PRELIMINARY STATEMENT

In the Complaint (the "Complaint"), Plaintiff Crown Castle NG East, LLC ("Crown Castle"), alleges that the City improperly reviewed Crown's requested amendment to the 2011 Right-of Way Use Agreement ("RUA"), discriminated against Crown as compared to other utility companies, and unlawfully applied the State Environmental Quality Review Act ("SEQRA") and zoning laws to Crown, among other allegations. However, over the past eighteen plus months, the record reflects the City's diligent and proper review of over 60 new proposed dual antennae systems ("DAS") locations throughout the City.

During the review process, the City and Crown entered into a tolling agreement that allowed the City more time to review Crown's application and provided Crown additional time to address the issues raised regarding the current breaches of the RUA. During this time, the City commenced its review of Crown's application pursuant to SEQRA by declaring its intent to be lead agent and also reviewing the potentially significant environmental impacts – primarily aesthetic, community character and noise. On April 19, 2017, the City Council rendered a finding that there may be a few significant environmental impacts as a result of Crown's application and stated that it needed to study these potential impacts in more detail through an environmental impact statement (the "Positive Declaration"). On April 22, 2017, because the deadline in the most recent tolling agreement to render a decision was expiring, the City stated that should it be required to render a decision despite the SEQRA process being incomplete, it would deny Crown's application (versions A, B, and C). As a result of the City's resolution denying Crown's application, Crown commenced this lawsuit. The City now moves to dismiss the Complaint for lack of subject matter jurisdiction, for failure to state a cause of action upon

which relief can be granted, and for failure to name Verizon Wireless as an indispensable party pursuant to FED. R. CIV. P. 12(b)(1), (6) and (7).

FACTUAL BACKGROUND

A complete set of facts is set out in the Affirmation of Kristen K. Wilson dated May 26, 2017 and are incorporated herein by reference.

PROCEDURAL HISTORY

Crown commenced this action by filing the Complaint on May 11, 2017, on the eve of Crown's latest deadline to correct the identified breaches of the RUA. On May 12, 2017, Crown filed a motion for a temporary restraining order and a preliminary injunction seeking to prevent the City of Rye from terminating the RUA. The parties agreed to the terms of a temporary restraining order that continues to remain in place. On May 12, 2017, the parties agreed to a briefing schedule regarding Crown's motion for a preliminary injunction. However, upon a review of the papers, it is clear that Crown's counts and ultimate relief that it is seeking are all issues to be resolved under state law and that this Court does not have subject matter jurisdiction. As a result, the City is moving to dismiss the Complaint.

ARGUMENT

I. STANDARDS ON MOTION TO DISMISS

a. 12(b)(1) – Lack of Subject Matter Jurisdiction

"Dismissal of a case for lack of subject matter jurisdiction under Rule 12(b)(1) is proper 'when the district court lacks the statutory or constitutional power to adjudicate it.' " Ford v. D.C. 37 Union Local 1549, 579 F.3d 187, 188 (2d Cir. 2009)

(quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)). "[T]he burden is on the plaintiff to prove by a preponderance of the evidence that jurisdiction exists." *Id.* Allen v. Commissioner of Social Security, 2017 WL 1102665, at 1 (S.D.N.Y., 2017)"

b. 12(b)(6) –Failure to State a Cause of Action

In order to survive a motion to dismiss "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Facial plausibility" is achieved when the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949.

