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October 19, 2016

**BY HAND & ELECTRONIC MAIL**

Mr. Marcus Serrano, City Clerk  
City of Rye  
City Hall  
1051 Boston Post Road  
Rye, NY 10580

Re: Crown Castle – Wireless Pole Attachments to Existing Utility Poles  
Crown’s SEQRA Materials

Dear Mr. Serrano:

We are writing to you at the request of and on behalf of our client, Crown Castle East NG, Inc (“Crown”), with respect to the above referenced matter. Specifically regarding the City Council’s SEQRA review as Lead Agency and the City’s request for information contained in your October 14, 2016 letter.

In the City’s letter, you request on behalf of the City Council extensive information and numerous documents from Crown that we believe could have been requested by the September 6, 2016 date set forth in the parties tolling agreement executed this past August. As such, Crown objects to this latest request by the City as untimely, unreasonable, and/or beyond the scope of the City’s jurisdiction for the purposes of the pending proceeding.

Crown has, nevertheless advised us that they are willing to provide additional information to the City Council to facilitate a decision on its pending request(s) before the City. To that end Crown has prepared the enclosed Full EAF with numerous exhibits attached thereto as its response to the City’s October 14<sup>th</sup> letter. Additionally, Crown requested that we provide this letter submission from our office to outline legal information related to SEQRA, the City’s review and the various legal memoranda provided to the City from counsel for members of the public.

**I. 2011 CITY COUNCIL CONSENT & RUA APPROVAL  
PURSUANT TO STATE LAW**

Consent to use Rye’s streets under New York state law (in furtherance of Crown’s Certificate of Public Convenience and Necessity) was originally granted to Crown in 2011 by resolution of the City Council. See Crown’s September 14, 2016 Response to the Counsel for the City’s September 6, 2016 Information Requests. Thereafter the City and Crown’s predecessor in interest executed a right-of-way use agreement (“RUA”) dated February 17, 2011. As noted in Crown and our prior submissions to the City Council, the RUA governs the terms and conditions for Crown’s access to and installations of equipment in public rights-of-ways in accordance with federal, state and local laws. It’s not clear why the City believes, as stated at the end of its October 14<sup>th</sup> letter that the RUA’s provisions would be unenforceable and invalid as a matter of state law. The RUA, like other right of way agreements and types of franchise agreements between telecommunications companies and municipalities, is a common form of agreement used in



New York State.<sup>1</sup> Suffice it to say we believe the RUA which was negotiated by City officials and entered into freely by the City as authorized by the City Council in 2011 and in furtherance of New York State and federal laws is fully enforceable and provides the legal framework for any City actions in this proceeding.

## II. CITY COUNCIL & THE SEQRA “ACTION”

At its October 5, 2016 meeting, the City Council declared itself lead agency for SEQRA review of the “action” which is:

- 1) Crown’s April 2016 request to interpret/amend the RUA to allow for a larger equipment cabinet and;
- 2) The City Council’s asserted permit jurisdiction under Section 3 and 5 of the RUA to approve or deny the larger cabinet and the list and type of locations proposed for Crown installations.

At this same meeting, Crown submitted a revised list of 64 node locations which are all pole attachments with no new poles or at grade disturbance in City rights of way. Additionally, Crown noted for the City Council that it was simultaneously seeking, in the alternative, approval by the City Engineer of a “by-right” equipment installation (i.e. RUA Exhibit A standard cabinet specification) for the same revised list of 64 node locations.

## III. DESCRIPTION OF THE PROJECT

With Crown’s changes to the current project (4 of the 64 locations) as set forth in its October 5<sup>th</sup> letter to the City Engineer and copied to the City Council, and in response to your request for information in Section 1a. and 1b. of the City’s October 14<sup>th</sup> letter, the project has the following elements:

- 1) No new poles or structures are proposed;
- 2) All attachments of equipment are to existing Consolidated Edison utility poles located within public rights of way;
- 3) The 64 locations are all listed in the spread sheet provided to the City Engineer on October 5<sup>th</sup> and is attached to Crown’s SEQRA filing as Exhibit 1;
- 4) 27 locations are “Commzone” and 37 locations are “Pole Top” antennas as set forth on the map and the spreadsheet included as Exhibit 1 of Crown’s SEQRA filing, with antennas conforming to Exhibit A of the RUA with the City;
- 5) Attached to Crown’s SEQRA filing as Exhibit 2 are signed sealed drawings that depict all of the equipment being installed on the Consolidated Edison poles for the two types of installations and depicting both the Exhibit A RUA approved cabinet and the larger cabinet sought by Crown; and

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<sup>1</sup> See e.g. *City of New York v. Verizon N.Y., Inc.*, No. 402961/03, 2008 N.Y. Misc. LEXIS 4572, at \*1 (Sup. Ct. N.Y. Co. July 7, 2008) (noting also that a franchise can be granted without a limit on the term under state and municipal law).



