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May 18, 2010

VIA FACSIMILE AND HAND DELIVERY**CITY OF LONG BEACH**

Attn: Hon. Bob Foster,
Councilmembers Garcia, Lowenthal, DeLong, O'Donnell, Shipske, Andrews, Uranga,
Gabelich and Lerch,
333 West Ocean Boulevard - 11th Floor
Long Beach, California 90802-4664

re: *NextG Networks of California, Inc. Objection to Extension of a Moratorium on
the Approval of Permits for the Installation of Communication Facilities, City
Council, May 18, 2010, 5:00 PM*

Dear Hon. Foster,

Dear Councilmembers Garcia, Lowenthal, DeLong, O'Donnell, Shipske, Andrews, Uranga, Gabelich and Lerch,

In connection with recent discussions with the City Attorney, Mr. Michael Mais, Esq. regarding NextG Networks, I am sending the following information for your review and consideration for the above-captioned matter, together with a request that the City Clerk enter this into the record for tonight's agenda.

I. Introduction to NextG and Statement of Interest

NextG is submitting a response to the City Council of the City of Long Beach ("City") regarding the May 18, 2010 proposed extension of the moratorium on the approval of permits for the installation of wireless telecommunications facilities in the City (hereinafter, the "Moratorium"). NextG makes this filing in order to put the City on formal notice of its strong objection to the Moratorium and to protect its rights pursuant to the Federal Communications Act, 47 USC §§253 & 332(c)(7), Cal. Pub. Util. Code §7901 and Cal. Gov't Code §65009(b)(2). NextG is under a firm contractual commitment to deliver a fully constructed, functioning network no later than December 23, 2010. Given the practicalities of such construction, such a delivery date cannot occur unless permits can be drawn by September 1, 2010, at the latest. It is in the context of the City's full knowledge of NextG's contractual obligations as a telephone corporation under California law that the proposal for a Moratorium now arises.

Sections 7901 and 7901.1 of the California Public Utilities Code ("PU Code") grant telephone corporations such as NextG a statewide franchise to deploy their facilities in the public rights-of-way and prohibit cities from interfering with such deployment while preserving their authority to manage the time, place and manner of the occupancy of the public rights-of-way, which management must be imposed on all entities equally. If the City imposes the Moratorium, in addition to offending federal law (as described in § IV, below), the City will violate PU Code Sections 7901 and 7901.1 because the City asks to take up

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to a minimum of 120 days to determine standards for wireless telecommunications facilities. Although we understand that City staff proposes to study and amend existing zoning regulations relating to wireless telecommunications facilities, the Moratorium, as explained further in this letter, contravenes the California Public Utilities Commission ("CPUC") issuance of a Certificate of Public Convenience and Necessity ("CPCN") to NextG that already establishes NextG's right to deploy as proposed in the public ways of Long Beach. The City's only role now is to manage the time, place, and manner of such deployment.

The Moratorium is not necessary since City has already established a process for right-of-way applications that have been in place since 2007, and many other utilities that are similarly regulated as NextG have made their installations pursuant to that process. The City has had ample time to make appropriate changes in its code. As of the date of this writing, it has been fourteen (14) years since the passage of the Communications Act of 1996, and fifteen (15) years since the California legislature passed Section 7901.1. Simply put, there is nothing new and by no means any urgency for the City to react in this way. As we will explain in further detail below, the legal issues are by no means novel, and the City has had ample time to address them.

II. NextG Has Made its Construction Commitment Based on Good-Faith Research and past experience with the City.

NextG is a fiber-based provider of telecommunications services and has a long tradition of close collaboration with municipalities. NextG is proposing to install its equipment on existing infrastructure (e.g., utility poles or streetlights), and wishes to work with the City in order to reach general agreement on the size, weight, color, and location of the equipment. Overall, NextG has had a positive experience with municipalities in California and across the nation because NextG's solutions offer an important solution to wireless carriers and to the public.

NextG has been operating its DAS network and related infrastructure in the City since 2007. In all cases, the City has recognized NextG's status as a public utility and processed NextG's applications within the public right of way. In 2007, NextG constructed a 7 node network. All permits were issued by the City within four months from submittal. These permits were issued as Encroachment Permits.¹

In April 2008, NextG constructed 3 additional nodes and installed underground fiber. Again, the City issued these Encroachment Permits in 2 weeks, from submission to issuance. In addition, in May and August of 2009, there were 4 and 15 more sites respectively that were constructed with associated aerial and underground fiber, respectively. The City issued all the permits promptly pursuant to the encroachment permit process.

