

**ATTACHMENT F: APPEAL APPLICATION WITH ATTACHMENTS**



## PLANNING & DEVELOPMENT APPEAL FORM

SITE ADDRESS: Public right-of-way on Santa Rosa Lane, Montecito

ASSESSOR PARCEL NUMBER: Adjacent to APN 007-290-006

SIZE (acres/sq.ft.): Gross N/A Net N/A

COMPREHENSIVE/COASTAL PLAN DESIGNATION: \_\_\_\_\_ ZONING: 20-R-1

Are there previous permits/applications? ☒no ☐yes numbers: \_\_\_\_\_  
(include permit# & lot # if tract)

Are there previous environmental (CEQA) documents? ☒no ☐yes numbers: \_\_\_\_\_

1. Appellant: NextG Networks of California, Inc. Phone: (408) 954-1580 FAX: (408) 383-5397

Mailing Address: 2216 O'Toole Ave. San Jose CA 95131 Website: www.nextgnetworks.net  
Street City State Zip

2. Owner: \_\_\_\_\_ Phone: \_\_\_\_\_ FAX: \_\_\_\_\_

Mailing Address: \_\_\_\_\_ E-mail: \_\_\_\_\_  
Street City State Zip

3. Agent: \_\_\_\_\_ Phone: \_\_\_\_\_ FAX: \_\_\_\_\_

Mailing Address: \_\_\_\_\_ E-mail: \_\_\_\_\_  
Street City State Zip

4. Attorney: Patrick S. Ryan Phone: (303) 835-3574 FAX: (303) 265-9737

Mailing Address: 1444 Blake Street Denver CO 80202 E-mail: pryan@nextgnetworks.net  
Street City State Zip

### COUNTY USE ONLY

Case Num **10APL-00000-00017**  
Supervi.  
Applica. NEXTG NETWORKS CELLULAR ANTENNA #ES  
Project SANTA ROSA LN 8/9/10  
Zoning SANTA BARBARA 111-111-111

Companion Case Number: \_\_\_\_\_  
Submittal Date: \_\_\_\_\_  
Receipt Number: \_\_\_\_\_  
Accepted for Processing \_\_\_\_\_  
Comp. Plan Designation \_\_\_\_\_

COUNTY OF SANTA BARBARA APPEAL TO THE :

☒ BOARD OF SUPERVISORS

☐ PLANNING COMMISSION: ☐ COUNTY ☐ MONTECITO

RE: Project Title NextG Networks of California, Inc. ESB11

Case No. 10APL-00000-00014 (10CDP-00000-00032)

Date of Action August 3, 2010

I hereby appeal the ☐ approval ☐ approval w/conditions ☒ denial of the:

☐ Board of Architectural Review – Which Board?

☒ Coastal Development Permit decision

☐ Land Use Permit decision

☐ Planning Commission decision – Which Commission?

☐ Planning & Development Director decision

☐ Zoning Administrator decision

Is the appellant the applicant or an aggrieved party?

☒ Applicant

☐ Aggrieved party – if you are not the applicant, provide an explanation of how you are and "aggrieved party" as defined on page two of this appeal form:

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Reason of grounds for the appeal – Write the reason for the appeal below or submit 8 copies of your appeal letter that addresses the appeal requirements listed on page two of this appeal form:

- A clear, complete and concise statement of the reasons why the decision or determination is inconsistent with the provisions and purposes of the County's Zoning Ordinances or other applicable law; and
- Grounds shall be specifically stated if it is claimed that there was error or abuse of discretion, or lack of a fair and impartial hearing, or that the decision is not supported by the evidence presented for consideration, or that there is significant new evidence relevant to the decision which could not have been presented at the time the decision was made.

