”) pursuant to Commission Rule 24(a), 29 C.F.R. § 2700.24(a), and section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or “Act”), as amended by the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”), 30 U.S.C. § 876(b)(2)(G). At issue are four section 104(a) citations issued on March 1, 2010, charging each of the Respondents – Orchard Coal Company (“Orchard”), S & M Coal Company (“S&M Coal”), Alfred Brown Coal Company (“Alfred Brown Coal”), and B & B Coal Company (“B&B”) – for failing to comply with section 316(b)(2)(F)(ii) of the Act, which requires operators to provide for post-accident communication between underground and surface personnel via a wireless two-way medium, and an electronic tracking system, in their Emergency Response Plans.

A hearing was held in Pottsville, Pennsylvania, on March 17, 2010, pursuant to Commission Rule 24(e), 29 C.F.R. § 2700.24(e), and the parties were permitted to submit all relevant material regarding the disputes.<sup>1</sup> At the hearing, the parties stipulated that: (1) the citations at issue were served on the date listed in the citations and were properly served by the Secretary of Labor; and (2) the Commission Judge has jurisdiction over these proceedings with the mine operators subject to the Act. (Tr. 8-9.) At the conclusion of the hearing, the parties filed post-hearing briefs.

The general issues before me are whether the Respondents were properly cited under sections 104(a) and 316(b)(2)(G)(ii) of the Act for failing to submit a revised plan for their respective mines that can be approved under section 316(b)(2)(C) of the Act. For the reasons set forth below, the citations are affirmed.

### **The Statutory and Regulatory Backdrop**

Section 2 of the MINER Act, which became effective on June 15, 2006, amends section 316 of the Mine Act, 30 U.S.C. § 876, to require underground coal mine operators to develop

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<sup>1</sup> All four of the operators belong to the Independent Miners and Associates, a group of anthracite operators, and have raised substantially identical issues with regard to updating their Emergency Response Plans. By order dated March 10, 2010, I consolidated these cases, set a hearing date, and ordered the parties to submit prehearing reports. Two of the operators, B&B and Orchard, did not submit a prehearing report but stated at the hearing that they would be represented by Alfred Brown of Alfred Brown Coal and Darryl Koperna of S&M Coal, who would question witnesses, elicit testimony, and/or submit documentation on behalf of all the operators. (Tr. 7.) However, S&M Coal alone raised the separate issue of financial inability to pay for new communication and tracking equipment. (Tr. 16-17.)

and submit for MSHA approval and periodic review an emergency response and preparedness plan (“Emergency Response Plan” or “ERP”). 30 U.S.C. § 876(b)(2)(A). The basic goals of an ERP are twofold: to provide for the evacuation of miners who are endangered by a mine emergency; and to assure the survival of miners who are trapped underground and are not able to evacuate. 30 U.S.C. § 876(b)(2)(B)(i)-(ii). The MINER Act specifies that operators develop and submit ERPs to the Secretary for approval within 60 days of June 15, 2006, the date of enactment. 30 U.S.C. § 876(b)(2)(A), (C). Thus, mine operators were required to submit ERPs to MSHA by August 14, 2006.

Within three years of enactment of the MINER Act, each underground coal mine operator is required to develop, adopt, and submit an ERP that includes, inter alia, provisions for the use of wireless, two-way communication and electronic tracking (“C&T”) systems following a mine accident. 30 U.S.C. § 876(b)(2)(E), (F)(ii).<sup>2</sup> If such a C&T system “can not be adopted,” the operator must “set forth within the plan the reasons” why it cannot adopt such a system and identify an “alternative means of compliance.” 30 U.S.C. § 876(b)(2)(F)(ii). Any alternative system “shall approximate, as closely as possible,” the level of safety and effectiveness provided by an MSHA approved C&T system. *Id.* Except when a mine operator could satisfy this exception, MSHA could not approve a mine operator’s ERP after June 15, 2009 unless the ERP provided upgraded C&T systems for use in the mine. Indeed, the legislative history of this section indicates that “[t]he intent . . . is for operators to use the most advanced technology available that works best in their particular mine, to provide a means for the [ERP] to be continuously adapted to changes in the mine or in the commercial technical equipment market, and to avoid the ‘behave only to the letter of the standard’ syndrome that stifles innovation and delays the implementation of new methods or equipment.” S. Rep. No. 109-365, at 13 (2006).

Despite this congressional mandate, there are currently no totally wireless communication devices commercially available and approved by MSHA that can be used in

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<sup>2</sup> Section 316(b)(2)(F)(ii) of the Mine Act, which is primarily at issue here, states as follows:

(ii) POST ACCIDENT COMMUNICATIONS.—Not later than 3 years after the date of enactment of the Mine Improvement and New Emergency Response Act of 2006, a plan shall, to be approved, provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground, or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator’s alternative means of compliance. Such alternative shall approximate, as closely as possible, the degree of functional utility and safety protection provided by the wireless two-way medium and tracking system referred to in this subpart.

30 U.S.C. § 876(b)(2)(F)(ii).

underground mines. Rather, as the Secretary acknowledges in MSHA Program Policy Letter (“PPL”) No. P09-V-01 (January 16, 2009), alternative technology exists in the form of “partially-wireless” systems that use “untethered” two-way communication devices to transmit signals to a node that is hard-wired to surface equipment. (Ex. G-6 at 1, 3.) Because fully wireless C&T systems were not yet technologically feasible, MSHA sought to offer guidance to operators on acceptable alternatives to fully wireless systems in formulating the required revisions to their ERPs. MSHA PPL No. P09-V-01 states, with respect to communications systems:

General Considerations – An alternative to a fully wireless communications system used to meet the requirements of the MINER Act for post-accident communication either can be a system used for day-to-day operations or a stored system used in the event of an accident. Examples of currently available technologies that may be capable of best approximating a fully wireless communications system include, but are not limited to, leaky feeder, mesh, Wi-Fi and medium frequency systems. Any alternative system generally should:

- a. Have an untethered device that miners can use to communicate with the surface. The untethered device should be readily accessible to each group of miners working or traveling together and to any individual miner working or traveling alone.
- b. Provide communication in the form of two-way voice and/or two-way text messages. If used, pre-programmed text messages should be capable of providing information to the surface necessary to determine the status of miners and the conditions in the mine, as well as providing the necessary emergency response information to miners.
- c. Provide an audible, visual, and/or vibrating alarm that is activated by an incoming signal on each untethered device. The alarm should be distinguishable from the surrounding environment.
- d. Be capable of sending an emergency message to each of the untethered devices.
- e. Be installed to prevent interference with blasting circuits and other electrical systems.

