Honorable Chairman William Rice,
Special Counsel Todd Steckler,
Nelsonville Zoning Board of Appeals, and
Planning Board
Village of Nelsonville
258 Main Street
Nelsonville, NY 10516

February 20, 2018

RE: Application by Homeland Towers, LLC for a Special Use Permit to Construct a Telecommunications Facility at 15 Rockledge Rd., Nelsonville, NY

Dear Honorable Chairman Rice,
Special Counsel Todd Steckler,
Members of the Zoning Board of Appeals, and
Planning Board

Philipstown Cell Solutions (hereinafter "PCS") submits the following in reply to: the February 9, 2018 letter submitted by Robert Gaudioso of Snyder & Snyder, LLP, as attorneys for Homeland Towers LLC, and New York SMSA Limited Partnership d/b/a Verizon Wireless (hereinafter referred to as "Homeland", "Verizon" or the "Applicant" individually, or the "Applicants" collectively); the February 9, 2018 letter submitted on behalf of New Cingular Wireless PCS LLC (hereinafter "AT&T", the "Applicant" or the "Applicants") by Cuddy & Feder LLP; and, all supplemental and supporting documentation contained therein.

Reply to the Snyder & Snyder, LLP Letter of February 9, 2018

Supplemental RF Report:

Counsel for the Applicant, in a letter dated February 9, 2018, states that the Supplemental Report prepared by PierCon confirms "that a Distributed Antenna System is not a feasible alternative." As is more fully detailed herein, the Supplemental Report merely makes conclusory statements and assertions unsupported by any technical or engineering information whatsoever. In short, this report confirms only that the Applicant has failed to meet its burden and exercise the due diligence required to demonstrate the feasibility of a DAS network for the Village of Nelsonville.

The Clarkstown Decision:

Counsel also references the Clarkstown decision which, as PCS detailed in its submission of February 9, 2018, has been distinguished in Second Circuit jurisprudence and is not

applicable to the instant matter. Local Boards are indeed allowed to specify a preference for alternative technologies for specific applications where aesthetic concerns are at issue.

In fact, without thoroughly exploring the feasibility of "other less visually-intrusive alternatives", the applicant has not met its burden. (See, Voicestream Minneapolis v. St. Croix County, 212 F.Supp. 2d 914 (2002), ("plaintiff appears to have taken the position that it would be more efficient and less costly to stick with its single-tower proposal because of the difficulties likely to be associated with obtaining the necessary leases and variances that would be required to build facilities in the Riverway District. Plaintiff's approach was understandable, given the costs involved in conducting feasibility studies, procuring leases and pursuing variance requests. However, as the court stated in Town of Amherst, "this one-proposal strategy may have been a sound business gamble, but it does not prove that the town has in effect banned personal wireless communication.")).

DAS Under the Village Code:

Counsel goes on to cite the Village Code (hereinafter "Code") (specifically Section 188-68A.11, which requires the number of towers and antennas in the Village to be minimized), suggesting that a DAS system is not allowed under the Code or would otherwise be in violation of this Section. This claim is wholly without merit. First, in reading the sections of the Code pertaining to telecommunications facilities as a whole, it is clear the intent and spirit of the Code is to minimize the intrusiveness of any such facilities upon the Village, and that even a liberal reading of the Code suggests Section 188-168A.11 refers to macro-cell "commercial communications towers", not small and inconspicuous DAS nodes. Second, the title of the very Section that counsel erroneously suggests pertains to DAS nodes is titled: "Application for special permit to place new tower." The Code defines commercial communications towers as "a freestanding or building- mounted structure, including appurtenances and antennas…" and thus may not in fact apply to DAS. Third, it is somewhat bemusing that the Applicant would show concern for the level of intrusiveness posed by a handful of strategically placed and discrete DAS nodes, but has no such concern when it comes to their intent to erect no less than three macro-cell tower sites in and around the Village of Nelsonville as has been made clear on the record.

Finally, Cuddy & Feder, counsel for AT&T in this proceeding, took a position contrary to the one advanced here. In a separate application in the nearby municipality of Pelham, NY, where Cuddy & Feder were in fact advocating for DAS deployment in a community with similar topographical conditions and tree-lined streets as are found here in Nelsonville, Cuddy & Feder stated:

> 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 permit application is not in and of itself capricious. See, Real Holding Corp. v.

> Lehigh, 778 N.Y.S2d 438 (2004); Chernick v. McGowan, 238 A.D.2d 596 (2d Dept. 1997); Cummings v.Town Bd. of North Castle, 62 N.Y.2s 833 477 N.Y.S.2d 607 (1984). (Emphasis added). (https://www.pelhamgov.com/sites/pelhamny/files/uploads/120814memotovillageboardoftrustees.pdf). (See also, photographic examples of DAS nodes on tree-lined streets in Pelham, NY and Weseley Hills, NY at Exhibit 'A': and the Decision and Order, In the Matter of the Application of MATTHEW KAPLAN and AIMEE LINN v. Village of PELHAM, attached with this submission).

Accordingly, it is within the Board's discretion in the instant matter to depart from the legislated standard of the Code where in the public interest, and as such the Applicant's claims here have no merit. Yet again, upon applying even modest scrutiny to the Applicant's submissions, it becomes evident that they are inaccurate and lack merit, do not reflect the actual state of the law and should be discounted in their entirety.

