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July 2019

**Re: Planet Networks, Inc.
Petition for Consent
To Utilize the Public Rights-of-Way
To Install Fiber Optic Cable on New and Existing Utility Poles**

To Whom It May Concern:

Please be advised that this office represents Planet Networks, Inc.¹ in connection with its petition for consent pursuant to N.J.S.A. 48:3-19, N.J.S.A. 27:16-6 and N.J.S.A. 48:17-8, to deploy fiber optic cable on new and existing utility poles in the public rights-of-way in New Jersey. I am writing to provide you with a brief legal memorandum regarding the applicable State and federal law and a proposed consent resolution for your consideration.

The legal requirements for the use of the public rights-of-way are found in both federal and State law. Federal law provides unambiguous and powerful support for approving the deployment of telecommunications infrastructure in the public rights-of-way. In particular, the Telecommunications Act of 1996 (the "TCA"), 47 U.S.C. §332(c)(7)(B)(i)(II), mandates that "the 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 service."

On September 26, 2018, the Federal Communications Commission ("FCC") provided its "definitive interpretation of the effective prohibition standard" contained in the TCA. Declaratory Ruling and Third Report and Order, WT Docket No. 17-79; WC Docket No. 17-84, FCC-18-133A1, para. 34, p. 13 Sept. 26, 2018 (the "Order"). The FCC held that "an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. . . a state or local legal requirement could materially inhibit service in numerous ways—not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services." Order at para 36, p15-16.

The FCC noted that "courts have recognized that states and localities 'hold the public streets and sidewalks in trust for the public' and 'manage public ROW in their regulatory

¹ Planet Network, Inc. was granted authorization to provide local exchange and interexchange telecommunications services throughout New Jersey by New Jersey Board of Public Utilities. BPU Docket No. TE19020198, May 28, 2019. See attached Order. It is a "Telecommunications Carrier" and provides a "Telecommunications Service" as defined in 47 USCS §153.

capabilities.” Order at para 92, p. 44. See, State v. Township of South Hackensack, 65 N.J. 377, 383 (1974); New Jersey Payphone Ass'n v. Town of West N.Y., 130 F. Supp. 2d 631, 638 (D.N.J. 2001), aff'd 299 F.3d 235 (3rd Cir. 2002); Halsey v. Rapid Transit S.R. Co., 47 N.J. Eq. 380 (1890). The FCC held that “Section 253(c) is properly construed to suggest that Congress did not intend to permit states and localities to rely on their ownership of property within a ROW as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services, and thus that such conduct is preempted.” Order at para. 93, p. 45.

In addition to access to the public rights-of-way, the FCC also noted that other state and municipal requirements, including fees, aesthetics, undergrounding requirements and delays in the issuance of approvals may each violate the prohibition of service proscription of the TCA. The FCC adopted the “Shot Clock” that imposes a 90-day limit to process a collocation application and a 150-day deadline for action on all other applications in order to reduce the delay involved in municipal reviews of such applications. In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 FCC Rcd. 13994, 13995 (2009); City of Arlington v. FCC, 133 S.Ct. 1863 (2013). “The Shot Clock Ruling contemplates not just that a local government will take some action on an application within the deadline, but that it will ‘resolve [the] application’ before the deadline.” New Cingular Wireless PCS, LLC v. Town of Stoddard, N.H., 853 F. Supp. 2d 198, 203-04 (D.N.H. 2012) quoting 2009 FCC Order at ¶ 38).

In New Jersey, the regulation of the use of the public rights-of-way lies outside of the Municipal Land Use Law in the Public Utilities provisions of the New Jersey statutes. Planet Networks seeks permission from the Township to utilize the public rights-of-way pursuant to N.J.S.A. 48:3-19² (for its fiber deployment on existing poles), N.J.S.A. 27:16-6³ (for installations utilizing the County rights-of-way located within the municipality), and N.J.S.A. 48:17-8⁴ (for the installation of new utility poles). Planet Networks has agreements (or is currently negotiating agreements) to attach fiber optic cables to utility poles owned by Jersey Central Power and Light Company, Sussex Rural Electric Cooperative, United Telephone of New Jersey d/b/a CenturyLink Telephone and Verizon. These companies are required to provide

² N.J.S.A. 48:3-19 provides: “The consent of the municipality shall be obtained for the use by a person of the poles of another person unless each person has a lawful right to maintain poles in such street, highway or other public place.”

³ N.J.S.A. 27:16-6 provides, in part: “The board of chosen freeholders shall not grant an easement, right of way, or use in, under or over, any portion of a county road in a municipality, unless the governing body of the municipality, or the board of public utility commissioners, shall consent thereto. When, in connection with any such grant, the consent of property owners is required by law, it shall be obtained before such grant of any such easement, right of way or use.”