(Ex. G-6 at 3.) Thus, this case involves whether the Respondents provided alternatives to a fully wireless C&T system, and whether such alternatives approximate, as closely as possible, the degree of functional utility and safety protection provided by a wireless two-way medium communication and electronic tracking system.

### **Findings of Fact and Procedural Background**

The Respondents all operate underground anthracite coal mines. Anthracite coal “is hard and black, and has a semimetallic luster and semiconchoidal fracture [i.e., fractures result in smoothly curved surfaces].” *Dictionary of Mining, Mineral, and Related Terms* 21, 117 (2d ed. 1996). Anthracite has a very high carbon content, the highest of any variety of coal, and “ignites

with difficulty and burns with a short blue flame, without smoke.” *Id.* at 21, 52, 311. Anthracite mining in the United States is primarily confined to eastern Pennsylvania. *Id.* at 21. According to MSHA’s website, in 1917, anthracite coal production peaked at over 100 million tons.<sup>3</sup> Underground anthracite mining declined throughout the 20th century, such that by 2008, there were only 13 such mines operating in Pennsylvania employing 91 miners, and they produced approximately 240,000 short tons.<sup>4</sup> Underground anthracite mining is far less mechanized than underground bituminous coal mining. Anthracite is mined underground using “conventional methods” – the coal is blasted from the surrounding rock at a working face using explosives. Once blasting has loosened the coal, it is loaded onto carts by hand using picks and shovels or by gravity loading. The coal is then transported out of the mine. Blasting occurs through the use of explosives detonated by electric detonators or blasting circuits. (Tr. 44-46.)

The evidence introduced at the hearing establishes that in March 2009, MSHA District Manager John A. Kuzar, along with several other MSHA representatives, met with members of the Independent Miners and Associates (“IMA”), an association of anthracite miners of which the Respondents are members. They discussed the IMA’s concern about the potential for radio frequency (“RF”) devices, which are associated with upgraded C&T systems, to cause unintended, premature detonation of blasting circuits used in the members’ mines. (Exs. G-1–G-4; Tr. 123-24.) Kuzar subsequently agreed to postpone the deadline for the operators to provide C&T system purchase orders from June 15, 2009 until a time after the date on which MSHA tested the RF devices in one of the IMA-member mines. (Ex. G-5.) Nevertheless, Kuzar still required each of the anthracite mine operators to submit revised ERPs identifying the upgraded C&T provisions by June 15, 2009. (*Id.*) The IMA had expressed interest in two MSHA-approved C&T systems for possible installation in anthracite mines: the L-3 Communications’ “Wireless Mesh Communication and Tracking System” and the Matrix Design Group, LLC’s, “RFID Miner Tracking and Text Messaging System.” (Ex. G-1H at 2; Tr. 203.)

On or around June 15, 2009, all but one of the Respondents submitted statements to MSHA indicating that, if the Respondents were to choose an upgraded C&T system, the Matrix METS 2.1 system would be the system of choice.<sup>5</sup> (Exs. G-2A, G-3A, G-4A.) None of the Respondents submitted revised their ERPs at that time. (Exs. G-1A, G-2A, G-3A, G-4A.) On July 2, 2009, Kuzar notified the Respondents by letter that the June statements did not qualify as revised and compliant ERPs and that they must submit compliant ERPs by July 16, 2009. (Exs. G-1B, G-2B, G-3B, G-4B.) None of the Respondents filed revised ERPs by the July 16, 2009 deadline. (Exs. G-1, G-2, G-3, G-4; *see* Tr. 124, 128.)

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<sup>3</sup> [www.msha.gov/District/Dist\\_01/History/history.htm](http://www.msha.gov/District/Dist_01/History/history.htm).

<sup>4</sup> [www.msha.gov/ACCINJ/ANTHRACI.HTM](http://www.msha.gov/ACCINJ/ANTHRACI.HTM).

<sup>5</sup> Alfred Brown Coal’s statement merely asserted that “[a]ny system that is guaranteed in writing and proved safe through extensive testing not to endanger my employees with radio frequency while using electronic detonators will be acceptable.” (Ex. G-1A.)

On July 21, 2009, MSHA tested RF devices of the L-3 Communications ACCOLADE (“L-3”) system at Alfred Brown Coal’s 7 Ft. Slope Mine.<sup>6</sup> (Ex. G-10; Tr. 203.) MSHA’s investigative report, which summarized the test results, concluded that the L-3 system could be safely used in underground anthracite mines. (Ex. G-10.) Accordingly, on August 28, 2009, Kuzar contacted the Respondents by letter, informing them of the results of MSHA’s testing and attaching a copy of the investigative report. (Exs. G-1C, G-2C, G-3C, G-4C.) Kuzar further notified the Respondents that the new deadline for submitting their ERPs would be September 11, 2009. (*Id.*)

On September 4, 2009, Kuzar again contacted the Respondents by letter, this time to provide further guidance on how to develop a revised and compliant ERP. (Exs. G-1D, G-2D, G-3D, G-4D.) This letter attached copies of MSHA PPL P09-V-01 as well as an “ERP Checklist.”<sup>7</sup> (Exs. G-6, G-9.)

