UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CROWN CASTLE NG EAST LLC,

Plaintiff,

-against-

17 CV 3535 VLB-PED

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

Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff Crown Castle NG East LLC ("Plaintiff") respectfully submits this Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Motion to Dismiss" or "Motion") (Doc. #13). The Court is respectfully referred to the Complaint and the accompanying Declaration of Christopher B. Fisher ("Fisher Declaration") for the facts of this case and defined terms referenced herein.[1]

The Motion is a thinly-veiled attempt to reframe Plaintiff's Federal Telecommunications Act ("TCA") case into something that it is not. In a confusing presentation of statutory excerpts, without citation to relevant legal authority or application to this case, the Motion and supporting papers ignore the four corners of the Complaint, submit facts outside of the Complaint, and disregard that the detailed factual allegations in the Complaint are to be accepted as true. The Motion also ignores well-established and controlling precedent that "[t]he TCA does not create a collection of default rules that municipalities and service providers can contract around." TCG New York, Inc. v. City of White Plains, 305 F.3d 56, 82 (2d Cir. 2002).

That this Court is the proper forum for Plaintiff's claims, and that Plaintiff has sufficiently pled claims for relief under the TCA (without its customer as a party), is illustrated by the fact that both the Southern District of New York *and* the Second Circuit have granted relief to *this Plaintiff*

[1] The Fisher Declaration is submitted to rebut the Declaration of Kristen K. Wilson in Support of Defendants' Motion to Dismiss ("Wilson Declaration"), provide documents relied upon in the Complaint, and address subject matter jurisdiction should this Court look beyond the allegations of the Complaint. The Fisher Declaration is not intended to 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").

under the *same* TCA provisions at issue here, against other New York municipalities. Moreover, a 2014 ruling of the Federal Communications Commission ("FCC") recognizes *this Plaintiff's* standing to assert TCA claims in federal court against municipalities for denial of access to the public right of way. This case falls squarely within the ambit of the TCA's substantive limitations on state and local authority, and the Motion's unsupported grounds for dismissal fail as a matter of law. As such, the Motion to Dismiss should be denied.[2]

ARGUMENT

I. The Complaint States Prima Facie Federal Claims Under the TCA

The fallacy of the Motion to Dismiss is highlighted by the fact that Plaintiff has prevailed within this Circuit and others on TCA claims similar, if not identical, to those alleged in the Complaint. *See* Crown Castle NG East Inc. v. Town of Greenburgh, 552 Fed. App'x 47 (2d Cir. 2014) (granting relief to Plaintiff under TCA Section 332 for denial of permits for wireless attachments in public rights of way); NextG Networks of NY, Inc. v. City of New York, 513 F.3d 49 (2d Cir. 2008) (reversing dismissal of Plaintiff's claims under TCA Section 253 where the city's right of way access requirements were alleged to be preempted by the TCA).[3]

The FCC and numerous federal courts have recognized not only the validity of the federal claims asserted in the Complaint, but have routinely afforded injunctive relief to wireless infrastructure providers for violations of the TCA, mandating that the approvals at issue be granted. Id; *see also* New York SMSA LP v. Town of Clarkstown, 612 F.3d 97, 105-106 (2d Cir. 2010)

[2] Although Defendants attack this Court's federal question jurisdiction, this Court also has diversity jurisdiction: Plaintiff is a Delaware corporation with a principal place of business in Pennsylvania and Defendants are a municipality and municipal agency within New York State. (Complaint ¶¶ 29-31). Although a dollar amount is not specified in the Complaint, the amount in controversy, which includes lost revenues due to illegal delays prohibiting further market entry, far exceeds $75,000 exclusive of costs and interest.

[3] Plaintiff, previously known as NextG Networks of NY, Inc., changed its name in 2012 to Crown Castle NG East Inc. (Fisher Declaration Exhibit F).

(town requirements interfered "with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law"). The Defendants' unsupported arguments that Plaintiff lacks standing, that the issues pled in the Complaint are not ripe for review, and that Plaintiff failed to join a necessary party are completely contrary to federal law.

A. The Motion Ignores the Well-Pleaded Claims Under the TCA, Which Federal Law Recognizes Applies to the Facts Alleged Here

Defendants' Motion does not attack the Complaint's substantive allegations that the Defendants have violated the plain language of federal statutes preempting certain state and local actions, as supported by FCC rulings and Second Circuit precedent.