⁴ N.J.S.A. 46:17-8 provides: “Any telegraph or telephone company organized under the laws of this or any other State, or of the United States may erect, construct and maintain the necessary poles, wires, conduits, and other fixtures for its lines, in, upon, along, over or under any public street, road or highway, upon first obtaining the consent in writing of the owner of the soil to the erection of such poles, and through, across or under any of the waters within this State and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same.”

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nondiscriminatory access to any pole, duct, conduit, or right-of-way they own or control pursuant to federal law. 47 U.S.C. §224.

With respect to fees or costs to utilize the public rights-of-way, a municipality may only request "reasonable fees for actual services made by any municipal, regional or county governmental agency." N.J.S.A. 54:30A-124. Such fees are themselves further restricted by the Order which held that "ROW access fees, and fees for the use of government property in the ROW such as light poles, traffic lights, utility poles, and other similar property . . . violate Sections 253 or 332(c)(7) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations." Order at para 48, p 22.

We hope that the above statement of the law is helpful in your review of Planet Networks' petition.

Very truly yours,



Gregory D. Meese

gdm/encl.

cc: Mr. Robert Boyle

RESOLUTION 2019-
RESOLUTION OF THE _____
AUTHORIZING THE USE OF THE PUBLIC RIGHTS-OF-WAY BY
PLANET NETWORKS, INC.

WHEREAS, Planet Networks Inc. ("Planet Networks") is a provider of telecommunications services that is authorized by the New Jersey Board of Public Utilities to provide local exchange and interexchange telecommunications services throughout New Jersey; and

WHEREAS, Planet Networks has petitioned the municipality for consent to use the public rights-of-way to place its telecommunication facilities aerially on existing and new utility poles and/or in underground conduit; and

WHEREAS, the Federal Communications Commission has held that that "an effective prohibition [under the Telecommunications Act of 1996] occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. . . not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services." Declaratory Ruling and Third Report and Order, WT Docket No. 17-79; WC Docket No. 17-84, FCC-18-133A1, at para. 36, p. 15-16; and

WHEREAS, Planet Networks has or will enter into agreements with the utility companies for the use of their poles; and

WHEREAS, N.J.S.A. 48:3-19 provides that "[t]he consent of the municipality shall be obtained for the use by a person of the poles of another person unless each person has a lawful right to maintain poles in such street, highway or other public place;" and

WHEREAS, N.J.S.A. 27:16-6 provides, in part that "[t] he board of chosen freeholders shall not grant an easement, right of way, or use in, under or over, any portion of a county road in a municipality, unless the governing body of the municipality . . . shall consent thereto;" and

WHEREAS, N.J.S.A. 46:17-8 provides that "[a]ny telegraph or telephone company organized under the laws of this or any other State, or of the United States may erect, construct and maintain the necessary poles, wires, conduits, and other fixtures for its lines, in, upon, along, over or under any public street, road or highway, upon first obtaining the consent in writing of the owner of the soil to the erection of such poles, and through, across or under any of the waters within this State and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same."

WHEREAS, N.J.S.A. 54:30A-124(a) provides that a municipality may not impose any fees, taxes,

levies or assessments in the nature of a local franchise, right of way, or gross receipts fee, tax, levy or assessment against telecommunications companies but that a municipality may impose reasonable fees for actual services made by any municipal agency; and

WHEREAS, it is in the best interests of the municipality and its citizens to grant consent to Planet Networks.

NOW THEREFORE BE IT RESOLVED THAT:

- 1) That the governing body does hereby grant permission and authority to Planet Networks, Inc. to install fiber optic cables and related facilities on existing utility poles within the public right-of-way and to install new utility poles, upon the following terms and conditions:
 - a) Planet Networks shall adhere to all applicable federal, State, and local laws in connection with its use of the public rights-of-way.
 - b) Planet Networks shall obtain any applicable permits in connection with the installation of its facilities;
 - c) Planet Networks shall indemnify, defend and hold harmless the municipality, its officials, agents, and employees, from and against any claim of liability, damages or loss resulting in bodily injury or property damage arising out of Planet Network's use of the public right-of-way, except to the extent such loss, injury or property damage resulting from the acts or omissions of the municipality.
 - d) Planet Networks shall procure and maintain, at its cost and expense, commercial general liability insurance with limits not less than \$1,000,000 for injury to or death of one or more persons in any one occurrence and \$500,000 for damage or destruction to property in any one occurrence and shall include the municipality as an additional insured on said insurance policy.
 - e) Planet Networks shall be responsible for the repair of any damage to pavement or any structure arising from its construction, installation or maintenance of its facilities.
 - f) Notwithstanding any provision contained herein, neither the municipality nor Planet Networks shall be liable to the other for consequential, incidental, exemplary, or punitive damages on account of any activity pursuant to this consent.
 - g) That the _____ is hereby authorized to execute and the Clerk to attest to any other documents necessary to effectuate the terms of this resolution.

STATEMENT: This resolution authorizes and consents to Planet Networks, Inc.'s installation of fiber optic cables and related facilities on new and existing utility poles within the public rights-of-way.