NextG Networks

EMPOWERING NEXT GENERATION WIRELESS NETWORKS

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November 27, 2009

VIA USPS PRIORITY MAIL WITH SIGNATURE CONFIRMATION

SANTA BARBARA COUNTY BOARD OF SUPERVISORS
Attn: Mr. Michael Allen
Chief Deputy Clerk
105 E. Anapamu Street, Room 407
Santa Barbara, CA 93131

re: *Agenda Item 09-00960*
Hearing to Consider Recommendations Regarding the Santa Barbara County Telecommunications Program
Hearing Date: December 1, 2009

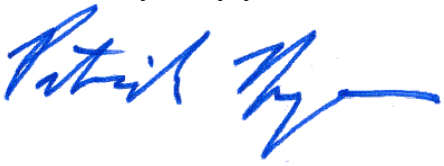
Dear Mr. Allen:

I have reviewed the published agenda materials for the above-referenced item, and have noticed that the letter filed by the undersigned on behalf of NextG Networks of California, Inc. ("NextG"), dated October 26, 2009, was *not* included in the materials, even though the letter was hand-delivered to your office, more than a month ago, in response to the issues pertaining to the agenda item. Although our letter was not included, many other letters from citizens were included in the packet.

Since the above-referenced agenda item addresses several issues pertaining directly to an application made by NextG, we request again that our letter be included in the record. Importantly, one of the recommendations that is under consideration is a moratorium on approval of applications, as well as other issues related to RF Emissions that are clearly preempted by federal law. As we have previously stated, if a moratorium or other serious actions are taken by the Board in connection with recommendations presented on December 1, 2009, the matter will likely lead to immediate litigation with NextG. All of NextG's applications were submitted several months ago under the County's ordinances, are deemed complete, and have been pending since that time.

In a desire to properly notify the Board of NextG's position on this matter, and to ensure that the record is clear as to NextG's position on the issues, NextG requests that the enclosed letter dated October 26, 2009 be entered into the record.

Very truly yours,



Patrick S. Ryan
VP of Government Relations and Regulatory Affairs

encl.: Letter dated October 26, 2009 (w/o attach.)

cc: Michael Ledbetter, Esq., County of Santa Barbara (via email)
Michael Munoz, Esq., County of Santa Barbara (via email)
Robert L. Delsman, Esq. (General Counsel, NextG)
T. Scott Thompson, Esq. (Davis, Wright & Tremaine)
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October 26, 2009

VIA EMAIL AND HAND DELIVERY

SANTA BARBARA COUNTY BOARD OF SUPERVISORS
Attn: Supervisor Joseph Centeno, Chair
Supervisor Janet Wolf, Vice Chair
Supervisor Salud Carbajal
Supervisor Doreen Farr
Supervisor Joni Gray

re: NextG Networks of California, Inc.

Honorable Chairman Centeno,
Honorable Supervisors,

NextG Networks of California, Inc. ("NextG") has made applications to the County of Santa Barbara ("County") for a total of thirty-nine (39) installations in the County's jurisdiction.[1] On October 20, 2009 the County Board of Supervisors held a "briefing in the matter of the Santa Barbara County Telecommunications Program and current permit processing."[2] At the end of the briefing, the Board voted unanimously to direct staff to respond to a number of "directives," each of which is highly problematic in separate respects.[3] The County staff had previously indicated

[1] In addition to the thirty-nine (39) nodes that have been applied for in the County, NextG has entered into a Right-of-Way Use Agreement with the Hope Ranch Homes Association, and plans on submitting an additional nine (9) sites as part of that agreement, for a total of forty-eight (48) nodes in the County's jurisdiction.

[2] Board of Supervisors Agenda Letter for Agenda of October 20, 2009.