The TCA was enacted to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies to all Americans." H.R. REP. NO. 104-458, at 206 (1996) (Conf. Rep.); *see also* 1996 U.S. Code Cong. And Adm. News, p. 10. Under TCA Section 253, Defendants may not effectively prohibit Plaintiff's ability to provide telecommunications services *and* must provide Plaintiff with "competitively neutral" and "nondiscriminatory" access to the public right of way. 47 U.S.C. § 253 (2012) (Fisher Declaration Exhibit A).

A claim is asserted under Section 253 when "any entity" asserts that a municipality has effectively prohibited it from providing telecommunications service. The prohibition "does not need to be complete" and can occur from any municipal "legal requirement." *See* TCG, 305 F.3d at 76 (invalidating several sections of city's ordinance and franchise requirements associated with access to public rights of way to construct fiber under TCA Section 253). That is precisely what Plaintiff has alleged here – that Defendants' legal requirements for access to the public right of

way have the effect of prohibiting and unreasonably discriminating against Plaintiff's provision of telecommunications services (by imposing vastly more onerous, time consuming review requirements than imposed on other utility providers in the right of way) as recognized within the meaning of the statute and Second Circuit precedent. (Complaint ¶¶ 5, 24, 29, 73-260).

In TCG, the Second Circuit invalidated several portions of a White Plains ordinance that effectively prohibited TCG from providing telecommunications service. 305 F.3d at 76. Specifically, because the ordinance gave White Plains the right to reject an application based on "public interest factors," the Court declared that it amounted to "a right to prohibit providing telecommunications services, albeit one that can be waived by the City." Id. The Second Circuit also noted that "the extensive delays" in processing TCG's application prohibited TCG from providing service for the duration of the delays.

The TCG Court further noted that analysis of the ordinance was required under Sections 253(a) *and* 253(c) (both of which are invoked in this Action, *see* Complaint ¶¶ 252-270), because analyzing individual provisions without considering the ordinance as a whole "would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions." Id. at 77. The Court recognized that under Section 253 a municipality cannot impose demands on one provider without making the same demands on similar providers, because a municipality's requirements must be "competitively neutral and nondiscriminatory." Id. at 80.

In affirming the district court's invalidation of various provisions of the White Plains ordinance, including provisions relating to disclosures about telecommunications services, the Second Circuit stated: "The disclosures mandated by the invalidated provisions were relevant only for regulating telecommunications, which § 253 does not permit White Plains to do, not for

regulating use of the rights-of-way, which White Plains may do." 305 F.3d at 81. Regarding the provision allowing White Plains to consider factors deemed to be in the public interest, which is akin to the position taken by Defendants here, the Second Circuit declared that that was "***precisely the sort of discretion to prohibit telecommunications services that § 253 preempts***." Id. (emphasis added).

The Defendants' restrictions in this case are analogous to those invalidated by the Second Circuit in TCG. Defendants' discretionary and dilatory review is preempted by Section 253, and Plaintiff is entitled to injunctive relief ordering that the approvals at issue be granted.

Similar to Section 253 affording relief to "any entity," a claim under Section 332 of the TCA exists where "any person" asserts that a denial of permits to "place, construct or modify wireless service facilities" is not supported by substantial evidence or effectively prohibits the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B) (2012) (Fisher Declaration Exhibit B); Crown Castle, 552 Fed. App'x 47 (granting relief to this Plaintiff under Section 332 of the TCA and compelling the town to issue permits and provide access to its rights of way for wireless attachments to utility poles). Once again, that is what Plaintiff has alleged here: that Defendants' determinations on Plaintiff's permit requests violate the effective prohibition and substantial evidence prongs of Section 332 of the TCA.[4] (Complaint ¶¶ 41-45, 73-251, 261-270).

Plaintiff's claims under the TCA are not diminished by the fact that the parties memorialized procedures for access to the right of way in their Right of Way Use Agreement ("RUA") in 2011, which applied requirements under federal law. Plaintiff could assert its TCA

[4] The Defendants' Memorandum misleadingly cites to only a portion of Section 332(c)(7), suggesting that somehow governments are not limited in their land use, zoning and permitting authority, whereas such authority *is absolutely* limited by federal law, including the unreasonable discrimination and effective prohibition clauses of Sections 253 and 332. *See* Defendants' Memorandum page 6, where "[e]xcept as provided in this paragraph" should more appropriately be highlighted as Congress' preemptory intent in adopting Section 332(c)(7) of the TCA.

claims even if the RUA did not exist at all, as the RUA was permissive and not legally required for access to the right of way under the City's Code. (Fisher Declaration ¶ 5; Complaint ¶¶ 25, 252-270). Notably, the Defendant City Council adopted a right of way access consent resolution in 2011 (and the City executed the RUA) directly in response to Plaintiff's invocation of Section 253 of the TCA. (Fisher Declaration Exhibit G).