- 6) The project from the beginning has proposed the use of a cabinet to enclose the operational equipment and use of neutral host low profile antennas. The antennas
- 7) and cabinets are to be painted brown consistent with existing pole conditions and prior installations in Rye.

#### IV. THE ACTION IS TYPE II EXEMPT

The New York State Department of Environmental Conservation (“DEC”) has declared as Type II (and thus exempt from SEQRA) any action that involves the “extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list.” 6 NYCRR part 617.5(c)(11). Section 11.1 of the RUA incorporates this specific SEQRA Type II exemption for Crown’s routine installations of poles and related equipment in the right of way and notes other actions not contemplated by the RUA could be “unlisted” actions.<sup>2</sup>

Crown’s position is, much like other similarly situated telecommunications and utility companies (ie. Cablevision, Verizon Fios, Fiber Companies etc) that issuance of City consent, approval or amendment of the RUA, and installation of standard utility equipment such as that proposed by Crown (ie. no new communications towers and all installations are within the right of way) are Type II actions for SEQRA purposes. This is consistent with past City reviews of cable franchise agreements and other right of way installations and, in reviewing minutes from past actions by City Councils, we noted no specific SEQRA reviews or references in such cases (being presumptively treated as Type II exempt actions as set forth in New York State SEQRA regulations, see 6 NYCRR 617.5(c)(11) and (7)).

Contrary to the unsupported statements by opponents to this project as set forth in their latest October 13, 2016 letter from counsel, the DEC Handbook specifically notes that

“radio and microwave transmission towers or other stand-alone facilities constructed specifically for radio or microwave transmission are specifically not included in the exemption for construction of small non-residential structures. **However, if a small dish antenna or repeater box is mounted on an existing structure such as a building, radio tower, or tall silo, the action would be Type II.**”

DEC, SEQRA Handbook 33 (3d ed. 2010) (emphasis added). As such, with Crown’s voluntary changes as of October 5th, the “action” in front of the City Council at this point clearly involves

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<sup>2</sup> To the extent that the public argues Kaplan v. Village of Pelham, Index No. 13/3827 (Sup. Ct. West. Co., June 20, 2014) (Zambelli, J.) is controlling, it is Crown’s position that Kaplan is not binding precedent in this matter. Aside from being neither appellate nor case law related to Rye and the consent/RUA issued/approved in 2011, the decision in Kaplan was appealed and ultimately settled as moot upon a municipal SEQRA negative declaration and permit approval. Furthermore, the defendants in Kaplan were proposing to construct a new utility pole in the village right of way which is no longer the case in Rye. Additionally, the Court in Kaplan did not address a facial challenge to a municipal permit regime and reserved for possible further scrutiny whether a municipality’s wireless siting law could be applied to a NYS CPCN holder under 47 U.S.C. § 253(a) and NY Transportation Corporations Law § 27. See Kaplan v. Village of Pelham, Index No. 13/3827 at \*18.



only attachments to existing utility poles, an action which falls squarely within the Type II category for SEQRA purposes.

## V. SEQRA PROCEDURES

In June of 2016, Crown supplied the City with a Short Form EAF for its review and to use in assessing the “action”, in the event the City determined the City Council’s review involved an unlisted action under SEQRA. Crown also suggested that the City Council seek the advice of the City Planner with respect to implementation of SEQRA and Crown’s position that the action is Type II, exempt and does not require EAF forms and further SEQRA review. The City has yet to take a position on SEQRA related to categorizing the action, and continues to elicit public comment and Crown is not aware of any formal advice or recommendations the City Planner may have rendered to the City Council.

In response to the City’s October 14, 2016 letter, Crown is submitting a Full EAF which includes as Exhibit 1 an updated map and updated list of the 64 node locations, all of which involve attachments and no new structures in City rights of way. Given that the Full EAF is typically reserved for larger actions listed in DEC’s SEQRA regulations and that might require further SEQRA evaluation, it’s not surprising that many of the questions contained in the Full EAF are not applicable to this Crown project. Indeed, in reviewing the Full EAF, it highlights why the action is Type II for SEQRA purposes in our opinion.

