PRICE, POSTEL & PARMA LLP

JAMES H. HURLEY, JR.
J. TERRY SCHWARTZ
DAVID W. VAN HORNE
PETER D. SLAUGHTER
DOUGLAS D. ROSSI
ERIC P. HVOLBØLL
CRAIG A. PARTON
CLYDE E. WULLBRANDT
KENNETH J. PONTIFEX
CHRISTOPHER E. HASKELL
TIMOTHY E. METZINGER
TODD A. AMSPOKER
MARK S. MANION
MELISSA J. FASSETT
IAN M. FISHER
SHEREEF MOHARRAM
SAM ZODEH
KRISTEN M.R. BLABEY
LESLEY E. CUNNINGHAM
DARRYL C. HOTTINGER

COUNSELLORS AT LAW

200 EAST CARRILLO STREET, SUITE 400
SANTA BARBARA, CALIFORNIA
93101-2190

MAILING ADDRESS P. O. BOX 99
SANTA BARBARA, CA 93102-0099

TELEPHONE (805) 962-0011
FACSIMILE (805) 965-3978

OF COUNSEL
ARTHUR R. GAUDI
DANIEL C. DAVID
SUSAN M. BASHAM
STEVEN K. McGUIRE

RETIRED PARTNERS
GERALD S. THEDE
DAVID K. HUGHES

OUR FILE NUMBER
22124.1

March 15, 2010

HAND DELIVERY

Chair Janet Wolf
and Members of Board of Supervisors
County of Santa Barbara
105 East Anapamu Street
Santa Barbara, CA 93101

Re: NextG Networks' Appeal of MPC's Denial of Seven Permits

Dear Chair Wolf and Supervisors:

We have been asked by an informally-organized group of Montecito citizens to present the legal arguments in opposition to seven appeals filed by NextG Networks, Inc. that are scheduled for hearing before your Board on March 16, 2010. We acknowledge that this submittal is arriving after your submittal deadline and respectfully request that you vote to accept it into the record of your proceedings.

Our clients include appellants who were successful in their appeals to the Montecito Planning Commission ("MPC") of seven Land Use and Coastal Development Permits approved by Planning and Development staff. Following the MPC's unanimous vote in support of the appeals and denying the permits on January 27, 2010, NextG filed an appeal of the MPC actions by letter dated February 5, 2010, thus bringing the seven permits before you for *de novo* review. (Montecito Land Use and Development Code § 35.492.050(C): Article II § 35-182.5).

If approved, the NextG permits would result in the installation of the first phase of an Distributed Antenna System ("DAS") – a network of "omnidirectional" antennas and related equipment that, when fully developed, will result in not the 7 antennas now proposed but at least 54 such antennas, according to NextG – each "node" with a radius of ¼ to ½ mile, resulting in

six "nodes" in each of Montecito's nine square miles.[1] It is no exaggeration to see these 7 antennas as the "tip of an iceberg" and the beginning of a major change in the way telephone services are delivered to the Montecito community.

If Montecito had no wireless service, or if there were gaps in service, the NextG network might be a reasonable if not entirely welcome addition, but that is not the case. Montecito is well-served by existing cellular antenna facilities mounted on approved towers on the outskirts of the community where additional facilities could be co-located to increase service. This approach would avoid intrusive installations on utility poles on the winding tree-lined roadways of this community that has made preservation of its semi-rural character a principal policy since the Montecito Community Plan was adopted in 1989.

NextG wishes to install a separate and unnecessary network of antennas and utility boxes that will be utilized initially by MetroPCS to provide service to its customers, with a fiberoptic cable network being installed throughout the community to support the antennas and utility boxes of at least four additional carriers on the same poles. In other words, the current 7 antennas represent the opportunity for 35, and the 54 that would represent a full-blown network throughout Montecito could multiply to approximately 270 antennas and utility boxes.

When NextG approached the County with plans for its network, Planning and Development staff determined that under the County's telecommunications ordinances (Montecito Land Use and Development Code Chapter 35.444 and Article II section 35-144), because the network is composed of individual antennas of modest size, each such antenna could be approved under either the "Tier 1" procedures, applicable to individual antennas, or the "Tier 4" procedures, applicable to review of a network. (MPC Staff Report, p. 9) Given a choice between a series of 39 individual permits with no design review, no environmental review, and no discretionary review by the MPC, or the more cumbersome and discretionary Tier 4 procedures, the choice was easy for NextG. Of course NextG chose the easiest path to approval – the one with the fewest steps and least discretionary review.

