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December 10, 2014

VIA EMAIL and FEDEX

Mayor Timothy Cassidy and Members of the Board of Trustees
c/o Robert Yamuder, Village Administrator
Village of Pelham Village Hall
195 Sparks Avenue
Pelham, NY 10803

Re: Reply to ExteNet's Response to Public Comments Opposing the Application

Dear Mayor Cassidy and Members of the Village Board:

On behalf of Matthew Kaplan and Aimee Linn, we submit this reply to the December 8, 2014 submissions of ExteNet responding to public comments on ExteNet's Application for a Chapter 87 permit to install three Distributed Antenna System ("DAS") nodes in the Village.

The December 8 submissions did not respond to deficiencies in the Application identified in our prior submissions and which were subsequently reiterated in large part in the information requests of the Village's consultant, CTC Technology & Energy, dated December 4. If and when ExteNet does provide supplemental materials, we will reply to that new information before the Village Board decides the Application.

1. The Application, even as currently supplemented, fails to establish a "significant gap in wireless service" as required by Chapter 87-8.A because:

    - Chapter 87 requires actual in-kind survey data of an alleged service gap, but ExteNet provides *no* in-building measurement data with respect to the alleged lack of in-building coverage. The Village Board cannot "waive" this mandatory evidentiary requirement.

    - Neither federal nor state law preempts these requirements of Chapter 87, and ExteNet's arguments to the contrary are essentially rehashes of meritless arguments that ExteNet made, *unsuccessfully*, in the prior litigation.

    - The Village Board would be acting rationally and based on substantial evidence in the record by concluding that ExteNet has failed to establish a significant gap in T-Mobile wireless service in the Village because:

        - ExteNet's own submissions fail to establish any location in the Village which is totally lacking reliable T-Mobile wireless service;

        - ExteNet's own submissions confirm that the locations of alleged lack of reliable in-vehicle and in-building T-Mobile wireless service are small, isolated, and at most only two blocks in length;

- ExteNet's own submissions confirm that aside from the aforementioned small and isolated areas, reliable in-vehicle T-Mobile wireless service exists throughout the Village; and
- ExteNet's own submissions fail to include any in-building measurements to demonstrate a lack of reliable in-building T-Mobile wireless service anywhere in the Village.

2. Even if, for argument's sake, a "significant gap" in T-Mobile wireless service is assumed to exist, the Application still must be denied because:
   - ExteNet has provided no evidence, as required by Chapter 87-8.E and F, that the alleged T-Mobile wireless service gap cannot be closed by any of the less intrusive alternative locations which ExteNet itself has identified and which would use existing poles;
   - Chapter 87 requires ExteNet, as the permit applicant, to show that alternatives are unsuitable—a burden that never "shifts" to the Village Board and which cannot be waived by the Village Board; and
   - A less intrusive suitable alternative to the node now proposed to be located on a new pole at 156 E. 2nd Street would be a DAS node on the existing pole at the corner of Corlies and 1st Avenue.

I. The Application Must Be Denied Because ExteNet Fails to Establish a Significant Gap in Wireless Service

A. Chapter 87 Requires Actual In-Kind Survey Data of an Alleged Service Gap, But ExteNet Provides *No* Measurement Data With Respect to In-Building Coverage

Chapter 87-8.A *requires* denial of a permit unless the proposed facility will "fill a significant gap in current wireless telecommunications services," and mandates that "[a] significant gap may be demonstrated only by actual in-kind survey data in the area of the proposed installation." Thus, if the alleged significant gap "is within a building or buildings, then the survey data must be measured inside the building or buildings…." ExteNet asserts that there is a "significant gap" in in-building T-Mobile wireless service in the Village, but submits *no* in-kind survey data in support of that claim, violating Chapter 87's unambiguous requirement.

