



CITY OF RYE

CITY HALL • RYE, NEW YORK 10580

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TO: Rye City Council

FROM: City Staff

RE: Action on Crown Castle's proposal to Amend RUA and deploy DAS throughout the City's public right-of-way

The Staff has prepared:

- (a) A recommendation with respect to SEQRA;
- (b) A resolution approving the DAS installations, subject to reaching certain agreements with Crown Castle.
- (c) A resolution that would deny the request from Crown Castle for Plans A, B and C.

It is important that the City issue a written decision based on the record before it (which would include the physical installations) contemporaneously with any decision, given the dispute among the parties as to what law applies.

STAFF RECOMMENDATION

A. SEQRA. If the City makes a negative declaration, negative conditional declaration, or determines that the facilities are exempt, it should make an on the merits determination as to the request for placement of the DAS nodes. Technically, if the City makes a positive SEQRA declaration, it should not act on the request for placement of the facilities. However, in this case, where the SEQRA declaration may be challenged, and Crown Castle claims that there are deadlines for final action are running, we recommend that the City make tentative determinations on the merits, without prejudice to revisiting those determinations after the SEQRA analysis. We do not recommend a negative declaration, or a finding that the facilities are exempt. If the City makes a negative conditional declaration, it should add the following to the draft resolutions:

“The City has determined that if only those facilities are installed are those shown in Exh A (two-Ion boxes, no ground cabinets, antennas no wider than poles) it may make a negative determination under SEQRA. However, as installation of different or additional equipment would potentially have a negative impact on the community, the negative declaration is conditional on the facilities remaining of the size and design specified by the City.”

If the City makes a positive declaration, it should include language akin to that in the draft denial resolution below.

B. Approval. Any approval would be based on the implicit conclusion that the RUA is lawful, and the explicit conclusion that the installations either satisfy the requirements of the RUA, or are otherwise unobjectionable. Unfortunately, any approval would need to be conditional since, under the proposed installation, Verizon Wireless would own structures in the rights of way, and it has no consent to be in the rights of way. Further, some facilities are clearly not covered by the RUA. Therefore, any approval would need to be tentative and conditioned on (a) modifications to the RUA; and (b) eliminating those facilities that are not approvable under the RUA. These conditions are reflected in the draft approval resolution.

C. Denial. Denial is a bit more complicated. Staff believes a denial could be supported on the following grounds, based on the record before the Council, and on materials that we expect to be provided tomorrow.

Section 1. There are three proposals before the City. Basically, under Plan A, there would be new poles; installation of facilities that do not comport with DoITT standards; and no placement of facilities on City facilities.

Under Plan B, there would be no new poles, installation of facilities that the company says would comply with DoITT standards, and no placement of facilities on City facilities.

Under Plan C, there would be no new poles, installation of facilities that the company says would comply with DoITT standards on third party poles, and placement of facilities that do not comply with DoITT standards on City facilities.

Under *all* of the proposals, the company would allow Verizon Wireless to place equipment in the rights of way without Verizon Wireless obtaining the consent of the City.

Under *all* of the proposals, some of the facilities would be placed on County rights of way or on private property.

Section 2. By its terms, Chapter 196 would apply to the facilities installed by Crown Castle. Crown Castle never applied for any facility under Chapter 196. While it submitted some of the information required by Chapter 196 in connection with its request that the City approve filings under the RUA, it among other things did not submit information sufficient to address two issues that it is specifically required to address under Chapter 196, namely, whether there are higher priority locations (or less intrusive locations) that would satisfy service requirements; and whether there is a "need for the wireless telecommunications facility to provide service." Based on the information in the record, including the information presented by Ronald Grieff, the information presented by Verizon and the information presented by Crown Castle and by the Citizen's Group criticizing the Crown Castle analysis, we conclude that this deficiency alone would mean the placement could not be authorized under Chapter 196 for Plan A, Plan B or Plan C.