NextG now asserts that only the Tier 1 procedures could have been applicable (Ryan letter 2/5/10), but that was not the position taken by Staff (MPC Staff Report, p.9). Moreover, NextG's recitation of the Tier 4 requirements overlooks the fact that "Tier 4" processing is appropriate for any "[w]ireless telecommunications facilities that may not be permitted in compliance with [Tiers 1, 2, and 3]." The reality of the County's ordinances is that they do not specifically describe networks or delivery systems, apparently because when these ordinances were last updated the principal "facility" for delivery of service was an antenna standing alone.

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[1] For purposes of this letter, we rely in part on testimony by NextG's representatives provided at the MPC hearing of January 27, 2010. We have reviewed the recording of these proceedings provided by the CSBTV and have provided a good faith representation of relevant testimony.

Thus the ordinances distinguish between small antennas and large ones, as well as between residential and nonresidential zones. It is the distinction as to size that forces consideration of a network into the Tier 4 processing, because in reality NextG is not proposing a stand-alone antenna of Tier 1 size – it is proposing many such linked antennas in a network extending throughout the County.

In fact, NextG's appeal letter presents little more than a self-serving interpretation of County ordinances. NextG characterizes the "tiering" in County ordinances as a "preference" system that favors its own type of installation and concludes that "they will have no adverse impact." (Ryan letter 2/5/10 p. 2) Based on its inflated sense of entitlement, NextG asserts that "the County cannot now deny NextG's applications." (Ryan letter 2/5/10 p. 2) In fact NextG is not entitled to preferential treatment under the ordinances, which require that findings be made to support applications regardless of which processing route is used.

The MPC rejected Planning and Development's seven ministerial approvals for one principal reason – this is a network of interdependent facilities, not individual, unrelated stand-alone antennas. None of the antennas for which NextG seeks approval would be of any value to NextG or MetroPCS without their connections to wiring and equipment and multiple other antennas. Thus members of the MPC understood that when Staff agreed to process each antenna application individually, it effectively determined that the entire project would receive no greater scrutiny than its smallest component part, ignoring the cumulative impacts on the community resulting from a network installation and, indeed, the reasonably foreseeable impacts associated with future expansion. The MPC concluded unanimously (5-0) that Staff was incorrect in allowing the 39 antennas to be processed and approved as 7 "Tier 1" projects, as though they are completely independent of each other. We ask your Board to reach the same conclusion in your de novo review.

But even if your Board disagrees with the MPC's conclusion that Staff erred when it ignored the network impacts and processed applications for seven individual antennas, you nevertheless should decide to deny the permits because even under the Tier 1 ordinance provisions, the required findings for approval cannot be made.

Attached to this letter you will find our January 25, 2010 submittal to the MPC in which we presented the principal arguments against the seven permits. The letter was part of the record in the MPC proceedings but apparently was not provided to you with other record materials. Since Staff has indicated it will proceed with the same explanations in support of approval of the permits, we believe our arguments presented to the MPC remain entirely relevant and responsive, and we ask you to review this letter in detail. Without repeating its contents, we summarize those arguments here:

I. Staff Neglected Aesthetic Considerations under Applicable Standards, Accepting NextG's Mitigation Effort Instead of Requiring Compliance.

If your Board contemplates approving one or more of the seven permits, you must make required findings of consistency with the Comprehensive Plan, including the Coastal Land Use Plan. The Montecito Community Plan is part of the Comprehensive Plan, implemented by the Montecito Land Use and Development Code.

In its MPC Staff Report for each of the permits now on appeal, Staff identifies numerous Comprehensive Plan and Montecito Community Plan policies as well as Zoning articles, compliance with which is a requirement for approval. The MPC considered these but did not address them in detail because it reached a more general conclusion that none of the permits comply with the Comprehensive Plan and with applicable provisions of the zoning ordinances because there was "lack of evidence that there was a thorough and complete review of the aesthetics and of the other information that should have been considered and that this project was viewed as Tier 1 project when evidence would support that this should have been considered as a network, or a system as a whole." Should your Board choose to revisit Staff's recommended findings that would support approval, we submit that it should conclude that the following, in particular, cannot be met:

Montecito Community Plan Goal LU-M-2:

Preserve roads as important aesthetic elements that help to define the semi-rural character of the community. Strive to ensure that all development along roads is designed in a manner that does not impinge upon the character of the roadway.