Rather than supplement its application with the required survey data, ExteNet tenders a map (Exhibit 2 in its submission) showing the approximate population density in the Village of Pelham. Given the absence of in-building measurements showing that residents in those areas will lack in-building service, this data has no bearing on whether there is a significant gap in service. ExteNet also "imagine[s]" that obtaining survey data of in-building signal strength could be difficult. This speculative statement does not excuse ExteNet's failure to comply—indeed, even to attempt to comply—with Chapter 87's clear mandate to provide such data to establish the alleged "significant gap" in in-building service.

Furthermore, it is entirely appropriate for Chapter 87 to require actual in-kind survey data. Other municipalities impose similar requirements in their ordinances regarding permits for wireless telecommunications facilities. For example, the municipal code of Calabasas, California requires a significant gap in wireless coverage to be established by "in-kind call testing" and specifies that "[i]f a claimed gap is for in-building coverage, then in-building call testing must be

performed…."[1] No challenge to the Calabasas code has ever succeeded in invalidating that requirement, and, indeed, courts have relied on such call tests in evaluating whether a significant gap in service exists. See, e.g., Cellular Tel. Co. v. Zoning Bd. of Adjustment, 197 F.3d 64, 69 (3d Cir. 1999); MetroPCS Inc. v. City & County of San Francisco, 2006 U.S. Dist. LEXIS 43985, 31–32 (N.D. Cal. June 16, 2006).

In short, ExteNet must comply with Chapter 87's in-building measurement requirement. Because ExteNet has not provided such evidence, it cannot demonstrate that any significant gap in T-Mobile wireless service exists.

B. A Municipality May Deny an Application for Wireless Telecommunications Facilities if No "Significant Gap" in Service is Demonstrated

The Second Circuit Court of Appeals has made clear that a gap in wireless service is *de minimis*, and therefore not a "significant gap," if it consists only of isolated "holes in coverage" that are "limited in number or *size*," or is "confined to a limited number of houses or spots" in a community. Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 643–44 (2d Cir. 1999) (emphasis added). ExteNet suggests that Willoth does not apply because it concerned cellular towers rather than DAS nodes, but that fact is irrelevant because the type of wireless facility proposed has no relation to what constitutes a "significant gap" in service.

ExteNet incorrectly claims that Willoth is no longer good law because it was decided in 1999. Courts continue to cite Willoth regularly for the legal rules that (1) gaps that are "de minimis" because they do are "limited in number or size" are not "significant" and (2) a municipality may deny a permit to fill even a significant gap in service "if the service gap can be closed by less intrusive means." See, e.g., T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield, 691 F.3d 794, 808 (6th Cir. Mich. 2012); N.Y. SMSA Ltd. P'ship v. Town of Oyster Bay & Oyster Bay Zoning Bd. of Appeals, 2013 U.S. Dist. LEXIS 116818, 48 (E.D.N.Y. Aug. 16, 2013); New Cingular Wireless Pcs v. Town of Fenton, 843 F. Supp. 2d 236, 253 (N.D.N.Y 2012). There is, in other words, absolutely no validity to ExteNet's attempt to evade Willoth.

C. The Village Board Cannot "Waive" Chapter 87's Requirement That ExteNet Prove a Significant Gap in Service by Actual In-Kind Survey Data

ExteNet requests that the Village Board "waive" Chapter 87's requirement of in-kind proof of a "significant gap" in service. Neither Chapter 87 nor state law authorizes such a waiver.

ExteNet improperly relies on a commentary on Section 7-725-b of the New York State Village Law. Section 7-725-b(5) permits a Village Board, in enacting permitting ordinances, to "empower" the permitting authority to waive certain requirements. However, such waiver authority *must* be written into the ordinance for Section 7-725-b(5) to apply, and Chapter 87 contains no such provision authorizing waivers of its requirements. None of the cases ExteNet cites suggest that a village board charged with processing permit applications may issue an *ad hoc* waiver of applicable legal requirements. Such waiver authority must be explicitly provided for in the relevant local permitting ordinance, and Chapter 87 contains no such authority.

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[1] The code is available at https://www.municode.com/library/ca/Calabasas_city/codes/code_of_ordinances.

