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December 2, 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: Pending Chapter 87 Permit Application of ExteNet Systems, Inc. for the Installation of Three Distributed Antenna System Nodes in the Village of Pelham

Dear Mayor Cassidy and Members of the Village Board:

On behalf of our clients, Matthew Kaplan and Aimee Linn, property owners and residents of the Village of Pelham (the "Village" or "Pelham"), we submit this letter setting forth our evaluation of the legal adequacy of the application (the "Application") of ExteNet Systems, Inc. ("ExteNet") for a permit from the Village Board of Trustees (the "Village Board"), under Chapter 87 of the Village Code, to install and operate three Distributed Antenna System ("DAS") nodes within the Village.

For the reasons explained in detail below, the Village Board is legally bound to deny the Application because the materials submitted by ExteNet fail to establish a significant gap in T-Mobile's wireless service. Among other defects, the Application omits the necessary survey data mandated by Section 87-8.A of the Village Code, is technically deficient, and the data that is submitted by ExteNet fails to establish that any significant sized geographic area in the Village lacks reliable T-Mobile wireless service.

Assuming *arguendo* that ExteNet could amend its application and ultimately provide data sufficient to establish a significant gap, the Village Board is still legally bound to deny the Application insofar as it proposes a DAS node on a new utility pole at 156 East 2nd Street. The Application does not demonstrate that any DAS node is needed at 156 East 2nd Street and omits data that would enable the Village Board to determine whether the alleged service gap would be adequately covered by the DAS nodes at 145 Harmon Avenue and the corner of Colonial and Pelhamdale Avenues alone. In addition, Sections 87-8.B and E of the Village Code require the Village Board to locate new DAS nodes on existing poles or structures, if possible. Suitable node placement alternatives on existing poles include: the corner of Corlies Street and 1st Avenue; and approximately 650' to the north on Cliff Avenue of the DAS node proposed at 156 East 2nd Street. Because alternatives on existing poles are possible, Chapter 87 prohibits the Village Board from approving the Application with a DAS node located on a new utility pole at 156 East 2nd Street. This non-discretionary requirement is binding on the Village Board and, if ignored, would render an approval of a DAS node at 156 East 2nd Street legally invalid.

DISCUSSION

On June 20, 2014, New York State Supreme Court Justice Barbara Zambelli invalidated the Village's approval of an earlier application by ExteNet to install DAS nodes at the same three locations proposed in the Application because the Village had failed to comply with Chapter 87 as well as the New York State Environmental Quality Review Act ("SEQRA").[1] The Court stayed ordering removal of the unlawfully approved DAS nodes pending the Village Board's timely review of the Application. The Application now under the Board's review is ExteNet's renewed effort to obtain approval for the installation of those three DAS nodes. A major focus in the instant proceeding is the location of one DAS node, proposed at 156 East 2nd Street, which is referred to in the Application and will be referred to herein as "Node 2."

Previously, ExteNet erroneously argued that its Chapter 87 application must be approved because "[f]ederal law allows [ExteNet] to move ahead with the installation" of its proposed DAS network even if approval of the Application violates Chapter 87.[2] In her June 20, 2014 opinion, Justice Zambelli rejected this view, citing binding appellate authority for the principle that "neither state nor federal law grants a telecommunications provider carte blanche authority to dictate the number and location of its facilities."[3]

For the following reasons, which are based in part on the Report of the Center Municipal Solutions, dated and submitted to the Board November 26, 2014 (the "CMS Report"), the Application fails to meet the prerequisites for approval under Chapter 87 of the Village Code because it lacks the required evidence of a significant gap in current wireless service. Furthermore, even if those requirements were met, the Application fails to establish that the location of Node 2 at 156 East 2nd Street is consistent with Chapter 87's requirement that wireless telecommunications facilities fill the purported gap in service using the least intrusive means and be located on existing attachment structures unless the applicant shows that no suitable existing attachment structure is available. Accordingly, the Board must either deny the Application or condition approval on the removal of Node 2 from the 156 East 2nd Street location.