Montecito Community Plan Goal VIS-M-2:

Protect public and private open space as an integral part of the community's semi-rural character and encourage its retention.

Telecommunications Ordinance Findings (Montecito Land Use and Development Code section 35.444.020(G) and Article II section 35-144F.7):

- The facilities are compatible with existing and surrounding development in terms of land use and visual qualities.

- The facilities are located so as to minimize visibility from public view.

- The facilities are designed to blend into the surrounding environment to the greatest extent feasible.

- The facilities comply with all required development standards unless granted a specific exemption by the decision-maker as provided in [applicable sections].

As to each of these required findings, your Board should conclude that compliance simply is not possible. The NextG "nodes" represent development along the roadways of the community, and they should be "designed in a manner that does not impinge upon the character" of each impacted roadway. Staff consistently has equated "small" with absence of impact, but that is an incomplete analysis. While viewing each antenna as relatively unintrusive, Staff has failed to consider that each small antenna is but a small part of a larger network and does not function alone. Each antenna represents a connection with others like it located as close as ¼ mile. One cannot contemplate the impact of a single "node" without considering the context in which it will be installed and without considering impacts associated with its operation. Moreover, where staff contemplated impact from mounting antennas and equipment boxes on existing utility poles, Staff applies what amounts to a mitigation standard – if NextG has done all it can to minimize impact, then it should be rewarded for its effort. Despite receiving countless communications from Montecito residents and property owners, Staff still reasoned that NextG's agreement to paint its equipment brown should satisfy the concerns of those who do not want to see the equipment at all.

Aesthetic impacts are in the eye of the beholder, and the beholders with the most at stake here are Montecito residents. What may be acceptable to Staff is not acceptable to the community. Your Board needs to consider these constituent concerns. Giving an applicant a "pass" if it makes an effort to limit the impact of an otherwise obnoxious use is insufficient if the installation remains nevertheless obnoxious. Those most affected by these proposed installations – property owners and residents of Montecito – maintain that these antennas cannot possibly meet the requisite standards.

II. Staff Improperly Accepted CPUC's Exemption as Satisfying the County's Obligation to Conduct Environmental Review under CEQA.

Proposed CEQA finding 1.1.1 (MPC Staff Report, Attachment A) states that the decision-maker should accept a Notice of Exemption completed by the California Public Utilities Commission should suffice for a review of environmental impacts in the Montecito community and, indeed throughout the entire County. should as sufficient to satisfy the County's obligations under CEQA. Your Board should find that the CPUC Notice is inadequate to satisfy the requirements of CEQA.

NextG has maintained consistently that the CPUC is the only agency with environmental review authority for any installation NextG engages in anywhere in California. That cannot be true, however, because CEQA is focused on the impacts on the ground and focuses on the jurisdiction most able to make the local assessment, distinguishing those agencies such as CPUC with use-specific jurisdictions that do not consider the specific environment where the installation will occur. The CPUC, moreover, did not provide proper notice to the County as a "responsible agency" for this installation and, under these circumstances, the County has a responsibility to assume the lead agency role, conducting its own environmental review. Under a Tier 4 review, clearly the impacts of the network as a whole would be considered, but even under a Tier 1 review, the cumulative impacts and reasonably foreseeable impacts of the project must be considered. It is not enough to say that ordinarily the approval of a land use permit or coastal development permit is considered ministerial in nature. Here Staff made no attempt at even an initial study and made no CEQA finding independently of the CPUC exemption.

At a minimum, your Board should find that regardless of whether Staff was correct in allowing NextG to present individual applications for each antenna under Tier 1 requirements, the obvious network implications and impacts required more than a claim of exemption from CEQA.

In summary, the fact that these seven antennas are part of a network, only one phase of which is currently presented for permitting, makes it incumbent upon County decision-makers to take every required step and every available opportunity to understand the immediate and anticipated impacts, which include both aesthetic and environmental considerations under applicable law, regardless of whether that process is called "Tier 1" or "Tier 4." Required findings clearly cannot be made, and therefore the NextG appeals, and the 7 permits, must be denied.

We look forward to your hearing on March 16 and will be pleased to answer any questions you may have at that time.