As more fully set forth in the attached appeal letter, NextG appeals the Montecito Planning Commission decision in 10 APL-00000-00015 and 10CDP-00000-00032. The evidence demonstrates that the proposed facilities do comply with the Montecito Community Plan MLUDC 35-169.5.1; the facilities are compatible with a semi-rural residential area MLUDC 35-144F.7.1; the facilities do minimize visibility from public view MLUDC 35-144F.7.2; the facility is designed to blend into the surrounding environment to the greatest extent feasible MLUDC 35-144F.7.3; and the facility does comply with required development standards MLUDC 35-144F.4.3.c. The Commission's denial is clear error, arbitrary and capricious, contrary to law, and not supported by substantial evidence.

Also see attached appeal letter.

Specific conditions imposed which I wish to appeal are (if applicable):

- See attached appeal letter.
- 
- 
-

**Please include any other information you feel is relevant to this application.**

**CERTIFICATION OF ACCURACY AND COMPLETENESS** Signatures must be completed for each line. If one or more of the parties are the same, please re-sign the applicable line.

Applicant's signature authorizes County staff to enter the property described above for the purposes of inspection.

*I hereby declare under penalty of perjury that the information contained in this application and all attached materials are correct, true and complete. I acknowledge and agree that the County of Santa Barbara is relying on the accuracy of this information and my representations in order to process this application and that any permits issued by the County may be rescinded if it is determined that the information and materials submitted are not true and correct. I further acknowledge that I may be liable for any costs associated with rescission of such permits.*

NextG Networks of California, Inc. by Patrick S. Ryan

Print name and sign – Firm

Date

Patrick S. Ryan, V.P. of Government Relations and Regulatory Affairs

Print name and sign - Preparer of this form

Date

NextG Networks of California, Inc. by Patrick S. Ryan

Print name and sign - Applicant

Date

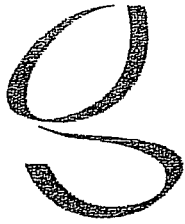
8-9-10

Print name and sign - Agent

Date

Print name and sign - Landowner

Date



**NextG Networks**

EMPOWERING NEXT GENERATION WIRELESS  
NETWORKS

**Corporate Headquarters:**

NextG Networks, Inc.  
2216 O'Toole Ave.  
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August 9, 2010

COUNTY OF SANTA BARBARA

Chair Janet Wolf

and Members of the Board of Supervisors

105 East Anapamu Street

Santa Barbara, CA 93101

re: *Appeal to NextG Application 10APL-00000-00014*  
*Montecito Planning Commission Hearing of July 28, 2010*

Dear Chair Wolf and Supervisors:

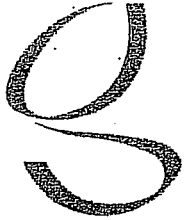
NextG Networks of California, Inc. ("NextG") hereby files its appeal to the above-captioned application. The findings made by the Montecito Planning Commission on July 28, 2010 are arbitrary and capricious, as has been the case in the other applications made by NextG in Montecito (but not elsewhere in the County). NextG holds a statewide franchise that authorizes NextG to make its deployments in public rights-of-way throughout the state pursuant to P.U. Code §7901. The County's Planning and Development staff also found that NextG's proposal meets with the requirements of the Tier I permitting process.

The issues raised in the above-referenced appeal are substantially identical to other appeals that NextG has on file with the Board of Supervisors, and for this reason, NextG incorporates by reference its appeal dated May 7, 2010 as substantive responses to the issues raised. It is our understanding that these matters will be heard together, with all ten (10) locations that NextG has proposed in Montecito, on September 21, 2010. We hope to reach a resolution for the deployment of NextG's network in Montecito at that hearing.