I. ExteNet Fails To Demonstrate a Significant Gap In Current Wireless Service Establishing a Need For The Project.

A. Legal Standards for Establishment of a Significant Gap in Service

Chapter 87 provides that "[n]o person may install a wireless telecommunications facility without a permit granted" by the Board. Pelham Village Code § 87-4. For such a permit to be approved, "[t]he proposed wireless telecommunications facility must fill a significant gap in current wireless telecommunications services in the Village of Pelham. A significant gap may be demonstrated only by actual in-kind survey data in the area of the proposed installation." Id. § 87-8.A. The Village's authority to require such proof derives from the courts' decision, in Sprint Spectrum, L.P. v. Willoth, establishing that the federal Telecommunications Act ("TCA") preempts local authority to prohibit facilities that are *necessary* to fill a *significant* gap in service, but that local laws, like Chapter 87, can prohibit facilities that are not needed to fill that gap. 176 F.3d 630, 644–45 (2d Cir. 1999); see also 47 U.S.C. § 332(c)(7)(B)(i)(II).

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[1] Matthew Kaplan, et al. v. Village of Pelham et al., Index No. 13/3827 (N.Y. Sup. Ct. June 20, 2014).

[2] Kaplan v. Village of Pelham, Index No. 13/3827, June 20, 2014 Decision and Order, slip op. at 4.

[3] Id. at 14.

A review of relevant TCA provisions and applicable case law confirms that federal law provides ExteNet with no basis for avoiding Chapter 87's clear requirements. The TCA provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof … shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(A)(II). Although municipalities therefore may not *prohibit* the provision of wireless service, the court in Willoth made clear that they may deny applications to install new facilities if there is no "significant gap" in existing service, meaning that the gap to be filled 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. Willoth, 176 F.3d at 643–44. Thus, application of Chapter 87's requirements will not "prohibit service" within the meaning of the TCA unless ExteNet demonstrates that applying the ordinance to its application would leave a significant gap in service in ExteNet's target service area.

The TCA in no way grants wireless service providers an unfettered right to universal in-building coverage. To the contrary, evidence of a gap in in-building coverage alone is insufficient to show a "significant gap" in service. Willoth, 176 F.3d at 636 (noting inadequacy of provider's proof, which consisted of propagation data depicting "areas covered by signals strong enough to penetrate buildings" but failed to specify "propagation data for the lesser signal strength required to penetrate the skin of a vehicle"). And, although in-building coverage is relevant to determining whether a service gap is significant, U.S.C.O.C. v. Town of Dunbarton, 2005 U.S. Dist. LEXIS 6789, 13–14 (D.N.H. 2005), small gaps in in-building coverage are insignificant. For example, in one case, the court reasoned that coverage of 88.1% in-building coverage of the target area was sufficient. New Cingular Wireless Pcs v. Town of Fenton, 843 F. Supp. 2d 236, 247 (N.D.N.Y 2012). Given these legal principles, there is no basis for ExteNet to argue that the area lacking in-building coverage according to the drive test reported in the Menio Report constitutes a "significant gap" in service amounting to a prohibition of T-Mobile service in the Village. Furthermore, even if such a gap were significant, ExteNet entirely fails to demonstrate that such a gap cannot be adequately filled by any of the alternatives identified in the CMS Report.

Nor is the area in which ExteNet alleges a gap in in-vehicle service to exist sufficient to invoke the protections of the TCA. The types of gaps in in-vehicle service which courts have deemed to entitle providers to obtain permit approvals from local authorities are much larger than the isolated locations where ExteNet believes in-vehicle service is lacking. For example, in one case, the court noted the fact that the area lacking in-vehicle service deemed to be a "significant gap" was "over a 3.5-mile area," Omnipoint Communs., Inc. v. Town of Lagrange, 658 F. Supp. 2d 539, 559 (S.D.N.Y. 2009), which is far larger than the short blocks and corners identified by ExteNet. Even if ExteNet's alleged service gap were so large, any of the alternatives proposed by the CMS Report would effectively close the alleged gap in in-vehicle coverage.