On or around September 11, 2009, each of the Respondents submitted an ERP. (Exs. G-1E, G-2E, G-3E, G-4E.) None of the ERPs included upgraded C&T provisions. Instead, the ERPs included reasons why the Respondents believed they could not adopt upgraded C&T systems, and provided for alternative C&T systems. The alternative C&T systems consisted of manual, magnetic board tracking systems and redundant, hard-wired communications systems that were the same or very similar to the systems each of the operators had originally installed to comply with the Mine Act’s ERP provisions for C&T systems before June 15, 2009. (Tr. 75-77.) The Respondents’ main reasons for not including upgraded C&T systems in their revised, post-June 15, 2009 ERPs were that: (1) no fully wireless system existed; (2) the RF devices used in upgraded C&T systems potentially could cause unintended, premature detonation of explosives; and (3) upgraded C&T systems had not been proven effective for use in the Respondents’ underground anthracite mines. (Exs. G-1E, G-2E, G-3E, G-4E.)

On October 5, 2009, Kuzar contacted the Respondents by letter, detailing the deficiencies in each of the Respondents’ September 2009 ERPs. (Exs. G-1F, G-2F, G-3F, G-4F.) Kuzar responded directly to each of the Respondents’ listed reasons for not providing upgraded C&T systems by explaining that: (1) while no fully wireless system existed, virtually wireless systems did exist and those systems would provide for approximately the same level of safety and effectiveness as totally wireless systems; (2) MSHA had investigated the potential for unintended, premature detonation caused by RF devices used in one of the upgraded C&T systems (i.e., the L-3 system) and found that upgraded C&T systems could be used safely in conjunction with electric detonators; and (3) based on MSHA’s understanding of anthracite

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<sup>6</sup> The L-3 system is another upgraded C&T system that IMA members considered for use in their underground anthracite mines. (Tr. 105.)

<sup>7</sup> MSHA also posted two “Q&A’s” that discussed the PPL on its website. (Exs. G-7, G-8.) Yet no date is indicated as to when the second Q&A was posted and MSHA provided no testimony as to the date it was posted. (Ex. G-8; Tr. 108-09.)

mining, the upgraded C&T systems could be used effectively in such mines.<sup>8</sup> (*Id.*) However, Kuzar explained that if the Respondents still felt there were reasons why the upgraded C&T systems could not be installed in their mines, they should provide more detailed explanations of their reasons for his consideration. Kuzar established a new deadline for ERP submission of October 28, 2009. (*Id.*)

On or around October 28, 2009, B&B, Orchard, and S&M Coal each submitted ERPs which were exact copies of the ERPs they had submitted in September 2009. (Exs. G-2G, G-3G, G-4G.) Alfred Brown Coal submitted a letter, rather than an ERP, reiterating its earlier concerns and explaining that it wanted to attend a meeting with the Institute of the Makers of Explosives (“IME”) on October 29, 2009 prior to submitting a revised ERP.<sup>9</sup> (Ex. G-1G.)

On January 12, 2010, Kuzar contacted the Respondents by letter, explaining that their October ERP submissions did not qualify as revised and compliant ERPs.<sup>10</sup> (Exs. G-1H, G-2H, G-3H, G-4H.) To B&B, Orchard, and S&M Coal, Kuzar stated that the October copies of their September ERP submissions still were inadequate and that the same deficiencies existed. (Exs. G-2H, G-3H, G-4H.) To Alfred Brown Coal, Kuzar explained that the operator had failed to submit a revised and compliant ERP following the October 30, 2009 IME meeting. (Ex. G-1H.) Kuzar also conveyed his understanding that information provided at the IME meeting demonstrated that upgraded C&T systems could be safely used in underground anthracite mines. For three of the operators, Kuzar set a new deadline for ERP submissions of January 22, 2010. (Exs. G-1H, G-2H, G-3H.) Because S&M Coal also indicated in its October 2009 submission that installation of an upgraded C&T system “ultimately would force [it] into closure” (Ex. G-4G at 3), Kuzar provided S&M Coal an additional week to submit a revised ERP and/or to provide documentation to demonstrate financial infeasibility. (Ex. G-4H.)

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<sup>8</sup> Thomas J. Garcia, MSHA District 1’s representative at the hearing, testified about the manner in which an upgraded C&T system would be installed and used in a typical, underground anthracite mine. (Tr. 80-90.) Garcia supported his position by explaining how other underground anthracite operators (and IMA members) had planned to install upgraded C&T systems as provided for in their compliant and revised ERPs, all of which had been approved by District 1 at the time of the hearing. (Tr. 96-99, 117-18.)

<sup>9</sup> At the October 29 meeting, the IME provided participants with Safety Library Publication (SLP) 20, “Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the USE of Commercial Electric Detonators (Blasting Caps)” and its recent addendum. (Exs. G-1–G-4, G-20, G-21.) SLP-20 states that, when proper and established precautions are taken, the risk of unintended, premature detonation of blasting circuits by radiofrequency devices is “practically nil.” (Ex. G-20 at 2.)

<sup>10</sup> In the January 12, 2010 letter, Kuzar also described the ALJ’s decision in *RS&W Coal Company*, an ERP dispute proceeding involving an underground anthracite operator (and fellow IMA member) who had failed to submit a revised ERP with upgraded C&T provisions. 31 FMSHRC 1440 (Dec. 9, 2009) (ALJ). Kuzar attached a copy of this decision to his letter. (Exs. G-1H, G-2H, G-3H, G-4H.)

On or around January 22, 2010, Alfred Brown Coal, B&B, and Orchard submitted ERPs. (Exs. G-1I, G-2I, G-3I.) Once again, none of the ERPs included upgraded C&T provisions. (*Id.*) Instead, the ERPs again listed reasons why the operators believed the upgraded C&T systems could not be installed, and provided for alternative C&T systems that were the same or similar to the ones the operators' had used in their original ERPs. (*Id.*) Meanwhile, S&M Coal submitted a request for an extension of time to provide support for its financial infeasibility argument. (Ex. G-4I.) On February 12, 2010, S&M Coal provided copies of several financial documents to MSHA for review. (Ex. G-4; Tr. 284.) On February 17, 2010, Kuzar contacted S&M Coal by letter, informing it that MSHA had refused to exempt it from submitting a revised ERP with upgraded C&T systems for reasons of "financial hardship," and establishing a new ERP submission deadline of February 22, 2010. (Ex. G-4J.) S&M Coal declined to revise and re-submit its existing ERP. (Ex. G-4.)

