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TO: Village Board of Trustees – Pelham New York

FROM: Christopher B. Fisher, Esq.

DATE: December 8, 2014

RE: ExteNet Chapter 87 Special Permit Application – Response to Various Public Comments

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I. Scope of this Memorandum

This Memorandum has been prepared on behalf of the Applicant ExteNet in response to various public comments regarding federal, state and local laws related to the Village Board's consideration of an application for a special permit for a three node distributed antenna system ("DAS") in the Village of Pelham. We do not address here various federal and state legal considerations related to municipal legislative authority over projects in public rights-of-way or ExteNet's status as a New York State utility certified by the New York State Public Service Commission. In providing this Memorandum, we have endeavored to prepare it as a resource for the Village Board as part of this administrative proceeding and in response to various discussions of laws and legal points by members of the public and their counsel.

II. Judge Zambelli's Decision - Procedural Remand Only

A little over a year ago, Matthew Kaplan and Aimee Linn, property owners and residents of the Village, brought litigation against the Village Board challenging how ExteNet's DAS project was processed and approved in Pelham. On June 20, 2014, Judge Zambelli granted their petition in part holding that the Village Board should have processed ExteNet's Chapter 87 permit application and also procedurally complied with the State Environmental Quality Review Act ("SEQRA") prior to approving use of the Village's public rights-of-way ("ROW") by ExteNet for the DAS. For a remedy, Judge Zambelli simply remanded the matter back to the Village Board for further proceedings on ExteNet's application in accordance with her decision that a Chapter 87 permit was in fact required for the project. Notably, Judge Zambelli ruled that ExteNet could lawfully maintain the DAS in Pelham pending the Village Board's review and decision in accordance with the Court's order.

In ruling solely on the petition that was before the Court, it is important to note that Judge Zambelli left open the possibility that large portions of Chapter 87 might be preempted and inapplicable to ExteNet's DAS specifically stating that:

- "[A]s noted in the decision on the TRO, the Court takes no position as to whether all of the provisions of those statutes would apply and survive scrutiny under 47 U.S.C. § 253(a) and Transportation Corporations Law § 27 as that question is not properly before this Court...";
- "As to the contention that applying Ch. 87 to it would be discriminatory...these claims are speculative because Ch. 87 was not applied to ExteNet and it has not been established that [*sic*] there has been any discrimination against "providers of functionally equivalent services.")(47 U.S.C. § 332(c)(7)(B)(i));
- "To the extent that Ch. 87 contains provisions that are determined to be pre-empted or would be non-sensical to apply to the application, such as requiring set back distance from the ROW for a project intended to be located in a ROW, they may be severed."

In fact, in response to ExteNet's legitimate legal position and concerns in response to the Kaplan/Linn petition, Judge Zambelli stated that upon remittance of ExteNet's Chapter 87 special permit application for further administrative proceedings, the Village Attorney should advise the Village on these various issues and areas of potential limitation on Village regulatory authority. See Judge Zambelli's decision and order, pg. 18.

Over the summer, ExteNet filed a notice of appeal of the Court's decision and, without prejudice, also requested the Village Board process its pending special permit application and consider SEQRA as part of reapproving a ROW agreement for the DAS. ExteNet has supplemented its application to address recent amendments to Chapter 87 without prejudice to its legal claims and rights. Of note, Judge Zambelli was not aware of the Village's decision to amend Chapter 87 at the time of the Court's decision. ExteNet nonetheless continues to support processing of its application in accordance with federal, state and applicable local laws without prejudice and has provided substantial information to the Village Board in support thereof.

III. Federal Telecommunications Act & New York Standards for Local Zoning with respect to Wireless Facilities

The 1996 Telecommunications Act (the "Act") preserved state and local zoning over wireless facilities and also set forth several requirements in exercising any such municipal authority. 47 U.S.C. § 332(c)(7). In New York, wireless facilities have been recognized as public utility facilities since 1993 and the seminal decision by the Court of Appeals in Matter of Cellular One v. Rosenberg, 153 Misc.2d 302, 581 N.Y.S.2d 554 (Westchester Co. 1992), affirmed, 188 A.D.2d 648, 591 N.Y.S.2d 526 (2d Dept. 1992), affirmed, 82 N.Y.2d 364, 624 N.E.2d 990, 604 N.Y.S.2d 895 (1993). In Rosenberg, New York's highest court held that a wireless carrier's antenna facility in a residential zoning district where such facilities were prohibited by local zoning regulations was entitled to a use variance under the "public necessity" standard, which has been set forth by the court previously:

> [T]he utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, ...[And,] where the intrusion or burden on the community is minimal, the showing required by the utility should be

correspondingly reduced. Consolidated Edison Co. of New York v. Hoffman, 43 N.Y.2d 598, 374 N.E.2d 105, 403 N.Y.S.2d 193 (1978).