In sum, federal law does not preempt the Board from denying the Application, or from conditioning its approval on any of the three alternatives identified in the CMS report, for the same reason that Chapter 87 obliges the Board to either deny the Application or condition its approval on the removal or relocation of Node 2: ExteNet has failed to demonstrate that its proposed DAS nodes, particularly the installation of Node 2 on a new attachment structure at 156 East 2nd Street, are necessary to fill a significant gap in T-Mobile service in the Village.

For the reasons discussed in detail in the CMS Report, ExteNet has failed to demonstrate a significant gap in current wireless service, and Chapter 87 therefore requires the Village Board to deny the Application. Such a denial is consistent with the TCA, the applicable provisions of which allow denial of the Application in light of ExteNet's failure to prove that its facilities are necessary to fill a significant gap in T-Mobile's wireless service. See Willoth, 176 F.3d at 636 (upholding denial of permit for wireless facility and noting the inadequacy of provider's proof, which consisted of propagation data depicting "areas covered by signals strong enough to penetrate buildings" but failed to specify "propagation data for the lesser signal strength required to penetrate the skin of a vehicle").

B. ExteNet's Evidence of a Purported Significant Gap in T-Mobile Wireless Service

In support of its showing of need, ExteNet has provided a document titled "Expert RF Report of Joseph Menio," dated October 22, 2014 and submitted to the Board on October 24, 2014. The Menio Report purports to show that the extent of coverage of the wireless network of T-Mobile, a wireless service provider which uses ExteNet DAS infrastructure to support its wireless network. ExteNet argues that a significant gap in T-Mobile service exists that includes both gaps in reliable service for T-Mobile customers inside buildings ("in-building service" or "in-building coverage") and gaps in service for customers in their cars ("in-vehicle service" or "in-vehicle coverage"). Exhibits 1 and 2 of the Menio Report are maps showing the area of Pelham in which, ExteNet asserts, T-Mobile has a significant gap in service requiring installation of the proposed DAS nodes. The maps summarize the purported results of computer models of radio signal propagation as well as a "drive test."

The computer propagation modeling summarized in the Menio Report was purportedly developed using a computer program known as "Asset," a software tool that predicts the geographic extent of in-building coverage based on certain starting parameters such as the signal's radio frequency, the structure of the network's antennas, and other inputs. (Menio Report at 6–7.) The results of that modeling are set forth in Exhibit 1 of the Menio Report, which purports to show the predicted extent of reliable in-building service without the proposed DAS nodes, and Exhibit 3, which purports to show the predicted extent of reliable in-building service with the nodes. (Those exhibits are reproduced in Appendix A of the CMS Report.)

The "drive test" on which the Menio Report relies consisted of a T-Mobile representative driving through the area of the alleged service gap while taking measurements of the strength of the T-Mobile wireless network's radio signals in decibel-milliwatts ("dBm"), a measure of wireless signal strength. The drive test map has a series of colored dots corresponding to the measured signal strength for each location at which a measurement was taken. Green dots show locations in which the signal was greater than -90 dBm, which ExteNet states is necessary to ensure reliable wireless in-building and in-vehicle service. Yellow dots represent locations with signals measured at less than -90 dBm but at least -98 dBm, which ExteNet asserts provide reliable in-vehicle coverage but not reliable in-building service. Red dots represent locations with signals below -98 dBm, which ExteNet asserts cannot provide reliable in-vehicle service.[4] Although the Menio Report indicates that -90 and -98 dBm are ExteNet's "design criteria" for in-building and in-vehicle service, respectively, it does not justify the selection of those criteria with any technical analysis or data.