Very truly yours,

Susan M. Basham
for PRICE, POSTEL & PARMA LLP

SMB:lkh
Enclosures

PRICE, POSTEL & PARMA LLP

JAMES H. HURLEY, JR.
J. TERRY SCHWARTZ
DAVID W. VAN HORNE
PETER D. SLAUGHTER
DOUGLAS D. ROSSI
ERIC P. HVOLBØLL
CRAIG A. PARTON
CLYDE E. WULLBRANDT
KENNETH J. PONTIFEX
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LESLEY E. CUNNINGHAM
DARRYL C. HOTTINGER

COUNSELLORS AT LAW

200 EAST CARRILLO STREET, SUITE 400
SANTA BARBARA, CALIFORNIA
93101-2190

MAILING ADDRESS P. O. BOX 99
SANTA BARBARA, CA 93102-0099

TELEPHONE (805) 962-0011
FACSIMILE (805) 965-3978

OF COUNSEL
ARTHUR R. GAUDI
DANIEL C. DAVID
SUSAN M. BASHAM
STEVEN K. McGUIRE

RETIRED PARTNERS
GERALD S. THEDE
DAVID K. HUGHES

OUR FILE NUMBER
22124.1

January 25, 2010

HAND DELIVERY

Chair Michael Phillips
and Members of the Montecito Planning Commission
County of Santa Barbara
123 East Anapamu Street
Santa Barbara, CA 93101

Re: January 27, 2010 Hearing
09APL-00000-00034 NextG Cellular Antenna #ESB13
09APL-00000-00035 NextG Cellular Antenna #ESB09
09APL-00000-00036 NextG Cellular Antenna #ESB08
09APL-00000-00037 NextG Cellular Antenna #ESB06
09APL-00000-00038 NextG Cellular Antenna #ESB14
09APL-00000-00039 NextG Cellular Antenna #ESB02
10APL-00000-00001 NextG Cellular Antenna #ESB03

Dear Chair Phillips and Commissioners:

On January 27, 2010, your Commission is scheduled to hear the seven appeals identified above. These appeals concern Land Use and Coastal Development Permits approved by Planning and Development staff ("P&D" or "Staff") for the installation of omnidirectional antennas and related equipment that are part of a new telecommunications network in the County of Santa Barbara proposed by NextG Networks of California. The Appellants include the Montecito Association and numerous Montecito citizens, and they are united in their opposition to the deleterious impact on their semi-rural community that will result from installation of the NextG equipment.

Each of the appeals was timely filed[1] and was accompanied by a letter detailing the grounds for the appeal and the specific impacts associated with each proposed antenna installation, reserving the Appellants' rights to expand their arguments and provide additional information prior to your hearing. In the intervening weeks, Staff has prepared a Staff Report for each of the appeals, explaining the rationale for Staff's approvals and recommending denial of the appeals. In addition, the applicant, NextG, has responded to the appeals by letter dated January 19, 2010. Appellants take issue with Staff's analysis and with NextG's arguments. Through this letter, Appellants respond to Staff and NextG and ask your Commission to uphold all seven appeals on the grounds stated here and in the letters accompanying the seven appeals.

I. Proposed Findings under County Policies and Ordinances Are Not Supported by the Evidence.

A. Aesthetic Impacts Must Be Given Paramount Consideration.

Staff states (Staff Report, page 10) that it agrees with Appellants that neither federal nor state law prohibits the County from considering aesthetics and visual impacts of cellular facilities, and therefore these impacts are appropriately considered in reviewing the NextG network project. Nevertheless, Staff insists that the installation of "one 26-inch whip antenna and one 6"l x 6"w x 2'h utility box," with both painted brown and mounted on a utility pole, does not have a significant aesthetic impact as it "meets the small facility criteria and uses existing utility poles." Staff adds that because the utility box is "not as wide as the pole" it will not protrude visually in an intrusive way.

Appellants strenuously disagree with Staff's assessment. In reaching its conclusions, Staff has ignored the perceptions of the people most affected by the proposed installations – the residents of Montecito, including but not limited to the Appellants, who pass by these poles on a daily basis. As discussed in the appeals and below, the Montecito Community Plan establishes long-range policies for the community that are designed to preserve the character of the community. The proposed installations, by their very nature and design, are contrary to the character of the community. The fact that the equipment will use existing poles does not negate its intrusion: the equipment is a new and unwelcome intrusion along the community's roadways

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[1] In a letter dated January 19, 2010, NextG asserts that the appeal of 09LUP-00000-00081, filed on January 13, 2010, was untimely because it was filed more than 10 days after P&D's approval notice. This statement is incorrect. P&D's Notice of Intent to issue this permit was dated January 6, 2010. P&D approved this permit nearly five weeks after the other six (which were dated December 4, 2009) because P&D anticipated that Appellants would appeal it and, for the convenience of the Commission, wanted this appeal to proceed to hearing at the same time as the other appeals. The appeal period for this permit ended January 19, 2010. At the request of Staff, Appellants filed the appeal on Wednesday, January 13 – well within the appeal period – so as to enable Staff to meet its own scheduling deadlines.

