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Fwd: Revised Statement in Opposition to Settlement with Homeland Towers

Mindy Jesek <villageclerk@nelsonvilleny.gov> Tue, Jan 21, 2020 at 5:15 P
Reply-To: villageclerk@nelsonvilleny.gov
To: Village Board of Trustees <villageboard@nelsonvilleny.gov>, Adam Rodriguez <ARodriguez@bpslaw.com>, John Diaconis <JDiaconis@bpslaw.com>

Forgive me if I sent this already- this is a revised version.

---------- Forwarded message ---------
From: **Jason Biafore**
Date: Tue, Jan 21, 2020, 3:44 PM
Subject: Revised Statement in Opposition to Settlement with Homeland Towers
To: <villageclerk@nelsonvilleny.gov>

Dear Village Clerk,

Please accept the following revised version of the Statement in Opposition into the record - noting that the former subparagraph 2) d) 2) is hereby retracted and amended to read: " Settling is simply a cost-saving measure for them;"

Thank you in advance for your attention to this request.

Dear Honorable Board Members,

My name is Jason Biafore. I own property at 1715 Route 9D (a.k.a. Gilbo Lane) which is in proximity to the Nelsonville cemetery and the proposed location of the cell tower at issue. I am one of the founding members of the PCS group of local residents who came together in opposition to the proposed cell tower. Herein is my statement in opposition to settlement of the ongoing litigation and I submit the same into the record and for your consideration.

First, let me sincerely thank you for all your time and consideration in managing this most difficult process. We all know the strain you are under, and continue to offer you our unwavering support.

For those of you who do not know me, I am an attorney with nearly two decades of litigation experience in areas including: municipal law; land use and zoning regulation; commercial and residential leases; real estate transactions; federal and state administrative law; public policy; insurance defence; public interest law; general civil and commercial litigation; and, over the last number of years, federal telecommunications law. I submit the following statement, not as an inexperienced layperson with a vague understanding of this proceeding and the law that governs it, but rather, as a highly skilled and experienced litigation attorney intimately familiar with all aspects of the case before you. Indeed, as the drafter of virtually the entirety of the administrative record and responsive submissions on the law in the underlying ZBA application, I think it's fair to say that my understanding of this case is as good if not better than anyone's, including your own counsel.

It is with this experience and understanding in mind, that I ask you to weigh and consider this submission against the legal advice you have received and may still be receiving.

Currently, I am posted abroad and have been unable to be present at the recent public hearings - including this evening's meeting. I have, however, maintained communications with colleagues in Nelsonville who have advised me that you are poised to settle the ongoing cell tower litigation unless: 1) you are satisfied that there is sufficient financial support from the community to continue the litigation; and, 2) you are satisfied that there is a clear legal path forward toward a victory in the case. I will address both points:

1) Funding - I will leave the first issue of funding to be discussed in detail by other community members. My understanding, however, is that in less than a week of informal fundraising, community members have raised an initial commitment of $30,000 to be put toward paying the Village's legal fees and carrying the case forward. This is a remarkable feat, with 30% of funding raised so quickly, it's clear that with a concerted and publicized campaign, the full funding amount can be reached in short order. Accordingly, the Board should not settle, but rather allow the community the necessary time to raise the balance of funds.

2) Legal Path Forward - As my area of expertise concerns the law, I will address this issue at length.

a) *The 2018 FCC Small Cell Order (hereinafter "the 2018 Order", or "the Order"), and the Legal Challenges Thereto*

It is my understanding that you are most concerned with the impact of the 2018 Order on the viability of the Village's case in federal court (hereinafter "the Case", or "the instant Case"). As you may know, the 2018 Order is a wide-reaching ruling from the FCC that establishes new rules and guidance with respect to telecommunications, particularly 5G, infrastructure roll-out. Many of the provisions of the Order have impacted the instant Case directly. While at first glance it may appear that the Order has undermined your legal position, a closer examination reveals that this may not actually be so.