[4] Because dBm values are negative numbers, -90 dBm is greater (i.e., indicates a stronger signal) than -98 dBm.

C. ExteNet's "Drive Test" and Computer Propagation Data Fail to Establish a Significant Gap in Service

As explained in detail in the CMS Report, the Menio Report's use of "Drive Test" and computer propagation data is insufficient to demonstrate a significant gap in wireless service. For this reason, Chapter 87 requires that the Board deny ExteNet's application.

To the extent that a purported significant gap consists of an alleged absence of in-building service, the Village Code is explicit about the type of evidence required for approval, and the Application fails to provide such data. The Village code mandates that "[a] significant gap may be demonstrated only by actual in-kind survey data in the area of the proposed installation." Village Code § 87-8.A. That Village Code section goes on to further mandate that "if the significant gap is within a building or buildings, then the survey data must be measured inside the building or buildings in the survey area." Id. (emphasis added). ExteNet has submitted no survey data measured inside any building or buildings in the survey area, only computer propagation modeling and outdoor drive test data. Therefore, ExteNet's application and supporting materials fail to tender the evidence mandated by the Village Code in order to establish a lack of in-building service anywhere in the Village.

ExteNet's failure to tender actual evidence of a significant gap in in-building service, as required by Chapter 87, cannot be overlooked in light of concrete evidence that there is, in fact, no lack of in-building service in the alleged service gap area. As explained in the CMS Report, Matthew Kaplan and Aimee Linn own and reside in a home near the center of the area marked by yellow dots in Exhibit 1 of the Menio Report, where they have received and continue to receive reliable in-building T-Mobile service. (CMS Report at 5–6.) The experience of Matthew and Aimee is unlikely to be unique given that they are located toward the center of the area which purportedly lacks in-building service. In light of this actual, in-kind evidence that reliable in-building T-Mobile service exists in the relevant area of Pelham, ExteNet's failure to provide actual, in-kind survey evidence of a significant gap in in-building service, as required by Section 87.8.A of the Village Code, requires that the Village Board deny the Application.

ExteNet fails to tender evidence of any significant gap in in-vehicle service. All of the areas shown with yellow dots on Exhibit 2 of the Menio Report have reliable in-vehicle coverage, which consists of the vast majority of the area of the alleged significant service gap. Thus, within most of that area, ExteNet's own data confirms that T-Mobile customers receive reliable service both outdoors and in their cars. The only areas in which ExteNet claims that gaps in in-vehicle service exist are small isolated areas shown with red dots on Exhibit 2 of the Menio Report, one of which is not in the Village at all: 1) a two-block stretch of Highbrook Avenue; 2) the corner of Colonial Avenue and Cliff Avenue; 3) at the corner of Heywood Road and Monterey Avenue (certain portions of which are located in the Village of Pelham Manor and not the Village of Pelham), and 4) on a short stretch of Pelham Manor Road. As explained in the CMS Report, those drive test measurements do not establish a significant gap in service because those small areas are not sufficiently large to constitute a "significant gap" and because ExteNet provides no evidence that those areas lack outdoor service (i.e. service while walking or sitting outside) even at the red-dotted locations.

Finally, the CMS report details numerous technical deficiencies in the Application which render it impossible for the Board to assess the accuracy and significance of the data ExteNet proffers, as would be necessary to rationally conclude that there is a significant gap in service. With

respect to the computer propagation modeling, the Menio Report fails to specify the inputs and parameters used in the Asset modeling software, preventing assessment of whether the model is accurate. With respect to the drive test, the Menio Report fails to specify in detail how the study was conducted or at what frequency bands signal measurements were taken, preventing assessment of the study or its ability to demonstrate a gap in service. In addition to ExteNet's utter failure to provide in-kind evidence of a significant gap in service, these technical deficiencies prevent the Board from conducting a rational evaluation of the evidence that ExteNet did provide.