Very truly yours,

Patrick S. Ryan  
VP of Government Relations and  
Regulatory Affairs

Encl: Appeal form, fee, letter of May 7, 2010



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May 7, 2010

COUNTY OF SANTA BARBARA  
Chair Janet Wolf  
and Members of the Board of Supervisors  
105 East Anapamu Street  
Santa Barbara, CA 93101

Re: *Appeal of the Denial of NextG's Land Use Permit #ESB15  
10APL-00000-00011*

Dear Chair Wolf and Supervisors:

Pursuant to Section 35.492.050 of the Montecito Land Use and Development Code ("MLUDC"), and in connection with the Santa Barbara County Appeal Application attached hereto, Appellant NextG Networks of California, Inc. ("NextG") hereby appeals the decision of the Montecito Planning Commission ~~(the "Commission")~~ reversing the approval by the County Planning and Development Department ("P&D") of Land Use Permit No. 09LUP-00000-00320.<sup>1</sup> While many of the issues presented by the appellants and stated by the Commission are ostensibly based on aesthetic and other matters, in fact, there is a very clear record in this case and others in Montecito that the denial is based on unfounded fears of electromagnetic frequencies ("EMF"). The site is near the Montecito Union School, as described in a letter and a resolution from the Montecito Union School, which included a Board resolution from the school, and came on the heels of numerous emails from concerned parents about health. There are also numerous public statements on the record by the Board of Supervisors, as well as in the press, that indicate the Board's predisposal to deny the site based on EMF. Without question, EMF is clearly the driving force behind the Commission's denial will be elaborated upon in Section I, below, in spite of the fact that EMF is not a valid grounds for denial.

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<sup>1</sup> NextG notes that the Santa Barbara Board of Supervisors has, in a previous appeal involving seven nodes, recused the Commission from consideration of earlier-filed appeals of NextG installations substantially similar to this present appeal. To the extent that the grounds for recusal of the Commission in the prior action are applicable here, the Commission should have been recused from acting on this appeal.

The application at issue here is for the installation of a "very small" wireless telecommunications antenna and associated equipment, as defined by MLUDC § 35.444.010.C.1, on an existing utility pole in the public right of way. NextG's antenna and equipment is in fact smaller and less intrusive than many other utility and communications attachments to the same and surrounding utility poles – a point acknowledged by the Commission and the citizen opponents of NextG's permit. As demonstrated by the photograph and photosimulation that accompany NextG's initial application (attached hereto), NextG's facilities present an extremely low visual impact, blending into the already existing utility right of way facilities. There are already at least two other utility companies attached to these poles and approximately four fiber splice equipment enclosures on the strands, each of which is larger than NextG's antenna, and for which it is our understanding that no planning approval was required.

The County and Montecito have already determined in the MLUDC that "very small facilities" precisely like NextG's are the least intrusive means of closing gaps in wireless coverage. As discussed below, the County and Montecito have adopted Code provisions that recognize that facilities that are the size of NextG's, installed on utility poles in the public right of way, are most favored options for installing wireless telecommunications facilities because they will have no adverse impact. Having reached that conclusion and created a process to promote the deployment of such facilities, the County cannot now deny NextG's application.

As demonstrated below, the Commission erred in denying NextG's application. NextG's node meets all the requirements set forth in the MLUDC and was properly granted as Tier 1 facility by P&D. In particular, NextG's proposed node is consistent with the community plan, minimally intrusive and blends into and is compatible with its surrounding environment. It is clear that the Commission has denied NextG's application as an attempt to regulate the placement of wireless equipment based on concerns regarding radio frequency emissions.

Accordingly, the Commission's decision must be reversed and the P&D's decision granting 09LUP-00000-00320 must be reinstated.

