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VIA EMAIL
Chairperson Bruce Flower and
Members of the Planning Board
20 Middlebush Road
Wappingers Falls, New York 12590

Re: Response to Tarpon Towers II, LLC's August 18, 2020 Correspondence
Proposed Wireless Facility at 110 Chelsea Road

Dear Chairperson Bruce Flower and Members of the Planning Board:

Our office represents two of your constituents, Mr. Christopher Barclay and Ms. Denise VanBuren, who asked us to analyze Tarpon Towers II, LLC's (the "Applicant") August 18, 2020 letter and provide a response. Upon careful review of the Applicant's latest submission, we respectfully and earnestly urge you to deny this application for all the reasons discussed below.

THE APPLICANT DID NOT ESTABLISH A "SIGNIFICANT" GAP IN WIRELESS SERVICES

The Applicant's latest letter is nothing more than a glib blend of misstatements of critical facts and applicable law, submitted for the sole purpose of "strong-arming" the Planning Board to render a decision in favor of the Applicant. The Applicant misleadingly directs your attention to the voluminous—although mostly irrelevant or defective—amount of evidence in the record to distract you from the most important aspect that the Applicant was unable to prove: a significant gap in service. Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 643 (2nd Cir. 1999).

As previously outlined in our Memorandum in Opposition dated June 3, 2020 (pg. 23-24), the Applicant never provided you with any hard data, either in the form of actual drive test data or dropped call records, which can reliably demonstrate whether or not a significant gap in coverage exists at the proposed location. The record only contains manipulated "expert reports," RF modeling and propagation maps that, without indicating the source of the date, estimate *alleged* gap in coverage. The documents submitted by the Applicant directly contradict Verizon's own database, which shows "Excellent" service around 110 Chelsea Road, Wappingers Falls. See Mem. in Opposition, Exhibit "I." The Applicant has failed to rebut these contentions in each submission.

This position is further bolstered by the fact that the Applicant itself admitted that the gaps in coverage *are not significant*. See Tarpon Towers' August 18, 2020 Letter, pg. 13 ("the proposed wireless facility will enable Verizon to remedy *gaps* in coverage" and not significant gaps, as expressly required by the Second Circuit in Willoth).

Since the purported holes in coverage are, at best, very limited in number or size and, at worse, completely non-existent, the lack of coverage likely will be *de minimis*, so that denying an application to construct a tower will not amount to a prohibition of service under the Federal Telecommunications Act of 1996. Willoth, 176 F.3d at 643. This reason alone warrants a denial of this application under the test articulated by the Second Circuit in Willoth. See also Crown Castle NG East LLC v. Town of Hempstead, 2018 WL 6605857, at *10 (E.D.N.Y. Dec. 17, 2018) (denying summary judgment when an applicant failed to demonstrate a significant gap in service).

THE FACILITY IS NOT THE LEAST INTRUSIVE MEANS TO REMEDY THE ALLEGED GAP

Even assuming the Applicant's evidentiary materials prove a significant gap in wireless services, the Applicant still fails to establish that the proposed facility is the least intrusive means to remedy such gap. Willoth, 176 F.3d at 643. First, as a preliminary matter, the Applicant completely misunderstands the standard under New York law by citing to T-Mobile USA, Inc. v. City of Anacortes, a Ninth Circuit case that has nothing to do with the applicable standard in this jurisdiction. 572 F.3d 987 (9th Cir. 2009). New York courts do not require "some inquiry into the feasibility of alternative facilities or site locations." Id. Rather, New York applicants must demonstrate that the proposed installation is the least intrusive of the possible alternatives to fulfill the needs of the gap area. Cellco Partnership v. Town of Clifton Park, New York, 365 F.Supp.3d 248 (N.D.N.Y. 2019).

Since the Applicant failed to properly evaluate other sites, the Planning Board made a request to consider the other feasible locations—otherwise, it would be factually impossible for the Applicant to determine that the proposed location constitutes the least intrusive of the possible alternatives. But the Applicant, once again, failed to explain why the proposed location is the least intrusive means to remedy the purported gap in coverage. For example, the Applicant simply claims "unwillingness by the owner" or "ownership was not interest" in leasing the property, but never attached a single document in support of this contention (*e.g.*, e-mails, testimonies, rejected proposals, etc.). For other locations where the construction of an access road, tree-clearing and pulling of utilities would cost thousands of dollars, the Applicant recites nothing more than a laundry list of excuses or relies on further reports prepared by Michael Crosby that contain no hard data. Therefore, the Applicant did not prove that this facility is the least intrusive means to remedy the purported gap in coverage. There is sufficient evidence in the record to show that the other alternative sites are feasible—another valid reason to deny this application under Willoth.