## VI. THERE ARE NO ADVERSE HISTORIC IMPACTS

Crown has consulted with state and local agencies on two proposed pole attachment locations that are in proximity to National Historic Sites/Districts in furtherance of federal law. Enclosed as Exhibit 3 to Crown’s SEQRA filing are two reports by its consultant ATC dated September 22, 2016 for node locations listed as #246 and #248 and which evaluated the potential for any historic impacts associated with the larger equipment cabinet and antenna installations proposed. As noted in the reports, the New York State Historic Preservation Officer (“SHPO”), who is the official charged as a matter of federal and state law with making such determinations, has determined that these installations would not have an adverse effect on historic resources pursuant to Section 106 of the National Historic Preservation Act (“NHPA”), National Environmental Protection Act (“NEPA”) and related FCC regulations. SHPO’s findings are dispositive for SEQRA and permitting purposes. See County-Poughkeepsie Ltd. P’ship v. Town of East Fishkill, 84 F. Supp. 3d 274, 311-12 (S.D.N.Y), aff’d, 632 F. App’x 1 (2d Cir. 2015); Omnipoint Communications, Inc. v. Vill. of Tarrytown Planning Bd., 302 F. Supp. 2d 205, 222 (S.D.N.Y. 2004); WEOK Broad. Corp. v. Planning Bd. of Town of Lloyd, 592 N.E.2d 778, 783 (N.Y. 1992). Notably, no local comments were received on these consultations conducted in furtherance of the NHPA.



## VII. GENERALIZED CLAIMS OF AN AESTHETIC IMPACT DO NOT RISE TO THE LEVEL OF A SEQRA IMPACT SUPPORTING A POSITIVE DECLARATION

Crown has previously submitted to the City photosimulations of the existing RUA Exhibit A cabinet and proposed larger cabinet along with photos of existing Crown installations in Rye that are located on Consolidated Edison utility poles. There has been no visual evidence presented by the City or its staff (such as the City Planning Director) to support or demonstrate a significant visual impact from the installation of Crown's proposed equipment on existing utility poles – to either a scenic resource or the overall character of the community. The City's most recent request in item 2.a of its October 14<sup>th</sup> letter nevertheless outlines a request for additional photosimulations from various angles and locations, a request that is excessive in relation to the City Council's evaluation of the project aesthetics and certainly burdensome to produce in the one week time allotted.

Nevertheless, Crown has prepared a series of photographs for each node location so the City Council can evaluate all 64 locations in context (which also shows poles that are not available pursuant to Consolidated Edison requirements and also the lack of any municipal owned structures).<sup>3</sup> Copies of those photos are enclosed as Exhibit 4 to Crown's SEQRA filing. Crown has also selected a proposed utility pole location for a near field representative photosimulation which is included in Exhibit 5 to Crown's SEQRA filing (showing a commzone antenna with the larger cabinet in view 1a and the RUA Exhibit A conforming cabinet in view 1b). The original photosimulation of a pole top installation is included again in Exhibit 5 as well. Additional representative photosimulations may be filed by Crown by October 19<sup>th</sup> date as requested. Notably, in response to Items 2.b and 2.c of the City's October 14<sup>th</sup> letter, no new structures are proposed as of the October 5<sup>th</sup> changes by Crown to the project and as such, no response is required.

With respect to Item 2.d in the City's October 14<sup>th</sup> letter, in Crown's review of the map of the 64 locations, there are very few situations where there is a linear street with two or more node locations proposed. Two streets were identified by Crown in response to this question though – Theall Road and Dearborn Avenue. Crown prepared visual materials from Google Earth that include existing pole conditions along these streets and photos at street view which are included in Exhibit 6 to Crown's SEQRA filing. We are advised by Crown that for Theall Road, there are 5 poles between the two locations with several of those poles supporting light fixtures, transformers and pole mounted cabinets. For Dearborn Avenue, there are apparently 6 poles between the two locations with several of those poles supporting light fixtures, transformers and pole mounted cabinets. The enclosed street views show in Crown's opinion that the pole separations are just too distal to prepare a photosimulation for Crown equipment (given the size of Crown's equipment) and in and of themselves the photos readily show the lack of any cumulative visual impacts associated with Crown's plans.

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<sup>3</sup> See attached Crown letter from Ms. Esme Lombard explaining further the Consolidated Edison pole use limitations as verbally discussed previously with the City and as noted in Crown's Pole Attachment agreement with Con Ed a copy of which was previously provided to the City in July.



These visual materials collectively demonstrate the lack of any aesthetic impact that would rise to “large” for purposes of SEQRA. Crown does reiterate its request to the City though for any specific information it may have on local scenic resources and related to a specific aesthetic objection on the size of the proposed equipment cabinet or location of an existing pole as proposed for an attachment.

