

UNITED STATES DISTRICT COURT
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.

**AFFIDAVIT OF PETER
HEIMDAHL IN SUPPORT OF
PLAINTIFF CROWN
CASTLE NG EAST LLC'S
MOTION FOR
INJUNCTIVE RELIEF**

DOCKET NO. 7:17-cv-03535

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STATE OF PENNSYLVANIA)
) ss.:
COUNTY OF WASHINGTON)

Peter Heimdahl, being duly sworn, hereby deposes and says:

1. I am Director of Government Relations for Plaintiff Crown Castle NG East LLC ("Crown Castle"), and am fully familiar with and possess knowledge of the facts and circumstances underlying and necessitating the instant motion, whereby Crown Castle seeks an injunction restraining Defendant the City of Rye ("Rye" or the "City") and/or the City Council of the City of Rye (the "City Council") (collectively, "Defendants") from terminating or attempting to terminate a February 17, 2011 Right of Way Use Agreement (the "RUA").

2. For a complete recitation of the background of this action, the Court is respectfully referred to the Complaint filed on May 11, 2017, a true and accurate copy of which is annexed hereto and incorporated herein as Exhibit A.

3. Crown Castle deploys telecommunications facilities in public rights of way ("ROW") to provide personal wireless services to people living, working and traveling through the City, who depend on such services for operation of their smartphones, tablets and

other mobile devices.

4. On January 12, 2011, the City issued a resolution which granted consent to Crown Castle¹ for ROW access in accordance with its federal and state rights (the "Consent Resolution"). The Consent Resolution was memorialized in the RUA, which recognizes rights of access under federal and state law and delineates reasonable terms and conditions regarding Crown Castle's right of access. In furtherance of those rights, the RUA provides expeditious and narrowly tailored review procedures for deployment of Crown Castle's equipment. In particular, the RUA gives Crown Castle a municipal franchise to install equipment in the ROW, including on City-owned poles, and requires that Crown Castle's approval be granted through an informal, expedited administrative process applicable to other providers of utility infrastructure. A true and accurate copy of the RUA is annexed hereto as **Exhibit B**.

5. Pursuant to the RUA, Crown Castle installed nine nodes in its Distributed Antenna System ("DAS") network between 2011 and 2015, which installation was subject to a streamlined administrative review process conducted by the City Engineer. When Crown Castle was approved for installation of the nodes, the City was well aware that the nodes were coupled with equipment from a third party wireless carrier customer, for the purpose of transmitting that wireless carrier customer's signals. Not once did the City indicate that this installation of third party equipment ran counter to the terms of the RUA. Instead, the City complied with its obligations under the RUA and approved the node installations.

6. In late 2015, the good faith which the City had worked with Crown Castle came to an end as the City bowed to a vocal group of members of the public opposed to wireless deployment. When Crown Castle sought to expand its DAS network, the City abandoned its

¹ The Consent Resolution related to, and the RUA was entered into by, Crown Castle's predecessor NextG Networks of NY, Inc. ("NextG"). For ease of reference and continuity, all references herein to "Crown Castle" include, where appropriate, NextG.

previously cooperative review process in favor of a rigorous, make-it-up-as-you-go discretionary review process. The City continued its intransigence despite Crown Castle's efforts to cooperate and offer of three alternative proposals called Plan A, Plan B and Plan C. All three proposals were consistent with the standards of the RUA, but in an effort to cooperate with the City Crown Castle ensured that the last two proposals were completely compliant with the equipment standards set forth in the RUA.

7. On October 4, 2016, in an effort to unlawfully frustrate and interfere with Crown Castle's entitlement to approval of additional facilities on its DAS network in the ROW, the City erroneously asserted that Crown Castle was in default of the RUA, and demanded a cure within 45 days, after which the RUA would terminate (the "Notice"). The parties subsequently agreed to an extension until May 12, 2017 for Crown Castle to cure its purported defaults. (See Exhibit A to the accompanying Declaration of Andrew Schriever). A true and accurate copy of the Notice is annexed hereto as Exhibit C.

8. Crown Castle conducted a review of City-owned sites and, at significant time and expense, reengineered the DAS expansion to incorporate several City owned traffic lights and poles in commercial areas of Rye which were incorporated into a February 2017 filing referred to as "Plan C." On February 24, 2017, counsel for Crown Castle submitted to the City a summary of where its approval request stood, recounting how it had worked with the City to reduce its node plan from 85 to 75 and then to 64 nodes. Crown Castle also detailed alternative equipment plans being presented by the City and explained all of the alternatives it evaluated, including with respect to City-owned infrastructure (this also confirmed that Crown Castle "cured" the alleged default under the RUA which claimed that City-owned alternatives had not been considered). That letter summarized three different options that Crown Castle had

presented in total, including Plan C. A true and accurate copy of the February 24, 2017 letter is annexed hereto as Exhibit D.