For 2010, NextG has 2 additional nodes to be placed on existing wood poles which have a firm contractual requirement to be built and fully functioning by December 1, 2010. To NextG's knowledge, there have been no issues or controversy related to NextG's network permitting, installation and operation. As stated above, to date staff has correctly identified and processed NextG's network infrastructure as a public utility. It is crucial that staff continue to do so.

III. NextG's Certificate of Public Convenience and Necessity and Statewide Franchise under California Public Utilities Code §7901

¹ In addition, in 2008 and 2009, the City processed permits for a similarly regulated fiber provider, Sunesys, which holds the same form of CPCN and regulatory authority as NextG.

NextG holds a statewide franchise which confers attendant rights under PU Code § 7901, a matter that has been established, tested, and reaffirmed over several proceedings at the Commission the past several years. On January 30, 2003, in Decision 03-01-061, the California Public Utilities Commission ("CPUC") issued NextG a Certificate of Public Convenience and Necessity ("CPCN") to provide limited facilities-based and resold exchange service as a telephone corporation. Subsequently, the CPUC reaffirmed that it "finds limited facilities-based authority for carriers providing radiofrequency transport services includes installation in or on existing utility poles." D 05-01-006 (Jan 12, 2006) at p. 2. On April 12, 2007, in Decision 07-04-045, the CPUC granted NextG's application for full facilities-based authority, and made findings that exempted its facilities from the California Environmental Quality Act ("CEQA") through the issuance of Notices to Proceed ("NTPs") which would to be issued on a per-project basis by the CPUC. In short, NextG is a public utility in California subject to regulation by the CPUC and benefitting from a statewide franchise issued under the Commission's rules.

In addition to the foregoing, the CPUC has stated in a recent *amicus curae* filing that "[i]n the case of NextG, because the company sought authority to provide particular types of 'telecommunication services', the CPUC issued a license for NextG to operate in California as a 'telephone corporation' pursuant to section 234 of the Public Utilities Code. *Amicus Curae* filing of the CPUC in Case No. 30-2009-00119646-CU-OR-WJC, *NextG Networks vs. City of Huntington Beach* (filing dated April 27, 2010)

NextG's statewide franchise rights under PU Code Sections 7901 and 7901.1 restrict local governments' authority to regulating *only* the time, place and manner of right-of-way access, so as not to unreasonably obstruct travel. Section 7901 prohibits any attempt to regulate a telecommunications carrier beyond those restrictions, and prohibits cities from preventing NextG from deploying its facilities in the public rights-of-way. Section 7901 states, in relevant part:

"Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway ... and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

California courts have subsequently confirmed the Legislature's determination that telephone service is a matter of statewide—not local—concern and therefore not subject to the normal scope of local regulatory control:

"[I]t is apparent that because of the interest of the people throughout the state in the existence of telephone lines in the streets in the city, the right and obligation to construct and maintain telephone lines has become a matter of state concern. For this reason the city cannot today exclude telephone lines from the streets upon the theory that 'it is a municipal affair.'" *Pac. Tel. & Tel. Co. v. City & County of S.F.*, 51 Cal. 2d. 766, 774 (1959).

Section 7901 allows telephone corporations, including NextG, to construct their facilities in the public rights-of-way, subject only to the requirement that construction activities do not "incommode" (i.e., "unreasonably obstruct and interfere with ordinary travel" in the public right-of-way). *Pac. Tel. & Tel. Co. v. City & County of S.F.*, 197 Cal.App.2d 133, 146 (1961). Section 7901 acts to preclude local governments from operating under their usual land use powers. It therefore operates as a limit on local land use authority. *W. Union Tel. Co. v. Hopkins*, 160 Cal. 106, 118-19 (1911); *Pac. Tel. & Tel. Co.*,

supra, 197 Cal.App.2d at 152; Pub. Util. Code § 7901.1; Sen. Com. Energy, Utilities and Communications, SB 621, S. 1994-95 Legs. Sess. (Cal. 1995) (Section 7901 "facilitated construction by minimizing the ability of local government to regulate construction by telephone corporations.").