Indeed, since the Order was handed down in September 2018, there have been a number of court challenges. Some remain pending. Of those cases that have been decided, the FCC has yet to claim outright victory in any of them, and courts have rejected and reigned in several key aspects of the 2018 Order, remanding those issues back to the FCC for further review and redrafting. In light of these defeats, and with respect to various aspects of the 2018 Order, the FCC itself commented: "It's time to go back to the drawing board and do better." See: https://www.smartcitiesdive.com/news/appeals-court-ruling-undercuts-fccs-plan-for-speedy-5g-rollout/560701/. In addition, the FCC has been accused of colluding with the major telecommunication companies. See: https://www.extremetech.com/internet/284541-the-fcc-has-been-accused-of-colluding-with-telcos-to-rig-5g-rules. As a result of these legal challenges and uncertainty, the much anticipated 5G roll-out has not yet materialized, and courts have viewed the FCC's recent actions with increasing skepticism and suspicion.

b) *Legal Challenges to the Order since 2018*

i) The 9th Circuit Challenge

Perhaps the most significant legal challenge to the 2018 Order is the consolidated docket before the 9th Circuit Court of Appeals, wherein dozens of municipalities, including some of the nation's largest metropolitan areas, industry organizations, trade associations and citizen groups, are suing the FCC and challenging the Order as unconstitutional, *ultra vires* - or beyond the scope of its mandate - and as an arbitrary and capricious abuse of its discretion.

One of the most significant aspects of this case is that the arguments being put forward by the petitioners (i.e., those municipalities and groups opposed to the Order) closely mirror those of the Village in the instant Case. Indeed, issues such as classifying mobile broadband as information services, NOT telecommunications services, unlawful failure to follow legal precedent, including US Supreme Court jurisprudence, administrative overreach, failure to follow FCC mandate as set out by Congress, and preservation of well-established legal doctrines such as the need for an applicant to demonstrate a "significant gap" and "least intrusive means", are all currently before the 9th Circuit. (See also: https://fas.org/sgp/crs/misc/LSB10265.pdf). In short, if the 9th Circuit rules in favor of the petitioners, which as will be discussed below is very possible, the bulk of the Village's legal position will be affirmed, and that will give the Village substantially more leverage in the Case than it currently has amidst the ongoing legal uncertainty.

Here is a link (https://www.nlc.org/sites/default/files/users/user56109/Local%20Governments%20Brief%20Sprint%20filed%206%2012%202019.pdf) to the Brief submitted by the petitioners in the 9th Circuit case - I am also attaching the Brief to this email. Before you make your decision whether to settle this case, at a minimum, this Brief should be read in its entirety so you are fully aware of what will be decided and what is at stake before the 9th Circuit and how it will impact the instant Case. If you choose not to do so, you will not be fully-informed of the implications of your decision, and you will be remiss in your duty to the constituents you represent and who elected you to serve them.

Currently, the 9th Circuit case is awaiting scheduling of oral arguments, likely within the next month (February 2020). All written submissions have been filed, and it is fully anticipated that a decision in the case will be handed down by the middle of 2020. As such, the most ground-breaking court decision on telecommunications law of the last quarter century, a case that will have the most significant impact on the litigation that the Village is now a party to, will be handed down imminently. Why would the Village choose to settle under these circumstances? The Board must await the outcome of this case. To do otherwise might arguably rise to the level of arbitrary and capricious conduct or an abuse of discretion. It is hard to imagine that the Village would incur any additional legal expenses of significance over the next 4 to 5 months, with at most one or two court appearances to be scheduled before we receive the 9th Circuit decision. Moreover, that the community has raised $30,000 in less than a week can more than offset any such additional cost. Prudence, as informed by the additional examples below, would dictate that the Village take the long view here.

ii) *DC Circuit Court of Appeals - United Keetowah Cherokee Indians v. FCC*

In August 2019 the DC Circuit Court of Appeal issued a ruling striking down the FCC's attempt to exempt historic and environmental review from small cell infrastructure roll-out as outlined in the 2018 Order. (See the decision here: https://www.cadc.uscourts.gov/internet/opinions.nsf/4001BED4E8A6A29685258451005085C7/$file/18-1129-1801375.pdf - I will also attach a copy to this email). This was a key component of the 2018 Order and one of its most sweeping revisions to existing policy. The FCC was relying on this exemption to accelerate infrastructure approvals. The Court ruled that to exempt environmental and historic review from infrastructure deployment was arbitrary and capricious and not in keeping with the FCC's public interest mandate. At a minimum, this decision shows that the 2018 Order is not invincible to judicial scrutiny, but rather courts are more than willing to reign in the aspects of the Order that are deemed over-reaching and not in the public interest. Moreover, as the instant Case involves considerations of historic and environmental preservation, these components of the Village's defence now remain preserved.