Conditions of Approval:

With respect to the Applicant's "Conditions of Approval", PCS submits the following responses:

a. The Applicant's offer to maintain the tower height at 110 feet does not ensure that it will never be raised at some point in future. The Applicant only offers not to raise the tower as of right, as is allowed under existing law. This confirms to an extent that under federal law the Applicant currently has the right to unilaterally raise the tower, as has been claimed by PCS and other tower opponents. The Applicant merely offers to come before the Board with any request to raise the tower. There is nothing in this offer that indicates what the Applicant would do if the Board denied any such request. Presumably, the Applicant will preserve its rights to challenge any such denial, such that future raising of the tower remains a distinct possibility. Alternatively, should the Applicant claim some additional actual coverage need in future that could only be remedied by a heightened tower or an additional tower, the Board would find itself in a position where its discretion to limit heightening the tower is effectively nullified. In addition, any such agreement between the Village and the Applicant would not apply to carriers not party to this application or the proposed agreement, thereby making it unenforceable against such a third party carrier seeking co-location. Finally, laws may be amended or passed in future that would grant the Applicant additional rights to raise the tower height not foreseen now nor contemplated by this offer.

b. The Applicant offers $20,000 in an escrow fund for adjacent homeowners to assist with landscaping and screening. First, it should be asked why this offer is being made now, when throughout the entirety of this proceeding the Applicant has maintained that the intrusiveness of the tower is insignificant and that no such screening or landscaping is required. Further, there is no evidence on the record that the residents immediately adjacent to the tower have made any requests or expressed any desire for such monetary assistance. In fact, the only evidence on the record on this issue suggests that the neighbors are adamantly opposed to the tower and have

stated openly that they are not willing to make modifications to their properties to accommodate its siting at the proposed location. As a result, this offer remains illusory at best given its contingency upon all neighboring properties granting a full release to the Applicant; impossibility, as at least two adjacent property owners have intervened in this proceeding by counsel to ensure their opposition is properly before the Board.

c. The Applicant's proposal to create a conservation easement to restrict future development at the property makes a mockery of such an instrument. The very purpose of a conservation easement is to ensure that development of the kind proposed herein never happens in the first place. What use would a conservation easement serve once the property has forever been marred by the industrial-scale intrusion that the proposed tower will bring to this community? Conservation easements are meant to preserve and protect land from development, not as a means to ensure such development projects are approved.

d. Regarding the alternative tower design simulations that have now been proposed by the Applicant and assessed by the Applicant's consultants: PCS submits that unfortunately both proposed designs do not minimize the detrimental intrusiveness or negative visual and aesthetic impact of the proposed tower. Given that the obelisk alternative is a taller and significantly more prominent structure, and that the flagpole alternative purportedly requires double the artificial tower structures on this prominent ridge, we submit that these designs will negatively affect the character-defining qualities and visitor-experience of the cemetery in much the same way as the monopine design and may even stand out more prominently in wider views from the surrounding area. Both the original monopine and these two additional tower designs that the Applicant has proposed are highly intrusive and have a significant negative visual impact not allowed under the Code. In short, even the "least bad" option does not mean it is a good option. Finally, the Applicant's insistence on offering these alternatives only on condition of the project's approval speaks to the lack of good faith in this offer and the level of disregard the Applicant shows for the real and repeated concerns expressed widely by hundreds of community members as well as members of both Boards about the impact of this size structure at this sensitive scenic and historic ridge location. As we have outlined in our previous reports and repeat herein, there are other better and less-intrusive solutions that are appropriate for a scenic and historic area like ours. We urge the applicant to adjust their plans to fit into our community, as is required by our local law, or alternatively, that the Board deny the application in its entirety.

<u>Reply to the Applicant's RF Consultants' Letters of February 5, and February 6, 2018</u>

The Applicant's RF consultants, Mr. Feehan and Mr. Penesso, each make various representations pertaining to the infeasibility of DAS for the Village of Nelsonville in their submissions of February 5, and February 6, 2018, respectively. PCS submits that the bulk of these submissions amount to bald assertions offered in a conclusory manner without any technical or engineering support, are lacking in merit and should be discounted in their entirety.

VOLTE and 4G LTE are Information Services and Existing Coverage at 850MHz is Sufficient:

The Applicant's consultants claim that the proposed tower will remedy a need for full spectrum 4G LTE technology, including VOLTE, but that the existing 3G technology provided on the 850 MHz bandwidth will remain active in this area in spite of not being part of the proposed installation. On its face, this last point is an admission by the Applicant that there is no gap in coverage at the 850 MHz bandwidth, an assertion that PCS has maintained from the outset of its opposition to this application. This further supports PCS' contention that the instant application is to accommodate a desire by the Applicant for increased capacity at additional wireless broadband bandwidths, and has nothing to do with a coverage gap in personal wireless services. There is no provision in the Telecommunications Act and no Section in the Code that requires a wireless provider to have full coverage at every possible bandwidth. Indeed, as has been previously submitted, U.S. district courts have held that 4G LTE technology, including VOLTE, are data information services, not personal wireless services, and are thus not protected under the Telecommunications Act. PCS respectfully submits that Mr. Feehan's conclusory statement to the contrary, unsupported by any countervailing legal authority, must therefore be discounted entirely.