In sum, because the Application fails to provide any actual, in-kind service data supported the alleged gap in in-building service in the Village, and because the evidence ExteNet did provide is technically deficient, the Application fails to demonstrate a significant gap in service as required by Section 87-8.A of the Village Code, and the Board therefore must deny the Application.

II. Chapter 87 Requires That Node 2 Be Eliminated or Relocated

Chapter 87 prohibits approval of the placement of Node 2 at 156 East 2nd Street because that location, which had no pre-existing attachment structure for the node, violates Chapter 87's requirements that wireless facilities employ the least intrusive means to fill significant gaps in service and that they use existing attachment structures unless no existing structure is suitable.

The Application acknowledges that there was no pre-existing attachment structure at 156 East 2nd Street, and seeks to install Node 2 on a new utility monopole. However, Section 87-4.B of the Village Code provides that an applicant for a permit under Chapter 87 must demonstrate that the proposed facility is "the least intrusive means of filling the significant gap in current wireless telecommunications services." Furthermore, Section 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."

The location of Node 2 on a new structure at 156 East 2nd Street violates both of those requirements because ExteNet has failed to show that less intrusive alternatives using existing attachment structures are not suitable. As explained below, ExteNet's evidence that alternative locations for Node 2 are not feasible is deficient, and the CMS Report proposes three suitable alternatives that ExteNet fails to adequately address in the Application. Because ExteNet has failed to prove that such alternatives are not available, Chapter 87 requires that the Board deny the Application as proposed or, if the Board does approve the Application, condition its approval on removal of Node 2 from 156 East 2nd Street and the use of one of the available alternatives.

A. ExteNet Fails to Establish that Less Intrusive Alternatives Using Existing Attachment Structures Are Not Suitable

ExteNet submitted a document, dated November 10, 2014, in which ExteNet provides signal propagation maps which purport to show that certain alternative locations for Node 2 are not feasible. Those maps (which are contained in Appendix B to the CMS Report) are misleading and fail to demonstrate that installing Node 2 at 156 East 2nd Street is permissible under Chapter 87.

First, although ExteNet offers the signal propagation maps as evidence that the alternatives which it has assessed are not suitable to fill the alleged service gap, the maps in fact show the opposite. In the case of one alternative, labeled "PLH003 ExteNet Proposed" (which corresponds

to Alternative 3 discussed below and which would use an existing attachment structure), the map delineates an area labeled a "compromised coverage area," which is largely colored in red. The legend for those maps indicates that areas colored in red are predicted to have signal strength of at least -98dBm, which is T-Mobile's design criteria for reliable in-vehicle coverage (this color-coding is misleadingly different from that in the Menio Report exhibits, where red is used to indicate areas which *lack* of in-vehicle coverage). Thus, contrary to ExteNet's argument that the November 10 maps show that the alternatives it assessed will result in a significant "compromised coverage area," those maps in fact show that use of that alternative would close the gap in in-vehicle coverage documented by the Menio Report's drive test survey data cited by ExteNet in support of its argument that there is "significant gap." (CMS Report, at 9.)

Second, the November 10 maps only show wireless service originating from the three proposed DAS nodes as if no other service was being provided from T-Mobile's existing service network. Thus, the areas in the November 10 maps which ExteNet labels as having "significant compromised coverage" in fact may receive reliable in-building and in-vehicle service from the existing network. From the inadequate model, which inexplicably omits existing T-Mobile coverage, the Board cannot reasonably conclude that ExteNet has proved that suitable alternatives to installing Node 2 on a new attachment structure are not feasible.

Because the November 10 filing is devoid of proof that less intrusive alternatives using existing attachment structures are not suitable to filling the purported gap in T-Mobile service, Chapter 87 prohibits approval of the Application to the extent it includes installation of Node 2 on a new attachment structure at 156 East 2nd Street.