D. Neither Federal nor State Law Preempts the Village Board's Authority to Deny the Application Based on Its Reasonable Determination That ExteNet Failed to Establish a "Significant Gap"

In arguing that federal and state law preempt or preclude the Village Board from denying the Application, ExteNet rehashes essentially the same meritless arguments that were rejected in Justice Zambelli's June 20, 2014 decision. ExteNet tries in vain to depict the court's decision as favoring its preemption arguments, but the plain fact is that Justice Zambelli ruled *against* ExteNet. The statements from the decision which ExteNet quotes merely reflect Justice Zambelli's decision not to interpret how Chapter 87 should be applied given that such issues were not ripe for decision given her disposition of the case. Nothing in her decision called into question the validity of Chapter 87-8.A, .E, or .F, or any other legal requirement at issue here.

ExteNet relies heavily on one case in which a denial of a DAS siting permit was invalidated, Crown Castle NG East Inc. v. Town of Greenburgh, 552 Fed. Appx. 47 (2d Cir. 2014). Crown Castle in no way calls into question the Village Board's authority to require proof of a "significant gap" in service and proof that less intrusive alternatives (including those using existing attachment structures) are not available. Indeed, Crown Castle is simply one of dozens of cases from around the country in which courts have applied the rules set down in Willoth and evaluated whether municipal wireless siting permit decisions are based substantial evidence in the record of a significant service gap and that the proposed facility is the least intrusive means to close that gap. All of those cases, including Crown Castle, acknowledge local governments' general authority over wireless facility siting and the applicant's need to meet the siting requirements of local permitting ordinances.

Although the court in Crown Castle happened to rule against the municipality, that decision does not limit municipal powers; rather, it holds that Greenburgh did not correctly evaluate the facts before it. The town's denial in Crown Castle rested on the erroneous premise that because one service provider had adequate coverage in an area, the town could deny a permit to a different provider that had demonstrated a significant gap in its own provision of service. Id. at 50. No such claim is made here. Second, in Crown Castle, the permit applicant proposed to install *all* of its DAS nodes on *existing* utility poles. Id. Here, by contrast, ExteNet seeks to construct an entirely new attachment structure despite available and feasible alternatives on existing poles, in violation of Chapter 87. Thus, Crown Castle is inapposite.

ExteNet's again attempts to rely on the "public necessity" standard set forth in Cellular Tel. Co. v. Rosenberg, 82 N.Y.2d 364 (1993). This is a red herring as no party has challenged the applicability of the "public necessity" standard: rather, the public argues that ExteNet fails to meet that standard. The Application's deficiencies are (1) that it fails to establish a significant gap in service—i.e., there is no "public necessity" for the DAS nodes—and (2) that it fails to show that the purported gap cannot be closed less intrusively using existing utility poles instead of the proposed new pole. Rosenberg allows denial of ExteNet's Application on such a basis.

Finally, ExteNet incorrectly asserts that, because the Telecommunications Act prohibits local laws that "interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology," N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 105 (2d Cir. 2010), the Village cannot require ExteNet to justify the signal strength thresholds which T-Mobile alleges are necessary to provide reliable coverage. But examining ExteNet and T-Mobile's signal strength measurements has *nothing* to do with the regulation of

how DAS nodes are operated; it is simply a means of determining whether a significant gap in service exists warranting installation of the nodes in the first place.

E. Because No Significant Gap in T-Mobile Wireless Service Has Been Demonstrated, the Village Board Would Be Acting Rationally and Based on Substantial Evidence to Deny the Application

The Village Board would be acting rationally and based on substantial evidence in the record by concluding that ExteNet has failed to establish a significant gap in T-Mobile wireless service in the Village. ExteNet's own submissions fail to establish any location in the Village which is totally lacking reliable T-Mobile wireless service. Thus, *some* T-Mobile wireless service exists *everywhere* in the Village.

ExteNet's submissions further confirm that the locations of alleged lack of reliable in-vehicle and in-building T-Mobile wireless service are small, isolated, and at most only two blocks in length. These are not *significant* gaps in service.

