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**

MEMORADUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Dated: White Plains, New York
June 6, 2017

Kristen K. Wilson, Esq.
BLANCHARD & WILSON, LLP
Attorneys for Defendants the City of Rye and the City Council of the City of Rye
235 Main Street, Suite 330
White Plains, New York 10601

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PRELIMINARY STATEMENT

Plaintiff Crown Castle NG East, LLC ("Crown Castle") moves for a preliminary injunction on the basis that it will be irreparably harmed if its motion is not granted because of the unknown alleged economic losses it will face and the alleged danger the community would face with having potentially reduced wireless coverage.

While the City feels strongly that Crown has failed to meet the requirements for a preliminary injunction, subject to further order of the court, it is quite willing to maintain the *status quo* – that is, to agree that it will not terminate the RUA, and to also agree that – as long as the company ensures that all parts of the installation remain compliant with existing codes[1] – the company may maintain (but not modify) the existing nine installations in place pending resolution of this case, with the understanding that, pending resolution of the rights of the parties, additional facilities may not be installed by Crown Castle pursuant to the RUA. If Crown Castle seeks more than that – if it seeks to take advantage of what it sees as the benefits of the RUA while denying the City's right to terminate the arrangement – it is going far beyond the status quo. Its memorandum is, unfortunately, unclear on what is meant by the relief sought. What is clear is that, even setting aside the flaws in its showings, its claims as to harm are limited to harms that would flow from removal of existing facilities. Even were its showing otherwise credible, it is not entitled to any relief broader than that what would be required to protect against those harms. It should not, for example, be given an extended opportunity to cure; that opportunity is designed to encourage parties to resolve disputes outside the courts, and if Crown misses the deadline for cure, the opportunity is gone – although obviously, it will be up to this

[1] For example, if equipment is malfunctioning and creating electrical, noise or other hazards, we would expect those to be promptly corrected by the company.

Court or a court with jurisdiction over the state law issues to ultimately decide whether there has been a breach.

As set forth in more detail below, Crown fails to establish that it meets the standards for this Court to grant its motion.

ARGUMENT

I. Preliminary Injunction Standard

A preliminary injunction "is one of the most drastic tools in the arsenal of judicial remedies. Iron Mountain Info. Mgmt. V. Taddeo, 455 F.Supp.2d 124, 132 (E.D.N.Y. 2006)(quoting Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 60 (2d Cir. 1985)). In the ordinary case, that burden is a heavy one: a plaintiff seeking a preliminary injunction has the burden of demonstrating that (1) it will suffer irreparable harm absent injunctive relief *and* (2) either (a) that it is likely to succeed on the merits of the action, or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly in the plaintiff's favor. Salinger v. Colting, 607 F.3d 68, 79 (2d Cir. 2010). However, if a party seeks relief that goes beyond maintaining the status quo, the burden is even heavier: if a party is moving for a mandatory preliminary injunction that alters the status quo by commanding a positive act, the party's likelihood of success on the merits must be established by a clear or substantial showing of a likelihood of success. D.D. ex rel. V.D. v. New York Bd. of Educ., 465 F.3d 503, 510 (2d Cir. 2006) (higher standard is especially appropriate when mandatory preliminary injunction is sought against government). Moreover, in this case (as we explain below), Crown Castle is claiming that it has been given what would be a sovereign right to grant consent to its third party customers to use public rights of way, and the City should be

prevented from requiring that those customers seek consent from the City – even though consent is required by New York law. In such circumstances, the "fair ground" standard does not apply, and a higher showing is required, County of Nassau, N.Y. v. Leavitt, 524 F.3d 408, 414 (2d Cir. 2008).

