UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CROWN CASTLE NG EAST LLC, Plaintiff, -against- THE CITY OF RYE and the CITY COUNCIL OF THE CITY OF RYE, Defendants.	**17 CV 3535 VLB-PED**

REPLY MEMORADUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Dated: White Plains, New York
June 23, 2017

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PRELIMINARY STATEMENT

Defendants City of Rye and City Council of the City of Rye (the "City" or "Defendants") submit this reply memorandum of law in further support of its motion to dismiss (the "Motion) of the Complaint (the "Complaint"). In its opposition papers Plaintiff Crown Castle NG East, LLC ("Crown Castle"), tries to ignore the threshold issue of whether this Court has jurisdiction over the alleged contractual breaches of the 2011 Right of Way Use Agreement ("RUA"). For the reasons set forth in the City's moving papers and as set forth below, this Court should grant the City's Motion to Dismiss.

ARGUMENT

I. THERE IS NO CLAIM UNDER SECTION 253

Plaintiff never responds to the City's argument that by the plain terms of the statute, Section 253 does not apply to decisions regarding the placement of wireless facilities. Crown Castle's lengthy reliance on TCG New York, Inc. v City of White Plains, 305 F3d 67 (2d Cir 2002) – a wireline case – is beside the point; none of the other cases cited in its brief support its position. The company's argument at p. 8-9, that because it submitted materials to the City in 2010 claiming Section 253 rights, it is bad faith for the City to challenge its contentions now has no legal support or basis.

II. THE ALLEGED BREACH OF CONTRACT DOES NOT GIVE RISE TO ANY OTHER FEDERAL CLAIM

Crown Castle argues (at p. 7) that it clearly has standing to bring its remaining federal claims (effective prohibition and substantial evidence) based on an FCC's decision, In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities

Siting Policies, 29 FCC Rcd 12865, ¶ 270 (2014). See Plaintiff's Memorandum of Law in Opposition at pg. 7. The paragraph Crown Castle cites has nothing to do with standing, but merely finds that facilities like those proposed by Crown Castle are personal wireless facilities within the meaning of Section 332(c)(7).

A. Crown Castle Cannot Bring An Effective Prohibition Claim

An effective prohibition claim requires more – it requires that some entity be prohibited from *providing* personal wireless services. Crown admits it does not provide them; no company that does provide them is before the court claiming a prohibition; and in the absence of such a party, any claim is either necessarily hypothetical, or an improper effort to decide the rights of another.[1] While Crown Castle correctly notes that Section 332(c)(7)(B)(v) permits any person adversely affected by a decision of a locality to challenge a local decision, that language does not mean that any person may file and pursue any claim – or assert the claims of others not before the Court. The cases cited by Plaintiff are not to the contrary, and simply hold that a company like Crown Castle may have standing to pursue some claims – the substantial evidence claim being an example in appropriate circumstances. Notably, Plaintiff's brief (at page 8) defends its right to file an "effective prohibition" claim under Section 253, and offers no real explanation as to why it should be permitted to pursue a Section 332(c) claim of effective prohibition when it does not claim to provide wireless services.

B. The Substantial Evidence Claim Also Fails

a. The cases cited by Crown involved challenged to regulatory ordinances

[1] This is one reason why Crown Castle's customer, Verizon wireless is a necessary party. It is hard to imagine how issues relevant to an "effective prohibition" claim = e.g., the existence of a significant gap – could be decided without the presence of Verizon Wireless, since it is that company's claimed service gap that will need to be examined to resolve this case. While Section 332(c)(7)

The substantial evidence claim is of course, independent of the "effective prohibition" claim, and the City's request for dismissal of that claim rests on different grounds. Plaintiff heavily relies upon Crown Castle NG East Inc. v. Town of Greenburgh, 552 Fed. App'x 47 (2d Cir. 2014) for its position that its causes of action in this Complaint are federal claims under the Telecommunications Act (the "TCA") and should be heard by this Court, although the case is not published and not precedential. However, simply because Plaintiff has crafted the causes of action as if they are violations of the TCA, it does not create federal jurisdiction. Importantly, the procedural posture of the Town of Greenburgh's review process and the relevant facts are entirely different than what has occurred in the City of Rye. Three important and distinguishing factors exist in the present case that were not present in Greenburgh: 1) Importantly, the Greenburgh Town Board denied Crown Castle's application outright under its Town Code. Here, Crown purposefully did not apply under the Rye City Code and the City's resolution "denying" the application was specifically worded so it was clear that all three plans would have to be denied if a vote was required pursuant to federal law because the impacts raised in the positive declaration needed to be studied further; 2) Plaintiff has existing facilities in Rye that did provide coverage and Greenburgh did not; and 3) Rye rendered a positive declaration under SEQRA so that it could study, in more detail, the impacts of the 60 plus nodes throughout the City and consider reasonable alternatives. In addition, in Rye, Crown's request concerned a contractual amendment, not a special permit request pursuant to the Town Code as it did in Greenburgh.