no matter where it is mounted. Staff's suggestion that a box narrower than the pole will not be visually intrusive appears to presume that each pole will be observed only from one angle, directly behind the pole where the pole itself will obscure the view of the box. Of course that is not how the equipment will be seen by most people. While one installation alone is objectionable, multiple installations create a cumulative negative impact on the community that ultimately is greater than the sum of the individual parts, which is why the several antennas on appeal must be viewed together as part of a network.

B. Aesthetic Impacts Negate Required Findings.

Acknowledging NextG's aesthetic impacts on the Montecito community, the Commission cannot reasonably make the required findings of consistency with the Comprehensive Plan, including the Coastal Land Use Plan. The Montecito Community Plan, which is part of the Comprehensive Plan, includes Goal LU-M-2:

> ***Preserve roads as important aesthetic elements that help to define the semi-rural character of the community. Strive to ensure that all development along roads is designed in a manner that does not impinge upon the character of the roadway.***

Staff concludes (Staff Report, page 19) that the proposed NextG network is consistent with this goal because it has been "designed as a Distributed Antenna System (DAS) to minimize the size and visibility of the facility, and to blend with the existing character of the area." Similarly, Staff maintains that the antenna installations are consistent with Goal VIS-M-2 because they are "as minimally visually intrusive as possible" and the project "preserves the existing streetscape character of the area." In reaching these conclusions, Staff appears to be asserting that this project meets the community's important goals because NextG has done as much as it can be expected to do to minimize the intrusiveness of its system and it is less intrusive than some other kind of system. By that logic, virtually any project could be approved based on avoidance of something perceived as less desirable, and that is clearly not an appropriate decision-making standard. Each project must be considered on its own merit and in the context of the proposed location at the time it is presented. While NextG may believe its facilities are designed to blend into the streetscape, Appellants disagree, and they are the people in the best position to know.

For these same reasons, Staff's recommended findings concerning telecommunication facilities (Sections 2.2.1, 2.2.2 and 2.2.3 of Attachment A: Findings) cannot be made. The same logic is applied here – that the equipment is not intrusive in the eyes of Staff because it "blends" with the "existing visual character" of the area and is no worse than other actual or potential facilities. Appellants urge that the County's telecommunications ordinances require far greater attention to the visual impact than Staff has provided.

C. **The NextG Project Must Be Evaluated as a Network, Not as a Series of Individual Antennas.**

NextG does not dispute that the proposed facilities are subject to the County's telecommunications facilities ordinances (Chapter 35.444 of the Montecito Land Use and Development Code and Article II section 35-144). However, as NextG explains in its January 19, 2010 letter, Planning and Development agreed in early 2009 to accept and process 39 separate applications from NextG under the "Tier 1" or lowest level of scrutiny, even though NextG was proposing an integrated Distributed Antenna System ("DAS") in Santa Barbara County – a network of omnidirectional antennas and equipment boxes mounted on utility poles throughout the County's communities with extensive cabling and with the potential for expansion to five antennas on each pole. For its part, P&D explains (Staff Report, page 9) that while it could see how either the Tier 1 or Tier 4 permit route could be applicable, P&D ultimately "left the permit path to the applicant." It should come as no surprise, then, that NextG would prefer the least demanding path to approvals. What is remarkable is that P&D apparently declined to take responsibility for this most significant threshold determination. In agreeing to review one antenna at a time, Staff agreed that each antenna would receive only ministerial review, and in so doing, effectively determined that **the entire project would receive no greater scrutiny than its smallest component part**. That decision has resulted is a series of permits that ignore the full impact of the network as an integrated project.

NextG argues in its January 19, 2010 letter that the Planning and Development "properly determined . . . that the larger network was permitted pursuant to state and federal law (specifically Section 7901 of the California Public Utilities Code and Sections 253 and 332 of the Telecommunications Act)." However, Staff has not so stated, and nothing in the language of these statutes suggests that a network of facilities cannot be reviewed locally unless it is broken down into its component parts. Section 7901 merely provides that a telephone corporation, which NextG claims that it is, "may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within State, and may erect poles, posts, piers or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such a manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." This section makes clear that a telephone installation that "incommodes" the public use of highways exceeds statutory permissibility.