On March 1, 2010, MSHA District 1 authorized representative Gregory Mehalchick, acting under Kuzar's direction, issued citations to each of the Respondents for failing to submit revised and compliant ERPs. (Tr. 137-38; Exs. G-1J, G-2J, G-3J, G-4K.) These proceedings ensued soon thereafter.

### **General Legal Principles - Standard of Review**

When the Secretary and an operator are unable to agree on a particular ERP provision, the Mine Act directs the Secretary to "issue a citation which shall be immediately referred to a Commission Administrative Law Judge" for expedited adjudication. 30 U.S.C. § 876(b)(2)(G). In *Emerald Coal Resources*, the Commission set forth the principles under which any such referral would be decided:

One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996).

While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), quoting S. Rep. No. 181, 95th Cong., 25 (1977), reprinted in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996)



(“*Peabody II*”). “[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *C.W. Mining*, 18 FMSHRC at 1746; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA’s conduct throughout the process was reasonable).

*Emerald Coal Res.*, 29 FMSHRC 956, 965-66 (Dec. 2007); *see also Twentymile Coal Co.*, 30 FMSHRC 736, 747-48 (Aug. 2008) (quoting same language for review of ERP disputes).

The Commission went on to hold that a judge hearing an ERP dispute must decide whether the record shows that the Secretary’s refusal to approve a proposed ERP provision was arbitrary and capricious, stating:

The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. In this regard, the Commission’s decision in *Monterey Coal* is instructive. In affirming a citation for failing to supply data relating to impoundment pond construction, the Commission applied the “arbitrary and capricious” standard in reviewing MSHA’s withdrawal of its approval of an impoundment plan:

We cannot conclude that MSHA’s use of the Table [of recommended minimum design storm criteria] or its act of withdrawing the plan approval was arbitrary and capricious. . . . [P]rior to issuance of the citation *Monterey* was given unequivocal notice of and a reasonable opportunity to comply with MSHA’s interpretation and use of the Table. In sum, we find the course of action taken by MSHA to have been a reasonable approach, and not arbitrary or capricious.

*Monterey Coal*, 5 FMSHRC at 1019 (citation and footnote omitted); *accord Peabody II*, 18 FMSHRC at 692 n.6 (in reviewing the Secretary’s refusal to approve a ventilation plan provision, Commission noted that the plan approval process involves an element of judgment on the part of the Secretary that is reviewed under an arbitrary and capricious standard). This standard appropriately respects the Secretary’s judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test. *See Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) (“abuse of discretion” has been found when “there is no evidence to support the decision or if the decision is based on an improper understanding of the law”) (citations omitted).

*Emerald Coal*, 29 FMSHRC at 966 (footnote omitted); *Twentymile Coal Co.*, 30 FMSHRC at 748.

### **Conclusions of Law – Further Factual Findings**

This case involves the safety of using mandated C&T devices that emit RF energy in anthracite mines where blasting is integral to mining coal. These cases turn on whether the Respondents have met the C&T alternative requirements under section 316(b)(2)(F)(ii).

A. Good Faith Negotiations

The record reflects, and the parties acknowledge, that ERP negotiations regarding the installation of updated C&T systems began in March 2009 when MSHA held a meeting with the IMA, of which all four Respondents are members. Because no truly wireless communication systems existed, MSHA attempted to rectify that issue by providing guidance through MSHA PPL P09-V-01, which references partially-wireless C&T devices that emit RF energy. The Respondents' fears over the risk of unintentional detonation if new C&T devices emitting RF energy were to be introduced in the vicinity of their anthracite blasting operations led MSHA to extend ERP deadlines and agree to testing of C&T systems in an anthracite mine. MSHA subsequently gave extensions for ERP submissions, completed one test of a C&T system at the 7 Ft. Slope Mine of Alfred Brown Coal, and disseminated those test results to the Respondents. The record is replete with correspondence between the mine operators and the district manager providing information and stating positions on ERPs. (Exs. G-1–G-4.)

However, it is clear the ERP negotiations were at an impasse by March 1, 2010 after nearly a year of negotiating, especially given that none of the operators had changed their positions or modified their ERPs as requested by MSHA. (E.g., Exs. G-1E, G-1G, G-1I, G-2E, G-2G, G-2I, G-3E, G-3G, G-3I, G-4E, G-4G.) I find that both sides had given notice of their positions and had adequate negotiations. *See Emerald Coal*, 29 FMSHRC at 965 (“One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision.” (citing *Carbon County Coal*, 7 FMSHRC at 1371)). Thus, I conclude that the parties had met their duty to negotiate in good faith and had done so over a reasonable period of time.

B. Arbitrary and Capricious Analysis

Absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition for approval of the Respondents' ERPs. Thus, the Secretary must establish a rational basis for her rejection of the Respondents' proposed alternatives to commercially-available C&T systems approved by MSHA for use in anthracite mines.

1. Operators' Arguments

The operators mainly argue that the new ERP requirements for upgraded C&T systems have not been proven 100% safe for use in anthracite mines. Indeed, they note their anthracite region is unique and anthracite mining is not analogous to other types of coal mining, such as at bituminous mines, which use highly mechanized operations including longwall mining to extract coal. Rather, all of the underground anthracite mine operators in these proceedings rely on conventional mining techniques. Moreover, the Respondents are all small operators, employing a handful of miners at their respective mines, which in most cases include fathers, sons, and

other family members of the principals. Consequently, anything that could remotely cause a blasting cap to ignite prematurely worries these operators, as it could put themselves as well as others at grave risk of possible injury or death.