Plaintiff's federal claims under the TCA are well-pleaded and fully supported by statute and by Second Circuit precedent. Because the RUA and contractual claims are secondary to the primary federal claims under federal telecommunications law, the state law claims asserted in the Complaint (which the Defendants' Motion does not address)[5] are ancillary and do not deprive this Court of jurisdiction.[6]

B. The TCA's Plain Language, the FCC, and the Second Circuit All Recognize Plaintiff's Standing to Assert the Federal Claims

Defendants' argument that Plaintiff does not have standing because it builds wireless network infrastructure for customers that provide wireless services is frivolous, cites to no legal authority (because it cannot), and ignores the plain language of the TCA, the FCC's rulings directly on point, and a wealth of authority (including from the Second Circuit) that recognizes that Plaintiff and other facilities-based providers absolutely have standing to assert the TCA claims in the

[5] The assertion in Footnote 5 of Defendants' Memorandum that Plaintiff "does not claim it looked at any alternatives aside from the DAS it proposed" is false and utterly irrelevant to Plaintiff's claims under the TCA that the Defendants' legal requirements are now effectively prohibiting access to public rights of way. Defendants' assertion is also completely contrary to the Second Circuit's ruling in Clarkstown, 612 F.3d at 105-106, which expressly ruled that a town's attempt to require a preference for "alternate technologies" was preempted by the TCA because it interfered "with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law." Id.

[6] Plaintiff has sufficiently alleged ancillary claims for SEQRA reversal (Complaint ¶¶ 271-276), breach of contract (Complaint ¶¶ 277-282), breach of the implied covenant of good faith and fair dealing (Complaint ¶¶ 283-288), declaratory judgment (Complaint ¶¶ 289-292), and violation of New York State Transportation Corporations Law (Complaint ¶¶ 293-296). These claims are well-pleaded and are not attacked by the Motion to Dismiss, notwithstanding the gratuitous assertion in footnote 1 (which Defendants acknowledge is not appropriate for a motion to dismiss) that the parties' agreement which they have operated under since 2011 is somehow invalid. (*Compare* Defendants' Memorandum n. 1 *with* Complaint ¶ 71).

Complaint. (*See* Defendants' Memorandum p. 5).

The plain language of TCA Section 332 states that "*[a]ny person* adversely affected by any final action or failure to act by a State or local government" may commence an action. 47 U.S.C. § 332(c)(7)(B)(v) (2012) (Fisher Declaration Exhibit B) (emphasis added). This language is not ambiguous, but even if it were the FCC has *confirmed* 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," they have standing to assert claims under Section 332 of the TCA. *See* excerpt from *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd 12865 (2014), *erratum*, 30 FCC Rcd 31 ("FCC Infrastructure Order") at ¶ 270 (Fisher Declaration Exhibit C). In providing support for its ruling that providers such as Plaintiff have standing, the FCC *cites to this very Plaintiff* and its previous 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) (Fisher Declaration Exhibit D) (*See* Fisher Declaration Exhibit C, n.709).

The FCC's Infrastructure Order recognizing Plaintiff's standing was upheld by the Fourth Circuit in Montgomery County v. FCC, 811 F.3d 121 (4th Cir. 2015), and the United States Supreme Court has ruled that the FCC's statutory interpretation is entitled to *Chevron* deference, such that if its interpretation is based on any permissible construction of the statute, "that is the end of the matter." City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863, 1874-75 (2013); *see also* Liberty Towers, LLC v. Zoning Hearing Bd. of Tp. of Lower Makefield, Bucks County, PA, 748 F. Supp.2d 437, 442 (E.D. Pa. 2010) (argument that wireless infrastructure provider did not have standing was "inconsistent with both the language of the Act and sound precedent in many circuit courts where non-telecommunication companies have pursued claims under the Act").