### *I. EMF Concerns*

While the residents and the Commission have recently sought to justify their opposition on allegedly aesthetic and other concerns, in reality, the core of the issue here is an unfounded fear of EMF. Indeed, this particular location (and the nearby school) has been the subject of considerable attention on that very issue. At the October 20, 2009 Board of Supervisors meeting, more than two hours of testimony was dedicated to an in depth discussion of EMF issues, and numerous Supervisors made public statements on the point. At that particular meeting, several high-profile public participants, including celebrity William Baldwin, addressed the Board and specifically implored the County to



deny the node currently under appeal because of its proximity to the Montecito Union School and concerns over the health implications of EMF exposure. As a result, several supervisors made statements on the record and were quoted in the press thereafter voicing their concerns on the topic, including the Chair, Janet Wolf, who stated the intention to "look at . . . saturation, cumulative impacts, the location of being near residences, schools, etc."<sup>2</sup> Supervisor Doreen Farr told a reporter that "at the heart of it is the fact that we really don't yet accept or trust the FCC standards."<sup>3</sup> Similarly, former Chair Joe Centeno told the press in the context of EMF that "we learn things we used to do, we ought not to be doing anymore because they're harmful for us."<sup>4</sup> Clearly, despite the attempt to pay lip service to aesthetic and other concerns, the core basis for these appeals and subsequent denials of NextG's nodes in Montecito are rooted in these unfounded concerns over EMF emissions, and as Supervisor Farr stated, a fundamental lack of "trust" in the FCC standards (even though NextG's proposal is less than 1% of the standard). A November 2009 letter from the Montecito Union School sent to NextG included a copy of the school's Board Resolution 09/10-4, which openly states that the school and the community have significant concerns about EMF and that NextG's "proposal hits an emotional trigger for all of us involved in the EMF issue." A copy of the letter and the resolution from the Montecito Union School is enclosed. Additionally, we have received copies on emails that involved the entire parents' association for the school, focused on the EMF fears, and clearly driving the community to seek a denial for those reasons.

The matter of EMF and NextG's compliance with FCC standards has been exhaustively addressed by NextG in correspondence with staff, and at the October 20, 2009 hearing (through the testimony of Dr. Jerrold Bushberg), as well as in letters that the undersigned has filed with the County dated October 14, 2009, October 26, 2009, and November 14, 2009. Copies of these letters are enclosed and submitted for the record in this case. These letters outline in considerable detail studies NextG has undertaken showing that the actual EMF measurements of NextG's nodes are less than one half of 1% of the applicable federal limits. Moreover, the letters explain that EMF considerations are completely and exclusively the province of the FCC. In other, similar contexts in California, courts have readily seen through a locality's pretextual justifications for denial and have reversed local decisions where a denial is clearly due, as it is here, to the overwhelming concern over EMF issues.<sup>5</sup> Given the overwhelming evidence that includes press statements, the school's resolution, and other statements on record by the Board of Supervisors, EMF is, quite clearly, the driving force behind the appeals here.

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<sup>2</sup> Television interview with Channel 3 News of October 20, 2009.

<sup>3</sup> Interview published in *Noozhawk*, October 21, 2009.

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F.Supp.2d 1148, 1163 (S.D. Cal. 2003). ("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.")

## *II. Additional Background*

On March 12, 2010, P&D issued its notice and intent to approve NextG's application ESB15 and grant land use permit 09LUP-00000-00320. By letter to the Commission, a group of eight individuals appealed P&D's approval of this land use permit. By letter dated April 26, 2010, NextG responded to the appeal letter in support of P&D's approvals.

At its meeting on April 28, 2010, the Commission, by a 4-to-1 vote<sup>6</sup>, upheld the appeal, overruling P&D's approval of 09LUP-00000-00320. In doing so, although presented with the same evidence, the Commission disregarded the Staff's recommendations and proposed findings.<sup>7</sup> Instead, the Commission summarily asserted that (1) the proposed node is inconsistent with Montecito Community Plan Goal LU-M-2 to preserve the semi-rural character of the community, (2) the proposed node is not located to minimize its visibility from public view, (3) the proposed node is not designed to blend into the surrounding environment to the greatest extent feasible, and (4) that the proposed node does not meet the undergrounding standards. These conclusions are belied by the facts and evidence, and moreover are not reasonable justifiable grounds for denial of 09LUP-00000-00320. They are nonetheless addressed below.