iii) *DC Circuit Court of Appeals - Mozilla v. FCC*

In October 2019 the DC Circuit Court of Appeal issued a ruling upholding in part the FCC's net neutrality Order of 2017. (See the decision here: https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf - I will also attach a copy to this email). While the court accepted the FCC's determination that wireless broadband is classified as an information service and not a telecommunications service, it also ruled that states are free to legislate their own net neutrality rules where the FCC chooses to take a "light touch" approach. In addition, while the court in part upheld the FCC's rulings, the court "was in several areas quite critical of the FCC's process, as well as the agency's reasoning or the lack of discussion or support in the record for several of the Order's determinations. Although these defects were not sufficient for the Court to reverse the (entirety of the) Order on review, the Court nevertheless agreed with (FCC opponents) on several issues, and remanded them to the agency for additional consideration." See : https://www.natlawreview.com/article/fcc-s-restoration-internet-freedom-order-largely-survives-appeal-net-neutrality-not. Again, we see the court's willingness to challenge the FCC and reject and require review on key policies

not deemed to be in the public's interest. Perhaps most significant for the instant Case, is the fact that the Court rejected "the FCC's broad pre-emption of any state or local requirements 'that are inconsistent' with the FCC's deregulatory approach," and thus we find further support for the Village's actions in the underlying litigation.

iv) *Montgomery County, MD v. FCC - Lawsuit over FCC's RF Emission Standards - FCC Review of RF Emissions Standards*

Understanding that health and safety considerations cannot be a basis to deny a tower application under applicable telecommunications law, it remains important for the Board to be aware that even the FCC's policies and standards with respect to Radio Frequency (RF) radiation emissions standards is currently under review before the courts. In 2019, Montgomery County, Maryland, challenged the FCC's failure to update its RF emissions standards with respect to small cells, and challenged the existing standards as outdated and inapplicable. The case has since been transferred from the DC Circuit to the 9th Circuit, where it has been consolidated with the above-referenced docket. Therefore, the 9th Circuit will also be ruling on whether the FCC's existing RF emissions standards remain acceptable.

In addition to the Montgomery County case, the FCC has in December 2019, just released a report on its 6 (six) year review of its RF radiation emissions standards. See FCC report and commentary: https://beverlyhills.granicus.com/MetaViewer.php?view_id=&event_id=3984&meta_id=416944. Beginning in 2013, the FCC embarked upon a review of the RF emissions standards that have served as the baseline for telecommunications infrastructure development since the 1990s. According to the December 2019 report, the FCC found that the existing standards from the 1990s are satisfactory and need not be revised with respect to small cell RF emissions and small cell roll-out. As we currently remain within the review period and window for a legal challenge, we can expect such a challenge against this report to be forthcoming. Although the report should not come as a surprise, emanating from the FCC, it does contradict recent research in this area. The NRDC for example, recently reported on a lengthy study conducted by the National Toxicology Program that attributed the development of various cancers in male rats to long term high-level exposure to RF radiation emitted by cell phones. See: https://www.nrdc.org/experts/sharon-buccino/5g-and-fcc-10-reasons-why-you-should-care. That the issue of RF emissions standards remains before the 9th Circuit, and will be ruled upon in short order, is pertinent to the underlying litigation to which the Village is a party. Should the Village settle now, being on notice that RF emissions are under review before a federal Court of Appeal, and before this issue is resolved, raises several concerns with respect to such conduct on the part of the Village.

To be clear, I do not raise the issue of RF emissions and health concerns as a basis upon which the Village should not settle the instant Case, or as an argument in support of the underlying denial of the cell tower application. Rather, I raise this issue to inform the Village's decision on whether to settle, when the issue is before the courts and within a matter of a few months we may yet see a ruling that mandates the FCC to revisit its RF emissions standards. This has no small impact on the decision before the Board and should be weighed very carefully. Again, the Board should exercise caution here, be prudent, and await the outcome of the court rulings on this and the other pertinent issues before deciding whether or not to settle the instant Case.

c) *The Board's Legal Counsel's Advice to Settle is Premature*

If the Board has not been made aware of the above examples and is not fully up to speed on these legal developments, then one must question the effectiveness of their legal counsel. Has the Board been made aware of these decisions? Has the Board been made aware of the petitioner's Brief and arguments currently before the 9th Circuit? Has the Board's legal counsel reviewed these materials, the Briefs, the court decisions, the FCC reports, RF emissions findings, and legislative, legal and industry commentary, in full, such that the Board is receiving fully informed and reasoned legal opinion?

The above examples are by no means exhaustive. Many legal and industry commentators are anticipating further efforts and court rulings that will continue to reign in the broad over-reach of the FCC's 2018 Order. In addition, legislative efforts are underway to overturn the Order all together. See: https://www.littletonma.org/sites/littletonma/files/uploads/presentation_-_legal_regulatory_update_on_wireless_small_cell_pole_att._.pdf.

If the Board's legal counsel has not read and evaluated these materials in full and in detail, how can the Board be receiving competent legal advice?