Similarly unavailing for purposes of establishing federal jurisdiction is Plaintiff's reference to NextG Networks of NY, Inc. v. City of New York, 513 F.3d 49 (2008). In

NextG Networks, NextG commenced a federal lawsuit alleging that New York City's charter, rules, regulations and requirements violated Section 253 of the TCA. The only thing decided in that case on appeal is that Section 253 gives rise to a private right of action – and in the case below, the issue was whether a facial challenge to the City ordinance would lie to challenge a comprehensive regulatory scheme; Section 332 was apparently not raised.

Crown is not challenging the validity of Rye's City Code. Crown's argument that the City's review process under SEQRA is equivalent to other municipality's actions of applying regulations that have been found to be discriminatory and in violation of the TCA is unavailing and this line of cases simply does not apply here.

b. The City was Acting in a Proprietary Capacity

Plaintiff conveniently argues that just because it did not apply under the Rye City Code Chapters 196 and 197, it does not mean that it is should not be treated as a wireless telecommunication company for purposes of commencing an action under the Telecommunications Act. Plaintiff's cannot on one hand argue that the matter is a simple contract amendment to allow infrastructure to be placed in the City's right-of-way and, on the other hand, argue that it's rights have been violated pursuant to the TCA when it has not applied under the City's regulatory codes. By its terms, the RUA does not (as Crown Castle claims) state is it part of a regulatory scheme (as did the regulations challenged in New York. The RUA actually purports to set out the terms and conditions under which access would be provided to a variety of City property, including structures in any Public

Way, and to foreclose application of zoning laws. The only way the City could be acting is in a proprietary capacity.[2]

c. The Matter is Not Yet Ripe for Federal Judicial Review

Crown Castle chose not to claim that the City failed to act in a timely manner under Section 332, which was the claim that gave rise to review under Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit, 848 F.Supp.2d 391 (W.D.N.Y. 2012).[3] It also chose not to claim that SEQRA is preempted by the Telecommunications Act, which was the ground on which the Lucas v. Planning Board of the City of Grange was decided, 7. F Supp.2d 310, 322 (S.D.N.Y. 1998). Its claim that the decision was final and therefore appealable is based on the assumption that it may ignore the positive declaration under SEQRA, which gives rise to additional procedures before a final decision is made on an application. It may not.

SEQRA applies to any action proposed or approved "which may have a significant effect on the environment." N.Y. Envtl. Conserv. Law § 9-0109(1). Plaintiff argues that the City illegally issued a positive declaration under the State Environmental Quality Review Act ("SEQRA") because the "action" under consideration – the amendment to the RUA – was a Type II Action. Under SEQRA, the "lead agency" must classify the action

[2] Under Crown Castle's theory, the RUA was actually a regulatory document that bypassed otherwise applicable provisions of the City Code. The problem for Crown Castle is that the agreement, adopted by resolution, could not conceivably amend the City Code, adopted by ordinance, and Crown Castle's case would fail because it never submitted an application under the City Code. If the action is proprietary, while there may be questions as to whether the contract, or elements of it are enforceable, the "substantial evidence claim fails for reasons stated in City's Motion. See In the Matter of Matthew Kaplan v. Village of Pelham, Westchester County Supreme Court, June 23, 2014.

[3] That is, because the claim in Bell was based on a "failure to act," the Court could properly consider whether the positive finding under SEQRA excused that failure. As City explained in its initial filing, because it anticipated Crown Castle might argue that the positive declaration amounted to a failure to act, or that SEQRA procedures were preempted, it adopted an alternative ruling that applies if the SEQRA process cannot move forward. In this case, neither claim was raised.

it is considering. There are three categories under which action may fall - Type I, Type II and Unlisted. The Type I and Type II lists describe certain actions that would fall under each category. Type II actions are those matters which have been found categorically to not have significant adverse impacts on the environment and they do not require the preparation of a negative declaration or positive declaration. Type I actions carry with it the presumption that the action will require the preparation of an environmental impact statement and Unlisted actions are simply those that do not appear on either the Type I or the Type II lists.

Interestingly, on December 7, 2016, the City Council determined that the "action" was "Unlisted" and specifically not a "Type II" action under SEQRA since the deployment of dozens of DAS systems on existing poles and structures is NOT on the Type II or Type I list. See **Exhibit A** to Reply Declaration of Kristen K. Wilson dated June 23, 2017. Although Plaintiff noted their position that the action should be a "Type II" action, Plaintiff never challenged this decision, submitted a long environmental assessment form at the City's request (which is required for Type I actions and may be required for Unlisted actions), and even continued to negotiate extensions of time to the City to allow both parties to address issues that had been raised.