## *III. The Commission's Decision Is Inconsistent With Law*

### *NextG's Proposed Node Must Be Granted As A Tier 1 Facility*

The Commission, just like P&D and this Board, is bound by all applicable federal, state and local laws, including in particular the MLUDC. The Commission's decision to overturn P&D's well-considered and well-founded approval constitutes an abuse of discretion because it is not supported by the evidence and is inconsistent with the clear language and authorization of the MLUDC. Put plainly, the Commission's decision violates the MLUDC. It also violates Section 7901 of the Public Utilities Code and unlawfully seeks to regulate the placement of wireless facilities based on EMF.

The MLUDC sets forth standards and processes by which wireless telecommunications facilities may be permitted within Montecito. The purpose of these standards and processes is to promote the orderly development of commercial telecommunications facilities and ensure compatibility with surrounding land uses. MLUDC § 35.444.010.A. Specifically, MLUDC § 35.444.0010.C establishes what types and sizes of commercial telecommunications facilities are compatible with surrounding land uses, and set forth processing requirements to permit those facilities.

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<sup>6</sup> Importantly, Commission Chairman Michael Phillips recognized that federal, State, and local law requires approval of the land use permit, whether the Commission wants this technology or not.

<sup>7</sup> Copies of the Staff Report and Proposed Findings are attached hereto.

The permit at issue here would authorize a single distinct "node" installation on an existing pole in Montecito within Santa Barbara County. The node consists of a singular omnidirectional "whip" (or "stick") antenna that is approximately one inch in diameter (essentially the diameter of a broom stick) and twenty-four inches tall, and associated equipment that is approximately six inches deep, six inches wide, and thirty-three inches long, both of which will be attached to an existing utility pole in the public right of way and painted to blend in with the pole to which it is attached. The node, along with associated fiber optic lines (which are already installed) will enable NextG to provide telecommunications services to licensed wireless telecommunications providers and other large users of telecommunications.<sup>8</sup>

Accordingly, NextG's node at issue here falls under the definitions of "Telecommunications Facility" and "Wireless Telecommunications Facility" set forth in the MLUDC,<sup>9</sup> and thus is subject to the permit requirements and siting and development standards established in the MLUDC.

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<sup>8</sup> Consistent with the County's permitting practice and permitting exemptions, the fiber-optic lines have, for the most part, already been installed through the Community, and are not subject to any appeal.

<sup>9</sup> MLUDC Section 35.500.010 defines "Telecommunications Facility" as:

A facility that transmits or receives electromagnetic signals for communication purposes including data transfer. It includes antennas, microwave dishes, horns, and other types of equipment for the transmission or reception of such signals; telecommunication towers or similar structures supporting said equipment; equipment buildings; parking areas; and other accessory development. It does not include facilities staffed with other than occasional maintenance and installation personnel or broadcast studios.

Likewise, MLUDC Section 35.500.010 defines "Wireless Telecommunications Facility" as:

A commercial facility that transmits and/or receives radio communication signals through the air for cellular, personal communication services, pagers, and/or similar services. The facility may include: antennas, radio transmitters, equipment shelter or cabinet, air vents, antenna support structure, air conditioning units, fire suppression systems, and emergency back-up generators including fuel storage.

MLUDC § 35.444.010.C outlines a multi-level, tiered system for considering and permitting commercial telecommunications facilities. As the size and intrusiveness of the proposed facilities increase, so too does the applicable tier, applying progressively more stringent siting restrictions and approval requirements. For example, Tier 1 projects are categorized as "very small facilities" under the code and require only ministerial approval of a Land Use or Coastal Development Permit, while Tier 4 projects require a Major Conditional Use Permit, approval of which requires a more extensive application process and public hearings. MLUDC § 35.44.010, Table 4-10.