As Judge Zielinski noted in his ERP decision involving another anthracite coal operator, concerns about the hazards of introducing RF sources into an anthracite mine's blasting environment were, and are, understandable and well-founded. *RS&W Coal Co.*, 31 FMSHRC 1440, 1454 (Dec. 2009) (ALJ). These concerns were understandably heightened by the manner in which some of the technical information is presented. Statements in authoritative technical literature to the effect that the "probability of an accidental firing from RF energy is practically nil," or "extremely remote," could easily be seen as less than reassuring to a miner who has to connect detonator leg wires in close proximity to high explosives. *Id.* (quoting the IME's Safety Library Publication No. 20, *Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the Use of Commercial Electric Detonators (Blasting Caps)* (July 2001) ("SLP-20")). Brown put it best during his cross-examination of the Secretary's expert, Chad Huntley, when he noted that papers he received on C&T systems state they are "safe, safe, safe, but at the end of every chapter there is a disclaimer." (Tr. 242.) Indeed, even Huntley testified that "nothing is a hundred percent safe." (Tr. 240.) For Respondents, not being able to receive 100 percent assurances from C&T system manufacturers does not provide them with the level of comfort expected when putting themselves or family members in potentially dangerous situations.

Nevertheless, facts and science, not visceral fears, drive the analysis of these congressionally-mandated C&T systems, and the Secretary presented much technical documentation and testimony at the hearing, as discussed below.

## 2. Technical Discussion

Fundamentally, these cases are about electricity and, more specifically, the amounts of electrical energy emitted by electronic devices used to communicate wirelessly in underground mines. The issue before me is whether the MSHA-approved electronic devices emit electrical energy at levels that could unintentionally initiate the detonation of blasting caps used to ignite larger explosions within the mines. It has long been recognized that devices emitting radio frequency ("RF") energy, such as wireless communications systems, can pose a hazard when used in proximity to electric blasting circuits. The wires of a blasting circuit function like antennae, and RF energy induces an electric current in such circuits, which could result in an unintended detonation. To understand whether such a hazard exists, it is necessary to be able to describe electrical energy, and the transmission of such energy in the form of RF energy.

A useful analogy for an electrical system is that it is akin to the water supply pipes in an average home. Three variables describe the flow of the water through the pipes: (1) the rate at which the water flows through the pipes, (2) the water pressure, and (3) the diameter of the pipes and how much resistance they create on the flow of water. Electrical current is described using similar variables. The electrical current itself, that is, the rate at which the electricity is flowing through the system, is measured in amperes, the symbol for which is I. The "pressure" of the electrical current is measured in volts, the symbol for which is V. Finally, resistance in an

electrical system is measured in ohms, the symbol for which is  $r$ . A simple equation describes the relationship between these three variables:

$$I = V/r$$

Current is equal to voltage divided by resistance. Current increases as voltage increases or as resistance decreases. Referring back to the water pipe analogy, if one were to increase the pressure of the water in the pipes in their home, or were to expand the diameter of the pipes and thus decrease the resistance, then the flow (or current) of water coming into the house would increase.

A fourth variable used to describe electrical energy is its power, which is measured in watts, the symbol for which is  $W$ . Another simple equation describes how to determine the power of an electrical system:

$$W = VI$$

Wattage is equal to voltage multiplied by current. In these proceedings, various permutations of these two formulae have been used, including voltage equals resistance multiplied by current ( $V = rI$ ) and wattage equals resistance multiplied by current squared ( $W = rI^2$ ).

At the hearing, the Secretary presented evidence on two C&T systems, the Matrix METS 2.1 system and the L-3 system. (Exs. G-10, G-30, G-32.) The Secretary states in her brief that “if the [R]espondents were to choose an upgraded C&T system, the Matrix METS 2.1 system would be the system of choice.” (Sec’y Posthearing Br. at 3.) This system has three components that are used underground: a two-way text communicator, a wireless tag used to track miners, and a network of communication nodes that are either wireless or connected to the surface by a hard wire. (Tr. 81-86, 102-04, 186-87; Ex. G-16.)

All three of these components transmit and/or receive RF energy, which can be measured in watts. The Matrix text communicator transmits 0.015 watt (15 milliwatts, or 15mW), the tracking tag transmits 0.006 watt (6mW), and each node transmits 0.010 watt (10mW). (Tr. 186-87.) RF energy is emitted as waves at a specific operating frequency measured in hertz (the symbol for which is Hz), or cycles per second – which are commonly referred to in higher multiples such as megahertz ( $10^6$  Hz, expressed as MHz) and gigahertz ( $10^9$  Hz, expressed as GHz). The Matrix system operates at a frequency of 430 MHz. (Tr. 193-94.) An important characteristic of RF energy, however, is that its power diminishes dramatically as it travels through the atmosphere. (Tr. 191-92.) The power level of an RF signal diminishes one hundred times after it travels one wavelength, which is known as “free space loss.” (Tr. 192.) In other words, at a distance of one wavelength from an RF antenna the available power in the RF field is only one one-hundredth (0.01) of the power at the transmitting antenna. At a distance of two wavelengths the strength drops to one four-hundredth (0.0025) of the power at the transmitting antenna. Each time a distance of a wavelength is added, the available power drops by a factor of four so that four wavelengths would decrease the strength of the energy field by one sixteen hundredth (0.000625). (Tr. 193.)

Knowing the wavelength at which RF energy is transmitted is highly relevant to this discussion. Wavelength (measured in meters per second and the symbol for which is lambda, or  $\lambda$ ) equals the velocity of light divided by the operating frequency of the system. For the Matrix system, the wavelength of an RF signal at 430 MHz equals 0.697 meters per second ( $\lambda = 0.697$ ). Expressed in feet, the wavelength of the Matrix system is approximately 2.2 feet. (Tr. 195.) Through the action of free space loss, the power of a 15mW Matrix transmitter operating at 430 MHz would be diminished 100 times to 0.15mW over one wavelength of 2.2 feet. (Tr. 198.)

Having determined the characteristics of the RF energy emitted by the electronic devices approved by MSHA (for example, the 15mW emitted by a Matrix text communicator as diminished over distance), it remains to be determined whether this RF energy could initiate the detonation of a blasting cap used to ignite explosive charges in the mines. Blasting caps typically are small cylindrical metallic objects, “about the size of a pencil,” with two wires extending from one end. (Tr. 47.) These are the leg wires, which are attached to lead wires running to a blasting unit or battery from which, at the time of detonation, an electrical current runs back through the lead wires to the blasting caps to detonate them and, ultimately, the explosive charge. (Tr. 49-56.)