B. The CMS Report Identifies Three Less Intrusive Alternatives Using Existing Attachment Structures

The CMS Report identifies three alternatives that would suitably address the purported gap in T-Mobile service without requiring the installation of a new attachment structure. ExteNet's November 10 propagation maps fail to show that any of the three alternatives contained in the CMS Report, which use only existing attachment structures, are not feasible and less intrusive than ExteNet's proposal. Thus, Chapter 87 requires that, if the Board approves the Application, it condition approval on the removal of Node 2 from 156 East 2nd Street and the adoption of one of those three alternatives. The proposed alternatives are explained in detail in the CMS Report, but are reviewed briefly here.

Alternative 1: Eliminate node at 156 East 2nd Street and use only the nodes at 145 Harmon Avenue and the corner of Colonial and Pelhamdale Avenues

Use of two instead of three nodes would be less intrusive than installing three nodes, and material provided in the Application suggests that two nodes could potentially fill the alleged service gap. That is particularly true if the height of those nodes were increased above the height assumed in the Application. ExteNet has provided no propagation map demonstrating that the alleged service gap could not be substantially filled using just two nodes, and it has therefore failed to prove, as Chapter 87 requires, that its 3-node proposal is the least intrusive means to fill the alleged service gap. Indeed, courts have upheld municipalities' denials of wireless facility permits where an alternative such as this—use of fewer wireless facilities to achieve substantial coverage of the target service area—was available. See Willoth, 176 F.3d at 644 (upholding denial of application of 3-tower system where evidence showed that 1 or 2 towers could provide "acceptable" levels of coverage). Here, use of fewer wireless facilities would still provide

acceptable levels of service because, as in Willoth, this alternative would comply with Pelham's permitting laws while providing "in-vehicle coverage throughout the [municipality], and in-building coverage throughout most of it." Willoth, 176 F.3d at 643.

Alternative 2: Relocate node at 156 East 2nd Street to the corner of Corlies Street and 1st Avenue.

In the event that the Board determines that elimination of Node 2 would not provide adequate service coverage, Chapter 87 requires that the Board condition approval of the Application on the relocation of node to the corner of Corlies Street and 1st Avenue. As the CMS Report explained:

> This location is preferable to the proposed location for Node 2 for numerous reasons. A utility pole exists at this intersection, so this alternative is consistent with the Village Code's requirement that new wireless telecommunications facilities be located, if possible, on existing support structures. This location is bordered on one side by the train station and tracks, and on the other side by two parks. It is not adjacent to any residences and is within approximately one block from the Village's commercially zoned areas. It is a less intrusive node location than the currently proposed location on a new structure across from the Kaplan residence.

(CMS Report at 10.)

ExteNet considered the signal propagation that would result if Node 2 were installed at this location in its November 10 materials, but those materials fail to show that the location is not suitable. The principal objection raised by ExteNet is signal interference outside the target coverage area. However, as explained in the CMS Report, screening and blocking equipment can be installed to eliminate such signal interference. (Id.) To the extent that ExteNet argues that this location would not sufficiently fill the alleged gap in T-Mobile service, the coverage area from Node 2 could be increased by installing the node higher. Given the location's distance from residential houses, even installation of a higher node would be less intrusive than the proposed attachment structure and node at 156 East 2nd Street. (Id.)

Alternative 3: Relocate node at 156 East 2nd Street to ExteNet's proposed alternative location approximately 650' to the north on Cliff Ave.

Finally, even if the Board deems the foregoing two alternatives not feasible, ExteNet's request to install Node 2 at 156 East 2nd Street still must be denied because, as ExteNet has acknowledged, a suitable alternative exists using an existing utility pole located about 650' to the north of the proposed location. As ExteNet concedes in its November 10 filing, ExteNet identified this location as a feasible alternative location for Node 2 during settlement discussions. ExteNet has now changed its story, arguing that the location that it previously admitted would suffice is inadequate because there would be "compromised coverage overlap" to the south of Node 2. As explained in the CMS Report, however, this alleged "compromised coverage" area would have reliable in-vehicle service, is geographically small, and could be further reduced by slightly increasing the height of the node.