The Significance of the Former Butterfield Hospital Site to the Instant Application:

The Applicant AT&T has repeatedly stated on the record that its purported coverage gap and need for the proposed tower has come about as a result of the loss of its wireless facility on the old Butterfield Hospital site in the Village of Cold Spring. Indeed, the following are quotes from statements made by the Applicant on the record at public hearings, and RF engineering reports submitted in support of the instant application:

> "AT&T has maintained a wireless facility on the Butterfield Hospital pursuant to a lease agreement in order to provide wireless service to the Village of Nelsonville and the surrounding areas ("Hospital Facility"). The Hospital has ended its agreement with AT&T thereby requiring AT&T to stop using that location and remove the existing facility. The **removal of AT&T equipment from the Hospital Facility will result in the loss of reliable wireless services for AT&T customers in this area.**" – Daniel Penesso, RF Consultant for Applicant AT&T, initial RF Analysis Report.
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> "A significant gap in reliable wireless service exists in the Village of Nelsonville and neighboring communities **as a result of the decommissioning of AT&T's facility at the Hospital Facility**" – Daniel Penesso, RF Consultant for Applicant AT&T.
>
> "Based upon these tests, a propagation map illustrating **AT&T's coverage without its equipment at the Hospital Facility** is attached as Exhibit 1. As the propagation map in Exhibit 1 clearly demonstrates, **there is a significant gap in service** in the portion of the Village in the vicinity of the Site and the surrounding areas **without the Hospital Facility.**" – Daniel Penesso, RF Consultant for Applicant AT&T.

"It is my professional opinion that: (1) **A significant gap in service exists** in the portion of the Target Area in the Village of Nelsonville and surrounding areas **as a result of the decommissioning of its facility at the Hospital Facility**;" – Daniel Penesso, RF Consultant for Applicant AT&T.

"**15 Rockledge Road Facility will allow** AT&T to provide reliable **wireless service** in the Target Area, **similar to that provided by AT&T's installation on the Hospital Facility** and thus work in conjunction with AT&T's existing network."– Daniel Penesso, RF Consultant for Applicant AT&T, initial RF Analysis Report.

"In fact, the **only existing site in the vicinity was at the Butterfield Hospital**, a location that has actually been decommissioned and removed." – Vincent Xavier, Regional Manager, Homeland Towers, LLC, 6/28/17 Alternative Site Analysis.

"The **need for the facility** to provide wireless service in the area, including throughout the Village of Nelsonville, and a large part for AT&T **is being driven by the fact that they lost their existing site at Butterfield Hospital**." – Robert Gaudioso, Snyder & Snyder, LLP, Counsel for the Applicant, before the Nelsonville Zoning Board of Appeals, 8/29/17.

"The point of the AT&T [RF] report, was that **they HAD a site at Butterfield Hospital** that was decommissioned when the work was done over there." Robert Gaudioso, Snyder & Snyder, LLP, Counsel for the Applicant, before the Nelsonville Zoning Board of Appeals, 11/15/17.

As has been repeatedly made clear throughout these proceedings by the Applicant and their respective legal counsel and RF engineering consultants, AT&T's purported need for the proposed macro-site is a direct result of the loss of their previous facilities at the former Butterfield Hospital. By these representations, the Applicant has thus admitted that had the Butterfield facility not been decommissioned, there would be no coverage gap and no actual need for the proposed macro-site. This fact raises three important issues: 1) any replacement facility need not be any more intrusive in design than that which existed at the Butterfield site; 2) the actual design of the prior Butterfield site contradicts the Applicant's claims pertaining to the infeasibility of a DAS system and the need for a 110 foot tower; and, 3) plans for the new Butterfield project have been approved that include provision for a cell site facility accommodating at least two wireless carriers, thereby presenting a less intrusive and less detrimental alternative for the Applicant.

1. The Butterfield Hospital Facility Design Provided Sufficient Coverage:

The decommissioned AT&T wireless facility consisted of approximately four to eight antennas mounted atop the two-story Butterfield Hospital facility. At most, these antennas were positioned approximately 30-35 above ground level, at the relative height of a third story building. (See, Attached photographs of former AT&T wireless facility on Butterfield Hospital at Exhibit 'B'). Clearly, these antennas are not mounted atop a 110 foot tower, yet by the Applicant's own statements on the record, this prior facility was adequate to "provide wireless service to the Village of Nelsonville and the surrounding areas." (See, Daniel Penesso RF Report). Why, if the

prior facility, consisting of a small number of antennas mounted approximately 30 feet in the air, was sufficient to provide reliable wireless coverage to the Village of Nelsonville and the surrounding area, has the Applicant now come before the Board to insist repeatedly that the only means to deliver the same service is by constructing a massive 110 foot macro-site cell tower in the heart of the Village overlooking our historic cemetery? PCS submits that as the Applicant's own statements on the record with respect to the Butterfield Hospital facility and the photographs of same prove, the Applicant has failed to demonstrate an actual need for the facility as it has been proposed, and that there exist substantially less detrimental alternatives that the Applicant has failed to pursue.