Since the issuance of a positive declaration is an interim step in the SEQRA process and the City stated that it wanted to study other alternatives to the deployment of DAS in residential neighborhoods, the noise impacts, aesthetic concerns, and other community character concerns, no final decision has been rendered. Plaintiff relies on a series of cases in support of its position that the positive declaration is a final agency action. As set forth below, none of these cases support Plaintiff's position.

In Westchester Day School v. Village of Mamaroneck, 236 F.Supp.2d 349 (S.D.N.Y. 2002), the issuance of a positive declaration was determined to be "ripe" only after an extensive review of environmental issues, in particular traffic concerns, had already been studied by the Village's zoning board of appeals. In Westchester Day School, the Village originally issued a negative declaration after the traffic studies performed by professional traffic engineers had been prepared and reviewed. Subsequently, the Village rescinded the negative declaration and issued a positive declaration based on the community opposition. As a result, the Court found that the positive declaration was ripe for review because the school had demonstrated by more than mere allegations that it would be futile to continue the SEQRA process. In addition, the Court noted that there were no new facts upon which the Village based its rescission of the negative declaration.

Here, the City never rendered a negative declaration and consistently raised concerns over the noise, aesthetics and impacts to the community character. Moreover, the environmental issues were never formally analyzed by professionals and the facts and details surrounding Plaintiff's deployment were constantly changing.

Similarly, in Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit, 848 F.Supp.2d 391 (W.D.N.Y. 2012), the court found the Town purposefully and wrongfully delayed the environmental review process and found that the Town's decision to issue a positive declaration was ripe to review. In Bell, the applicant had applied pursuant to the Town Code, reviewed the criteria for siting cell towers, and considered both public and private property. The Bell applicant also considered more than 12 alternative sites, some of which were private property, and that the aesthetic impacts of the new monopole were not significantly greater than the current lattice that was located on the proposed site.

Again, contrary to the facts in Bell, Crown did not apply under the City Code and, therefore, did not review the siting criteria for cell towers but, rather, chose as many telephone poles that were available in the City on which it could potentially place a DAS node. In addition, unlike the existing tall lattice tower that would be replaced in Bell, the proposed 60 plus nodes are new structures in Rye and are not replacing existing nodes.

Equally unavailing to Plaintiff's position is the court's decision in Center of Deposit, Inc. v. Village of Deposit, 90 A.D.3d 1450, 936 N.Y.S.2d 709 (3d Dep't 2011)[4]. In Deposit, the plaintiff established that the positive declaration would inflict a concrete injury. In Deposit, the action involved a 2-lot subdivision and the court found there was no evidence that there were any potential environmental issues that were identified relating to stormwater, air/water quality, wetlands, etc.

Contrary to the facts in Deposit, in the present case, there were numerous concerns raised related to particular parcels of property and areas within the City regarding noise, specific aesthetic and visual concerns, and community character impacts. In addition, the City Council did provide a reasoned elaboration of its decision in its resolution.

III. PLAINTIFF IS NOT A WIRELESS SERVICE PROVIDER AND VERIZON WIRELESS MUST BE A PARTY IN ORDER FOR PLAINTIFF'S EFFECTIVE PROHIBITION CLAIM TO SURVIVE

In its opposition papers, Crown does not assert that it is itself a wireless service provider. Indeed, in most of the cases referenced by Plaintiff, the causes of action did not sound in contract, but, rather, were direct challenges that municipal codes violated the

[4] Plaintiff also cite to Gordon v. Rush, 100 N.Y.236, 762 N.Y.S.2d 18 (2003) in support of its position that this matter is ripe for review. In Gordon, petitioners had already gone through a coordinated environmental review process and a negative declaration had been previously issued. The Court found that a second environmental review process would have been futile and would not improve the situation. Here, the City is in the middle of its environmental review process and has not made a final determination.

TCA. Moreover, Crown does not address the fact that Verizon Wireless does not have a franchise agreement establishing its rights to the City's rights of way. As a result, in addition to the reasons stated in the discussion of the "effective prohibition" claim, even if this Court does decide that the Complaint raised a viable federal cause of action under the TCA, it would ultimately be determining the City's rights with respect to a non-party (Verizon Wireless).

IV. CONCLUSION

For all the foregoing reasons, Defendants respectfully requests that this Court grant the Motion to Dismiss in its entirety and deny Plaintiff's request for costs, expenses and attorney's fees.

Dated: White Plains, New York
June 23, 2017

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