[3] The relevant text of the minutes are as follows:

> A motion was made by Supervisor Carbajal, seconded by Supervisor Wolf, that this matter be Acted on as follows: Directed staff to explore amendments/enhancements to the current County Ordinance including but not limited to the following: Potential for more transparency/public input in the process, enhanced protection to communities from potential negative health effects, potential moratorium on permitting facilities, role of CEQA in the regulatory/permitting process, relocation of existing sites, issues related to third party/peer review, conflict of interest/revolving door policies and laws, franchise/sublease issues, cumulative impacts of such facilities, and potential evaluation of high use and/or high risk sites such as schools and health facilities and to return to the board with recommendations as appropriate.

(over a course of several weeks) that permits would be available very shortly; however, since the Board has taken its direct interest in NextG's application, there is currently no indication of when permits may be granted. Additionally, the staff has asked NextG to reevaluate some of its installations, although to date, no single land-use application has been approved (even in cases where there is little or no controversy). Even more problematic is the fact that NextG has been told to stop work on the installation of its fiber-optic backbone (which runs through the County), even though the County's code expressly exempts permitting requirements for that activity.[4] This type of intervention—which clearly sources from the Board—is unwarranted for a "Tier I" process, which does not (by the County's own design) require public input nor any influence from the Board, except in the case of appeal. NextG hereby files this letter with the County and hopes that the issues will be quickly evaluated so as to avoid formal escalation.

The contextual background is important to understand: NextG's application to the County is by no means new. In November 2004, NextG sent an introductory application letter to County Administrator's office, which included a request for access to the County's public rights-of-way for the very same system that is currently under review. In the 2004 letter, NextG included an overview of its installation proposals, together with photographs and other details. For a period of about six months after NextG's 2004 application, we attempted to seek clarification from the County on any special requests; and, even though an agreement cannot be required under law (since NextG holds a statewide franchise under P.U. Code § 7901), NextG nonetheless offered such an agreement. The undersigned also engaged in correspondence and telephone conversations with the County Counsel's office. Ultimately, the County did not express any interest in an agreement and instead instructed NextG to make applications under the County's code. We have now done that and are committed to having the network construted in December 2009, so that it is operational in January 2010.

NextG's efforts with the County have been long and transparent. Accordingly, there is no basis, five years later, for the type of action that the County is currently undertaking, in particular contemplating the imposition of a moratorium affecting NextG's applications after such applications have been submitted and are complete. Yet, according to the County's published Minutes Note, File #09-00907, the Board "Directed staff to explore amendments/enhancements to the current County Ordinance." Each of such enhancements is excerpted below I as captured in the Board's minutes, with a response in each case.

I. "Potential for more transparency/public input in the process."

NextG's applications were carefully engineered solutions to meet the County's stated--and codified—preference for "Tier I, very small facilities," and they meet all of the required development standards required for these projects as set forth in § 35.44.010.C.1.(a) and § 35.44.010.D. As explained in the staff's presentation, when (in approximately 2005) the County underwent its fifth round of telecommunications ordinance revisions in the course of a decade, the County clearly established four (4) different tiers of projects, and the Tier I category was expressly intended for "very small facilities" like NextG's, and to strike a balance between administrative efficiency for facilities that use existing infrastructure and are less than a certain size, and larger

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[4] The Santa Barbara County Code at § 35.20.040.2.j exempts permitting requirements for inland installations of "poles, wires . . . and similar installations erected, installed or maintained by a public . . . utility."

facilities for which a public process is warranted. The ordinance is extremely specific: § 35.44.010.C.1.(a)(3) allows a single omnidirectional antenna to extend up to "40 inches above the height of the structure," and subsection (1) requires that the "associated equipment shall not exceed a combined volume of one cubic foot." NextG's proposal complies with this Tier I application in all respects. It is inappropriate for the Board of Supervisors to intervene at this late stage--after NextG has made applications that rely on the County's process and such applications have been deemed complete--to ask that the tiering be reviewed *de novo* (and potentially changed).