Under the MLUDC, commercial telecommunications facilities, like NextG's proposed node, are permitted in all zones as Tier 1 commercial facilities, requiring only a ministerial grant of a Land Use or Coastal Development Permit if they are wireless telecommunications facilities that comply with the following:

- (1) Antennas shall be limited to ~~panel antennas or~~ omnidirectional antennas. Antennas and associated equipment shall not exceed a combined volume of one cubic foot.
- (2) The antenna shall be mounted on either an existing operational public utility pole or similar support structure (e.g., streetlight standard) that is not being considered for removal, as determined by the Director, or the roof of an existing structure. More than two antennas shall not be located on a single utility pole or similar structure unless it is determined that there will not be a negative visual impact. If at a later date the utility poles are proposed for removal as part of the undergrounding of the utility lines, the permit for the facilities shall be null and void.
- (3) The highest point of the antenna either does not exceed the height of the existing utility pole or similar support structure that it is mounted on, or in the case of an omnidirectional antenna, the highest point of the antenna is no higher than 40 inches above the height of the structure at the location where it is mounted.

MLUDC § 35.444.010.C.1.

There is no dispute by P&D in this case that NextG's node consists of a single omnidirectional antenna and associated equipment that is approximately 1,212 cubic inches – or approximately 500 cubic inches less than one cubic foot. The node includes only one antenna, and is to be mounted on an existing operational public utility pole that based upon P&D's original approval is not being considered for removal. Clearly, P&D correctly determined that NextG's proposed node-complies with the Tier 1 standard, and

is a permitted facility requiring only a ministerial grant of a Land Use Permit. The Commission made no findings to the contrary and was presented with no evidence to the contrary by any appellant, thus it abused its discretion and acted contrary to law in denying 09LUP-00000-00320, when all the evidence shows that it is a properly permitted Tier 1 commercial telecommunications facility.

While the Commission's written findings did not specifically address the issue, to the extent that the Commission's decision was premised on the argument, put forward by the initial citizens' appeal, that this single node should be treated not as an individual installation under the Tier 1 process, but should be considered a component of NextG's entire proposed Distributed Antenna System ("DAS") network, which should be considered as a whole under the Tier 4 framework, such a consideration is impossible and inappropriate. The only facility at issue on this appeal and addressed by the Commission is a single node installation. Furthermore, the MLUDC establishes that the Tier 4 permitting standards are applicable to:

a. Wireless telecommunication facilities *that may not be permitted in compliance with Subsection C.1 through Subsection C.3 above* but do comply with the following development standards, may be allowed.

(1) The height of the antenna and associated antenna support structures shall not exceed 75 feet.

(2) The base of a new freestanding antenna support structure shall be set back from a lot with a residential zone designation a distance equal to five times the height of the antenna and antenna support structure, or 300 feet, whichever is greater.

(3) If the facility is proposed to be located on a lot with a residential zone designation as identified in Section 35.404.020 (Zoning Map and Zones), or on a lot with a Recreation (REC) zone designation, or does not comply with Subsection 4.a.(2) above, the Montecito Commission, in order to approve a Conditional Use Permit, shall also find that the area proposed to be served by the telecommunications facility would otherwise not be served by the carrier proposing the facility.

b. Other telecommunication facilities as follows are allowed in nonresidential zones as identified in Section 35.404.020 (Zoning Map and Zones):

(1) Facilities that are subject to regulation by the Federal Communications Commission or the California Public Utilities

(e.g., AM/FM radio stations, television stations). Such facilities may include: equipment shelters, antennas, antenna support structures, and other appurtenant equipment related to communication facilities for the transmission or reception of radio, television, and communication signals.

(2) Other commercial telecommunication facilities that exceed 50 feet in height.

These do not include wireless telecommunication facilities that are subject to the provisions of C.4.a. above, or amateur radio facilities that are subject to the provisions of Section 35.444.020 (Noncommercial Telecommunication Facilities).

MLUDC § 35.444.010.C.4 (emphasis added). The plain language of the Code makes clear that Tier 4 is not the applicable standard for wireless telecommunication facilities that may be permitted under any other processing tier. Because NextG's Node falls squarely within the definition of Tier 1, it cannot be Tier 4.