Generally, courts are required to accept as true all of the allegations contained in the complaint. See Iqbal, 129 S. Ct. at 1949; Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d229, 237 (2d Cir. 2007). Notwithstanding the above, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements…are not entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1949-50; see also Twombly, 555 U.S. at 555 (stating that the court is "not bound to accept as true a legal conclusion couched as a factual allegation"); Mateo v. County of Suffolk, 2014 WL 5425536 at 4 (E.D.N.Y. 2014)("…a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true…").

c. 12(b)(7) –Failure to Join a Necessary Party

Under Rule 12(b)(7), courts are required to dismiss an action for failure to join a necessary party under Rule 19 Fed. R. Civ. P. 12(b)(7); see Federal Ins. Co. v. SafeNet,

Inc., 758 F.Supp.2d 251, 257 (S.D.N.Y.2010). Courts considering a Rule 12(b)(7) motion must look to Rule 19, which sets forth a ‘‘two-part test for determining whether the court must dismiss an action for failure to join an indispensable party.’’ Federal Ins. Co., 758 F.Supp.2d at 257 (citing Viacom Int’l, Inc. v. Kearney, 212 F.3d 721, 724 (2d Cir.2000)). A person may be "necessary" under Rule 19(a) if (1) "in that person's absence, the court cannot accord complete relief among existing parties," or (2) "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence" may "as a practical matter impair or impede the person's ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1).

II. THE COURT SHOULD GRANT DEFENDANT’S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURSIDICTION and FOR FAILURE TO STATE A FEDERAL CAUSE OF ACTION

Three facts alleged in the Complaint are dispositive of this motion. First, Crown Castle does not claim it asked the City to approve the placement of the proposed facilities under the provisions of the City Code applicable to wireless facilities (Chapters 196 and Chapters 197). That is, the City was never asked to approve the facilities under its regulatory codes. Plaintiff’s Complaint largely raises state law issues and primarily claims that the City violated a contract with Crown Castle– a “Right of Way Use Agreement” or RUA,[1]

[1] Complaint, ¶6. We note that there is a substantial question as to whether that contract is valid, to the extent it purports to permit Crown Castle to avoid otherwise applicable zoning regulations or state law requirements under SEQRA, as claimed by Crown Castle. See In the Matter of Matthew Kaplan v. Village of Pelham, Westchester County Supreme Court, June 23, 2014. For purposes of this motion, those issues need not be addressed.

Second, while Plaintiff alleges that it builds wireless facilities, in the form of distributed antenna systems, or "DAS,"[2] it does not actually claim that it provides any wireless services. Rather, it builds systems and its customers add their own equipment to them, and it is those *customers* that provide wireless services.[3] Plaintiff does not claim that those entities ever applied for permission to place facilities in the City's rights of way, and points to no document that gives them (as opposed to Crown Castle) a right to be in the rights of way. Those entities therefore are *not* claiming that they are prohibited from providing any wireless services.

Third, Crown bases its complaint on actions of the City which it references in its Complaint at ¶¶ 13-18, but then mischaracterizes the actions. The Court may take notice of what the City actually did: on April 19, the City issued the Positive Declaration under SEQRA. Having made that determination, the City could not consistent with New York law, either approve or deny the application, as an applicant may well respond to a Positive Declaration by modifying its proposal and mitigating concerns. However, because the City was aware that Crown Castle argued that it was obligated to make a determination on the siting of the proposed facilities under Section 332(c)(7), the City also issued a decision explaining how it would have resolved the request for placement if *federal law* obligated it to make a decision in April, 2017. As we explain below, it did not, so at this stage, legally, Crown is simply obligated to move forward under SEQRA.

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[2] Complaint, ¶3.

[3] *Id.*

A. There Are No Cognizable Federal Claims

Based on the facts set forth above, there are at least four grounds upon which this Court should find that the Complaint fails to state a federal claim upon which relief may be granted, even it were ripe (which it is not).

Plaintiff relied on two provisions of federal law, 47 U.S.C. Section 253(a) and 47 U.S.C. Section 332(c)(7). The first provides 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 any interstate or intrastate telecommunications service," subject to certain important savings clauses in Sections 253(b) and (c). Section 332(c)(7), provides, importantly that:

> **(7) Preservation of local zoning authority**
> (A) General authority
> Except as provided in this paragraph, **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.
> (B) Limitations
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.***
> (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction….