In relation to the public comments, the public has generally commented that the installations are objectionable aesthetically, but has not provided specific evidence regarding same. We note that aesthetic concerns must be grounded in substantial evidence and “objections based on aesthetic grounds should be articulate[d] specifically and cannot be premised on a few generalized expressions of concern.” Orange County-Poughkeepsie Ltd. P’ship v. Town of East Fishkill, 84 F. Supp. 3d 274, 309 (S.D.N.Y.), aff’d 632 F. App’x 1 (2d Cir. 2015) (tower site within 500 feet of residences). See also Crown Castle NG East Inc. v. Town of Greenburgh, 552 F. App’x 47, 50 (2d Cir. 2014) (holding that the size of the proposed shroud box does not necessarily correlate with aesthetic intrusion, that the addition of an 8-foot antenna was *de minimis* because it was being added to an *already existing* 30-foot utility pole, and that the installations would be no more intrusive than *existing installations* of other carriers); New York SMSA Ltd. P’ship v. Vill. of Floral Park, 812 F. Supp. 2d 143, 157 (E.D.N.Y. 2011); WEOK Broad. Corp. v. Planning Bd. of Town of Lloyd, 592 N.E.2d 778, 780 (N.Y. 1992) (holding that the “Board’s determination should be annulled because it is not supported by substantial evidence that the proposed site would have a visual impact”). See also Veysey v. Zoning Bd. of Appeals of City of Glens Falls, 546 N.Y.S.2d 254, 256 (App. Div. 3d Dep’t 1989), appeal denied, 553 N.E.2d 1343 (N.Y. 1990); Syracuse Bros. v. Darcy, 511 N.Y.S.2d 389, 390 (App. Div. 2d Dep’t 1987).

Contrary to a statement in the City’s October 14th letter related to federal law, Crown has simply asserted in response to your counsel’s prior correspondence that the RUA (adopted prior to Section 6409 and FCC regulations) does not directly limit subsequent modifications of existing installations and therefore there is no conflict between the RUA and federal law. See Crown’s September 14, 2016 Responses, Q.11. In Rye, Crown has sought and the City has acknowledged prior modifications (which we understand were not visible changes to the existing equipment) for existing nodes. See 2014 correspondence from Crown to the City Engineer included here as an attachment.

Going forward, Crown has noted that it may seek by interpretation or amendment to the RUA, a process for approval of modifications which would otherwise involve eligible facilities. Of note though, essentially the principal, if not sole reason, for the current proceeding before the City Council is related to an interpretation/amendment of the RUA for the larger cabinet proposed by Crown so Crown can avoid later modification requests to the extent practicable.

Notably, the erroneous and speculative interpretation by the public of Section 6409(a) of the federal Middle Class Tax Relief and Job Creation Act of 2012,<sup>4</sup> and Federal Communications Commission (“FCC”) regulations<sup>5</sup> is misplaced. Indeed, the Second Circuit has already held that

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<sup>4</sup> Section 6409(a) of the 2012 Middle Class Tax Relief and Job Creation Act is codified at 47 U.S.C.A. §1455 (“Section 6409”).



“speculation based on what may or may not happen in the future cannot provide substantial evidence for denying the Application . . . .” Orange County-Poughkeepsie Ltd. P’ship, 84 F. Supp. 3d at 308. Thus, in lieu of trying to speculate through a visual, which visual equates essentially to the visuals and plans for the larger cabinet as proposed by Crown and in its SEQRA filing, we suggest the City propose a condition of approval or language in the RUA it would propose to address future modifications for Crown’s review.

### VIII. PROPERTY VALUES ARE NOT A SEQRA ISSUE

There has been no credible evidence filed by opponents to Crown’s plans that the proposed pole attachments will cause a decrease in property values in the surrounding area. Moreover, “[s]peculative environmental loss, such as concern for property values, is . . . not an environmental factor under SEQRA.” Bell Atlantic Mobile of Rochester L.P. v. Town of Irondequoit, 848 F. Supp. 2d 391, 401 (W.D.N.Y. 2012). “Purely economic arguments have been disallowed by the courts as a basis for agency conclusions when concluding a SEQRA review by developing Findings. Therefore, potential effects that a proposed project may have in . . . possible reduction of property values in a community, or potential economic disadvantage caused by competition or speculative economic loss, are not environmental factors.” SEQRA Handbook at 89 (answer to question 34) and 120 (answer to question 9). See also Cellular Tel. Co. v. Town of Oyster Bay, 133 F. 3d at 496 (one real estate broker’s affidavit stating that the presence of cell sites would depress real estate values of nearby property, unsupported by evidence about how the conclusion was reached, was “not adequate to satisfy the requirements of the substantial evidence standard.”). A decision to deny a permit for a wireless communications services provider on property value grounds would have to be supported by substantial evidence. Orange County-Poughkeepsie Ltd. P’ship v. Town of East Fishkill, 84 F. Supp. 3d 274, 312-13 (S.D.N.Y) *aff’d* 632 F. App’x 1 (2d Cir. 2015) (the “generalized concerns about a potential decrease in property values . . . does not seem adequate to support a conclusion.”).