Sections 253 of the Telecommunications Act is designed to promote competition and prevent state and local regulation from maintaining the monopoly status of any one service provider. Specifically, Section 253(a) states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any

entity to provide any interstate or intrastate telecommunications service." Section 332(c)(7), however, provides for the "preservation of local zoning authority" and "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." The limitations stated in the paragraph include the prohibition of regulation based on EMF, heavily emphasized by NextG, and a prohibition on unreasonable discrimination among providers of functionally equivalent services. Of immediate relevance, Section 332(c)(7)(B)(i)(II), repeating the language of Section 253, provides that a local zoning regulation shall not "prohibit or have the effect of prohibiting the provision" of personal wireless service.

Staff certainly must be mindful of the limitations stated in these statutes. However, in relying upon them for the proposition that the County is precluded from considering the NextG network as one project, NextG conveniently ignores the Ninth Circuit's decision in *Sprint Telephony PCS, L.P. v. Pacific Bell Wireless LLC* (9th Cir. 2008) 543 F.3d 571, where the Court overruled its own prior restrictive reading of Section 253(a) and declared that the plain language of the section requires that, to invalidate a local ordinance, a plaintiff must show actual or effective prohibition of its facilities, rather than the "mere possibility" of prohibition. The Court's reading of Section 253(a) was buttressed by its earlier interpretation of the same relevant text in Section 332(c)(7). Interestingly, the local ordinance validated by the Court's decision had similarities to the County's telecommunications facilities ordinances in that it used a tiered approach and included extensive standards and procedural requirements. The Court regarded these as "reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition." (543 F.3d at 580.)

D. NextG's Self-Serving Opinion Concerning Aesthetic Impacts Impugns Appellants' Motives and Reflects a Complete Lack of Consideration for the Montecito Community.

In its January 19, 2010 letter, NextG repeatedly attempts to minimize Appellants' aesthetic concerns by characterizing these concerns as a "pretext" for a denial of the project based upon EMF safety concerns and a "thinly veiled attempt to evade federal law." In fact, the two concerns are separate and unrelated, as Appellants made clear in the seven appeal letters. Appellants recognize that federal law currently prohibits regulation based upon safety concerns. While they remain concerned about EMF exposure and the current state of the law, they have not asked the Commission to deny the permits on safety grounds.

Neither federal nor state law prohibits regulation based upon aesthetic considerations, and NextG does not deny that the County has this authority. Instead, NextG argues that if its facilities are presumed to be "very small facilities" then they cannot have any measurable

aesthetic impact. This argument, repeated *ad nauseam*, does nothing for NextG except highlight the extent to which NextG clings to the County's willingness not to subject its entire project to "Tier 4" scrutiny as a single large project.

Appellants have expressed a legitimate concern for the aesthetic impacts of NextG's network on their community. Staff's rationale concerning aesthetic impacts clearly does not take stock of the enormous change that these multiple installations represent in a semi-rural community, nor does it give sufficient consideration to the personal experiences of people who live and work in the community. NextG's view is even farther removed from the day to day experience of the community and cannot possibly reflect an understanding of actual conditions. That is precisely why aesthetic impacts must be considered locally and are not prohibited under laws that otherwise favor telecommunications providers.

Accordingly, your Commission should uphold the appeals and deny all of the permits at issue, directing Staff to review the NextG network as one project under "Tier 4" standards, should NextG wish to apply for a Conditional Use Permit for such a project in Santa Barbara County.

II. Proposed CEQA Findings Are Not Supported by the Evidence.

A. CEQA Requires the County's Environmental Review of the NextG Network.

Staff has recommended that, in denying the appeals, your Commission should "[a]ccept the exemption to CEQA prepared and adopted by the Public Utilities Commission, the lead agency, as sufficient environmental review pursuant to sections 150[6]1(b)(3), 15301(b), 15301(c), 15302(c) and 15304(f) of the CEQA Guidelines."[2] The Notice of Exemption prepared by the California Public Utilities Commission ("CPUC") is attached to the Staff Report as Attachment C. The proposed CEQA finding 1.1.1 (Staff Report, Attachment A) also makes

[2] The Appellants filed their appeals based on the contents of the seven permits, none of which makes specific reference to CEQA or to the required findings for approval. Based upon that limited information, it appeared that Staff had not completed CEQA review because it had processed each of the antenna applications individually as a ministerial approval exempt from CEQA. In their appeals, appellants challenged the lack of environmental review, and now expand that challenge to include challenge to the insufficiency of the CPUC Notice of Exemption. Appellants continue to maintain that the network is one project for CEQA purposes and any environmental review undertaken by the County must consider the project as a whole. Should the County or NextG assert a CEQA exemption for ministerial actions, Appellants reserve their right to resume their challenge of that position under these appeals.