The Court must also (3) consider the balance of hardships between plaintiff and defendant – even if the plaintiff demonstrates a likelihood of success – and may issue a preliminary injunction only if the plaintiff demonstrates that the balance of hardships tips in the plaintiff's favor, and (4) "pay particular regard for the public consequences in employing the extraordinary remedy of injunction" and may issue a preliminary injunction only if the plaintiff demonstrates that they "public interest would not be disserved" by the issuance of such relief. eBay, Inc. v. MercEchange, 547 U.S. 388, 391, 126 S.Ct. 1837, 1839 (2006). It is the plaintiff's burden to make "a clear shoring that [it] is entitled to such relief." Winter v. Natural Resources Defense Council, 555 U.S. 7, 22, 129 S.Ct. 365, 376 (2008).

II. PLAINTIFF HAS NOT SHOWN A "CLEAR" OR "SUBSTANTIAL" LIKELIHOOD OF SUCCESS ON THE MERITS

On this motion, Plaintiff bears the burden of establishing a prima facie case that it has a substantial likelihood of success. In their motion for a preliminary injunction, Plaintiff focuses on causes of action sounding in state law - 1) breach of contract; 2) breach of implied covenant of good faith and fair dealing; and 3) a declaration that it has been in compliance with the RUA.

In support of these claims, Crown's pleading and declarations focus on a notice of non-compliance that the City sent to Crown on October 4, 2016. See Wilson Dec. Exhibit **A**. That letter gave Crown notice and opportunity to cure two breaches: its failure to

consider municipal structures in Public Ways as sites for location of facilities; and its attempt to transfer rights to occupy the rights of way to third parties. Such breaches would indeed provide a basis for termination of the RUA, and it is that potential termination that forms the basis of Plaintiff's harm showing. As stated below, it is quite likely that if litigated, Crown's actions will be found to be a breach of the agreement. Separately, Plaintiffs complain that the City has required showings beyond what may be required by the RUA, acted in bad faith and dragged out proceedings, but aside from non-cognizable legal conclusions disguised as fact,[2] its preliminary injunction motion (as opposed to its Complaint) does not actually claim that the City's action on its request under the RUA was unlawful, or justifies immediate relief.

As shown below, Plaintiff has not sustained this burden and its motion for a preliminary injunction must be denied.

A. Crown Failed to Apply under the Rye City Code

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

[2] See, e.g. Heimdahl Declaration at ¶12. While a Court is not required to exclude hearsay evidence submitted in support of a preliminary injunction motion, Mr. Heimdahl's declaration is beyond the pale. Not only does he purport to interpret the contract legally (his statements cannot even generously be described as parol evidence), he purports to attest to what the City knew or did not know regarding who would own what equipment at the DAS nodes, see ¶¶ 5, 13 – something he does not show he is in any position to know. He is not a signatory to the RUA, which was negotiated by a different company, and he does not claim to have discussed what the City knew or did not know with anyone. The statement is so flawed; it can be accorded no weight.

RUA.[3] Under that agreement, Crown is claiming the right to install facilities under all three plans it submitted to the City – Plans A, B and C. While the Complaint seeks to disguise the fact, it has not withdrawn any of those plans, and hence its claims with respect to likelihood of success depend on showing it is likely to succeed on all three of those claims.

The RUA by its terms (in section 3.3) requires attachment to municipal facilities, where there is a choice between those and other facilities. At the time the City issued the notice of breach about which Crown complains, the plan before the City did not consider attachment to municipal facilities; in fact, according to the Complaint, ¶ 138, the required alternatives are only taken into account in what Crown refers to as Plan C. Hence, applying the terms of the RUA, Crown is not likely to prevail under either Plan A or Plan B.

In addition, the RUA, Exhibit A, specified the size of facilities that may be attached pursuant to the RUA. What Crown fails to mention to the court is that Plan A and Plan C with respect to municipal facilities, fails to comport with those standards.[4] Crown does not challenge that factual statement, or actually show that its proposed installation comported with the RUA. It simply asserts that it is in compliance, but an *ipse dixit* is not sufficient to support a finding that Crown will prevail on its claims.