Because ExteNet has previously admitted that this alternative is sufficient to close its alleged service gap, and because this alternative would use an existing attachment structure, Chapter 87 requires that the Board either deny the Application or, if it approves the Application, to condition

approval on relocation of Node 2 to this place. Even if service coverage will not be as strong using this site as it would with ExteNet's preferred location, that does not entitle ExteNet to avoid the clear requirement of Chapter 87 to use existing attachment structures where feasible. ExteNet's own filings show that this location would provide in-vehicle coverage throughout the target coverage area and in-building coverage throughout the vast majority of it. The courts have held that such coverage is "acceptable" for purposes of the TCA, Willoth, 176 F.3d at 636, and therefore the Board must apply Chapter 87's clear prohibition against installation of a new attachment structure at 156 East 2nd Street in light of this available alternative requiring no new attachment structure.

III. The Administrative Record Before the Village Satisfies the "Substantial Evidence" Standard of the TCA for Rejection of the Application

The TCA requires that decisions by local governments to deny a request to place, construct, or modify personal wireless service facilities "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). This provision simply requires that the Village Board explain its decision in writing and that the administrative record—i.e., the submissions of the various parties—support the Village Board's determination that the Application fails to meet the requirements of Chapter 87. See USCOC of VA. RSA #3 v. Montgomery County, 343 F.3rd 262, 271 (4th Cir. 2003) ("[T]he proposed tower's inconsistency with the local zoning requirements is sufficient to establish substantial evidence for the denial of the permit."); see also Willoth, 176 F.3d at 639 (noting that, consistent with the TCA, "local governments may reasonably take the location of the telecommunications tower into consideration when deciding whether … to approve an application….").

Likewise, evidence (like that present here) that an alleged service gap may be filled by less intrusive alternatives, as required by a local ordinance, is sufficient to satisfy the "substantial evidence" requirement. Willoth, 176 F.3d at 639 (upholding denial of permit because "the evidence in the record … adequately supports the Planning Board's conclusion that Sprint could remedy its service gaps by using fewer than three towers"); see also USCOC of Greater Mo., L.L.C. v. Vill. of Marlborough, 618 F. Supp. 2d 1055, 1063 (E.D. Mo. 2009) (upholding denial of wireless siting permit because the provider's mere "allegation that [its preferred] site was the best suited site does not create an inference that the [preferred] site was the only viable alternative.")

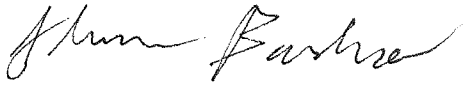
For the reasons explained in the CMS Report and this letter, the current administrative record before the Village Board fully demonstrates the Application's non-compliance with Chapter 87. Accordingly, Chapter 87's requirement that the Village Board's deny the Application or condition its approval on the relocation of Node 2 to an existing support structure fully satisfies the TCA's "substantial evidence" requirement.

Finally, the TCA's requirement that the denial of a wireless siting permit be "in writing" requires that such a writing: "(1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." Sprint Spectrum, L.P. v. Platte County, 578 F.3d 727, 731 (8th Cir. 2009). As long as these basic elements are present, courts have held that even a document as simple as the minutes of a local government board meeting are sufficient to meet the "in writing" requirement. Sprint Spectrum, L.P. v. Platte County, 578 F.3d 727, 731 (8th Cir. Mo. 2009).

CONCLUSION

For the foregoing reasons, Chapter 87 requires, consistent with applicable federal law, that the Village Board either deny the application or condition its approval on the elimination of Node 2 or its relocation to existing attachment structures at either the Corlies Avenue or the Cliff Avenue alternative locations. Failure to comply with these legal requirements would render the Board's decision unlawful and therefore subject to judicial reversal in a proceeding under Article 78 of the New York Civil Practice Law and Rules.

Sincerely,



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