In short, the "public necessity" standard provides that a municipality may not exclude a utility from a community where the utility has shown a need for its facilities." Consolidated Edison Co. of New York v. Hoffman, 43 N.Y.2d at 610; Matter of Cellular One v. Rosenberg, 604 N.Y.S.2d at 899.

Federal Communication Commission ("FCC") licensed wireless carriers, like T-Mobile, and certified facilities based providers like ExteNet, are public utilities for zoning purposes and the "public necessity" test set forth by the Court of Appeals. This is true because, among other things, the existence of "logistic problems, such as the fact that '[t]he product of the utility must be piped, wired, or otherwise served to each user ***[,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery.'" Id. As such, as a matter of federal and state law, the Rosenberg case provides the outer limit for appropriate municipal regulation of wireless facilities through zoning codes and as applied determinations in administrative proceedings.

IV. Pelham's Zoning for Wireless Facilities – Chapter 87

Sections 87-9.D and 87-8 of the Chapter 87 of the Village Code set forth various standards for approval of wireless facilities in the Village and within the Village's ROW. ExteNet has submitted prima facie evidence demonstrating compliance with all of the Chapter 87 requirements and standards for approval of the DAS network as proposed. Members of the public have nevertheless argued that the Village Board should adopt interpretations of Sections 87-8.A and E and F that are even stricter than drafted by the Village and certainly stricter than what even federal and/or state law would permit.

A. Significant Gaps in Service

Section 87-8.A of Chapter 87 incorporates the Rosenberg standard right in its title - "necessity of service". By any measure, T-Mobile has provided proof of the significant gaps in its services in the Village including real world measurements from right outside residential buildings in the Village. This data has been collected and interpreted by professionals to testify that there is a significant gap in reliable services that includes in-building service in various residential areas of Pelham. To put to rest the "significance" of the gaps in T-Mobile's service and more fully quantify the need for the ExteNet DAS system, ExteNet is providing under separate cover information regarding the thousands of residents and visitors this network will serve with reliable service in vehicles, buses, and trains and at schools, the MTA station and single family residences in the area where there is a gap in reliable services.

In relation to the arguments advanced by the public, municipalities are preempted from adopting standards expressed in dBm signal strengths or any other form of technical operational requirements related to the deployment of wireless facilities. See New York SMSA Ltd. Partnership v. Town of Clarkstown, 612 F.3d 97 (2d Cir. 2010), affirming 603 F.Supp.2d 715

(S.D.N.Y. 2009). As such, the Village of Pelham has no authority to regulate through its local laws or in proceedings such as the pending Chapter 87 special permit application, a carrier's specific technical standards and signal strength as has been suggested by the public. Rather, the Village need only understand the need for a specific wireless facility to provide reliable services, a standard clearly articulated by the Court of Appeals in Rosenberg.

Moreover, a coverage gap itself is not defined by the scope of the geographic area to be served, but rather the service that is needed in a given geography. The Second Circuit recently confirmed that interpretation of federal law in a 332(c)(7) litigation involving DAS - Crown Castle NG E. Inc. v. Town of Greenburgh, N.Y., 552 F. App'x 47, 50 (2d Cir. 2014). The fundamental inquiry regarding what is a service gap revolves around the FCC licensed provider's network and/or the nature of potential users of that network in a given area, not the scale of the geographic gap itself. See, Crown Castle NG E. Inc. v. Town of Greenburgh, N.Y., citing Omnipoint Commc'ns, Inc. v. City of White Plains, 430 F.3d 529, 535 n. 3 (2d Cir.2005) (where the court relied back to the standard first enunciated in Con Edison noted above). Indeed, in its own 2009 declaratory ruling affirming that every carrier has a right to serve the community in which it's licensed, the FCC confirmed Federal congressional intent to prevent any "zoning approach that subsequently prohibits or effectively prohibits additional carriers" leaving "segments of the population unserved or underserved". 2009 FCC Declaratory Ruling, paras. 54-59.[1] By any metric, including the carrier data supplied by T-Mobile and the nature of end users in the area to be provided reliable service from the DAS as noted by ExteNet, the service gap in Pelham that will be addressed by the ExteNet DAS is significant, something the Village's own consultant CTC has confirmed.