None of the parties to these proceedings were able to testify to or otherwise document the exact amount of energy required to initiate the detonation of the blasting caps used in the Respondents’ mines. Instead, the Secretary put on evidence concerning the energy level below which a detonator could not be ignited, which is called the “no-fire level.” The Secretary’s expert witness, Chad Huntley, an electrical engineer at MSHA’s Technical Support Approval and Certification Center, testified that, according to the SLP-20, “the chance of an unintended detonation is practically nil if your power level’s below 40 milliwatts.”<sup>11</sup> (Tr. 163-64 (citing Ex. G-20 at p.2); Ex. G-18.)

Huntley also testified concerning the specifications for a blasting cap made by Austin Powder that is commercially available for use in underground coal mines, the COALSTAR II Detonator. (Tr. 179-80; Ex. 25.) According to Huntley, this detonator has a no-fire level of 105 milliwatts,<sup>12</sup> and using a detonator with a higher no-fire level than the IME 40mW standard would also increase the level of safety. (Tr. 180-83; Ex. G-25.)

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<sup>11</sup> The IME and Bureau of Mines publications refer to a “no-fire level” of 0.04 watts (W), or 40 milliwatts (mW), for commercial detonators. (Tr. 171; Ex. G-23.) The 40mW no-fire level equates to an induced current of 0.2A or 200mA at 1.0 ohm resistance, and is recognized as a “conservative” limit, because many commercially available detonators or blasting caps manufactured in North America have no-fire levels higher than 40mW. (Tr. 173, 231-32; Ex. G-24.) Detonators tested in 1973 by the Bureau of Mines were found to have no-fire levels ranging from 77mW to 275mW. (Ex. G-22 at 4-4.)

<sup>12</sup> The manufacturer specified the no-fire level as 0.45 amperes, and the “bridge wire resistance” as 0.54 ohms. To determine the no-fire level in watts, Huntley used the equation  $W = rI^2$ , and calculated this as 105mW. (Tr. 182.)

As noted above, the energy levels emitted by the Matrix system are far below the IME 40mW (0.040 watts) no-fire standard, especially as the distance between the devices and the detonators increases. Thus, a Matrix text communicator held 2.2 feet away from a detonator would emit just 0.15 milliwatts (0.00015 watts) of RF energy, or less than one-half a percent (0.375%) of the IME 40mW no-fire standard, or for that matter only 0.14 percent of the 105mW no-fire level for a COALSTAR II Detonator.

Moreover, Huntley testified that blasting in anthracite mines is often done in series where more than one blasting cap is used, which would require an increase in the power necessary to “initiate any one of the detonators.” (Tr. 184-85.) Huntley testified further:

Q: [L]et’s say we’re using our COALSTAR detonator that has a . . . 105 milliwatt no-fire level, and I have 10 COALSTAR detonators wired together in a series, what would be the no-fire level for . . . those detonators as a group?

A: It would be 10 times the power level necessary to initiate one detonator. . . . A thousand fifty milliwatts [1,050mW].

(Tr. 185.) As far as the Matrix system is concerned, if a miner were to be carrying all three components – a text communicator (15mW), a node (10mW), and a tag (6mW) – the combined RF energy emitted by them would be, at zero feet in distance, 31mW, which is less than the IME 40mW no-fire standard. However, a miner would not normally have a need to carry a node, so simply having a text communicator (15mW) and a tag (6mW) would only amount to about half (21mW) of the 40mW no-fire level at a zero separation distance.

Finally, administrative controls, such as separation distances, were also raised at the hearing. (Tr. 109-10.) On cross-examination and redirect, Garcia noted that as of January 22, 2010 when Alfred Brown Coal submitted an ERP, MSHA would approve separation distances of up to 50 feet. (Tr. 268-74.) Brown indicated in his cross-examination that it was his understanding that separation distances of 50 feet were required in his ERP. (Ex. G-11.) However, as Garcia clarified, MSHA would approve separation distances of up to 50 feet where a mine operator was unable to specify a safe separation distance based on a manufacturer’s recommendation. (Tr. 274; *see* Ex. G-3F at 3.) Huntley later explained how to read the manufacturers’ component charts and this revealed the L-3 and Matrix systems, as recently as 2008 and 2009, had recommended separation distances for various components of their C&T systems ranging from zero to seven feet. (Tr. 209-11; Ex. G-14.)<sup>13</sup>

### 3. Analysis of Secretary’s evidence

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<sup>13</sup> The IME’s SLP-20 provides tables of recommended safe separation distances to be maintained between blasting circuits and different types of RF equipment. (Ex. G-20.) An August 2008 SLP-20 addendum, intended to be more applicable in underground mines, sets forth a formula for calculating the field strength produced by multiple RF sources. (Ex. G-21.)

The Secretary has established through her expert witness, Chad Huntley, that the chances of an unintentional ignition or detonation of a blasting cap from C&T devices, which emit such low levels of RF energy, is infinitesimally remote to the point that it is nearly non-existent. The Secretary has also demonstrated through testimony and documentation that MSHA-compliant C&T systems are commercially available and can be effectively and safely used in underground anthracite mines.

Where an ERP sets forth reasons for not adopting the specific post-accident provisions of section 316(b)(2)(F)(ii) which mandate a wireless two-way medium for communication and an electronic tracking system, the statute places the onus squarely on the operator to come up with alternative means of compliance that shall “approximate, as closely as possible,” the degree of functional utility and safety protection provided by a wireless two-way communication and electronic tracking system. The Respondents failed to set forth in their ERPs such alternative systems that approximated, as closely as possible, the same level of safety and effectiveness provided by the upgraded C&T systems, as reflected in MSHA PPL P09-V-01. (Exs. G-1F, G-1H, G-2F, G-2H, G-3F, G-3H, G-4F, G-4H, G-4J.) Rather, the Respondents’ ERPs continued to rely on their older hard-wired telephone systems and mechanical “magnetic board” tracking systems with little change or explanation as to why these systems provided the same functional utility and safety protection as the newer C&T systems, such as the L-3 system tested by MSHA. Consequently, I find that the Respondents’ ERPs (1) did not provide the congressionally-mandated and upgraded C&T systems, and (2) did not set forth satisfactory reasons for failing to include such systems. (Exs. G-1F, G-1H, G-2F, G-2H, G-3F, G-3H, G-4F, G-4H, G-4J.) Furthermore, the Respondents failed to set forth in their ERPs alternative systems which “approximate[d], as closely as possible,” the same level of safety and effectiveness provided by the upgraded C&T systems, as required by section 316(b)(2)(F)(ii).