9. The City's claim that Crown Castle breached the RUA by failing to consider mounting equipment on City-owned poles is false. As evidenced by Crown Castle's proposed Plan C, Crown Castle did in fact conduct a review of City-owned sites, and then, at significant time and expense, reengineered the DAS expansion to incorporate several City owned traffic lights and poles in commercial areas of Rye.

10. The City's interpretation of the RUA in a manner that restricts the installation of third party equipment on DAS infrastructure violates the express language of the RUA, and could render the RUA meaningless by prohibiting circumstances where carrier equipment would be necessary to the installation and operation of Crown Castle's DAS network.

11. The City's 2011 interpretation of the RUA in connection with Crown Castle's original installation of nine nodes runs directly contrary to the interpretation it now adopts as a means to unlawfully terminate the RUA. The DAS system currently in place, which the City approved, has for years included equipment furnished by a third party wireless carrier customer.

12. The City's scope of review under the RUA, as well as under state and federal law, is narrowly limited to such issues as ensuring traffic and pedestrian safety. Whether an antenna that is installed is technically owned by Crown Castle or by a third party wireless carrier customer has absolutely no bearing on such inquiry.

13. The RUA expressly contemplates that third parties will locate equipment on Crown Castle's infrastructure by virtue of the RUA's definition of "equipment" and Statement of purposes. First, the RUA's definition of "equipment" includes the phrase "to be

installed and operated by” Crown Castle. Second, Recital A of the RUA expressly notes that Crown Castle deploys infrastructure in connection with “serving [Crown Castle’s] wireless carrier customers.” As the City is well-aware, equipment may need to be provided by these “wireless carrier customers” in connection with transmitting carrier signals, without which Crown Castle’s DAS infrastructure (and the RUA itself) would be entirely useless.

14. The RUA clauses setting forth the purposes of the Agreement expressly state that the DAS infrastructure is deployed in connection with “serving [Crown Castle’s] wireless carrier customers.” It would make no sense to reference “serving wireless carrier customers” if the parties truly intended that those customers’ equipment could not be installed on Crown Castle’s infrastructure to transmit carrier signals. Thus, Crown Castle’s proposed installation of third party equipment on its facilities cannot constitute a default under the plain terms of the RUA.

15. Crown Castle is entitled to a temporary restraining order and preliminary injunction to preserve the *status quo* and prevent the City from illegally terminating the RUA, which would not only create further bars to entry of telecommunications services provided by Crown Castle but would also give the City an excuse to demand removal of the existing nodes which have been installed since 2011 – effectively cutting off wireless services to people traveling, working and residing in the City who depend on those services, including E911 services.

16. In the event Crown Castle is stripped of its rights under the RUA, including to the narrowly tailored administrative review process for deployment in the ROW as stipulated in the RUA, Crown Castle will be irreparably by the unquantifiable economic losses occasioned by the lack of reliable cellular services (particularly for businesses needing this

service). In addition, irreparable harm could occur to members of the public relying on Crown Castle's services, including by virtue of the unavailability or disruption to E911 services.

17. In addition to the incalculable public safety impact, monetary damages are insufficient because there is no rational indicator of how much business and other revenue will be lost by Crown Castle and those in the community who rely upon the services facilitated by its installations.

18. Termination of the RUA will adversely impact realization of the important federal policy to make available to all people of the United States rapid, efficient and extensive wireless communication services at reasonable charges, and would allow the City to erect barriers to entry in the telecommunications market. Absent injunctive relief, there is no way to prevent this harm.

19. Maintenance of the *status quo* should have no adverse effect on the City, as it has been operating under the RUA, with knowledge of Crown Castle's housing third party equipment belonging to third party carriers, since 2011. Moreover, Crown Castle cannot move forward with its equipment deployment in the City's ROW at this point, because the City has issued a SEQRA Determination and Denial of Crown Castle's application. Thus, pending resolution of the issues by this Court, the City will not be harmed by the injunction in any way.

20. As a consequence of the City's conduct, Crown Castle has been forced to seek redress for, among other things, the City's breach of contract and of the implied covenant of good faith and fair dealing, by virtue of the City imposing requirements beyond what is contemplated by the RUA and attempting to curtail and/or terminate Crown Castle's rights under same.

21. Denial of the relief sought would render a subsequent judgment

ineffectual, because a judicial declaration that the RUA is valid after it has been terminated would render the claim moot and the judgment of no practical effect.

22. For these reasons, Crown Castle Crown Castle is likely to succeed on its claims and respectfully seeks an Order by this Court granting emergency temporary and preliminary injunctive relief enjoining and restraining the City from terminating Crown Castle's rights to and interest in the RUA.

23. It is respectfully requested that the Court grant Crown's application for emergency temporary and preliminary injunctive relief enjoining and restraining the City from terminating, or attempting to terminate, Crown Castle's rights to and interest in the RUA prior to a full determination on the merits.


PETER HEIMDAHL

State of WI County of St Croix

Sworn to before me this
11th day of May, 2017

Nancy Heister
Notary Public

My commission expires 18 Feb. 2018