reference to the CPUC Notice and the fact that the CPUC found the project exempt from environmental review.[3]

Staff's recommendation that the County merely adopt the conclusions of another agency overlooks the County's responsibility under CEQA to make environmental determinations concerning projects within the County's jurisdiction. CEQA recognizes that more than one agency may have jurisdictional responsibility for a project and so contemplates the designation of both a "lead agency" and "responsible agencies" for each project. Under the CEQA Guidelines, a "lead agency" is defined as "the public agency which has the principal responsibility for carrying out or approving a project. The lead agency will decide whether an EIR or negative declaration will be required for the project and will cause the document to be prepared." (Guidelines section 15367) A responsible agency is one that "proposes to carry out or approve a project, for which a lead agency is preparing or has prepared an EIR or negative declaration. For the purposes of CEQA, the term 'responsible agency' includes all public agencies other than the lead agency which have discretionary approval power over the project." (Guidelines section 15381) Read together, these sections say that if one agency has started the process of permitting a project (i.e., it is the first to act) then the other agencies are considered responsible agencies as a result.

Clearly the County is either a lead agency or a responsible agency for the NextG network in Santa Barbara County, since it has discretionary approval power under its ordinances. Staff apparently has accepted CPUC as the lead agency because it was the first to act on the project. Nevertheless, it is not immediately clear that the nature of CPUC's action on the NextG project in Santa Barbara County dictates that it be treated as lead agency for all purposes. In a situation where more than one agency could be the lead agency, the CEQA Guidelines provide that the lead agency "shall be the public agency with the greatest responsibility for supervising or approving the project as a whole. . . . The lead agency will normally be ***the agency with general governmental powers, such as a city or county***, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service or public utility to the project." (Guidelines section 15051(b) [emphasis added])

In considering challenges to lead agency status, California courts have focused on the immediacy of the agency's responsibility. For example, in *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, the Court of Appeal rejected the contention that a "program environmental report" prepared by the state Department of Water Resources provided sufficient environmental review for a later project that flowed from it. The

[3] We note that the list of the sections of the CEQA Guidelines in the Public Utilities Commission's Notice of Exemption is not identical to the list provided in the Staff Report, nor is the list in the body of the Staff Report the same as the list included in the proposed findings. Staff apparently has interpreted the Notice of Exemption to rely upon certain sections even though they are not correctly stated, and we will respond to Staff's analysis.

Court emphasized that where the core of the project is service to a local area, it is the agency serving that area that can best determine the needs of the area.

The CPUC is a single-purpose agency regulating private utility providers. It does not have "general governmental powers." It is concerned with regulation of the industry as a whole, promoting access to services in a competitive market. Local impacts are well beyond the scope of its authority and its mandate. Therefore, in the present situation, it is the County of Santa Barbara that can best determine the environmental impacts of the NextG network on the Montecito community.

Guidelines sections 15072 and 15082 require that the lead agency consult with the responsible agencies before making an environmental decision because the responsible agency may have expertise that the lead agency lacks. Staff in the present case has reported no consultation with CPUC before CPUC reached its determination. Even more significant is the fact that although the project at issue is in Santa Barbara County, CPUC failed to notify County officials of its action to approve the project and, in the absence of any notice to the County, the County had no opportunity to exercise its statutory right to challenge the determination of the purported lead agency. Accordingly, Guidelines section 21081.1, which otherwise would make the determination of the lead agency final and conclusive, has no bearing here.

Instead, Guidelines section 15052 operates to shift the lead agency designation to the County: where a responsible agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate lead agency, and where the statute of limitations has expired for a challenge to the action of the appropriate lead agency, then the responsible agency ***shall assume the role of the lead agency*** under circumstances where the lead agency either prepared no environmental documents or prepared inadequate environmental documents without consulting with the responsible agency as it is required to do.

In the present case, CPUC's Notice of Exemption provides no review of environmental impacts, instead concluding that the project is exempt from such review. Based on this document, apparently without any consultation with the County, the CPUC approved the project and then failed to provide any notice to the County that would have given it an opportunity to challenge the Notice within the applicable limitations period. Under these circumstances, the County must assume the responsibilities of a lead agency and conduct its own environmental review.