### IX. THERE ARE NO SIGNIFICANT NOISE IMPACTS

The noise specifications for the equipment were previously supplied by Crown to the City in early July. The documents submitted included an acoustical study which demonstrated that the equipment fan, and that of similar units, in an equipment shroud<sup>6</sup> is less than 50 db(A) at a distance of 5 meters (16.4 feet).<sup>7</sup> That report demonstrates compliance of Crown’s equipment installations with the City’s Noise Code,<sup>8</sup> which states that at 50 feet “the permissible intensity of noise from any of the foregoing acts, whether such noise is intermittent, impulsive, sporadic or continuous, shall be limited as follows:

“A. Maximum sound pressure [db(A)] shall be as follows: 1) Fifty-five db(A) for stationary sources . . . .” Rye City Code §§ 133-3; 133-4.

<sup>5</sup> FCC Report and Order, adopted October 17, 2014 (FCC 14-153).

<sup>6</sup> All of Crown’s DAS node units are placed in a shroud.

<sup>7</sup> See Noise Report conducted by Arndt Pischke of Andrew®, p. 5, March 22, 2010.

<sup>8</sup> See City Code §§ 133-3 and 133-4 incorporating a maximum sound pressure of 55 db(A) at a distance of 50 feet.



The City's representatives nevertheless noted that the current equipment unit proposed is an "advanced" version of the ION-M17P/19P and your October 14<sup>th</sup> letter asks for additional noise information (See section 3 of the City's letter). As such, Crown requested additional information from the manufacturer regarding the "advanced" unit and compliance with the City's Noise Code. Included as Exhibit 7 to Crown's SEQRA filing is a specific report prepared by the manufacturer Commscope, and Mr. Juergen Struller, which confirms the same acoustical properties, includes additional noise data and confirms compliance with Chapter 133 of the City Code individually and cumulatively.

## X. RF SAFETY

The City has inquired further regarding FCC regulation of RF emissions.<sup>9</sup> The seminal case on this topic is Cellular Phone Taskforce v F.C.C., 205 F.3d 82, 94-95 (2d Cir. 2000), cert. denied sub nom. Citizens for the Appropriate Placement of Telecommunications Facilities v. F.C.C., 531 U.S. 1070 (2001). As noted therein, the FCC has broad preemption authority under the Telecommunications Act. See City of New York v. FCC, 486 U.S. 57, 63-64 (1988); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-700 (1984). The Second Circuit held that, "[a]fter examining the evidence, the FCC was justified in continuing to rely on the ANSI and NCRP standards." Cellular Phone Taskforce, 205 F.3d at 90. As related to local considerations and as the City is aware "Congress added § 332(c)(7) to impose some limits on state and local government authority to regulate the location, construction, and modification of such facilities." Drago v Garment, 691 F. Supp. 2d 490, 492 (S.D.N.Y. 2010). Notably, SEQRA does not provide the City with any further jurisdiction than it might otherwise have under federal and state laws. See N.Y. Envtl. Conserv. Law § 8-0103(6) (McKinney 2016).

To the extent the City has further questions regarding the current position of the FCC, we suggest that, unrelated to and independent of this proceeding, it contact the FCC Wireless Bureau. Indeed, the City's line of inquiry here in response to repeated public comments that state a concern over RF safety as the basis for objections to Crown's plans is a concern to Crown. As noted by several courts, federal law is violated when a board decision is based in part on community concerns about exposure to radio frequency emissions. T-Mobile Northeast LLC v. Town of Islip, 893 F. Supp. 2d 338, 354 (E.D.N.Y. 2012); Bell Atlantic Mobile of Rochester L.P. v. Town of Irondequoit, 848 F. Supp. 2d 391, 401 (W.D.N.Y. 2012) ("Defendants' concern about the perception that radio frequency transmissions from the tower are harmful, cannot be properly considered."); T-Mobile Northeast LLC v. Town of Ramapo, 701 F.Supp.2d 446, 460 (S.D.N.Y. 2009) ("[A]ny decision actually based on environmental effects is a violation, whether other legitimate reasons factored into the decision or not."); New York SMSA Ltd. P'ship v. Inc. Vill. of Mineola, No. 01-CV-8211, 2003 WL 25787525, at \*6 (E.D.N.Y. March 26, 2003) ("Although the Board expressly stated that health concerns expressed by Village residents played no part in its denial, the record shows that these concerns permeated throughout both the first public hearing and the SEQRA determination."). See also Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 495 (2d Cir. 1999) ; and Drago, 691 F. Supp. 2d at 494-95. ("[T]he federal cause of action in § 332(c)(7) of the TCA serves as an enforcement mechanism—a tool for

<sup>9</sup> MPE reports previously supplied to the City in this proceeding were acknowledged in the City's October 14<sup>th</sup> letter to demonstrate compliance with FCC requirements.



providers whose requests are denied without good reason or are left to languish before local planning boards, or parties who are adversely affected when local planning boards frustrate the growth of access to wireless services”).