Section 3. While there is substantial question as to the validity of the RUA to the extent it purports to exempt Crown Castle from land use provisions for 25 years, the following Sections are particularly relevant to the discussion of the RUA that follows:

a. Section 1.12: Public Way. "Public Way" means the space in, upon, above, along, across, and over the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes. and places, including all public utility easements and public service easements as the same now or may hereafter exist, that are under the jurisdiction of the City. This

term shall not include county, state, or federal rights of way or any property owned by any person or entity other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such person or entity.

b. 3. SCOPE OF USE AGREEMENT, Any and all rights expressly granted to [Crown Castle] under this Use Agreement...shall be subject to the prior and continuing right of the City under applicable Laws to use any and all parts of the Public Way exclusively or concurrently with any other person or entity and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the Public Way. Nothing in this Use Agreement shall be deemed to grant, convey, create, or vest in NextG a real property interest in land, including any fee, leasehold interest, or easement. Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the City except that it is agreed that no zoning or planning board permit, variance, conditional use permit or site plan permit, or the equivalent under the City's ordinances, codes or laws, shall be required for the installation of [Crown Castle's] equipment installed in the Public Way and/or on Municipal Facilities, unless such a process has been required for the placement of all communications facilities and equipment in the Public Way by all other telecommunications providers...

c. 3.1 Attachment to Municipal Facilities. The City hereby authorizes and permits [Crown Castle] to ...install, operate, maintain, control, remove, reattach, reinstall, relocate, and replace Equipment in or on Municipal Facilities...A denial of an application for the attachment of Equipment to Municipal Facilities shall not be based upon the size, quantity, shape, color, weight, configuration, or other physical properties of [Crown Castle's] Equipment if the Equipment proposed for such application substantially conforms to one of the approved configurations and the Equipment specifications set forth in Exhibit A.

d. 3.2 Attachment to Third-Party Property. Subject to obtaining the permission of the owner(s) of the affected property, the City hereby authorizes and permits [Crown Castle] to enter upon the Public Way and...to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace such number of Equipment in or on poles or other structures owned by public utility companies or other property owners located within the Public Way as may be permitted by the public utility company or property owner, as the case may be...A denial of an application for the attachment of Equipment to third-party-owned poles or structures in the Public Way shall not be based upon the size, quantity, shape, color, weight, configuration, or other physical properties of [Crown Castle's] Equipment if the Equipment proposed for such application substantially conforms to one of the approved configurations and the Equipment specifications set forth in Exhibit A....

e. Preference for Municipal Facilities. In any situation where [Crown Castle] has a choice of attaching its Equipment to either Municipal Facilities or third-party-owned property in the Public Way, [Crown Castle] agrees to attach to the Municipal Facilities....

Section 4. RUA Analysis

(a) Several of the facilities are not installed in public ways of the City; some are on private property (particularly, Loudon Woods), and some are on County rights of way. Those uses are not

governed by the RUA, but are governed by *inter alia*, Chapter 196. Crown Castle never filed an application for those facilities. Those facilities cannot be approved under the RUA, and because no application was filed as required by Chapter 196, and the information presented would not justify a special use permit, the request for those facilities must be denied under Plans A, B and C..

(b) The installations are proposed to serve Verizon Wireless. Verizon Wireless will own facilities that will be managed by Crown Castle and will be connected to the node equipment owned by Crown Castle. Verizon Wireless does not have consent from the City to place facilities in the rights of way. Crown Castle proposes to overcome this deficiency by effectively granting franchise rights it holds to Verizon Wireless. The City has notified Crown that this is a violation of the RUA, and Crown Castle is now in a cure period under the RUA. There is no basis for authorizing installation of the facilities under Plan A, Plan B or Plan C until and unless the deficiency is cured, as the rationale for construction of the facilities is based on the particular requirements of Verizon Wireless.

(c) (1) The RUA Exhibit A, referenced in the quoted RUA language above, references the NYC DoITT standards for wireless placement. In 2011, those standards, among other things, provided that a wireless provider could install:

“An equipment housing with a volume no greater than 2.8 cubic feet (i.e., 4,840 cubic inches). Equipment housings that are of a volume no greater than 2.8 cubic feet, but that are not “sub-sized housings” under subsection (b) below are referred to in this Agreement as “standard housings”. Standard housings shall have a maximum width (i.e., a maximum horizontal dimension, perpendicular to the pole and parallel to the ground) of eighteen inches unless a substantial operational need for a larger width is demonstrated to the satisfaction of DoITT and the City’s Department of City Planning (“DCP”). Any determination of satisfaction by DoITT and DCP pursuant to the preceding sentence may be in the form of an approval of a specific Street Pole use proposal or may be made in more generic form covering all or a category of Street Poles or potential installations, as DoITT and DCP may determine.

An equipment housing with maximum dimensions of 13 inches by 9 inches by 4 inches (that is, no more than thirteen inches in its longest dimension, nine inches in its second longest dimension and four inches in its shortest dimension).”