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[3] 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 pleading, the Pelham case provides a further reason to conclude that Crown is not likely to succeed on its claims, as the contract, to the extent it purports to exempt Crown from otherwise applicable requirements of local or state law, may not be enforceable by Crown. However, there is ample reason to deny the motion even if one assumes that the RUA is wholly enforceable according to its terms.

[4] See Staff Recommendation on RUA, Wilson Dec., Exhibit **B**; adopted by City by Resolution on April 22, 2017.

The claim that Crown is likely to prevail on its claim with respect to third party facilities is quite literally based on a misstatement of the breach. Crown characterizes the City as prohibiting it from installing equipment that is owned by others. That is not the source of the breach. Third party contractors may often install facilities that may be owned by others – a telephone company may hire a third party to install fiber conduit, for example. The issue is whether Crown can grant third parties the right to occupy rights of way, in lieu of obtaining consent from the City. The claim would be comparable to a claim by Consolidated Edison that its right to permit cable operators to attach to its poles obviates the need for a cable operator to obtain a franchise to place facilities in the rights of way. Not one sentence of the RUA grants Crown that right, and Section 10 (no assignment) seems to prohibit it. Nor does the Resolution referenced bv Crown Castle help its cause: that resolution does not authorize anyone to use the rights of way, and merely authorizes the City to enter into an agreement with "NextG Networks" for telecommunications access. There is no hint that NextG was authorized to then grant others the right to place facilities in the rights of way.

To be clear: the City is not saying Crown cannot install facilities for others – it is simply saying that those others must themselves have authorization to have facilities in the rights of way. This is a requirement of New York State Law for telecommunications companies that are authorized to place facilities in the streets, Pub. Serv. Law Section 99. Nor can Crown claim it has obtained sovereign franchising rights by past practice. First, the RUA itself indicates that the City's past practices do not bind it for the future. And of course, as a general matter, the RUA must be read in favor of Rye and against Crown; rights asserted against the municipality must be clearly defined and not dependent on

inference or presumption. 12 McQuillin, Municipal Corporations, § 34.16a (3rd.Ed. 1970). Where a city has not by contract or otherwise restricted the exercise of its public powers, it is not to be shorn of its powers by "mere implication." Water Co. v. Knoxville, 200 U.S. 22, 23. (1906). As a result, it is highly unlikely that Crown can prevail on either of the RUA claims it has articulate in its moving papers.

B. The provider of wireless services (Verizon Wireless) is not claiming it is prohibited from provide service

Also, fatal to Plaintiff's motion is another fact. While Plaintiff (at page 1 of its Memorandum) claims that it "deploys telecommunications facilities in the rights of way…thereby providing personal wireless services," that claim is actually contradicted by the Complaint, which makes it clear that while Crown builds wireless facilities,[5] it is its customers, not Crown, which "provide wireless services to the public.[6] The distinction is important because the claims of harm all depend on the assumption that (1) Crown can obtain an injunction not based on harm to it, but on a claimed harm to entities not even before the Court and are claiming no need for relief; and (2) Crown's customers can only provide services via Crown's facilities. As to the former point (and as discussed in more detail below: "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted *the applicant* (emphasis supplied) is likely to suffer irreparable harm…" Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983). One the second, as discussed below, Crown presents no evidence at all, and the record is to the contrary.

[5] Complaint, ¶3.

[6] Id.

C. The City complied with its obligations under New York State Law

Third, Crown seems to base its motion on actions of the City which it references in its Complaint at ¶¶ 13-18, but then mischaracterizes the actions. On April 19, 2017, 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 decide on the siting of the proposed facilities under 47 U.S.C. 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. Crown may complain that this is "bad faith," but its own pleading (at Exhibit 1) shows that it agreed to the process and the timetable under which the City took action. Hence, the process followed and the decision made provide no basis for injunctive relief; they are not directly challenging it as unlawful in the motion; and Crown makes clear in its Memorandum at p.5, that it is not seeking the right to install any of the facilities it proposed to install pursuant to the injunction.