ExteNet's data also confirm that aside from the aforementioned small and isolated areas, reliable in-vehicle T-Mobile wireless service exists *throughout the Village*. Finally, ExteNet fails to include any in-building measurements to demonstrate a lack of reliable in-building T-Mobile wireless service anywhere in the Village. Thus, based on ExteNet's own submissions, the Village Board would be acting rationally and based on substantial evidence if it denied the Application for failure to demonstrate a significant gap in T-Mobile wireless service.

II. Even If a "Significant Gap" in Service Is Assumed, the Application Must Be Denied or Conditioned On Use of Less Intrusive Alternatives Using Existing Poles

A. ExteNet Provides No Evidence That the Alleged Gap Cannot Be Closed By Less Intrusive Alternatives Using Only Existing Poles, As Chapter 87-8.E and F Require

Chapter 87-8.E *requires* "[t]he use of a utility pole or an attachment structure" instead of a new attachment structure "unless the applicant demonstrates that no attachment structure is suitable for the location of the wireless telecommunications facility." Likewise, Chapter 87-8.F states that "[a] new support structure is permissible only if use of an existing structure is not feasible and a new support structure is the least intrusive means to fill the significant gap" in service.

ExteNet proposes the use of a new utility pole at 156 E. 2nd Street, yet it entirely fails to demonstrate the lack of suitability of the three alternatives that ExteNet identified and CMS has analyzed, which would use existing utility poles only. ExteNet is not entitled, under Chapter 87 or federal law, to the DAS node locations of its choice. See Cellco P'ship v. Town of Grafton, 336 F. Supp. 2d 71, 84 (D. Mass. 2004) ("[A]lthough a provider may desire the most efficient and cost-effective system, … the provider must be willing to consider and present to localities other feasible alternatives available to them….").

Three alternatives to locating a DAS node on a new utility pole at 156 E. 2nd Street have been identified, and nothing in ExteNet's December 8 submissions even purports to explain why use of those alternatives—none of which require a new attachment or support structure—is not suitable or feasible.

B. Chapter 87 Requires ExteNet to Prove That Such Alternatives Are Not Suitable, And That Burden Never "Shifts" To the Village Board

With respect to alternative locations, ExteNet states, without support, that it need not conduct further alternatives analysis because, at some stage in the application process, "the burden shifts to the Village Board to identify any potential node site modifications…." To the contrary, Chapter 87-8.E explicitly provides that "the use of a utility pole or an [existing] attachment structure … is required **unless the applicant demonstrates that no attachment structure is suitable**…." It is therefore ExteNet's burden, not the Village Board's or anyone else's, to explain why the alternatives identified by ExteNet and analyzed in the prior CMS Report are not suitable. ExteNet's bald assertion that this burden "shifts" to another party is, like all its other legal arguments, utterly without merit.

C. The Village Board Cannot "Waive" ExteNet's Obligation to Demonstrate That Less Intrusive Alternatives Using Existing Attachment Structures Are Not Suitable

As with respect to its failure to comply with Chapter 87-8.A's "significant gap" requirement, ExteNet argues that its violation of Chapter 87-8.E and .F's requirement to use existing support structures can and should be waived by the Village Board. For the same reasons stated in Part I.C, supra, ExteNet's "waiver" argument is entirely unsupported. The Village Board has *no* discretion to suspend application of Chapter 87's clear legal requirements. Indeed, it was the Village Board's failure to apply Chapter 87's mandatory provisions to ExteNet's original application that resulted, about one year ago, in litigation and ultimately in Justice Zambelli's decision invalidating the Village Board's prior actions.

CONCLUSION

As explained in our previous submission, the Village Board must deny the Application or condition the requested permit on relocation of the proposed DAS node at 156 East 2nd Street because (1) the Application fails to demonstrate a significant gap in service as required by Chapter 87-8.A and (2) even if it did do so, alternatives to the 156 East 2nd Street location are available using existing attachment structures and therefore must be used instead of the proposed location under Chapter 87-8.B, E, and F. ExteNet does not and cannot deny those facts.

Sincerely,

Steven Barshov