## **XI. THE CITY DOES NOT HAVE JURISDICTION OVER CARRIERS’ TECHNICAL AND OPERATIONAL USE OF FCC SPECTRUM**

The City requests coverage maps illustrating Verizon coverage in the 700 MHz bands within the City of Rye. Crown has previously objected to this request. The grounds for Crown’s objection as part of this administrative proceeding are that, among others: 1) that 700 Mhz maps are not relevant because it is not the frequency being deployed in the Crown DAS system by Verizon; 2) that type of information is in excess of the scope of the City’s authority set forth in the RUA and/or not germane to Crown’s request for a larger cabinet size; 3) the information sought intrudes into areas reserved to the New York State Public Service Commission which issued a CPCN to Crown and not delegated to municipalities for consideration in rendering consent to use of public rights of way; and 4) the information sought seeks to regulate the technical and operational parameters of Verizon’s wireless services in Rye which is within the FCC’s exclusive jurisdiction. See e.g., *New York SMSA Ltd. P’ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010).

Notwithstanding Crown’s objections, Crown has supplied the City (and public) with AWS/PCS drive data of the existing Verizon network frequencies to be utilized in the DAS expansion by Crown. This information supplied to the City dates back to the Spring of 2016 and even prior to Crown’s filing its amendment request with the City Council. Additionally, I am advised that Crown has provided the City’s consultant as of today’s date, CW Drive Test data for select node locations in the proposed AWS/PCS bands (which has been deemed proprietary technical information by Crown exempt from FOIL).

As relevant to the appropriate MHz bands to be used by Verizon, Crown has also shared other proprietary information exempt from FOIL with the City’s consultant as encouraged as part of his communications with Crown’s RF Engineer, Mr. Greg Sharpe. That includes largely the information sought in Section 5.b of the City’s October 14th letter. In this regard, we understand there has been a fair exchange of information and Crown’s position is that the City’s consultant has what is reasonably needed to professionally understand Crown’s proposed node installations which will carry Verizon’s wireless signals.

At this point in time and to the extent the City believes 700 MHz bands are relevant to its jurisdiction and over Crown’s objections, we suggest the City consult with its consultant further and seek from him any such information the City seeks in this regard. We also reiterate our request on Crown’s behalf, that any opinion the City’s consultant has and/or will publicly share with the City Council, be provided to Crown as part of this administrative proceeding.



## XII. SEQRA CAN NOT BE USED AS A DELAY TACTIC AS REQUESTED BY OPPONENTS TO CROWN'S PLANS

SEQRA's procedures may not be used merely as delaying tactics as a result of a vocal opposition to the placement of telecommunications equipment. Bell Atlantic Mobile of Rochester L.P. v. Town of Irondequoit, 848 F. Supp. 2d 391, 4012 (W.D.N.Y. 2012); Lucas v. Planning Bd. of Town of LaGrange, 7 F. Supp. 2d 310, 321-22 (S.D.N.Y. 1998); WEOK Broad. Corp. v. Planning Bd. of Town of Lloyd, 592 N.E.2d 778, 780 (N.Y. 1992). Public controversy surrounding an issue "does not indicate significance" for the purposes of SEQRA review. Bell Atlantic Mobile of Rochester L.P., 848 F. Supp. 2d at 401. Moreover, alternatives to the "action" would only be studied in an Environmental Impact Study, if and only if it was determined that the proposed action had the likelihood to cause the potential for a significant adverse impact. Lloyd v. Greece, No. 6924/2000 (Sup. Ct. Monroe Co., Sept. 14, 2000) (Galloway, J.), aff'd, 739 N.Y.S.2d 303, appeal dismissed in part, denied in part, 775 N.E.2d 1286 (N.Y. 2002). "If a significant adverse impact is likely to occur, an . . . (EIS) is prepared to explore ways to avoid or reduce adverse environmental impacts or to identify a potentially less damaging alternative." SEQRA Handbook at 4; 617.9(5)(v). In this matter and if not exempt as noted above, there simply is no factual or legal basis on which to claim that Crown's list of 64 proposed equipment locations on existing Consolidated Edison poles with a slightly larger equipment box has a likelihood of causing a significant environmental impact that would justify a positive declaration under SEQRA.