The plain language of TCA Section 253 also provides Plaintiff with standing. Section 253(a) states that a municipality cannot "prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate *telecommunications service*." 47 U.S.C. § 253(a) (2012) (Fisher Declaration Exhibit B) (emphases added). Plaintiff is an "entity" which provides a "telecommunications service" under the plain language of TCA Section 253. (Complaint ¶¶ 2-4, 7-9, 29, 45). Plaintiff alleges that Defendants have effectively prohibited it from providing telecommunications services in violation of Section 253(a) and that the Defendants have exceeded their jurisdiction to manage access to public rights of way set forth in Section 253(c). (Complaint ¶¶ 5, 24, 29, 45, 73-260).

The Second Circuit has recognized this Plaintiff's (*see* n. 3, supra) standing under Section 253 in overturning a district court's dismissal of a Section 253 claim asserted by Plaintiff against the City of New York. (Complaint ¶ 29); *see* NextG, 513 F.3d 49 (reversing dismissal of claims under 253 where City's "regulatory scheme is in material respects prohibited or preempted" by TCA) (Fisher Declaration Exhibit D).

Defendants' argument that Plaintiff does not have standing under Section 253 is all the more hollow given that Plaintiff's May 21, 2010 Application to Defendants ("Application"), which led to the RUA, specifically stated that it was submitted "in accordance with Section 253 of the Federal Telecommunications Act," as well as relevant New York statutes governing "use of the public way by telecommunications carriers for the provision of their services." (*See* Fisher Declaration Exhibit E, p. 1).

Plaintiff's Application included "A Local Official's Guide" which explained that "Section 253 of the Communications Act grants [Plaintiff] the right to provide telecommunications services and prohibits municipalities from imposing requirements that prevent [Plaintiff] from providing

telecommunication services," and explained that courts have held that Section 253 preempts any municipal requirement that "materially inhibits" Plaintiff's ability to compete. (Fisher Declaration Exhibit E, "A Local Official's Guide, pp. 4-5). Thus, Defendants were fully aware in 2010 of Plaintiff's authority under TCA Section 253 and their restrictions under TCA Section 253. Defendants' bad faith in making their current arguments in the Motion to Dismiss is obvious. Under the plain statutory language, the FCC's recognition of Plaintiff's standing, and Second Circuit precedent, Plaintiff has standing to assert its claims under the TCA.

C. Defendants are Not Operating in a Proprietary Capacity

Defendants' citation to a short excerpt from the FCC's 2014 Infrastructure Order and its discussion regarding municipal actions in a proprietary capacity (as related to an entirely different federal statute compelling site modifications) for the proposition that the City here has no federal constraints whatsoever in how it reviews Plaintiff's right of way access is a red herring.[7] (Defendants' Memorandum p. 7; Fisher Declaration Exhibit C). Tellingly, Defendants do not define what "proprietary capacity" means, and do not assert that they are acting in a proprietary capacity in this case - because they cannot.

"Proprietary capacity" is a term of art that means the municipality's actions are "so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." NextG Networks of New York, Inc. v. City of New York, No. 03-civ-9672 (RMB), 2004 WL 2884308, *4-5 (S.D.N.Y. Dec. 10, 2004), *citing* Sprint Spectrum LP v. Mills, 283 F.3d 404, 420 (2d Cir. 2002). Courts look to whether the challenged action

[7] Another red herring is Defendants' suggestion that because Plaintiff did not proceed under Chapters 196 and 197 of the City Code, this Court is somehow deprived of jurisdiction. (Defendants' Memorandum p. 8). The cited Chapters do not apply to Plaintiff's rights to access the right of way (which is governed by Chapter 167) and are specifically precluded from applying under Section 3 of the RUA. (Fisher Declaration ¶ 13). Defendants cite to no law requiring an application to be made specifically under a municipality's wireless ordinance as a condition to a plaintiff's ability to bring a TCA claim.

reflects Defendants' interests in "efficient procurement of needed goods and services" (as in the case of a contract transaction which is purely private in nature, such as hiring a landscaper to maintain City Hall grounds), and whether the "narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." Id. Defendants have not even attempted to explain how their actions and decisions denying Plaintiff access to the right of way and permits for wireless attachments to utility poles were rendered in a "proprietary capacity."