2. The Butterfield Hospital Facility Design Indicates a DAS Network is Feasible:

One of the Applicant's primary reasons given for why a DAS network is infeasible in the Village of Nelsonville, is the prevalence of tall trees that rise above the available utility poles. Presumably, the issue here being the purported interference the taller trees will have on the signals of the DAS nodes. The photographs of the Butterfield Hospital facility, however, clearly show that the antennas were mounted at or below the prevalent tree line. (Exhibit 'B). Yet, the Applicant has stated on the record that this facility was still somehow capable of providing reliable wireless coverage throughout the Village of Nelsonville and the surrounding area. Certainly, the Butterfield site did not consist of tower-mounted antennas rising dozens of feet above the dense tree line, as is now being claimed as a necessity by the Applicant. This glaring contradiction should raise questions in the minds of the Board as to the Applicant's veracity with regard to its entire application. PCS submits that as the photographs of the Butterfield Hospital show, a 110 foot macro-site cell tower is not the least detrimental means to provide wireless coverage throughout the Village of Nelsonville and the surrounding area, and that a thoughtfully designed DAS network is in fact feasible regardless of the tree cover.

3. The New Butterfield Development Has Received Wireless Facility Approval:

The new Butterfield development has received approval from the Village of Cold Spring to accommodate a wireless facility that will accommodate at least two wireless providers. Specifically, the roof line of Building 3 of the project has been redesigned to incorporate a cupola within which the cell facility will be located. Approval of this redesign has been granted, as observed by members of PCS at the recent Cold Spring Historic District Review Board public hearing of February 14, 2018. Members of PCS confirmed with the developer that accommodation for at least two wireless providers will be made available, and that construction of the project is set to commence imminently. PCS submits that the new Butterfield development is a less detrimental and less intrusive alternative location that must be pursued by the Applicant.

AT&T Drive Test Data Indicates Sufficient Coverage at 700 MHz:

AT&T RF consultant, Daniel Penesso, in his February 6, 2018 letter, attempts to qualify the drive test data presented at the 700 MHz frequency by claiming "one must account for some coverage being provided existing on-air site" from an antenna facility located across the river at West Point. Notwithstanding that PCS submits the Applicant's propagation maps are inaccurate for reasons stated in prior submissions, rather than merely record and report the date the Applicant again attempts to provide an excuse as to why the reported coverage appears to be better than it actually is. Whether the existing coverage is provided by an antenna across the river is irrelevant. So long as coverage exists and is sufficient, then the Applicant is unable to show an actual need as required under the Code. (See, 360 [Degrees] Communs. Co. v. Board of Supervisors, 211 F.3d 79, 2000 U.S. App. LEXIS 5071, finding that federal regulations contemplate the existence of dead spots, defined as small areas within a service area where the field strength is lower than the minimum level for reliable service).

Applicant's RF Consultants' Claims of DAS Infeasibility are Unfounded:

In Mr. Feehan's letter, he claims in conclusory fashion that "[a]n outdoor DAS is not a feasible alternative to remedy Verizon Wireless' significant gap in service in this area." The reasons given include: the high number of trees in the area; the distance of homes from the streets; limitations of access to utility poles; State right-of-way claims along Route 301; the inability to co-locate providers with DAS; and, the possibility that a DAS system would go down in times of emergency or natural disaster. Likewise, Mr. Penesso's letter discusses in a conclusory manner that a DAS system for the Village of Nelsonville is infeasible. Mr. Penesso claims that DAS networks are "typically implemented in locations such as shopping malls, school campuses, office buildings, larger venues such as sports stadiums and even arenas as well as nodes attached to utility poles in street right-of-ways." Mr. Penesso claims that AT&T requires a macro cell site for this target area "because of the large geographic area of unreliable coverage that needs to be filled," and that "a DAS network would not be able to provide the level of coverage that the proposed macro site can provide." Mr. Penesso also goes on to discount the feasibility of DAS for Nelsonville given the number of trees in the area that are taller than the available utility poles and the impact that would have on a DAS network's effectiveness.

The above reasons given by both RF consultants are provided in a conclusory manner, with no supporting evidence or technical information whatsoever. No RF or engineering testing was conducted to support these assertions and very little useful information is provided. Indeed, much of this submission contradicts readily available wireless industry examples of DAS implementation as well as the Applicant's counsel's very own submissions in other municipalities where they have advocated for DAS networks.

DAS Can Accommodate Co-location:

For example, Mr. Feehan asserts that "co-locating multiple carriers on a DAS system is very difficult." Yet, in the town of Wesley Hills, NY, Applicant's co-counsel Cuddy & Feder stated before the Zoning Board there in an application to deploy a DAS network that "DAS

nodes can accommodate up to two additional carriers for co-locating." (See, https://www.wesleyhills.org /sites/wesleyhillsny/files/minutes/pb_meeting_1.24.18.pdf). Interestingly, no mention was made there either by the Applicant's co-counsel or the Village's own RF Consultant Mr. Graiff, that co-locating on a DAS system was fraught with difficulty. Indeed, even a cursory review of wireless industry publications indicates that co-locating multiple carriers on a DAS network is common place and a standard component to any such network.