Of course, in order to show that it has a likelihood of succeeding, Crown must have a cognizable claim. The City has separately moved to dismiss, and for the reasons stated in support of that motion, no preliminary injunction can issue here.

III. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF IRREPARABLE HARM

As stated above, "… the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that … applicant is likely to suffer irreparable

harm before a decision on the merits can be rendered." Bell & Howell: supra. There is no presumption of irreparable harm. EBay, supra, 547 U.S. at 392-93, 126 S.Ct. at 1840. The Court "must … consider the injury the *plaintiff* will suffer if it loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the 'remedies available at law, such as monetary damages, are inadequate to compensate fo that injury.'" Salinger, supra, 607 F.3d at 80; Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011)(irreparable harm is "an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation"). "A mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction." Borey v. Nat'l Union Fire Ins. Co., 934 F.2d 30, 34 (2d Cir. 1995).

Here, it is evident that this motion for a preliminary injunction is all about the money. Crown's alleged harm is its alleged economic harm as a result of not being able to deploy telecommunications facilities in the City's public rights of way for its wireless carrier customers. See Affidavit of Peter Heimdahl dated May 11, 2017 at ¶ 14 (the "Heimdahl Aff."). However, there is nothing that Crown can point this Court to showing what damages it will suffer if it cannot start its deployment immediately, or that it will suffer any damages. Crown seems to speculate that it will lose money by having to proceed through the SEQRA process. However, every "action" is subject to the SEQRA process. Here, Crown is no different than a developer seeking to develop a three-lot subdivision, a municipality drafting new legislation concerning wetlands, or a property owner wishing to install a swimming pool. All the aforementioned "actions" are subject to SEQRA and the applicant must undergo the relevant environmental inquiries before it can proceed.

Crown's pleading does not show that *it* will suffer cognizable irreparable harms, itself a fatal flaw under *Bell*.

Rather, the irreparable harms alleged are to entities other than Crown: (a) Crown Castle's customers, who are not before the Court; (b) to the public including thousands who rely on Crown; and (c) to the entire nation, as according to Crown's pleading, the entire nation has an interest in ensuring Crown's DAS facilities are placed in residential neighborhoods in Rye.

But, the alleged irreparable harm of a "reliable cellular services (particularly for businesses needing this service)" and the "irreparable harm …to members of the public relying on Crown Castle's services" is simply not supported. <u>See</u> Heimdahl Aff. at ¶¶ 16-17. Here, the only entity alleging harm is the infrastructure provider. Verizon Wireless is not alleging harm, the public is not alleging harm, and there are no complaints by Crown or Verizon Wireless' customers alleging any harm.

There is no reason to presume irreparable harms will flow from any City action. First, the company misstates the nature of the community, and the severity of any problem that could flow from termination of the RUA. City of Rye lies on the Long Island Sound, and on the Eastern side, along the coast. In its southeastern corner, the population is relatively less dense and the City as a whole is one of the least densely populated communities in the area, https://www.arcgis.com/home/webmap/viewer.html?webmap=80f9b95a4ce0491091f1477710f6a91d. While some roads on the Western Side (the Boston Post Road, for example) are subject to heavier traffic, many of the streets show traffic levels at the lowest levels measured by New York State. While Crown Castle complains that heavily trafficked areas

lack coverage that reach transiting vehicles, that is not what the data show: what Crown Castle and Verizon Wireless' data show is that Verizon's standards for such traffic are easily met on the Western side of the City at virtually all locations, a point emphasized by a report submitted as part of the record by an expert for the City, Mr. Ron Graiff annexed to Wilson Dec. as Exhibit **C**. While Mr. Graiff indicated that there were some areas on the southeastern part of the City where there might be issues with capacity, those areas are the less dense, and less traveled areas, and areas that could potentially be addressed by a facility at other locations. See Wilson Dec. Ex. **D** regarding traffic data.