Given the Mine Act’s clear mandate, MSHA’s and the IME’s findings with regard to the operators’ ability to safely use upgraded, commercially available C&T systems in conjunction with electric detonators, and ALJ Zielinski’s decision in the *RS&W Coal Company* ERP dispute resolution proceeding, I determine that the Respondents did not satisfy section 316(b)(2)(F)(ii) of the Act. Therefore, I conclude that the Secretary did not act arbitrarily or capriciously in refusing to approve the Respondents’ ERPs. See *Twentymile Coal Company*, 30 FMSHRC 736, 745-49 (Aug. 2008) (district manager’s determination following review of an ERP can be reversed by Commission only if it is arbitrary and capricious).

Nevertheless, while the technical evidence clearly demonstrates an extremely low risk of RF energy from C&T systems causing unintended detonations, it appears the results of these technical reports were not communicated effectively to the Respondents, which led to these proceedings. What is clear from the testimony elicited from Brown’s cross-examination of the Secretary’s witnesses is that the Secretary, through the district manager, did an inadequate job of explaining to the operators the safety issues surrounding the installation of C&T systems in an environment where blasting occurs. In so doing, District 1 personnel failed to assuage the fears of the Respondents.

The Secretary through her operatives at the district level seemed to give conflicting information and did not appear to appreciate the practical concerns of these operators. Indeed, as of January 22, 2010, Brown stated his belief that he was required to have, and Garcia testified that MSHA had continued to approve of, a separation distance of 50 feet for C&T devices in a revised ERP, which admittedly would make it extremely difficult for a miner to work effectively in these small anthracite mines when wearing the required gear. (Tr. 263-66.) Yet, expert witness Huntley testified that in 2009 the L-3 and Matrix manufacturers had recommended a five-foot separation distance – a 90 percent cut in the distance – which MSHA had approved. Huntley also testified that Matrix had recently requested a zero separation distance, which MSHA would be analyzing for approval in the near future. (Tr. 214-15.) While advances in technology can occur rapidly, and the onus is on the operator to submit an ERP with appropriate administrative controls, it appears MSHA did not adequately communicate to the Respondents recent changes in the safe separation distances for MSHA-approved C&T systems. A case in point is that other anthracite mines with recently updated and approved ERPs, still mandate a 50-foot separation distance even though they have Matrix systems. (Exs. G-15, G-16, G-17.) MSHA appears to have compounded the problem, and created the perception it was not proceeding in good faith, by initially promising a second test of C&T equipment in an anthracite mine and then failing to do so. (Tr. 234-35, 257.) Although Huntley explained on cross-examination that the results of the LEP testing in conjunction with the lower RF levels emitted from the Matrix system made a test of the Matrix system unnecessary (Tr. 257-60), nothing in the evidence presented at the hearing by the Secretary indicates this information was communicated effectively to the Respondents.

Furthermore, other practical solutions to assuage the fears of the Respondents do not appear to have been considered or adequately communicated to the Respondents by MSHA. For example, during questioning by the court, Garcia was asked about differences in the blasting caps with regard to no-fire levels. He indicated that the blasting caps were all the same. (Tr. 145-46.) Yet questioning of expert witness Huntley noted the existence of different no-fire levels for blasting caps and specifically pointed to research that showed higher no-fire level thresholds for certain non-foreign manufactured blasting caps (Tr. 176-78; Ex. G-22 at 4-4), which the Secretary cited in her post-hearing submission (Sec'y Closing Br. at 13-14). As the supervisor who is directly involved with approval of ERPs, Garcia's apparent lack of knowledge in this area is troubling. Granted that MSHA did share with the Respondents its technical analyses and papers regarding information on the RF levels and their safety with regard to unintended detonations; however, MSHA needs to know its audience. These are not multi-million dollar operations that have technical experts who can digest these documents. Rather, these are small operators who have other day-to-day concerns with little background in megahertz and radio frequency analyses. Alfred Brown's cross-examination of Huntley is a case in point. Brown was repeatedly apologetic for having to ask expert Huntley questions on the stand about several concerns with regard to this new C&T technology, but he explained that he had no other forum to get his questions answered than through this expedited hearing process. Making Huntley available to the IMA to address their concerns before issuing the citations could have been an effective step to resolve these disputes.



As the operators stated in their prehearing statement, the ERP dispute process is not the best way to resolve these concerns. In this regard, MSHA initially took the right step in meeting with the IMA in March 2009 and by agreeing to test C&T systems at an anthracite mine, which were positive and productive steps to respond to the IMA's concerns. However, holding a close-out meeting with the IMA to explain testing results, answer additional questions, and discuss next steps might have avoided the need for these proceedings. Instead, MSHA made the decision to issue citations and force the issue into this forum.

C. Economic Feasibility – S & M Coal Company

While I find that the Secretary has established a rational basis for rejecting the alternate means of compliance in the ERP submitted by S&M Coal, this does not necessarily translate into an affirmance of her findings regarding the citation at issue. The Secretary published MSHA PPL No. P09-V-01 on January 16, 2009, which discussed the criteria she would use for approving ERPs. In a Question and Answer document on PPL No. P09-V-01 published on April 29, 2009, MSHA stated it would consider economic feasibility in approval of C&T systems.

S&M Coal is a very small operation, which in 2009 produced 3,526 tons of anthracite coal and employed just five miners. (Ex. R-1.) Koperna testified that in 2009, S&M Coal had gross receipts of \$183,139, with net proceeds after expenses of \$19,483.<sup>14</sup> (Tr. 285-86.) Koperna took his salary out of S&M's net proceeds. (Tr. 286.)

