UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CROWN CASTLE NG EAST LLC,

Plaintiff,

-against-

THE CITY OF RYE, and THE CITY COUNCIL OF THE CITY OF RYE

Defendants.

DECLARATION OF CHRISTOPHER B. FISHER IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

17 CV 3535 VLB-PED

June 9, 2017

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CHRISTOPHER B. FISHER, under penalty of perjury and pursuant to 28 U.S.C. § 1746, submits this declaration in opposition to Defendants' Motion to Dismiss (Doc. #13), Declaration of Kristen K. Wilson in Support of Defendants' Motion to Dismiss (Doc. #14) ("Wilson Declaration"), and Memorandum of Law in Support of Defendants' Motion to Dismiss (Doc. #15) ("Defendants' Memorandum"):

1. I am a member of Cuddy & Feder LLP, attorneys for Plaintiff Crown Castle NG East LLC ("Plaintiff") in the above-captioned action. I am admitted to practice in this Court, and have knowledge of the facts stated in this Declaration, which facts are submitted only if required by the Court to address the jurisdictional grounds of Defendants' Motion to Dismiss beyond the allegations of the well-pleaded Complaint, and to provide documents referenced in the Complaint, but not to otherwise enlarge the allegations of the Complaint. *See, e.g.,* Carter v. Healthport Tech., LLC, 822 F.3d 47 (2d Cir. 2016) ("[w]hen the Rule 12(b)(1) motion is facial, *i.e.*, based solely on the allegations of the complaint or the complaint and exhibits attached to it…the plaintiff has no evidentiary burden," and even when a fact-based Rule 12(b)(1) motion is asserted, "the plaintiffs are entitled to rely on the allegations in the Pleading if the evidence proffered by the defendant is

immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing"); Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991) (on a motion to dismiss, the Court must "limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference").

2. I have represented telecommunications providers such as Plaintiff for over twenty years, and based on that experience can confidently state that Defendants' Motion to Dismiss misleadingly and inappropriately attempts to reframe this federal telecommunications case as a garden variety contract case with a municipality.

3. As briefly explained to the Court during the parties' appearances on May 12, 2017, Plaintiff's claims are rooted deeply in federal telecommunications law and properly belong in this Court.

4. Plaintiff asserts valid and legitimate federal claims under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("TCA"), codified at 47 U.S.C. Sections 253 and 332, and as recognized by the Federal Communications Commission ("FCC"). For the Court's ease of reference, a copy of the statutory text of TCA Section 253 is attached hereto as **Exhibit A**, and a copy of the statutory text of TCA Section 332 is attached hereto as **Exhibit B**.

5. Federal preemption of Defendants' municipal authority to act contrary to TCA Sections 253 and 332, and Plaintiff's standing to bring claims under such federal law, exists entirely independent of the parties' February 17, 2011 Right of Way Use Agreement ("RUA"). Plaintiff's claims under TCA Sections 253 and 332 would exist even if there were no RUA between the parties. The existence of the RUA cannot be used by the City to shield itself from the substantive limitations on its municipal authority as contained in federal statutes, or to somehow convert federal rights into mere contractual rights under state law.

6. The FCC has even confirmed as a matter of law that "to the extent DAS or small-cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services," such entities have standing under 332 of the TCA to assert claims against municipalities. *See* excerpts[1] from *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order,* 29 FCC Rcd 12865 (2014), *erratum*, 30 FCC Rcd 31 ¶ 21 (2015) ("2014 FCC Infrastructure Order"), at ¶ 270, a true and accurate copy of which is attached hereto as **Exhibit C**.

7. In its 2014 Infrastructure Order, which held that providers such as Plaintiff have standing under Section 332 of the TCA, the FCC even *cites to this very Plaintiff* and its earlier case before *this* Court, which was affirmed by the Second Circuit: Crown Castle NG East Inc. v. Town of Greenburgh, 2013 WL 3357169 (S.D.N.Y. 2013) (Seibel, J.), *aff'd*, 552 Fed. App'x 47 (2d Cir. 2014) (*See* Exhibit C at n.709). A copy of the Second Circuit decision granting this Plaintiff Section 332 relief, cited by the FCC, is attached hereto as **Exhibit D**.

8. Attached hereto as **Exhibit E** is a true and accurate copy of Plaintiff's May 21, 2010 Application for License Agreement Between the City of Rye and NextG Networks for Use of the Public Rights-of-Way (the "Application") filed with Defendant City Council. Plaintiff was known as NextG Networks of NY, Inc. until 2012, when it changed its name to Crown Castle NG East LLC.

9. Notably, the very first page of the Application to the City for access to public rights of way and permits for wireless attachments stated that it was submitted "in accordance with Section 253 of the Federal Telecommunications Act" as well as relevant New York statutes and

[1] Due to the large size of the document, I attach hereto only the pages of the 2014 FCC Infrastructure Order which include the paragraphs and corresponding footnotes cited by Defendants (Defendants' Memorandum p. 7) and by Plaintiff in its Opposition papers. The full text of the 2014 FCC Infrastructure Order, which is a matter of public record, can be found at 2014 WL 5374631.

New York State Public Service Commission approvals. (Exhibit E p. 1).

10. Attached hereto as **Exhibit F** is a copy of Plaintiff's state filings, approvals and tariffs on file with the New York State Public Service Commission which confirm Plaintiff's status as a *telephone corporation* in the State of New York since 2003, with the requisite standing and legal authority to build telecommunications infrastructure in public rights of way and provide telecommunications services to its customers, including wireless carriers, as set forth in its Certificate of Public Convenience & Necessity ("CPCN") and related laws.