DEFECTIVE VISUAL RESOURCE EVALUATION MATERIAL

In a desperate effort to convince this Board that the proposed facility will fit with the surrounding area, the Applicant has submitted an additional visual report prepared by Tectonic to show you that the tower will be screened by the "surrounding" vegetation and will be barely visible. This report is the definition of an inherently defective visual evaluation under Omnipoint

Communications Inc. v. The City of White Plains, 430 F2d 529 (2d Cir. 2005). The majority of the pictures are taken from more than 1,000 feet away, including observation points designed to show that the tower will not be visible from the specific locations. However, not a single picture was, again, taken from the "residents' backyards much less from their second story windows." Id. The closest home to the proposed tower is at approximately 550 feet. Yet, the Applicant continues to submit visual evaluation reports with pictures from double of the distance, which simply lack any probative value, whatsoever. No explanation was provided as to why the Applicant has deliberately refused to provide proper visual evaluation materials.

The Applicant, aware that the facility will stand out like a sore thumb, is simply refusing to produce pictures in close proximity to the proposed tower. This evaluation is even worse than the one originally submitted because the Applicant has now blatantly disregarded the concerns raised in the Memorandum in Opposition, pg. 8-9. Instead, Tarpon Towers is essentially asking you to violate the law and refuse to follow the ruling in Omnipoint.

THE RESIDENTS DEMONSTRATED
SUBSTANTIAL ADVERSE AESTHETIC IMPACT
UPON THE CHARACTER OF THE AREA

The Planning Board is completely within its power to deny this application based upon the significant adverse aesthetic impact on the neighborhood character. See Town of Wappinger Zoning Code, §§ 240-81 (B)(1)(2)(5)(6)(8). The purpose of *your* Zoning Code is to protect the appearance of the Town, while preserving property values and placing wireless facilities strategically to reduce their adverse aesthetic impact. This facility will be located in a residential neighborhood where no existing structure stands taller than two stories in height. As such, it will stand out like a sore thumb and will destroy the appearance of this residential area.

The record contains more than "a few residents' comments at public hearings, generalized community objections, and general NIMBY feelings," as the Applicant implies in its latest letter. In fact, the residents submitted numerous letters that provide detailed and compelling explanations of the dramatic adverse impacts upon their properties and surrounding area. See Mem. in Opp., Exhibit "B." As discussed above, the Tectonic visual evaluation is inherently defective and does actually depict the visual impact upon this residential neighborhood—*i.e.*, to reiterate, pictures taken from more than a thousand feet away from the proposed tower are the type of presentation that the federal court explicitly deemed defective in Omnipoint. Given the evidence in the record, the Town of Wappinger Zoning Code, §§ 240-81 (B)(1)(2)(5)(6)(8) mandate a denial of this application.

THE RESIDENTS' PROPERTIES WILL
SUFFER A DIMINUTION IN VALUE BY 10-25%

The Applicant incorrectly claims that the residents allege generalized and unsubstantiated concerns about a diminution in property value. Clearly, this argument is unintelligent considering that the residents submitted four different letters from real estate brokers in the area, which demonstrated how the proposed facility would decrease the value of their homes by 15-25%. See Mem. in Opposition, Exhibit "C." This board is faced with the exact scenario in Willoth, where the Court ultimately ruled that letters from real estate brokers showing a decrease in property value by 10-25% constituted substantial evidence to support the board's denial. 176 F.3d at 646.

The Applicant can attempt to discredit the real estate brokers' methodologies and findings with pages of additional evidentiary material, but it will not change the fact that the residents have raised more than generalized concerns. The residents have unquestionably complied with established federal law in this jurisdiction. Omnipoint Communications, Inc. v. City of White Plains, 430 F.3d 529 (2d Cir. 2005). As such, the Planning Board can weigh the evidence in the record and freely issue a decision on this matter. If the Planning Board denies the application because the proposed installation will inflict significant and wholly unnecessary losses (10-25%) upon the residential properties, no federal court can possibly reverse this finding based upon the evidence in the record.

CONCLUSION

Based on the foregoing, the Planning Board has plenty of valid reasons to deny the Applicant's application for a proposed wireless facility at 110 Chelsea Road, Wappingers Falls, under both its own zoning code and established jurisprudence in New York, without violating the effect of prohibiting language or the substantial evidence requirement under 47 U.S.C.A. § 332(c)(7)(B) of the Federal Telecommunications Act of 1996.

Yours,

Andrew J. Campanelli, Esq.