B. Least Intrusive Facilities–Village Preference for Commercial Districts or Utility Poles

Sections 87-8.E and F of the Village Code set forth an express preference for use of existing or new utility poles once it has been established that a facility can't be sited in a commercial zoning district as set forth in Section 87-8.B's priority list of siting locations for wireless facilities. In this proceeding, the public readily admits it is not possible for T-Mobile's service gaps to be filled from sites in commercial zoning districts. Any rational interpretation of Section 87-8.E and F would lead to the conclusion that existing or new utility poles (of the same kind already located in the ROW) are the least intrusive means to providing service in the Village once it has been established that such sites are needed in residential areas. Given the evidence already provided by T-Mobile and ExteNet that includes verbal testimony of pole surveys, coverage plots of alternative node sites, and other data, we respectfully submit that there is no legal requirement in Chapter 87 to engage in a further "least intrusive" analysis of the type suggested by the public and in particular Mr. Kaplan and Ms. Linn. See Crown Castle NG East Inc. v. Town of Greenburgh, 2014 U.S. App. Lexis 925 (2d Cir. 2014)(finding violations of the Act and holding that a special permit was required for a specific DAS network noting the DAS provider qualified as a public utility under New York law and its customer had a gap in service in the area and that the nodes were simply not an aesthetic intrusion).

[1] Full citation: Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, 24 FCC Rcd 13994, 14021, paras. 54-59 (2009), recon. denied, 25 FCC Rcd 11157 (2010).

V. Public Comments on Carrier Federal Prohibition of Service Claims & Case Law

Federal law, FCC regulations and declaratory rulings and numerous court decisions make clear that Section 332(c)(7)'s preservation of zoning authority did not convert municipalities into "mini FCC's" in regulating wireless facilities. See generally, City of Arlington v. FCC, 133 S.Ct. 1863 (2013)(U.S. Supreme Court upholding the FCC Declaratory Ruling interpreting Section 332(c)(7)). The public in this administrative proceeding has nevertheless advocated for exactly such an approach by the Village Board. Indeed, citations to 1999 Second Circuit caselaw have been offered by the public to try and persuade the Village Board to deny the application in the hope that it might prevail on any subsequent prohibition of service claim that might be brought by the Applicant pursuant to Section 332 of the Act.

We previously provided references for the Village Board that included court citations detailing the lack of relevant credentials held by consultants for Mr. Kaplan and Ms. Linn in the area of radio frequency engineering. As such, it is not surprising that their representatives try and focus on cases from 15 years ago and erroneously seek to inject judicial standards of review into this administrative proceeding. The Village Board need only review subsequent cases that involved the same consultant and which have routinely held in favor of wireless carriers in overruling local zoning denials to understand that the Village should not rely on such comments from the public. See Cuddy & Feder letter dated September 30, 2014.

With respect to the law, the Second Circuit Court of Appeals has already rejected the approaches advocated by the public including counsel for Mr. Kaplan and Ms. Linn. In 2014, the Second Circuit rejected the Town of Greenburgh's defenses and compelled issuance of permits for a DAS network. The Second Circuit held that the DAS system proposed on the town's rights-of-way was simply not intrusive at all relative to legitimate planning and zoning considerations. See Crown at 2 (noting the Court's prior ruling in Willoth); See also Clarkstown distinguishing Willoth as inapplicable to efforts to regulate by a town.

As such, perhaps the greatest contribution the Willoth case can be cited for is where coverage holes "are very limited" denying applications to construct **towers** necessary to fill these holes will not amount to a prohibition of service." Willoth 176 F.3d 630, ¶ 45 (2d Cir. 1999)(emphasis supplied). Here, as considered by the Second Circuit and as defined by Chapter 87, there is simply no tower proposed in this application for a Chapter 87 special permit (compare Section 87-3 definitions of "monopole" with "utility pole"). Of note, even if a new tower were proposed, since 1999, there are several cases in the Second Circuit and other Circuits that have held that the need for improved 3G and 4G LTE services given current consumer demands can warrant construction of new facilities including 100' plus towers in residential areas as the "least intrusive" means of providing such services. See e.g. New Cingular Wireless PCS, LLC v Fenton, No. 3:11-CV-510 (N.D.N.Y. 2012) T-Mobile West Corp. v. City of Huntington Beach, 2012 WL 4867775 (C.D. California 2012); Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38 (1st Cir. 2009).