11. Defendants were clearly well aware of Plaintiff's legal authority under Section 253 of the TCA as far back as 2010, and the City cannot be acting in its "proprietary capacity" (which term is discussed and defined in the accompanying Memorandum of Law) in granting access to the right of way, given Plaintiff's CPCN and rights under related laws. Indeed, the City implicitly affirmed Plaintiff's position when it adopted a consent resolution in 2011 approving Plaintiff's access to public rights of way in the City and deployment of its telecommunications infrastructure in the future without specific condition or limitation other than execution of an RUA as negotiated by the parties. A true and accurate copy of the 2011 consent resolution is attached as **Exhibit G**.

12. Plaintiff's claims do *not* all "sound in state law breach of contract," and Plaintiff is absolutely not "forum shopping." (Wilson Declaration ¶¶ 4, 26). In fact, the RUA was an outgrowth of the City's consent and intended by the parties as a memorialization of the terms and conditions for Plaintiff's ongoing access to the right of way and the process for obtaining permits for specific wireless equipment to be installed by Plaintiff during the full term of the RUA in a manner that complies with federal, state and City of Rye laws applicable to other telecommunications providers and telephone companies accessing public rights of way in the City.

13. By law and by contract, Chapters 196 and 197 also do not apply to Plaintiff's access

to the public right of way, as asserted by Defendants. (Defendants' Memorandum p. 4). Chapters 196 and 197 pertain to zoning and regulation of wireless facilities on private properties, not access to the public right of way for telecommunications purposes (including by telephone corporations constructing DAS and small cells), which is governed by Chapter 167 regulating streets and sidewalks.[2] Moreover, the RUA expressly precludes application of those Chapters, as follows: "no zoning or planning board permit, variance, conditional use permit or site plan permit, or the equivalent under the City's ordinances, codes or laws, shall be required for the installation of [Plaintiff's] Equipment installed in the Public Way and/or on Municipal Facilities, unless such a process has been required for the placement of all communications facilities and equipment in the Public Way by all other telecommunications providers, including but not limited to the ILEC and local cable provider(s)." RUA § 3. The Complaint specifically alleges that other providers were subjected only to an administrative permitting review (Complaint ¶¶ 70,79), not to review under Chapters 196 and 197.

14. Plaintiff's customer is not an "indispensable party" to Plaintiff's claims, as asserted by the Motion to Dismiss. (Defendants' Memorandum pp. 11-12; Wilson Declaration ¶¶ 4, 5). DAS providers have standing to challenge municipalities' violations of the TCA, as does "any person" or "any entity" similarly aggrieved. Both this Court and the Second Circuit have granted Plaintiff relief on similar claims under the TCA without joinder of its wireless customer. *See* Exhibit D. This Court can accord complete relief amongst the existing parties without Plaintiff's customer, and Plaintiff's customer has not asserted any interest in joining this action.

[2] Section 167-5 of the City Code specifically states that "No person not otherwise authorized by law to do so shall erect or maintain on or over any street or sidewalk within the City any telegraph, telephone, electric light or other poles, or string wires in, over or upon any street, sidewalk or other public place, or over or in front of any building within the City, without the consent of the Council." Section 167-1 of the City Code also states that "[i]t shall be unlawful for any person to encumber or obstruct any street, sidewalk or other public place within the City, except for immediate transfer into or from the premises, or to erect or maintain any encroachment or projection in, over or upon any street, sidewalk or other public place, without a permit from the Clerk."

15. The Wilson Declaration admits that, unlike reviews for administrative permitting for other utility providers in the right of way, the City has with regard to Plaintiff acted for "more than 18 months, over a dozen public hearings and over one hundred hours of testimony from" Plaintiff, Plaintiff's experts and the public and delayed action on Plaintiff's Application. (Wilson Declaration ¶ 8). The foregoing admission *de facto* demonstrates that Defendants have improperly discriminated against Plaintiff in its access to the public right of way and improperly prohibited Plaintiff from providing telecommunications services in a manner prohibited by Sections 253(a) and (c) of the TCA and associated caselaw in the Second Circuit.

16. Plaintiff has been directly harmed by: (1) Defendants' errors of law in not confirming that Plaintiff's application is legally exempt from SEQRA review, and Defendants' improper issuance of a positive declaration to unreasonably delay consideration of its application in violation of TCA Section 332 (*see* Wilson Declaration Exhibit D); (2) Defendants' denial of Plaintiff's application to expand its DAS network, in violation of TCA Section 332 (*see* Wilson Declaration Exhibit E); and (3) Defendants' unlawful exercise of a discretionary, multi-tiered, illegal review process and unjustified delay which has obstructed Plaintiff's access to the rights of way while other similarly situated utility providers in the rights of way have not been subjected to those same review procedures and delay tactics, in violation of TCA Section 253.

17. The arguments advanced by Defendants in support of the Motion to Dismiss essentially take the position that Defendants are not subject to the federal laws or this Court's jurisdiction. As discussed in Plaintiff's accompanying Memorandum of Law, Defendants' position is completely contradicted by numerous decisions in this Circuit (including decisions involving this Plaintiff), FCC rulings, and the plain language of the applicable federal statutes.

WHEREFORE, it is respectfully requested that the Motion to Dismiss be denied in its entirety, together with such other and further relief as the Court may deem just and proper.

Dated: White Plains, New York
June 9, 2017.

Christopher B. Fisher, Esq.