If the Board's legal counsel has read and evaluated these materials in full and in detail, one wonders whether counsel has the Board's (and Neslonville's) best interest in mind when advising in favor of settlement? Even a cursory review of these materials supports a finding that the trend before the courts, industry, and legislatures, has been against the FCC and in favor of reigning in the 2018 Order in the public's interest. Moreover, that following on the heels of this trend, the single most important decision on the matter is set to be handed down within a few months, suggests that to settle now would be foolhardy. I could understand this position if the risk were 5 (five) towers of 200 feet each, vs. 1 (one) tower at 95 feet. But that's not the choice. The Board's counsel is advising to fold in order to (hopefully, possibly) save 20 feet of tower. As a litigation attorney with nearly 20 years of courtroom experience, having taken hundreds of cases to trial and/or settlement, I would have to question my professionalism, ability and duty to my client, were this my legal advice under these circumstances.

d) *Homeland's Proposed Settlement*

With respect to the proposed settlement, why is Homeland so keen on settling at this moment? If Homeland is so sure of a victory in the Case, why are they offering to settle for a shorter tower and pay out significant additional sums? I suspect it may be for one of the following reasons:

1) They aren't so sure of a win, and want to guarantee at least a 95 ft tower instead of a loss and nothing;
2) Settling is simply a cost-saving measure for them;
3) They aren't as flush with cash as it might appear, and their own legal costs are rapidly ballooning; or,
4) They are concerned about the 9th Circuit review of the 2018 FCC Ruling and may fear that it won't stand as written and that they better get this done asap before the legal landscape changes (again).

In all of these scenarios, it makes sense to continue fighting, reject the settlement and continue to apply pressure for a better/different outcome.

e) *Prolonging Litigation as a Path to Victory*

Given my many years as a litigation attorney, appearing before various courts and tribunals in a number of jurisdictions in all manner of different types of cases, if there has been one constant that has led to the best possible outcomes for my clients, it has been my ability to prolong the litigation as long as possible. Dragging out cases are what litigation lawyers are known, and loathed, for. This strategy can not be effectively utilized in all cases of course, but in my experience, those cases where this strategy is not viable have not been numerous, and they are usually identifiable from the outset. The instant Case is not one of these cases. Rather, this Case is uniquely well-suited to being prolonged as a path to victory for the following reasons:

1) The Village's case has merit. The underlying legal arguments presented in the Village's case are strong, well-reasoned and supported by reams of substantial evidence. Far from a frivolous case, the Village's arguments raise pressing legal issues that are at once well-supported in the jurisprudence and are poised to be affirmed by the 9th Circuit, as discussed above;

2) The Village has the moral and financial support of its constituents. I have yet to hear from any resident that they approve of this settlement. Certainly, the majority of residents remain against settling with Homeland, as is evidenced by those community members before you at tonight's meeting. Additionally, as previously discussed, the community is prepared and has committed to supporting the Village financially through this ongoing legal fight;

3) As discussed above, though not without its initial challenges, the legal landscape is trending in favor of the Village's legal position;

4) The Village has very capable special counsel at its disposal. Mr. Steckler, still retained by the Village, and who remains willing to carry the litigation forward, is uniquely capable to manage the litigation and ensure that all legal procedural and tactical measures are utilized to ensure the Case continues as long as it remains to the Village's advantage.

5) Settling prematurely is never a wise option. The Board is now being called upon to consider the first real settlement proposal offered by Homeland. In my experience, I have rarely found the first offer to be the best. Indeed, I have observed countless cases where simply by prolonging the litigation and wearing down the opponent, better offers (offers that had previously been "unfathomable") suddenly materialized - to the benefit of my client. The first offer in the course of litigation is rarely the best, and there will continue to be settlement discussions throughout the course of the case. I have settled many cases on the eve of trial, and indeed even during the course of trial. If the Board is being advised that the current settlement being offered is a "take it or leave it, last chance" opportunity, then they are receiving poor advice.

6) Regarding perceived weaknesses in the Village's case, no case is perfect. The Village's case is not perfect, and neither is Homeland's. Concerns such as issues surrounding the depositions, or admissible evidence, do not stand alone. These issues will shake out through the litigation process, the court will assign the appropriate weight in its determination and no single issue or weakness in a case will necessarily be its undoing. Such concerns that on their face seem monumental at first, often turn out to be irrelevant or inapplicable in the eyes of the court. Perhaps for no bigger reason than this, settling at this stage, before summary judgment, is unwise and ill-advised.

For all of the foregoing reasons, I respectfully request that the Board take this submission into consideration and vote NO on the proposed settlement with Homeland Towers.

Sincerely,

Jason A Biafore
(On behalf of myself and the current and active members of PCS).