Simply put, the legal implications of Willoth have evolved in time with the development of different technologies and network infrastructure requirements to meet consumer demands for

high speed reliable wireless services. In the zoning context, carriers and infrastructure companies simply "do not bear the burden of proving that every potential alternative, no matter how speculative, is unavailable" but instead if there has been a good faith effort to identify and evaluate less intrusive means. See Sprint Spectrum & T-Mobile v. Zoning Board of Adjustment of Paramus, (D.N.J. Civ. No. 09-04940 (KM)(MAH) May 12, 2014) citing APT Pittsburgh Ltd. P'ship v. Penn Twp., 196 F3d 469, 480 (3d Cir. 1999). ExteNet has undertaken a review of alternative node sites with respect to the DAS and the planning and zoning principles and objectives expressed in Chapter 87, a code which does not identify aesthetic objections of a homeowner as a basis to deny a permit. ExteNet's evaluation was done in good faith and it proves that the DAS system as proposed is the least intrusive means of providing reliable wireless services in the Village.

VI. The Village Board Has Authority for Waivers of Chapter 87 Submission Requirements and Siting Preferences

Where a village board as the legislative body regulates and retains special permit jurisdiction, it has inherent authority to modify special permit submission requirements on the basis of the details of a particular application and in furtherance of the public's welfare even where the code does not expressly state such authority. *See* McKinney's Village Law 7-725-b, Practice Commentaries. Indeed village boards in such circumstances have authority to depart from their own legislated standards so long as their decision on a specific special permit application is not in and of itself capricious. Real Holding Corp. v. Lehigh, 778 N.Y.S.2d 438 (2004); Chernick v. McGowan 238 A.D.2d 586 (2d Dept. 1997); Cummings v. Town Bd. of North Castle, 62 N.Y.2d 833 477 N.Y.S.2d 607 (1984). See also, Nolon, *Well Grounded:Using Local Land Use Authority to Achieve Smart Growth*, pg. 132. As such, despite the assertion of counsel for Mr. Kaplan and Ms. Linn, the Village Board has the retained authority to waive any of the submission requirements or priorities set forth in its siting hierarchy set forth in Chapter 87 where based on rational reasons and related to the overall community's interests. In this regard we note that the public's interpretation of Section 87-8.A (in building surveying) and Section 87-8.E and F (existing or new utility pole preferences) while not supported, can be waived as part of issuing a special permit to ExteNet for the DAS. Indeed the untenable approach advocated by consultants to Mr. Kaplan and Ms. Linn, while not surprising based on past practice, ignores industry standard data collection practices which can be utilized to assess the reliability of in-building signals from actual drive test data collected from public streets and interpreted by qualified RF engineers, exactly what was done in the case of Pelham and supplied to the Village Board by Mr. Menio of T-Mobile.

VII. DAS Node Site Locations – Potential Modifications

ExteNet has studied various alternatives to the current three node DAS network in Pelham and concluded that, as designed and built, the project is not intrusive and is required for the provision of reliable wireless services in Pelham. All three nodes provide overlapping coverage in T-Mobile's existing network, fill gaps in service and work in combination to remarkably improve service with a technologically advanced solution where the siting infrastructure does not present adverse impacts to the community. At this point in time and based on relevant caselaw, the burden shifts to the Village Board to identify any potential node site modifications it believes

would be "less intrusive" for the community as it relates to legitimate planning and zoning interests.

With respect to any potential modifications of the DAS network, it is important to note that Public Notice that was given on this proposed extension of ExteNet's DAS network from Mount Vernon and Yonkers specifically stated "As part of the application process, the Village may consider and approve alternative node locations or modifications to the DAS network as proposed by ExteNet." In this regard, we note that the Public Notice was sent to all property owners within a 1,500' radius of the (3) proposed DAS network node sites, including owners within 1,500' from the potential alternate node location further north on Cliff Avenue. Notably, due to the Village's extensive requirements, the Public Notice was mailed via Certified Mail to approximately 1,221 homes and businesses in the Village of Pelham, the Clerk's for the City of New Rochelle, Village of Pelham Manor and City of Mt. Vernon, as well as to the Westchester County Planning Department and published in the Pelham Weekly newspaper on October 17, 2014. Accordingly, although ExteNet is not proposing an alternate DAS node location, the Village Board would have the authority to approve an alternate DAS node site location if one worked in providing reliable service and could be constructed by ExteNet. See generally, Gaona v. Town of Huntington Zoning Bd. of Appeals, 106 A.D.2d 638, 640, 483 N.Y.S.2d 430, 432 (2d Dep't 1984). Nevertheless, none of the alternatives studied by ExteNet or suggested by the public can provide such reliable service and/or be constructed in accordance with Consolidated Edison pole attachment requirements.