Moreover, the data above do not show that Crown's DAS nodes are the linchpins upon which service depends, and neither does the material presented in support of the injunction. The data shows that there are antennas in place – in other words, alternatives from which the public can receive, and wireless providers can provide service. There is no reason to find – based on what has been presented - that there is such an absence of coverage as to require issuance of an injunction by this court – especially when the entity that would provide the service, Verizon Wireless, is not before the court complaining that it lacks alternatives for providing services.

Finally, denial under the RUA, or termination of the RUA, is not itself fatal to the provision of wireless services. Crown and its customers remain free to apply for approval of sites under Chapter 196 of the City Code. They have simply chosen not to do so.

IV. A BALANCING OF THE EQUITIES TIPS DECIDEDLY IN FAVOR OF DEFENDANT

Even where plaintiff shows some irreparable harm, the Court's consideration of whether such harm warrants the discretionary relief of a preliminary injunction cannot occur in a vacuum; the Court must also "assess the balance of hardships between the

plaintiff and defendant. Those two items, both of which consider the harm to the parties, are related." Salinger, Supra, 607 F.3d at 81 (emphasis added). Plaintiff cannot show that the balance of hardships tip decidedly in its favor. In fact, such balancing of the equities tips decidedly in Defendants' favor. Plaintiff is the nation's largest provider of wireless infrastructure and provides a variety of infrastructure types (towers, roof top antennae, DAS) to allow wireless providers to meet their client's coverage and capacity demands. The City of Rye, on the other hand, is a small residential community of approximately 5,000 households trying to preserve its idyllic and picturesque neighborhoods along the Long Island Sound shore. While, as we noted at the outset, the City is amenable to agreeing to maintaining the *status quo* during the pendency of this action, the *status quo* cannot permit Plaintiff to take advantage of the RUA, while preventing the City from taking actions to enforce it. Indeed, if Plaintiff were seeking the right to install pursuant to the RUA, while preventing the City from acting under SEQRA effectively resolves the action in favor of Plaintiff. To grant Plaintiff relief would be the equivalent of striping the City of its right and obligation under the law to ensure that the environmental actions taken are those that are least intrusive pursuant to SEQRA.

When this Court weighs the alleged undocumented financial hardship of the largest wireless provider against the City's interest in thoroughly reviewing the potential adverse environmental impacts and ensuring that that the proper contractual agreements are in place, it is clear that Defendants' interests far outweigh any financial burden Crown may suffer as a result of the City's compliance with SEQRA and other state or local laws.

V. **A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST**

Plaintiff cannot demonstrate that the "public interest would not be disserved" by issuance of the preliminary injunction it seeks. In fact, the federal law claim brought by Crown is intended to carefully balance the legitimate interests of localities and their citizens against the interest of companies like Crown Castle in deploying wireless facilities. That law attempts to balance those interests by providing for consideration of any action brought against a locality on an "expedited basis." 47 U.S.C. Section 332(c)(7)(B)(v). Here, to the extent that granting the preliminary injunction would limit the City's authority to control wireless siting, the grant would be inconsistent with federal law. The public interest is best served by requiring Crown to proceed through the SEQRA process and allow the City, its residents and the industry to engage in a public review of how best to address the requests for placement. If Crown truly wishes to preserve the status quo, the status quo can be preserved by agreement of both parties.

VI. **CONCLUSION**

For the above-mentioned reasons, Defendant respectfully requests that this Court deny Plaintiff's motion.

Dated: White Plains, New York
June 6, 2017

_________/s/_____________________________
Kristen K. Wilson, Esq.
BLANCHARD & WILSON, LLP
Attorneys for Defendants the City of Rye and the City Council of the City of Rye
235 Main Street, Suite 330
White Plains, New York 10601