II. "Enhanced protection to communities from potential negative health effects."

As we have indicated in separate communications with your office, NextG is surprised at the Board's open hostility to matters that have been clearly established under federal law and preempted under the Communications Act of 1996. In particular, we respectfully draw your attention to a similar case in Carlsbad where—like here—it was substantially clear to the courts that the ostensible basis for denials given were really rooted in unfounded health concerns:

> having reviewed the administrative record the court cannot reasonably conclude that the evidence supporting the denial decision was substantial especially in light of the high degree of attention drawn to the concern over the health effects of RF emissions by the residents, planning commission, and city council. Therefore, the city's decision in denying ATT's applications violated § 332(c)(7)(B)(iii) and (c)(7)(B)(iv) and cannot stand.

AT&T Wireless Services of California LLC v. City of Carlsbad, 308 F.Supp.2d 1148, 1163(S.D. Cal. 2003).

It is abundantly clear after more than two hours of statements and inquiries from the Board (and as expressly stated in the very "directives" used as headers in this letter) that any negative action on NextG's applications would be based on the County's desire to regulate based on "potential negative health effects." In addition to the public statements at the October 20th 2009 meeting, similar statements have been made by Board members to the local press.[5] Acting on the location of wireless facilities based on the potential effects of RF emissions has been expressly prohibited by Congress. We respectfully refer you to our letter dated October 14, 2009, which explains that NextG's facilities are "categorically exempt" under the relevant regulations and that their emissions are less than one percent (1%) of the allowable standard.

In addition, we are annexing here a new study that contains site-specific, as-installed measurements of an installation in nearby Carpinteria. In that report, the measurements were so low that they did not even make a significant registration on the equipment typically used for this type of test.[6] Dr. Bushberg states on page 4 that, "Indeed, due to the fact that the instrument that was used for the test is generally calibrated to take measurements between 1% and 600% of the

[5] In a television interview with Channel 3 News of October 20, 2009, Supervisor Janet Wolf stated the intention to "look at . . . saturation, cumulative impacts, the location of being near residences, schools, etc." Additionally, in an article entitled "Supervisors Get an Earful on Proposed Cell-Phone Antenna," *Noozhawk,* October 21, 2009, Supervisor Doreen Farr was quoted as stating that "At the heart of it is the fact that we really don't yet accept or trust the FCC standards." Similarly, Supervisor Joe Centeno was quoted as stating that "We learn that things we used to do, we ought not to be doing anymore because they're harmful for us."

[6] Jerrold T. Bushberg, PhD, *Report on Cumulative Maximum Radiofrequencies*, October 23, 2009.

applicable standard, it is not unusual that fractions of a percentage (and in particular, measurements below 1%) are not discerned, as in the case of this particular test." Finally, NextG's equipment has been "Type Certified" by the FCC and as such, has been independently evaluated to operate within applicable legal parameters. In FCC Report and Order Docket 98-68, the FCC adopted rules for the establishment of Telecommunication Certification Bodies, which in turn, certify equipment to fall within FCC standards pursuant to Parts 2 and 68 of the FCC's rules.[7] The County is preempted from questioning the status of NextG's equipment so certified.

III. "Potential moratorium on permitting facilities."

There is no basis for imposing a moratorium on permitting at this stage of processing NextG's applications, and doing so would be an abuse of discretion and unlawful. Cal. Gov't Code § 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 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. No such justification exists in this case, particularly since NextG has designed a system that is in full compliance with the Tier I permitting under the County's code, and further, has provided the County with ample evidence that the proposed installations are well below the acceptable federal emission standards. Concerns about RF emissions do not create a current and immediate threat to the public health or safety and as a matter of law cannot be considered by the County. 47 U.S.C. § 332(c)(7)(B)(iv).