State Right-of-Way and Utility Pole Access Concerns are Speculative:

Regarding Mr. Feehan's claims that there are potential limitations of access to utility poles and issues with respect to State right-of-way claims along Route 301, no evidence is submitted that such concerns would be at issue with a DAS network in Nelsonville. Again, these claims are conclusory and unsupported and can only be meant to cast doubt in the minds of the Board rather than providing any useful information. There is no indication that a DAS network in Nelsonville would necessitate placing nodes along Route 301 in the State right-of-way (particularly given the prospect of a raised McKeel Corner tower), nor is there reference to any specific utility poles that would be necessary for a DAS in Nelsonville but are inaccessible, thereby making such a network infeasible. Indeed, the Applicant resorts to providing photographs of four random utility poles that happen to be at or below the tree line as in some manner supporting the infeasibility of DAS for the entire Village of Nelsonville. Yet, it is not even asserted that these particular poles would even need to be part of such a network. Accordingly, these photographs are irrelevant and should only be considered by the Board in terms of how little use they are in determining the feasibility of DAS in Nelsonville.

In addition, The Applicant's RF consultant submits that Nelsonville risks losing regulatory authority of node placement in the Right of Way (ROW). While utility poles in the ROW are considered the private property of the utility companies in New York, a review of New York jurisprudence demonstrates that municipalities exercise significant control in regulating these structures.

Critically, N.Y. VILLAGE LAW § 6-602 "Separate Highway District" recognizes that highways within a Village boundary are subject to local control: "The streets and public grounds of a village constitute a separate highway district and are under the exclusive control and supervision of the board of trustees or other officers of the village when such control is delegated to them by such board."

Moreover, Nelsonville Village Code §188-67 "Collocation on Eligible Building or Structure" clearly states that special permit approval is necessary for attaching an antenna on "eligible structures" (including utility poles) that alter the width and height of the structure. It stipulates that any application must be reviewed under the criteria set forth in §188-70 "Standards for Issuing Special Permits" including provisions related to actual need and adverse impact on scenic and historic resources.

And Central Hudson instructs private parties seeking to attach equipment to poles owned by Central Hudson to first receive federal, state and/or municipal approval:

"Licensee shall install its facilities in accordance with all requirements of Central Hudson, the National Electrical Code, the National Electrical Safety Code, the Occupational Safety and Health Administration any other applicable federal, ***state and municipal statute****, rule and/or regulation, and any rules or orders now in effect or that hereafter may be issued by the PSC or any other governmental authority or any entity whose standards are referenced in the Agreement or the Exhibits attached to the Agreement having jurisdiction, including, but not limited to, all requirements for proper bonding, grounding, clearances, guying and anchoring of Licensee's Facilities…****If permits, permissions or consents are required from federal, state and/or municipal authorities, it will be the Licensee's obligations to apply and obtain it before attaching to Central Hudson facilities.****"*
https://www.cenhud.com/workingwithus/operatingprocedures

1.KAPLAN v. VILLAGE OF PELHAM (Supreme Court, Westchester. 2014)

Here petitioners commenced an Article 78 proceeding against the Village of Pelham to vacate the municipality's Right of Way agreement with Extenet. The Village had authorized Extenet's installation of DAS nodes without seeking a special use permit or conducting SEQRA as necessitated under its own Pelham Village Code. Extenet argued that under New York State law it required only the consent of the municipality to install and maintain infrastructure in the ROW. It further claimed that a municipality only has the authority to regulate public safety in the ROW, but not the siting of utility infrastructure.

The Court disputed ExteNet's argument, saying:

"Under federal law, the Telecommunications Act of 1996 provides at, 47 U.S.C. §253(a), that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide and interstate or intrastate telecommunications service." However, regarding state and local governmental authority, the statute further provides that ***"[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way …****" (47 U.S.C. §253(c)). In the section of the statute that addresses mobile services, the preservation of local zoning authority is expressly addressed and provides that "nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities" (47 U.S.C. §332(c)(7)(A)). From the recitation of the above,* ***it is clear that the Village maintains significantly more authority over its ROW than ExteNet contends and that the representation made to the Village that if it denied ExteNet the right to install its equipment, "Federal law" allowed ExteNet "to move ahead with the installation" was, at best, a gross misstatement of the law****. The above case law also makes clear that, as indicated in the Court's decision on the TRO, neither Ch. 87 nor SEQRA are pre-empted in their entirety by federal or state law in this matter. Indeed, while ExteNet disputes that "aesthetics" is a valid concern of municipal authorities when it comes to telecommunications equipment to be installed in a ROW, such zoning concerns have been held to be valid and not in conflict with the TCA, so long as they do not have the effect of prohibiting wireless services."*

2.VERIZON NEW YORK INC. v. VILLAGE OF WESTHAMPTON BEACH (United States District Court, E.D. New York 2014)

Verizon New York argued that it maintains the right to license attachments to its utility poles with private parties, saying that under New York law, a municipality does not have the right to dictate to the franchisee what it may or may not do with its own property—in this case, the utility poles. Verizon referenced the New York Court of Appeals' holding that a telephone company has an "unconditional right to erect and maintain poles for its lines upon public streets and highways" and that the company's telephone poles constitute personal property belonging to the utility (citing North Hempstead, 41 N.Y.2d at 693).