(2) Under Plan A, and under Plan C, with respect to the municipal facilities, the installations do not comply with DoITT specifications. Under the February 24, 2017 submission proposes installation of equipment boxes at 42 x 24 x 12, (7 cubic feet) with a RF warning sign (indicating that the installation is no longer RF safe) which, according to the drawings submitted, are at a level possibly as low as 5’7” and no higher than 8’6. In in considering the request under Plan A and Plan C with respect to Municipal Facilities, the City may consider size, quantity, shape, color, weight, configuration, or other physical properties of the proposed installations. While the City desires for facilities to be placed on Municipal Facilities per the RUA, after viewing the drawings and the differences between the facilities that meet the DoITT standards and those that do not; the proposals that do not comply with the RUA appear significantly different, especially given the number proposed to be installed, and because there may be alternatives that could obviate the need for the facilities. In addition, the record suggests that there may be noise issues that are greater with the larger facilities than with the DoITT approved facilities.

(d) Plan B fails because it does not include any consideration of Municipal Facilities as required by the RUA.

(e) That leave the question as to whether the City should approve the facilities under Plan C that satisfy the DoITT standards (essentially, that is, the Plan B facilities minus the facilities where a municipal structure provides a substitute). For reasons already suggested, we think the answer is “No.” But in addition:

(1) The installation is subject to the City’s “reasonable prior review and approval” under Section 3, although there are several factors that the City may not consider in reviewing a request to install facilities, quoted in Sections 3.1 and 3.2. However, we note that Section 3 specifically contemplates that the agreement shall not be interpreted to allow Crown Castle to effectively monopolize available space in the rights of way – that is, it is intended to ensure that the rights of way remain available to all. We think as part of the City’s review it is therefore important to ask whether the facilities – regardless of how many may be requested or their physical configuration – are needed to provide service. In this case, as the report of Mr. Grieff suggests, the company has not provided the information that would permit the City to determine how many, if any, of the facilities are needed.

(2) There appears to be a substantial contractual dispute between Crown and the City. The City views the RUA, if valid, as contractually limiting the company to installing facilities that meet DoITT standards, absent an approval process that would permit the City to consider various physical factors prior to modification. Crown Castle, as we understand it, contends that it may expand the facilities any way it desires after the initial installation, or alternatively that any right of review by the City has been preempted by 47 U.S.C. Section 1455. Legally, the latter conclusion is suspect. The FCC’s Order interpreting that provision noted that it did not apply where “local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property... We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt “non regulatory decisions of a state or locality acting in its proprietary capacity.” If Crown’s view of the preemptive scope of federal law were correct, it is hard to imagine that the contract itself could survive, since its basic purpose – limiting what may be installed – could no longer be served. Given this dispute, we think it unreasonable to approve the proposed installations under Plans A, B or C.

**RESOLUTION
APPROVING
PROPOSED PLAN FOR PLACEMENT OF WIRELESS
FACILITIES PURSUANT TO RUA**

WHEREAS, the City of Rye entered into a Right of Way Use Agreement with NextG Networks of New York, whose successor is Crown Castle East NG, Inc. (Crown Castle) has asked the City to approve a plan for placement of more than 60 DAS nodes within the City of Rye;

WHEREAS, Crown Castle has not applied to place wireless facilities in the rights of way pursuant to the RUA, and not Chapter 196 of the City Code; and

WHEREAS, the RUA only extends to public ways of the City of Rye, and does not authorize placement of facilities by Crown Castle in any other location; and

WHEREAS, Crown Castle has applied for placement of its nodes in locations that are subject to the RUA; and

WHEREAS, the RUA itself limits the facilities that may be installed without further review and approval by the City:

NOW THEREFORE BE IT RESOLVED BY THE CITY OF RYE:

Section 1: Pursuant to the RUA, at those locations that are subject to the RUA, the wireless facilities complying with the DoITT size standards (volume no greater than 2.8 cubic, with a maximum width of (i.e., a maximum horizontal dimension, perpendicular to the pole and parallel to the ground) of eighteen inches and using a stick type antenna no wider at the widest point than the pole to which it is attached (for placements outside the general communications zone on the pole) and an antenna on a single arm (for antennas within the communications zone may be installed, subject to the RUA and this resolution. The specific designs approved are Exh. A to this Resolution. The approval grants no other rights, does not permit installation of any ground cabinets, and pursuant to the RUA, is conditioned specifically on installation only of those approved structures.