Moreover, a moratorium by the County would violate federal law. A moratorium by the County, nearly fourteen (14) years after the passage of the Communications Act of 1996, could hardly be considered to be a *bona fide* reaction to a change in legal landscape; rather, it would be an improper response to NextG's application as a state-franchised utility and would not be sustained by any court. In *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D.Ala.1997) the district court set forth a standard that has been cited by many other courts, noting that "[t]he delay created by the [Jefferson County] Commission's moratorium 'has the effect of denying the provision of this new technology and its advantages to consumers." *Id,* at 1468 also (citing *Western PCS III Corp v. Extraterritorial Zoning Auth.*, 957 F. Supp. 1230, 1238 (D.N.M. 1997) ("a moratorium against the expansion of personal wireless services would violate the Telecommunications Act." *Omnipoint Communications, Inc. vs. City of Scranton*, 36 F. Supp. 2d 222, 232-233 (M.D. Pa. 1999). *Also see Sprint Spectrum, L.P. vs. Town of North Stonington,* 12 F. Supp 2d 247, 256 (D. Conn 1998), *Sprint Spectrum L.P. vs. Town of Farmington,* 1997 WL 631104 (D. Conn 1997). In short, a moratorium simply would not be an appropriate mechanism at this late stage, especially as the type of installation NextG proposes is precisely that specified in detail under the existing ordinance.

The holding in *Farmington* is, we believe, similar to how a federal court would decide in this case. The court there struck down a moratorium where "Farmington passed its moratorium sixteen months . . . after the Act came into effect and almost nine months after Sprint's first zoning application." *Id,* at 6. For this reason, a moratorium would certainly lead the parties to litigation.

[7] 47 CFR § § 2.960, 2.962, 68.160 and 68.162. Also see ET Docket 98-68 (December 17, 1998), available at: http://www.fcc.gov/oet/dockets/gen98-68/.

IV. "Role of CEQA in the regulatory/permitting process"

The role of the California Environmental Quality Act ("CEQA") in the permitting process has been extensively discussed with the County, and NextG has already obtained all of the appropriate CEQA clearances from the California Public Utilities Commission ("CPUC"). For full-facilities-based CLEC carriers such as NextG the PUC is clearly the lead agency for CEQA purposes. There is no fear of piecemealing due to the possibility of other installations in the future, since NextG currently only has one customer contract for the facilities, and assumptions based upon any future additions would be speculative. The CPUC is the only entity with broad discretionary decision-making authority over NextG's proposed services, facilities, and construction throughout the state (and for this project, which includes the cities of Carpinteria, Goleta and Santa Barbara), and as such, is appropriately designated as the lead agency. Cal. Code Regs. tit. 14, § 1505(b). As lead agency, the CPUC's CEQA determinations are "final and conclusive," except under certain exceptional circumstances, and binding on all parties. *Id,* § § 15050, 15162. NextG has informed the Countythat it has obtained the appropriate determination from the PUC in the form of a Notice to Proceed that has been published in the state's clearinghouse. The the opportunity to appeal the CEQA determination for this project has now passed.[8]

V. "Relocation of existing sites."

NextG is entitled to receive the County's decision on its Type I applications administratively as complying with the County's defined, published designation of least intrusive means for wireless sitings. Since the County has intentionally removed public hearings and discretion from the Tier I application process, there is no basis to require that NextG move or relocate its installations, and it is inappropriate for the Board of Supervisors to exert pressure (as it is doing with its directive to staff) to relocate facilities that fall within the ordinance's requirements for lTier I "very small facilities."

The Ninth Circuit's recent decision in § *Sprint PCS Assets v. Palos Verdes Estates*, No. 05-56106, --- F.3d ----, 2009 WL 3273935 (9th Cir. 2009), does not change the analysis in this case. In addition to the fact that the Ninth Circuit's decision wholly-ignored existing California Court precedent interpreting § 7901, there are significant differences between *Palos Verdes Estates* and the situation in the County. In *Palos Verdes Estates*, there was no published preference and tiering of application types, and virtually any kind of application "[could] be denied for . . . adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property." *Id.* In the County, there is no such ground for denial except in the larger Tier III and IV applications. Moreover, in *Palos Verde Estates*, the installations did not involve existing utility poles that already held various utility installations, which is the case with NextG's installations. Ultimately, *Palos Verdes Estates* did not alter the fact that the County is preempted from acting based on concerns about health effects of RF emissions.