B. **The Categorical Exemptions Relied Upon by CPUC and Staff Do Not Support a CEQA Exemption.**

Regardless of whether CPUC appropriately prepared the Notice of Exemption as the lead agency, the document is wholly inadequate because it relies on three categorical exemptions and a general finding that the project has no significant environmental effect. Staff's recommended acceptance of these exemptions is not supported by the facts.

- The Notice of Exemption asserts a "Class 2" exemption under Section 15302(c), which pertains to replacement or reconstruction. To qualify under this exemption, the project must consist of "replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity." Certainly this exemption is inapplicable, since the NextG project is a new system. It is not a replacement for any equipment but an addition of new equipment and new capacity throughout the County, adding to existing visual blight and creating the opportunity for the installation of more antennas on each pole at issue in these appeals.

- The Notice of Exemption asserts a "Class 4" exemption under Section 15304(f) concerning "minor" alterations in the conditions of land "which do not involve removal of healthy, mature, scenic trees except for forestry and agricultural purposes." Here CPUC refers to the example of "minor trenching and back filling where the surface is restored." Even if the proposed trenching is relatively minor when compared to what CPUC might otherwise contemplate, it is not "minor" in its impact on this particular community, and the damage NextG already is doing to mature trees in preparation for its installations dictates that the project has greater environmental impact than is contemplated under this exemption.

- The Notice of Exemption asserts a "Class 1" exemption under Section 15301(c) for "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of **existing** public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (emphasis added) Within this category, CPUC relies specifically upon two examples provided: existing facilities of certain utilities to provide electric power, natural gas, sewerage, or other public utility services; and existing highways and streets, . . . and similar facilities. While CPUC may be accustomed to invoking this exemption for most utility projects, it does not apply to the NextG project, which does not pertain to existing facilities or equipment and certainly involves

more than "negligible or no expansion of use," since what existed in Montecito at the time of the CPUC determination was no NextG network at all.

- Finally, and most audaciously, the Notice of Exemption asserts that apart from the several categorical exemptions, the NextG network also qualifies for a CEQA exemption under Guidelines section 15061(b)(3) because CEQA applies "only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." The Guidelines define a "significant effect on the environment" as "***a substantial, or potentially substantial, adverse change in any of the physical conditions*** within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or ***aesthetic significance***. . . . A social or economic change related to a physical change may be considered in determining whether the physical change is significant." (Guidelines section 15382 [emphasis added]) In determining that the NextG project is exempt under this "no significant effect" provision, CPUC plainly ignored both the aesthetic impacts that are of great concern to the Appellants and the cumulative impacts of the project in relation to both the existing approved telecommunications facilities of other providers and the foreseeable installation of four additional antennas on each of the poles where NextG currently proposed to install its equipment.

In short, the Commission cannot reasonably agree with Staff's recommendation that the CPUC Notice of Exemption should be accepted as a correct and complete determination of the environmental impacts of the proposed NextG installations. The individual antennas are part of a network of facilities affecting 39 poles in total, with extensive cabling between the poles. Each pole will be equipped with an antenna and an unsightly equipment box, which will support four additional antennas. The physical intrusion into the environment for installation of a new system negates a determination that the project is entitled to Class 1, Class 2 or Class 4 exemptions, and there can be no question that this project will have a significant effect on the environment as contemplated under CEQA. Accordingly the Commission should reject the CEQA finding recommended by Staff and direct Staff to take the responsibilities of a lead agency pursuant to the CEQA Guidelines, reviewing NextG's proposed network as one project and not as a series of individual antennas.

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In summary, the Required Findings for approval recommended by Staff cannot be made. NextG's letter of January 19, 2010 makes clear its belief that it is entitled to ride roughshod over

the prerogatives of local communities. Asserting protections under state and federal law, NextG has muscled its way into a "Tier 1" review so as to avoid a higher level of scrutiny under County zoning and actual environmental review under CEQA, all at the expense of the Montecito community. Appellants understand that Staff has been in a difficult position responding to NextG, but a series of rationalized findings of consistency with the Montecito Community Plan and the County's detailed telecommunications ordinances cannot be the right result. For all the reasons stated here and in the letters accompanying the seven appeals, Appellants respectfully request that the Montecito Planning Commission uphold the appeals and deny the proposed Land Use and Coastal Development Permits.

Very truly yours,

Susan M. Basham
for PRICE, POSTEL & PARMA LLP

SMB:lkh

cc: Appellants (via email)