This issue was decided in Plaintiff's favor by this Court in NextG, 2004 WL 2884308 at *4-5, where Judge Berman ruled that placement of distributed antenna system ("DAS") nodes[8] on existing infrastructure in the public right of way by Plaintiff did not involve the municipality acting in a proprietary capacity, given Section 253 of the TCA's limitation on municipal authority. Id. Similarly, Plaintiff's proposed placement of DAS nodes on 64 existing poles in the public right of way (only a handful of which are owned by Defendants) does not implicate the narrow "proprietary capacity" or any other exception to TCA preemption of state or municipal authorities' prohibition of access to the public rights of way for wireless facilities. (Complaint ¶¶ 6, 79, 80, 124, 203).

D. Plaintiff's Claims are Ripe for Review

Defendants incorrectly assert that the facially valid claims stated in the Complaint are not ripe for review because Defendants committed errors of law and issued an illegal SEQRA positive declaration (nearly one year late if SEQRA were to apply). (Defendants' Memorandum pp. 8-11). Defendants had no discretion to take such action, because placement of nodes on existing

[8] "Nodes" are wireless antennas and equipment configurations located on utility or streetlight poles in the public right of way; the typical node consists of electronic equipment that converts radio frequency format communications to light signals carried over fiber optic lines. (Complaint ¶¶ 48-49).

infrastructure is a Type II action under SEQRA. (Complaint ¶¶ 100-101). Moreover, the improper issuance of a positive declaration under SEQRA is legally irrelevant given that Defendants issued the Denial two days later.[9]

In Bell Atlantic Mobile of Rochester L.P. v. Town of Irondequoit, 848 F. Supp.2d 391 (W.D.N.Y. 2012), which involved the erection of a cell phone tower that, unlike here, may be subject to SEQRA review, the court noted that the municipality's issuance of a positive declaration under SEQRA "was not required, and was done merely to delay the permitting process in contravention of the Federal statute and the FCC Order." Id. at 401; *see also* Lucas v. Planning Bd. of Town of LaGrange, 7 F. Supp.2d 310 (S.D.N.Y. 1998) (SEQRA procedural requirements were preempted by TCA insofar as would allow town to keep telecommunications company tied up in the hearing process). Here, as alleged in the Complaint, the positive declaration was plainly pretextual and completely unjustified – moreover, an examination of whether it was a pretextual move on Defendant's part is an issue of fact that cannot be resolved on a motion to dismiss.

As a matter of state law, placement of DAS nodes on utility poles in the public right of way cannot be the subject of a positive declaration. (Complaint ¶ 100). The Complaint amply pleads that the City's SEQRA resolution was issued in error of law and also that the positive declaration was nothing more than an attempt by Defendants to deny Plaintiff its rights under the TCA and allow the City to delay action on Plaintiff's request for access to the right of way and right of way permits for installation of DAS nodes. (Complaint ¶¶ 13, 14, 17, 25, 100, 167, 197-199).

[9] Ironically, Defendants' Memorandum recognizes that the purpose of SEQRA is to incorporate consideration of environmental factors "at the earliest possible time," yet admits in the Wilson Declaration that this process has taken "more than 18 months, over a dozen public hearings and over one hundred hours of testimony…" (*Compare* Defendants' Memorandum p. 9 *with* Wilson Declaration ¶ 8). After Plaintiff sought an interpretation of the RUA in 2015, Defendants put Plaintiff through an onerous and discretionary review process and ignored the New York State Department of Environmental Conservation's determinations that mounting equipment on utility poles is a Type II action exempt from SEQRA review, and at the last minute on April 19, 2017 voted to issue a positive declaration before issuing the Denial three days later. (Complaint ¶¶ 73-197, 254-259).

Accordingly, Plaintiff's claims are ripe for review.

This Court and others have held that judicial review after a positive declaration is issued is appropriate in circumstances such as those here. Irondequoit, 848 F. Supp.2d 391 (ripe for review); Lucas, 7 F.Supp.2d 310 (ripe for review); Westchester Day School v. Village of Mamaroneck, 236 F. Supp.2d 349 (S.D.N.Y. 2002) (ripe for review); Gordon v. Rush, 100 N.Y.2d 236, 792 N.E.2d 168, 762 N.Y.S.2d 18 (2003) (ripe for review); Center of Deposit, Inc. v. Village of Deposit, 90 A.D.3d 1450, 936 N.Y.S.2d 709 (3d Dep't 2011) (ripe for review). The inappropriate positive declaration was issued only so that Defendants could argue ripeness here – an argument which completely fails under the facts.[10]

E. Plaintiff's Customer is not a Necessary Party Under FRCP 12(b)(7)

Finally, Defendants cite to no cases to support their bald assertion that Plaintiff's customer is an "indispensable party," which it is not. (Defendants' Memorandum pp. 11-12). As explained in Point I.B. herein, wireless infrastructure providers have standing to challenge municipalities' violations of the TCA, as does "any person" or "any entity" similarly aggrieved.