Section 253 is "in this chapter" and the allegations in the Complaint make it clear that what Crown Castle is complaining about is, in fact a "decision" of the Council regarding the placement of wireless services facilities. It follows that as a matter of law, Section 253 cannot apply, and that Count I must be dismissed.

Section 332(c)(7) prohibits those actions that prohibit, or effectively prohibit the "provision of personal wireless services," but as Crown Castle does not provide those services, it has no standing to assert that claim – and in fact at most seems to claim (at ¶ 282) that the decision prevents its customers from using *Crown's* facilities. A wireless provider may of course provide wireless services using its own or other facilities and structures. The company fails to state an effective prohibition claim it may pursue, and Count III must be dismissed.

Even setting aside those issues, the FCC has ruled that *neither* Section 253 or Section 332 apply when a locality is operating in a proprietary capacity.

> Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt "non regulatory decisions of a state or locality acting in its proprietary capacity."[4]

The FCC's decision is compelled by the plain language of Section 332(c)(7)(1). broadly prohibits any federal interference with decisions regarding placement of wireless facilities subject only to federal preemption where a *regulation* violates certain federal

[4] Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order, 29 FCC Rcd 12865 at ¶ 239 (2014) (2014 Infrastructure Order), erratum, 30 FCC Rcd 31 (2015), aff'd, Montgomery County v. FCC, 811 F.3d 121 (4th Cir. 2015).

standards. As the Complaint shows on its face, and as Counts IV-VIII suggest, the company is contending that this is a matter of contract, not of regulation, and it therefore follows that Counts I, II or III – all of which apply to regulatory actions – fail.[5]

Of course, if the federal counts are dismissed, there is no ground for this court to maintain jurisdiction on the remaining counts.

B. The Matter is Not Yet Ripe for Judicial Review

Alternatively, all counts in the Complaint may be dismissed because this case is not ripe for judicial review. Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties' " National Park Hospitality Assn. v. Department of Interior, 538 U.S. 803, 807–808, 123 S.Ct. 2026, 155 L.Ed.2d 1017, quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148–149, 87 S.Ct. 1507, 18 L.Ed.2d 681.

"To determine whether a matter is ripe for judicial review, it is necessary first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied" Matter of Town of Riverhead v. Central Pine Barrens Joint Planning & Policy Commn., 71 A.D.3d 679, 681, 896 N.Y.S.2d 382

[5] At ¶151 of the Complaint, where Plaintiff alleges that the City *illegally* required it to show that its proposed facilities were required to close a significant gap and that the proposed facilities were the least restrictive means of doing so. Under precedent in this Circuit, it is the applicant's burden to demonstrate not only a gap in wireless services, but to show that it considered alternatives and the method proposed was the least intrusive alternative. In this case, Plaintiff does not claim it looked at any alternatives aside from the DAS it proposed, and merely criticizes an alternative proposed by a citizens' group. This is a striking (and an additional ground for dismissal) of its effective prohibition claim, but as importantly illustrates that the claims here lie in contract, and are not regulatory disputes as framed by Crown.

A court considering review of an agency determination "must determine whether an agency has arrived at a definitive position on the issue that inflicts an actual concrete injury and whether the resolution of the dispute requires any fact-finding, for '[e]ven if an administrative action is final, however, it will still be "inappropriate" for judicial review and, hence, unripe, if the determination of the legal controversy involves the resolution of factual issues' " id. "The position taken by an agency is not definitive and the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party" Matter of Patel v. Board of Trustees of Inc. Vil. of Muttontown, 115 A.D.3d at 864, 982 N.Y.S.2d 142.

"The basic purpose of [SEQRA] is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, [SEQRA] requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement" 6 NYCRR 617.1[c]; Chase Partners, LLC v. Incorporated Vil. of Rockville Ctr., 43 A.D.3d 1049, 1052, 843 N.Y.S.2d 116. Actions falling within the purview of SEQRA include, among others, "projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that ... require one or more new or modified approvals from an agency or agencies" 6 NYCRR 617.2[b][1] [iii]. "An action taken by an agency pursuant to SEQRA may be challenged only when such action

is final" Matter of Patel v. Board of Trustees of Inc. Vil. of Muttontown, 115 A.D.3d at 864, 982 N.Y.S.2d 142.