IV. Moratoria are Illegal Under the Circumstances and There is No Urgency to Adopt a Moratorium to Delay NextG's Application to the City

The City has initiated its moratorium after it knew that NextG intended to apply for access to the right-of-way. There is scant legal support for any moratoria to be upheld aside from one or two cases decided shortly after the passage of the Communications Act of 1996. At that time, municipal codes responding to the radical regulatory sea-change brought about by the 1996 Communications Act were at their infancy, and the federal courts were sympathetic, in a limited way, to that reality. For example, within a matter of a few days after the passage of the 1996 Act, the City of Medina, Washington, passed a six-month moratorium that reads very similarly to the moratorium that the City of Long Beach is proposing. The U.S. District Court upheld the City's action at that time as a "short-term suspension of permit-issuing while the City gathers information and processes applications." *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp 1036 (W.D. Wash. 1996). However, the court emphasized the fact that the moratorium was adopted immediately after the 1996 Act and that there was nothing in the record suggesting that it was other than a necessary and *bona fide* effort to act carefully in a rapidly evolving field. See also *National Telecommunication Advisors, LLC v. Board of Selectmen and Town of West Stockbridge*, 27 F.Supp.2d 284 (D.Mass. 1998).

In contrast to the situation in *Medina*, and much more in line with subsequent cases, here, the City is acting 14 years after the adoption of the 1996 Act. It has operated for several years without change to its wireless zoning regulations, and since that time has authorized the installation of cables on utility lines by other utilities, the ILEC, the local cable company, and other utilities. The fact that the City purports to "accept" applications under the moratorium is not persuasive when the applications cannot not be acted on for at least 120 days and then under unknown criteria. The proposed moratorium would explicitly and actually prohibit NextG from providing telecommunications services in the City in clear violation of Section 253 of the Communications Act.

The law in California regarding moratoria is much more restrictive than that of Washington or Massachusetts. In California, Gov't Code Section 65858(c) states that a municipality may not adopt or extend any moratorium absent a finding of a "current and *immediate threat* to the public health, safety or welfare" and unless approval of additional permits "would result in that *threat to public health, safety or welfare*." (Emphasis added). In other words, there must be some urgency and safety threat in order to legally support the imposition of a moratorium. There is none in this case, and in fact, the City's draft ordinance states only very general concerns, for example, that, "In recent months the City has experienced a significant increase in the number of inquiries and applications for the installation of wireless antenna and associated facilities". Draft Ordinance Section 1.C. This is not a supportable legal basis under California law, since there is no evidence that there is a safety threat. Additionally, it is not a supportable basis under federal law, since moratoria have, since 1998, not been regularly upheld.

V. Consequences of a Moratorium for NextG

The consequences of a moratorium for NextG would be severe, since the Moratorium purports to prohibit the issuance of any permits "for a period of at least 120 days". Calculating this timeframe from the proposed second reading of this draft ordinance, on June 1, 2010, the Moratorium would run until September 28, 2010. This date would leave NextG approximately 2 months to meet its contractual obligations to deliver its fully functioning network. Even assuming that the permit applications are issued

on the very day that the Moratorium expires, (which seems unlikely, as it would mean that the City took no action and made no changes during the Moratorium) if we assume that the NextG network is constructed within three (3) months thereafter, the operational network would not be delivered by NextG until January, 2011. Such a delay would effectively prohibit NextG from providing telecommunications service. Permitting issues aside, NextG currently stands ready to begin construction within the next thirty (30) days.

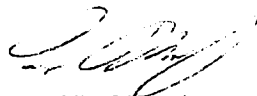
VI. The City has Less Restrictive Options to Preserve its Interests

The City could, and should, accept and process NextG's applications and review them as they are, pursuant to the City's long-standing regulations, rather than overreacting on the fear of what they might be. NextG stands ready to make applications to the City within a matter of days, and the City could dedicate its resources to the review of them rather than engaging in an adversarial process.

VII. NextG's Options Will be Limited if Moratorium is Passed

For the aforementioned reasons, if the City passes the Moratorium as proposed on May 18, 2010, NextG will be placed in a very awkward position. NextG can, of course, vest its trust in the City's process to positively collaborate and issue permits no later than September 1, 2010 (as required for the construction on time). However, given the limited timeframes established under California law to appeal Council decisions, NextG wishes to put the City on formal notice that it may have no choice but to litigate the matter as described in this letter. NextG requests that the City decline from taking any action on the Moratorium on May 18, 2010, and instead, that the City's Council directs the City staff to work collaboratively with NextG on its current applications so that permits can be promptly issued.

Very truly yours,



Paul R. O'Boyle
Counsel for NextG

cc: Michael Mais, Esq. (City of Long Beach) (by email)
Patrick Ryan, Esq. (NextG)
Joe Milone, (NextG)