Upon deeper investigation into the Tier 4 standard, it is clear that the description of facilities to which Tier 4 processing applies does not remotely resemble the proposed nodes in NextG's DAS network, much less this particular single node. Tier 4 clearly contemplates large, freestanding structures like traditional cell towers or monopoles. NextG's small omnidirectional antennas and equipment attached to existing public utility poles in the public rights-of-way are nothing like the larger freestanding support structures Tier 4 encompasses. Based on the language and specifications in the MLUDC for Tier 4 permitting, it is nonsensical to even attempt to apply Tier 4 standards to the proposed node in question.

If the Commission determined that Tier 4 is the appropriate standard for the single node site at issue, that decision is illogical and indefensible based on NextG's equipment specifications, which are undisputed, and the plain language of the MLUDC. Nothing in MLUDC § 35.444.01, contemplates treating a single distinct installation that happens to be connected to other facilities via fiber optic lines under a collective permitting process, nor does the MLUDC grant the Commission the authority to make such a decision. As explained above, the node at issue here clearly meets the Tier 1 standard for approval.

Moreover, when NextG first approached P&D about the permitting process in 2004 and 2005, and then specifically with the current DAS network project in early 2009, the various permitting processes under the MLUDC were discussed. The requirements of the code were considered and P&D determined that under the requirements of the MLUDC each individual node installation would require a permit, but that the network as a whole was governed by Section 7901 of the California Public Utilities Code and Sections 253 and 332 of the Federal Telecommunications Act (47 U.S.C. § 253; 47 U.S.C. § 332). The

Commission's decision ignores local, state, and federal laws governing NextG's network, and this individual application in particular.

#### *IV. NextG's Proposed Node Is Consistent with the Montecito Community Plan*

From their deliberations, we understand that the Commission erroneously claims that NextG's proposed node is inconsistent with Montecito Community Plan Goal LU-M-2. Goal LU-M-2 establishes as a goal to "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." As explained fully above, the node at issue is what the MLUDC defines as a "very small" facility that will be located on an operational and occupied public utility pole. NextG's installation of its node will do nothing to alter the already existing character of the road and the utilities in the public rights of way. The Commission's decision improperly denies NextG's application based on objections to the pre-existing facilities in the right of way, not NextG's.

As the challengers and Commission noted, School House Road, the proposed location of the node at issue, already has multiple utility poles housing various utility lines and equipment. Accordingly, NextG's very small facilities would be completely consistent with the existing character and nature of the School House Road. Indeed, as addressed below, the addition of NextG's node would hardly be noticed among the existing right-of-way infrastructure.

Perversely, the Commission attempts to rely on that very point to assert that NextG's proposed node is inconsistent with the Montecito Community Plan. After acknowledging the prevalence of utility poles and infrastructure in the public rights of way on School House Road, the Commission asserts that the addition of NextG's very small facility will "exacerbate the already diminished semi-rural character of the roadway." The Commission is essentially acknowledging that the proposed node is completely consistent with the current character of the roadway, but seeks to deny NextG's permit because it wishes the roadway were *more* rural than it actually is. NextG's node does nothing to diminish the current semi-rural nature of the roadway and thus is consistent with Montecito Community Plan Goal LU-M-2.

Moreover, to the extent the Commission's determination that NextG's node may be denied based on a theory that it is the proverbial straw that broke the camels back would violate Public Utilities Code Section 7901 and 7901.1. Under Section 7901 of the California Public Utilities Code, NextG has a statewide franchise to construct its equipment "to facilitate communication by telephone," in the public rights of way. NextG has an absolute right to deploy its facilities in the public rights of way that cannot be denied. Additionally, under Section 7901.1 of the Public Utilities Code, local regulations governing right of way deployment must treat all entities equally. Thus, neither the Commission, nor

the Board, can deny NextG the right to install its equipment on an existing utility pole where all other telephone and utility companies have already been allowed to do so.