Although the Mine Act does not provide that an operator's ability to afford upgraded C&T systems should be considered during the ERP approval process, the Question and Answer guidance document appended to PPL No. P09-V-01 states that MSHA "will consider whether [C&T] systems are economically feasible on a case-by-case basis." (Ex. G-7, item 4.) This was done in the case of S&M Coal. In a February 17, 2010 letter, MSHA District 1 Manager John Kuzar informed S&M Coal that, after reviewing financial statements from the company, he "determined that the information does not exempt you from providing upgraded [C&T] systems for your Buck Mountain Slope mine." (Ex. G-4J.) Kuzar acknowledged that "there is a fairly significant expense associated with the purchase and installation of such a [C&T] system." (*Id.*) But Kuzar went on to state:

[I]t is my understanding that the [C&T] system can be purchased and installed at the Buck Mountain mine for an amount that is less than the average profit reported by the mine over the last three years[,] and for an amount that is substantially less than many of the other expenses associated with your operation.

(*Id.*)

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<sup>14</sup> S&M's 2009 expenses included explosives (\$17,392), fuel (\$13,223), haulage (\$20,950), accounting (\$1,200), timber (\$2,700), repairs and maintenance (\$3,264), miscellaneous supplies (\$4,500), taxes and licenses (\$5,141), amortization (\$1,928), depreciation (\$1,655), interest (\$3,264), and labor (\$80,586). (Tr. 285-86; Exs. R-1, R-2.)

However, in a December 10, 2008 guidance document, MSHA estimated the per mine cost of installing C&T systems in mines with 1-19 employees as follows: (1) \$148,000 for the communication system, consisting of a base unit, amplifiers and associated barrier units, power supply, handheld radios, cable, and labor to install the system; (2) \$76,200 for the tracking system, consisting of a mine server and workstation, software, cable, hubs, radio frequency identification (“RFID”) readers, RFID personnel tags, and labor to install the system; and (3) \$9,000 per year for maintenance and extensions of the systems. Given these figures from MSHA, I find that S&M Coal could expect to incur an initial start up cost of \$224,200 to install a C&T system and, each year thereafter, maintenance costs of \$9,000 per annum. (Ex. G-6 at 11.)

As stated above, S&M Coal reported a net profit of \$19,483 for 2009, which was paid to Koperna as his salary. (Tr. 285-86.) I found credible and convincing Koperna’s testimony that S&M Coal is a “hand to mouth” operation with few cash resources to invest in new equipment. I also note that the Secretary failed to introduce any record evidence showing that S&M Coal had alternate sources of funding for a C&T system. Nor did the Secretary rebut Koperna’s testimony concerning the financial condition of S&M Coal.

In light of the foregoing, District Manager Kuzar’s determination that installation of a C&T system would cost “less than the average profit reported by [S&M Coal] over the last three years”<sup>15</sup> would appear so perfunctory and conclusory as to fail to comport with MSHA’s stated policy of “consider[ing] whether [C&T] systems are economically feasible on a case-by-case basis.” (Ex. G-7, item 4.) Contrary to Kuzar’s determination, the evidence before me indicates that installation of a C&T system would impose upon S&M Coal a crippling financial burden, even in light of the probability of S&M Coal obtaining such a C&T system with financing.

Kuzar’s apparent failure to follow MSHA’s policy to consider S&M Coal’s financial ability associated with implementation of section 316(b)(2)(F) appears to have rendered that policy moot. Operators such as S&M Coal will be forced to shut their mines, and lay off their miners and have them enter a workforce in an economy that is, at this point in time, in the midst of the deepest recession since the Great Depression. MSHA published a policy its district managers apparently do not intend to support, leaving small and financially strapped operators like S&M Coal to wonder why their government is unresponsive. (See Ex. R-4.) MSHA can and must do better.

This is true notwithstanding the fact that the Commission has long held that MSHA’s policy statements such as a Program Policy Letter or MSHA’s Program Policy Manual are not binding on the Secretary or the Commission. See *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *Bulk Transp. Servs.*, 13 FMSHRC 1354, 1360 (Sept. 1991); see also *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538–39 (D.C. Cir.1986) (reversing

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<sup>15</sup> The net profits earned by S&M Coal for 2007 and 2008 were not introduced into evidence. I thus base my conclusions on the issue presented by Mr. Koperna on data from 2009. I note, however, that S&M Coal’s production figures for 2007 (3,085 tons) and 2008 (4,667 tons) are similar to the mine’s production for 2009 (3,526 tons). (Ex. R-3.)

Commission decision which improperly regarded the Secretary's general statement of an enforcement policy as a binding regulation which the Secretary was required strictly to observe). This precedent is echoed in MSHA's policy here. On page two of the guidance document it states:

This guidance represents MSHA's current thinking with respect to two-way communication and electronic tracking for use in mine emergencies. It does not create or confer any rights for any person nor does it operate to bind mine operators or other members of the public.

(Ex. G-6 at 2.) I am cognizant that, unlike section 110(i) of the Mine Act, 30 U.S.C. § 820(i), which provides that any penalty the Commission assesses against a mine operator must take into consideration "the effect [of a penalty] on the operator's ability to continue in business," the Mine Act itself does not specify that a mine operator's compliance with section 316(b)(2)(F) is contingent upon its ability to afford a state-of-the-art C&T system. Congress mandated the use of such systems in mines regardless of cost, and both MSHA and the Commission are duty bound to enforce that mandate. I am therefore constrained to conclude that Koperna's arguments concerning the inability to afford a new C&T system, although compelling, must be rejected.

Having reached this conclusion, I would urge MSHA to work with S&M Coal in the future to find a workable solution to the company's conundrum – a solution that allows the company to continue in business.

### **ORDER**

Citation Nos. 7000115, 7000116, 7000117, and 7000440 are hereby **AFFIRMED**. The Respondents are hereby **ORDERED** to submit revised and compliant Emergency Response Plans to the district manager within 20 days of the date of this decision.<sup>16</sup>

Alan G. Paez  
Administrative Law Judge

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<sup>16</sup> The Administrative Law Judge shall retain jurisdiction over these proceedings for the limited purposes set forth in Commission Procedural Rule 24(f)(2), 29 C.F.R. § 2700.24(f)(2).

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