The Court recognized the right of a company to enter into contracts with private parties, but found that

> *"Under Village Law § 6-602, the streets and public grounds of Quogue and Westhampton Beach to be under the control and supervision of the Boards of Trustees of those villages. N.Y. VILLAGE LAW § 6-602 ("The Streets and public grounds of the village constitute a separate highway district and are under exclusive control and supervision of the board of trustees…"). N.Y. VILLAGE LAW § 4-412(3)(6) gives the Board of Trustees the power to "grant rights and franchises or permission to use the streets . . . [and] public places or any part thereof or the space above or under them…for any specific purpose upon such terms and conditions as it may deem proper and as may be permitted by law." N.Y. VILLAGE LAW § 4-412(3)(6)."*

Verizon also claimed that its rights and powers with respect to the utility poles derive from state law, not local law, and that state law expressly trumps any competing local law. But the Court disputed state pre-emption in this matter, arguing:

> *"**Notwithstanding these findings, however, private property, such as the utility poles at issue here, may still be regulated by the municipalities**… Courts have repeatedly addressed the issue of whether a municipal ordinance is invalid because the state legislature has pre-empted the area that the municipality had sought to enter… In general, police powers are not to be superseded unless the legislature has demonstrated a clear and manifest purpose to do so… **Further, the New York Court of Appeals has exhibited a reluctance to overturn local laws, finding that the laws enacted by local legislatures have an "exceedingly strong presumption of constitutionality"**… The Court finds here that there is no language in either the LIPA Act or the [New York State] Transportation Corporations Law specifically pre-empting a village's authority to regulate attachments to utility poles. **Nor is there any evidence from the legislative history of a "declaration of state policy" that would supersede the municipalities' police powers to regulate this area. As a result, the Court finds that the municipalities' ability to regulate attachments to utility poles as a function of their police powers is not pre-empted by the LIPA Act or the Transportation Corporations Law.**"*

3.STAMINSKI v. ROMEO (Supreme Court, Special Term, Suffolk County, 1970)

> *"Section 27 of the Transportation Corporations Law gives telegraph and telephone corporations broad powers to construct their lines and fixtures over or under public highways, and to utilize private lands for their purposes, with the right to condemn such lands if necessary.* ***The section requires however that telegraph and telephone corporations must obtain the permission of city, village or town authorities to use local streets for the construction of its lines.****"*

4.VILLAGE OF CARTHAGE v. CENT. NEW YORK TEL. & TEL. COMPANY (1906).

The Court of Appeals found that localities retain the right to regulate and manage the ROW in terms of coordinating construction schedules and ensuring public safety, but are also permitted *"to regulate the erection of telegraph, telephone or electric light poles and the stringing of wires on these poles…the right to erect these poles and string the wires is not derived from the village authorities, but they are permitted to regulate the erection of the same; that is to say, the location of the poles and the streets to be occupied are, doubtless, within the reasonable power of the village to regulate."*

For all the foregoing reasons, PCS submits that the Village of Nelsonville would retain siting authority over DAS nodes in the Village right-of-way.

<u>DAS is Used in Surrounding Municipalities with High Tree Lines and Challenging Topography:</u>

With respect to both RF consultants' claims regarding the prevalence of tree lined streets making DAS in Nelsonville "infeasible", there are many examples in nearby communities that prove otherwise. Indeed, as is more fully detailed below in the section of this submission pertaining to the former Butterfield site, and as is evidenced in several nearby communities where DAS has been deployed, this line of argument against DAS should be highly scrutinized by the Board. For example, in the village of Pelham, NY, in neighboring Westchester county, a DAS network has been deployed among the tall tree-lined streets and in spite of the topography. (Exhibit 'A'). Similarly, in Wesley Hills, NY, where Applicant's co-counsel and the Board's own RF consultant Mr. Graiff have advocated for the deployment of a DAS network, DAS nodes were deployed on utility poles in spite of difficult topography and tree lined streets not unlike here in the Village of Nelsonville. (See, aerial video of Wesley Hills, NY topography and tree lined streets at https://www.youtube.com/watch?v=oX6XxeMHL6U).

Both of the Applicant's consultants in fact admit in their submissions that the conditions found in Nelsonville only reduce a typical DAS node's coverage to approximately 800' to 1200' relative to its capability in flat open terrain. This reduced coverage, however, does not make a DAS network infeasible. Rather, it requires better engineering and maximizing the potential of each DAS node by considered and strategic placement, in addition perhaps to a small number of additional nodes. Indeed, the Applicant's RF consultants, in spite of their expertise as engineers, provide no useful information regarding how a DAS network in Nelsonville is technically "infeasible." (See, additional examples of DAS deployment in local

communities with dense vegetation and challenging topography:
http://www.crowncastle.com/projects/rye-ny.aspx;
http://www.crowncastle.com/projects/wesley-hills-ny.aspx;
http://www.crowncastle.com/projects/huntington-ny.aspx).

A DAS Network in the Village of Nelsonville is Feasible and Would Require Only a Few Nodes:

The Applicant's RF consultants also claim that at least twenty DAS nodes would be needed to achieve the same coverage of the proposed macro-site cell tower. The proposed tower, however, would cover an area of nearly eight square miles, whereas the Village of Nelsonville, where this application is situated, is only one square mile. Thus, as PCS' RF engineering consultant Richard Comi has stated, very few DAS nodes (perhaps as few as three or four) would be required to sufficiently cover the entire Village of Nelsonville, and would constitute a dramatically less intrusive and detrimental alternative to the proposed macro-site cell tower. As has been discussed in prior submissions, there is nothing in the Telecommunications Act or the Code that requires the Village of Nelsonville to approve an application for a cell tower that will provide the vast majority of its coverage outside this municipality. (See, Airtouch Cellular v. City of El Cajon, 83 F. Supp. 2d 1158, (S.D. Cal., 2000), finding there is no prohibition of wireless services within the meaning of § 332(c)(7)(B)(i)(II) if the carrier's request is denied but the carrier may turn to alternative sites, even if those sites "may be less than optimal." Jefferson County, 59 F. Supp. 2d at 1109-10 ("forcing [the carrier] to use lesser alternatives" does not constitute prohibition)).