[8] The relevant Notices to Proceed have been provided to the County Staff. Additionally, they are published on the CEQA state clearinghouse. *See* http://www.ceqanet.ca.gov/ProjDocList.asp?ProjectPK=598960.

VI. "Issues related to third party/peer review" and "Conflict of interest/revolving door policies and laws"

The context here suggests the allegation that, somehow, Dr. Jerrold Bushberg has a conflict of interest with respect to the NextG application by virtue of his having advised the County on RF emissions as a third-party consultant in prior unrelated projects). We do not believe any such current conflict of interests exists in this case. NextG decided to hire Dr. Bushberg because the County staff had previously told NextG that Dr. Bushberg was a trusted third-party expert that the County believed would provide an honest evaluation. If anything, the fact that the County has previously relied on Dr. Bushberg should make him all the more credible.

VII. "Franchise/sublease issues"

Supervisor Carbajal suggested in the hearing that Southern California Edison ("SCE") may somehow be violating its franchise with the County by "subleasing" its poles to NextG. This is simply not the case, as NextG has already acquired joint-ownership rights in the relevant SCE poles by virtue of NextG's membership in the Southern California Joint Pole Committee, a cooperative organization that has existed for more than 100 years. There is nothing in the County's franchise agreement that could possibly derogate NextG's ownership rights in the SCE poles. This has been comprehensively addressed in a letter to Michael R. Ledbetter dated October 20, 2009, addressing, among other matters, NextG's rights under § 224 of the Telecommunications Act of 1996 to access the poles of investor-owned utilities such as SCE to deploy its telecommunications networks.

VIII. "Cumulative impacts of such facilities and potential evaluation of high use and/or high risk sites such as schools and heath facilities."

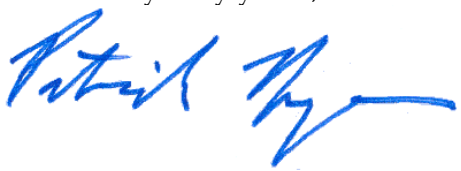
We draw the Board's attention to the attached report, which contains empirical, cumulative test data on an installation in the area and demonstrates that the installation's RF emissions arebelow one percent (1%) of the applicable standard.

CONCLUSION

NextG has made an application to the County to install "very small facilities" on existing utility poles under the County's Tier 1 administrative process. The application is consistent not only with the County's stated preference for this type of facility but with NextG's rights as a statewide franchise holder under P.U. Code § 7901. In the face of such a lawful application under the County's own ordinance the Board has clearly stated its determination to re-evaluate its ordinance and to attempt to regulate in areas that have been preempted by state and federal law. Additionally, the Board has clearly influenced the staff's disposition on NextG's permitting—which is administrative—and has delayed the project.

In order to avoid further escalation, NextG requests that the Board immediately direct staff that NextG's existing completed applications are exempt from any proposed future revisions to the County's ordinances so that the County staff can proceed with its permitting of the applications under the County's code. NextG further requests the immediate ability to continue the installation of its fiber backbone on existing aerial utility poles.

Very truly yours,



Patrick S. Ryan
VP of Government Relations and Regulatory Affairs

cc: Robert L. Delsman, Esq. (General Counsel, NextG Networks, Inc)
T Scott Thompson, Esq. (Davis, Wright & Tremaine)
Michael Munuz (County Counsel's Office)
Michael Ledbetter (County Counsel's Office)

Encl: Cumulative Report from Dr. Jerrold Bushberg dated October 23, 2009