## XIII. CONCLUSION

We would respectfully request that the City Council confirm the action before it is Type II. In the alternative, and even if designated Type I, we submit that a hard look at the facts and using the Full EAF would lead to the inescapable conclusion that there are no potentially large adverse environmental impacts.

As noted by the Court of Appeals in Merson v. McNally, 688 N.E.2d 479, 486 (N.Y. 1997), the purpose of an EAF is to assist an agency "in determining the environmental significance or non-significance of actions." 6 NYCRR 617.2(m). "The full EAF is intended to provide a method whereby applicants and agencies can be assured that the determination process has been orderly, comprehensive in nature, yet flexible enough to allow introduction of information to fit a project or action." 6 NYCRR 617.20, appendix A. "Part 2 of the EAF allows the lead agency to identify the range of possible impacts and whether an impact can be mitigated or reduced." Merson, 688 N.E.2d at 483 (citing 6 NYCRR 617.20, appendix A).

"For all individual actions which are Type 1 or Unlisted, the determination of significance must be made by comparing the impacts which may be *reasonably expected* to result from the proposed action with the criteria listed in section 617.7(c) of this Part." 6 NYCRR 617.4(a)(1) (emphasis added). In making a determination of significance, the lead agency must "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment . . ." 6 NYCRR 617.7(b)(3). "The significance of a likely consequence (i.e., whether it is material, substantial large or important)



should be assessed in connection with” factors such as setting, duration, irreversibility, and magnitude. 6 NYCRR 617.7(c)(3).

“As stated on the required form, “[i]dentifying that an impact will be potentially large does not mean that it is also necessarily significant. Any large impact must be evaluated in Part 3 to determine significance. Identifying an impact in column 2 simply asks that it be looked at further. This highlights the functional difference between an EAF and an Environmental Impact Statement (EIS). While an EAF is used to determine significance or nonsignificance, the purpose of an EIS is to examine the identified potentially significant environmental impacts which may result from a project.” Merson, 688 N.E.2d at 483. “To arrive at its determination of significance, the lead agency must identify the relevant areas of environmental concern and take a hard look at them. . . . The agency must set forth a reasoned elaboration for its determination” Merson, 688 N.E.2d at 483-84.

Courts have upheld negative declarations where the lead agency has taken the necessary “hard look” in evaluating the potential impacts and determined that moderate to large impacts would not result from the proposed activity. See Gordon v Rush, 792 N.E.2d 168, 173 (2003) (DEC reviewed relevant record evidence and took the necessary hard look at relevant areas of environmental concern and its issuance of the negative declaration was not irrational, an abuse of discretion, or arbitrary and capricious and, consequently); Merson, 688 N.E.2d at 483-84 (upholding the lead agency’s negative declaration, which was issued after identifying “potentially large” environmental impacts during the EAF process).

Thus, in the City Council’s review of Part II and Part III of the Full EAF, and as applied to Crown’s right of way installations on existing utility poles, we submit that the City could not rationally find based on the facts before it that Crown’s plans will involve large impacts on natural resources such as the land, surface water, groundwater, and air. Moreover, nothing the public has provided to the Council, other than generalized objections, indicates a severe, sizeable and large impact from any or a slightly larger equipment cabinet on a pole or putting Crown installations on any of the 64 existing utility poles as planned. Indeed, there is no credible evidence whatsoever that Crown’s proposed installations would have a large impact on scenic or community character resources, produce noise above local limits, impact scenic views or historic sites, or otherwise interfere with the use and enjoyment of public streets and designated public resources. There simply is no substantial evidence to support a finding of a large impact, which is why utility installations in existing streets are Type II for SEQRA purposes under State regulations adopted by NYS DEC. As such, a determination of no significance should be issued under SEQRA.



Thank you for your consideration of this letter on behalf of our client.

Very truly yours,

A handwritten signature in blue ink, appearing to read "C. Fisher", is written over the typed name.