Traditionally, a "SEQRA determination [has] usually [been] considered to be a preliminary step in the decision-making process and, therefore, ... not ripe for judicial review until the decision-making process has been completed" Matter of Young v. Board of Trustees of Vil. of Blasdell, 221 A.D.2d 975, 977, 634 N.Y.S.2d 605, affd. 89 N.Y.2d 846, 652 N.Y.S.2d 729, 675 N.E.2d 464.

Here, the City Council, as the lead agency acted properly under SEQRA in making a positive declaration based on the potential adverse aesthetic impacts, impacts to the community character and noise. Plaintiff's action challenging the lead agency's initial positive declaration is tantamount to an attempt to circumvent its statutorily imposed obligations to undergo environmental review. The initial Type II designation for the provision of wireless telecommunication facilities under the initial Right-of-Way Use Agreement was due to the limited size and scale of the project. Plaintiff's proposed amendment to the Right-of-Way Use Agreement seeks to increase the provision of facilities by over 60 units and would approximately double the potential size of the units to be installed.

The federal claims do not somehow create a basis for an action that would not lie under state law. A claim under Section 332(c)(7) may only be brought after a "final decision" or "failure to act" by a local agency. In this instance, the City made a determination under SEQRA, and that would not constitute a final action or failure to act. Rather, New York courts have found that when a positive declaration is made under SEQRA, a claim does not lie under Section 332(c)(7) until after an applicant complies with

SEQRA and a post-SEQRA decision is made on its application. N.Y. SMSA Ltd. Pshp. v. Town of Riverhead Town Bd., 118 F. Supp. 2d 333 (E.D.N.Y. 2000). A different case might be presented if Plaintiff alleged that SEQRA itself is preempted by federal law, but it has made no such claim.

III. THE COURT SHOULD DISMISS THE COMPLAINT FOR FAILURE TO NAME AN INDISPENSABLE PARTY

Even if this Court finds that Crown has established that there is legitimate federal subject matter jurisdiction and that Crown has stated a cause of action upon which federal relief can be afforded, this Court should grant the City's motion to dismiss for failure to name an indispensable party. As noted above, an "effective prohibition" claim can only lie if some entity is prohibited from providing wireless services. Because Crown Castle is not a wireless service provider, it is necessary to determine whether Verizon Wireless will be prohibited from providing wireless services in order to pursue that claim.

Moreover, central to Crown's claim is its assertion that Verizon Wireless has obtained the right to be in the rights of way by virtue of Crown Castle's RUA or the Resolution approving it. The City strongly disputes that claim. As a result, should the Court retain jurisdiction, it will be necessary for it to decide what rights, if any, Verizon Wireless has to access the rights of way. Its authority is central to this dispute, as the proposed system is only being built in order to serve Crown Castle's customers, as indicated by the Complaint, ¶¶47-54, and would not be built if Verizon Wireless lacks the ability to place facilities it owns in the right of way to connect to facilities that are owned by Crown Castle.

Put another way, if this Court were to grant the relief requested by Crown Castle, it would effectively be determining the City's rights with respect to Verizon Wireless.

Alternatively, if the Court finds that the RUA is not valid and/or that Verizon Wireless must have a contract or other form of franchise agreement to be within the City's right-of-way, Verizon Wireless is directly impacted. It is a necessary party.

IV. CONCLUSION

Crown has brought an entirely state-based action in federal court, trying to circumvent the need to commence this action in New York State Court. As a result, the City respectfully requests that this Court enter an Order pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(b)(7), dismissing the Complaint, together with all such other and further relief as this Court deems just and proper.

Dated: White Plains, New York
May 26, 2017

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