Section 2. The facilities will be installed at the locations proposed by Crown Castle, or such nearby locations as the City Manager determines will result in a lesser impact on the community. The facilities will be installed subject to design conditions as the City may establish (including but not limited to painting requirements and requirements for signage), and in compliance with all applicable provisions of the City Code (including but not limited to the electrical code and noise code).

Section 3. Notwithstanding the foregoing, the facilities are only proposed to be installed for use by Verizon Wireless, and Verizon Wireless does not have authorization to place any facilities in the rights of way in Rye. No facilities may be installed until and unless

a. Verizon Wireless enters into an agreement for use of the rights of way governing the installation of its equipment; or

b. The RUA is amended to permit the installation of the Verizon Wireless equipment, in a form and for a term acceptable to the City Council.

Section 4. The City Manager and City Attorney are authorized to negotiate with either Crown Castle, Verizon Wireless, or both for placement of Verizon Wireless equipment in the rights of way, which agreement shall be subject to the approval of the City Council. Any amendment to the RUA must contain terms and conditions beneficial to the City, and may not grant Crown Castle additional benefits without additional benefits to the City.

Section 5. The authorizations are specifically conditioned upon:

a. Verizon Wireless and Crown Castle each warranting that are no other planned, or reasonably foreseeable additional installations or installations that would modify or replace the approved installations; and

b. Crown Castle agreeing that it will comply with this Resolution.

Section 6. This Resolution is without prejudice to the right of Crown Castle and Verizon Wireless to apply for installation of wireless facilities at locations that are not subject to the RUA, in the manner required by the City Code.

Section 7. The provisions of this Resolution are not severable.

**RESOLUTION
DENYING
PROPOSED PLAN FOR PLACEMENT OF WIRELESS
FACILITIES PURSUANT TO RUA**

WHEREAS, the City of Rye entered into a Right of Way Use Agreement with NextG Networks of New York, whose successor is Crown Castle East NG, Inc. (Crown Castle) has asked the City to approve a plan for placement of more than 60 DAS nodes within the City of Rye;

WHEREAS, Crown Castle has applied to place wireless facilities in the rights of way pursuant to the RUA, and not Chapter 196 of the City Code; and

WHEREAS, the RUA only extends to public ways of the City of Rye, and does not authorize placement of facilities by Crown Castle in any other location; and

WHEREAS, Crown Castle has applied for placement of its nodes in locations that are subject to the RUA; and

WHEREAS, the RUA itself limits the facilities that may be installed without further review and approval by the City, and

WHEREAS, there is a substantial question as to the continuing validity of the RUA;

WHEREAS, the City has considered the request under the RUA as if it were fully enforceable according to its terms; and

WHEREAS, the City has determined that the project is subject to a positive declaration under SEQRA, notwithstanding Crown's interpretation of what is stated under its agreements with Crown Castle, find its appropriate to make findings with respect to the proposed project as if it were exempt from SEQRA:

NOW THEREFORE BE IT RESOLVED BY THE CITY OF RYE:

Section 1. This Resolution is made without prejudice to the right of the City to approve the project after completion of a SEQRA analysis, and only reflects the view of the City as to the projects as proposed in plans A, B and C, which the City understands summarizes the requests Crown Castle now asks that the City act upon.

Under Proposal A, there would be new poles; installation of facilities that do not comport with DoITT standards; and no placement of facilities on City facilities.

Under Proposal B, there would be no new poles, installation of facilities that the company says would comply with DoITT standards, and no placement of facilities on City facilities.

Under Plan C, there would be no new poles, installation of facilities that the company says would comply with DoITT standards on third party poles, and placement of facilities that do not comply with DoITT standards on City facilities.

Under *all* of the proposals, the company would allow Verizon Wireless to place equipment in the rights of way without Verizon Wireless obtaining the consent of the City.

Under *all* of the proposals, some of the facilities would be placed on County rights of way or on private property.

Section 2 After considering the record before it, the expert reports received by the City, and the staff recommendation, the City concludes that the requests for placement under Plans A, B and C should be denied, if the City is required to make that determination as of this date, and adopts the staff denial analysis as its grounds for denial. Of course, if after the SEQRA analysis, the proposal changes, or if in light of the materials presented, Crown Castle modifies its proposal, the City would consider it.