A DAS Network Would Provide In-Building Coverage to Most of Nelsonville:

Also raised as a concern by the Applicant's RF consultants, is the claim that a DAS network will not provide adequate in-building coverage, as compared to the proposed tower. Again, this claim is overstated. The Village of Nelsonville is one square mile, with most of the residents being clustered along main street and among the closely spaced houses in the immediate vicinity. As with the other examples given herein, professional engineering consultant Richard Comi has indicated that a properly engineered DAS network of a handful of nodes would be more than sufficient to address any purported in-building coverage gaps within the small geographic area of the Village. Regardless, as has been indicated in prior submissions, in-building coverage in sparsely populated rural areas is neither required under the Code nor protected under the Telecommunications Act.

DAS Failure During an Emergency of Natural Disaster is Speculative:

The Applicant's RF consultants also discuss the possibility of a DAS network failure in the event of emergency or natural disaster. Not only is this assertion highly speculative and clearly meant to cast doubt and fear in the minds of the Board, but it is not supported by the reality that DAS networks are being deployed throughout New York and across the country in increasing numbers. If such networks were as fragile as the Applicant would have us believe, it is doubtful that the wireless industry would be utilizing this technology at all. For

the Applicant's consultants to engage in such speculation, it is no different than if PCS were to suggest that the proposed tower is a faulty design due to the risk of it being hit by lightning, falling as a result of an earthquake given Nelsonville's proximity to a fault line, or the risk of electrical fire causing the tower to collapse. Further, in the event of emergency or natural disaster, the Applicant has developed contingent technologies to ensure adequate coverage. (See, Applicant's deployment of drone cell nodes during emergencies: http://fortune.com/2016/10/06/verizon-drones-emergency/; https://www.rcrwireless.com/20170718/carriers/up-air-verizon-drones-public-safety-market-tag6; https://www.rcrwireless.com/20170928/carriers/drones-FirstNet-ATT-tag4). In addition, a DAS network in Nelsonville would not replace the coverage that currently exists, but would rather expand and enhance that service. As cellular service generally remains adequate now in times of power outage, there is no reason to believe that such an outage affecting a DAS network would have any impact beyond what residents experience now when the power goes out. Accordingly, the Applicant's submissions in this respect are highly speculative, amount to little more than fearmongering and should be disregarded in their entirety.

Applicant's Participation in the FirstNet Program has No Bearing on the Instant Application:

The Applicant submits information regarding the FirstNet program with which New York State has chosen to participate. Nothing in the Applicant's submission, however, supports a finding that approval of the instant application is required in order for the Applicant to deploy a FirstNet compatible facility. First, the Applicant currently enjoys sufficient coverage at the 700 MHz bandwidth, thereby allowing for FirstNet deployment under existing conditions. Second, should additional coverage be required for FirstNet deployment, such could be accomplished by utilizing any number of the various less intrusive and less detrimental alternatives that have been outlined throughout this proceeding. In short, the proposed facility is not necessary for the Applicant to accomplish its FirstNet rollout, which is scheduled to be complete by 2022. Finally, accommodation for a FirstNet participant is not required under the Code. Accordingly, the Applicant's participation in the FirstNet program should not have any bearing on the instant application.

Reply to Saratoga Associates Supplemental Submission of February 7, 2018

PCS submits the following responses to Saratoga Associates (hereinafter "Saratoga") supplemental Visual Resource Assessment submission dated February 7, 2018.

1. The alternate designs proposed by the Applicant and evaluated by Saratoga remain highly intrusive and do not present less detrimental alternatives to the tower initially proposed in this application. The obelisk in particular, being necessarily taller and a more prominent structure will likely increase visibility of the structure from the surrounding area rather than minimize such views. A modern fake monument would be out of character against our small village's skyline, competing with the historic steeples that have defined our area for hundreds of years. It would also tower above--and take focus away from--the real monuments to those who have died in the beautiful and bucolic cemetery. The double flag pole design also remains highly

intrusive, as this alternative would purportedly require two towers as opposed to one, thereby increasing the discordance with the surrounding natural features. Indeed, as has been shown throughout this application process, a towering structure of this height situated on the key ridge and in several of the most important views of our historic rural cemetery is highly intrusive and not the least detrimental or least intrusive alternative as required by the Code and pursuant to federal law.