Christopher B. Fisher

Cc: Mayor Sack and Members of the City Council  
Kristen Wilson, Esq., City Corporation Counsel  
Joseph Van Eaton, Esq. City Outside Counsel  
Daniel Richmond, Esq., Counsel for Unidentified Opponents  
Crown Castle



F  
Crown Castle  
131-05 14th Avenue  
College Point, NY 11356

June 24, 2014

**Via FedEx**

Ryan Coyne, P.E., City Engineer  
Department of Public Works  
City of Rye  
1051 Boston Post Road  
Rye, NY 10580

**RE: Crown Castle NG East LLC ("Crown Castle") - Upgrades to equipment installed in the City of Rye (the "City") Public Right-of-Way**

Dear Mr. Coyne:

This a courtesy notice that Crown Castle will be performing upgrades on its telecommunications equipment currently installed on two (2) wood utility poles in the City of Rye's Public Right-of-Way, as well as, attaching to one (1) other wood utility pole. Installation is anticipated to commence at the end of the third quarter of 2014. Crown Castle has previously installed and currently maintains such equipment pursuant to a RUA, dated February 17, 2011. These upgrades are now required in order to continue to meet the demands of improved technology and will not substantially change the physical dimensions of the equipment. Therefore, the upgrades fall within the scope of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (the "Tax Act"). Additionally, the Federal Communications Commission ("FCC") has clarified that the Tax Act applies to distributed antenna system and small cells, which is what Crown Castle's deployed equipment constitutes.<sup>1</sup>

This planned equipment upgrade is exactly the type of technological improvement that Congress intended to encourage when passing the Tax Act. Further, this notice serves as a confirmation that since no permits were required for the initial installation of equipment, no permits are required to perform this upgrade.

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<sup>1</sup> See [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/Docket-12-2047A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/Docket-12-2047A1.pdf) for FCC Clarification on the Tax Act.

Please do not hesitate to contact me with any questions at (917) 563-3670 or via email [john.cavaliere@crowncastle.com](mailto:john.cavaliere@crowncastle.com).

Very truly yours,  
CROWN CASTLE NG EAST LLC

A handwritten signature in blue ink, appearing to read "John Cavaliere", is positioned above the printed name and title.

John Cavaliere  
Government Relations Manager



Crown Castle  
16-16 Whitestone Expressway  
Whitestone, NY 11357

**VIA HAND DELIVERY**

October 19, 2016

Mr. Marcus A. Serrano  
City Manager  
City of Rye  
1051 Boston Post Road  
Rye, NY 10580

**Re: Crown Castle NG East LLC & City of Rye Pole Attachment Criteria**

Dear Mr. Serrano,

On behalf of Crown Castle NG East LLC ("Crown Castle"), please accept this letter which seeks to outline/explain the criteria that must be considered when considering pole attachments in the public right-of-way and, more specifically, the sixty-four (64) new pole attachments proposed in the City of Rye's public right of way.

There are a number of factors that contribute to the viability of attaching to an existing utility pole versus considering the placement of a new utility pole in the public right of way. The evaluation criteria and conditions set forth by the pole owner or utility are as follows:

- Crown Castle may not attach to any existing utility poles that will adversely affect or interfere with the utilities or other existing operators on the pole's operations;
- Crown Castle must locate its equipment in a fashion as to minimize any operating problems for existing utilities and not interfere, impede or obstruct the implementation and exercise of any licensed parties on the pole;
- The utility or pole owner discourages or generally do not permit attachment to existing poles that:
  - Contain other services
  - Contain transformers or an abundance of other equipment
  - Contains turn-angles or junctions
  - Require additional guying
- All proposed attachments must be above and outside the communications space on the pole(s) and achieve necessary clearances set forth by the pole owner or utility.
- Where an existing pole meets the utility or pole owner requirements, a structural is performed. O-Calculc by Osmose is the preferred software tool for the structural analysis. The structural analysis must meet the current NESC requirements (and all other applicable codes) in effect at the time of the installation.
- While light trimming may be acceptable, poles that are surrounded by significant vegetation or foliage are not useable as the wireless signal will be impacted and the required service will not be available to remedy the gap in service unless the tree or other vegetation is destroyed.

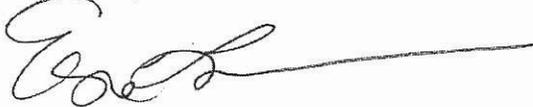
Based on the foregoing, Crown Castle is limited from using *any* existing poles.

Crown Castle's attachments and new poles are designed to comply with all applicable laws, rules, regulations, codes and ordinances including the National Electric Safety Code, the New York State Department of Transportation and other governmental traffic safety requirements as applicable.

If you have any questions or comments on the enclosed, please do not hesitate to email me at: [Esmé.Lombard@crowncastle.com](mailto:Esmé.Lombard@crowncastle.com) or call me at 203-919-0896.

We appreciate your review and consideration of the enclosed materials.

Respectfully,

A handwritten signature in black ink, appearing to read 'Esmé Lombard', with a long horizontal flourish extending to the right.

Esmé Lombard  
*Government Relations- Contractor*

cc: Crown Castle  
Chris Fisher, Cuddy Feder