Plaintiff has alleged that it has suffered direct harm under federal law. (Complaint ¶¶ 254-259, 262-266, 268-270). Plaintiff's direct harm stems from: (1) Defendants' illegal and improper issuance of a positive declaration (*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

[10] The Motion's reliance on New York SMSA LP v. Town of Riverhead Town Bd., 118 F. Supp.2d 333 (E.D.N.Y. 2000) is misplaced, as that case is entirely distinguishable. New York SMSA involved *construction of a 62-foot high monopole*, which was subject to SEQRA review, not location of nodes on existing equipment exempt from SEQRA review, and unlike here there had been no prior delay before issuance of the positive declaration. Moreover, New York SMSA was decided before the FCC's 2009 "Shot Clock Order," which allows wireless providers to seek judicial redress after 90 days for collocation applications or 150 days for other delayed applications in violation of TCA Section 332(c)(7). (Complaint ¶¶ 42-43).

way while other similarly situated utility providers have not been subjected to those same review procedures and delay tactics, in violation of TCA Section 253. (Complaint ¶¶ 225-259).

Plaintiff's customer is not an "indispensable party" to Plaintiff's direct claims, as asserted by the Motion to Dismiss. (Defendants' Memorandum pp. 11-12; Wilson Declaration ¶¶ 4, 5). Both this Court and the Second Circuit have granted this Plaintiff relief on similar claims without joinder of its wireless customer. *See* Crown Castle, 2013 WL 3357169 and Crown Castle, 552 Fed. App'x 47 (Plaintiff, and not its customer MetroPCS, granted relief under the TCA). Plaintiff is similarly entitled to relief here.

Defendants' argument ignores the plain language of FRCP 12(b)(7), because this Court absolutely can accord complete relief amongst the existing parties without Plaintiff's customer, and because Plaintiff's customer has not asserted any interest in joining this action. To say that wireless infrastructure providers cannot obtain relief without wireless carriers is contrary to the express language of the statutes, Congress' intent, FCC rulings, and would render Sections 253 and 332 meaningless in the case of an infrastructure provider's request for access to the right of way and/or permits for wireless infrastructure. FRCP 12(b)(7) provides no ground for dismissal here.

II. The Motion Ignores Well-Established Dismissal Standards

To the extent that the Motion makes a facial subject matter jurisdiction attack under FRCP 12(b)(1), or invokes and relies upon FRCP 12(b)(6) for dismissal, the Motion disregards the applicable standards by veering far outside the face of the Complaint and introducing new facts, and by disregarding the facts alleged in the Complaint which must be accepted as true. *See, e.g.,* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (facts as alleged in Complaint must be accepted as true); McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007) ("review is limited

to the facts as asserted within the four corners of the complaint"). Defendants' Memorandum improperly asserts that a "complete set of facts is set out in the Affirmation of" Defendants' counsel, (Defendants' Memorandum p. 2), cites to the 64-page Complaint only seven times, and fails to explain why the facts pled do not give rise to the asserted claims. As stated in Point I herein, the Complaint absolutely states claims and there are no grounds for dismissal.[11]

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Motion to Dismiss be denied in its entirety, that it be awarded its costs, expenses, and attorneys' fees in defending the Motion to Dismiss, and such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
June 9, 2017

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[11] Given that the Defendants assert only jurisdictional grounds for dismissal, dismissal "with prejudice" as requested by the Motion is entirely inappropriate. *See, e.g.,* Schwartz v. HSBC Bank USA, N.A., No. 14 Civ. 9525 (KPF), 2017 WL 95118 (S.D.N.Y. Jan. 9, 2017) (dismissal "is without prejudice because the dismissal is one for lack of subject matter jurisdiction, which deprives the Court of its ability to issue a prejudicial dismissal"). Should this Court dismiss the Complaint, the appropriate outcome is the service of an amended complaint.