2. The photographs taken by Saratoga from the south end of the rural cemetery, in an effort to minimize the negative impact of the proposed macro-site, are misleading. These photos are effectively irrelevant to the issue of the visual impact of the proposed facility, as regardless of where visitors end up within the cemetery, EVERY single visitor is impacted negatively, twice over, upon entering and exiting this sacred space. The imposing cell tower will be the first image visitors have of the cemetery as they enter, and the last image they have as they leave, regardless of where they spend their time while visiting. This will negatively impact their experience and distract from the solemnity of this historic landmark and the reflection that people seek to engage in while visiting. Tower structures of similar height and substance at this sensitive location will also significantly impact several of the character-defining features of this thoughtfully designed National Register eligible Rural Cemetery, as outlined in letters submitted to the Boards by Liz Campbell Kelly, ASLA on 1/9/2018, Erin Muir, RLA on 1/12/2018, Ethan Timm, RA on 1/12/2018 and other landscape architects and professionals. In addition, given that the tower will loom over the historic cemetery gatehouse, the only entry and exit point to the cemetery, it will be impossible to visit this landmark without being negatively impacted. This negative impact is compounded by the fact that the Village gathers around the gatehouse and central flagpole area for special commemorative events such as on Memorial Day services. In terms of having a negative visual impact on the cemetery, the proposed tower could not be in a worse spot. It is a desecration.

3. The photographs taken from the surrounding area confirm that the tower will be highly visible from hiking trails that residents and tourists frequent and enjoy, and thus the tower will disrupt and negatively impact the views, vistas and sightlines that residents are accustomed to, and in many cases have invested in homes here to enjoy. Nature tourism has become a vital component to the local economy in the Village of Nelsonville, with hikers, bird-watchers and other nature-lovers descending upon the Village throughout the year to enjoy its many hiking trails and other natural features. Any negative impact on this asset to the Village cannot be underestimated. Accordingly, the proposed tower remains both unnecessary given the absence of an actual need for signal coverage in the area, and highly detrimental and intrusive to the Village of Nelsonville and the surrounding area.

4. The photographs taken from across the river by Saratoga are at best inconclusive. No photos were taken that depict the proposed tower from a straight-on perspective from across the river or from other useful and informative sightlines. Interestingly, Saratoga claims that due to road closure, they were unable to take photos from across the river on the date of the second balloon test. Yet, in their submission they produce a number of photographs from across the river apparently taken in the spring of 2017. These photos are clearly taken from vantage points that

conceal the view of the Village. Members of PCS and many in this community have driven along Route 218 across the river, and are familiar with the various scenic outlooks, including at least two that provide unobstructed clear straight-on views of the Village. That Saratoga would have driven this scenic route and not observed these views and photographed them is highly unlikely given these views would be the most negatively impacted by the proposed tower. Put another way, it is highly likely that the proposed tower would be highly visible from these straight-on views. Rather than present photographs from these vantage points, however, Saratoga submits irrelevant photos from positions that obscure and minimize the view of the tower. PCS submits that either Saratoga chose not to take photographs from these highly impacted vantage points across the river as they would clearly reflect the intrusiveness of the proposed tower upon surrounding vistas, or Saratoga did take photographs from these vantage points and has not submitted them for the same reason. PCS attempted to take photos from Route 218 on the date of the second balloon test, but can confirm that Saratoga is correct in stating that the road was closed, thereby making it impossible to take photographs from these locations on that date.

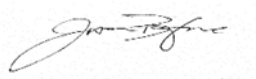
5. PCS confirms that a second balloon test was conducted on January 31, 2018, but is unable to confirm the appropriateness of the methodology under which said test was conducted. Counsel for the Applicant makes reference to correspondence dated January 23, 2018 that sets out the methodology used, but PCS has not reviewed this correspondence and is unable to speak to its contents. The second balloon test was purportedly conducted at a height of 110 feet, approximately 10 feet lower than the first test. Even at this lower height, however, the balloon remained highly visible from several points in and around the Village, and in particular in the vicinity of the historic rural cemetery. Accordingly, the proposed tower remains highly intrusive, has a significant negative impact on visual and historic resources within the Village of Nelsonville and is not the least detrimental alternative to remedy any purported gap in coverage, as required under the Code.

Reply to the Lane Appraisals, Inc. Letter of January 18, 2018

In response to submissions made by Lane Appraisals, Inc. regarding the impact of cell towers on property values, PCS submits a June 2014 study conducted by the National Institute for Science, Law and Public Policy questioning the impact of cell towers on property desirability. (See, attached NISLP study with this submission). PCS submits that there is empirical data supporting a finding that proximity to cell towers negatively impacts the desirability and marketability of residential properties. Although the Code does not require the Applicant to ensure no negative impact on property values in the Village of Nelsonville, many residents have raised this issue as a concern. Therefore, PCS submits that the Board may exercise its discretion in reviewing the study submitted herewith, as a means to balance the considerations submitted by the Applicant with respect to the impact of cell towers on property values.

For all the reasons stated herein, and based on the substantial evidence on the record, PCS respectfully requests that the application for an information services wireless facility as proposed, be denied in its entirety.

Sincerely,



PCS
By: Jason Biafore

EXHIBIT ‘A’


DO NOT
BLOCK
THE BOX
SCHOOL
SPEED
LIMIT
15


DO NOT
BLOCK
THE BOX
SCHOOL
SPEED
LIMIT


DO NOT
BLOCK
THE BOX
SCHOOL
SPEED
LIMIT
15
MPH


2 HOUR
PARKING


357

EXHIBIT ‘B”


JULIA L. BUTT FIELD MEMORIAL HOSPITAL