#### *V. NextG's Proposed Node Is Located To Minimize Its Visibility From Public View*

As P&D found in initially approving the permit at issue, NextG's proposed facility is located to minimize its visibility from public view as required by MLUDC § 35.444.010.G.2. Specifically, the singular whip antenna that is approximately 24 inches long and its associated facilities which are similarly small in stature are designed to blend in with their surrounding environment and be minimally visible. Indeed, the node is to be mounted on an existing, occupied public utility pole that is a part of the existing landscape amongst surrounding trees and developments, including other existing on pole utility boxes, cables, and transformers. Additionally, the facility will be painted brown to blend in with the pole to which it is attached and, because it is narrower than the pole itself, will not extend past the profile of the pole. All of these precautions ensure that the facility will be minimally visually intrusive and in compliance with MLUDC § 35.444.010.G.2.

Despite these facts, the Commission apparently found that because NextG's node would be placed on a utility pole that is visible to the public – at all – the node would also be visible and thus did not meet the requirement that it be located to minimize its visibility from public view.

The requirement that a telecommunication facility be located to minimize its visibility from public view does not demand that the facility be invisible from public view. Indeed, as discussed below, the MLUDC requires that NextG's proposed installation be co-located on an existing structure, such as a public utility pole. Utility poles, including the one at issue here, are typically located in the public rights of way, and by their very nature, are visible from the public view. Accordingly, it cannot be, as the Commission's denial would have it, that telecommunications facilities that are at all visible cannot comply with MLUDC § 35.444.010.G.2. Such a reading would amount to an absolute prohibition on the installation of telecommunications facilities in Montecito, and thus would violate Sections 253 and 332(c)(7) of the federal Communications Act. It also would violate Section 7901 of the Public Utilities Code. NextG's proposed node is a very small facility that is designed and painted to blend into the utility infrastructure to which it is attached, thus minimizing its visibility from the public view.

#### *VI. NextG's Proposed Node Is Compatible With And Blends In With The Surrounding Environment*

As discussed above, evidenced by the attached photograph, and admitted by opponents of NextG's proposed node at the April 28, 2010 hearing before the Commission, the node at issue here will be attached to a pole that already has utility infrastructure and equipment attached to it. Likewise, numerous other utility poles in the area have



overhead equipment and lines attached to them. The surrounding environment NextG seeks to attach its node to is in fact the existing above ground right of way infrastructure, and as stressed above, NextG's very small facility will be painted to blend in with the utility pole and will be but another attachment among many in the surrounding public rights of way. There is no evidence, and there could be no evidence, that NextG's very small antenna and associated equipment will not be compatible with the existing right of way infrastructure.

P&D's consideration of those very facts is enough to support their finding that the facility at issue here is compatible with the existing and surrounding development. The Commission erred in ignoring P&D's decision on this point. Moreover, to the extent the Commission's denial is based on the type of facility NextG is installing, its decision is preempted by State and federal law. As explained above, NextG has a statewide franchise to construct its equipment "to facilitate communication by telephone," in the public rights of way under Section 7901, and thus they are a compatible use in the public rights of way. Neither the Commission, nor this Board, have the option of finding that "no project" is an appropriate "alternative," as argued by the challengers. NextG has an absolute right to deploy its facilities in the public rights of way that cannot be denied out-of-hand, as is currently happening not just in this case, but elsewhere in Montecito. Likewise, under Section 7901.1, local regulations governing right of way deployment must treat all entities equally. Thus, neither the Commission, nor the Board, can deny NextG the right to install its equipment on an existing utility pole where all other telephone and utility companies have already been allowed to do so.

#### *VII. There Is No Applicable Undergrounding Standard That Supports Denial Of NextG's Proposed Node*

In a note handed to Ms. Sharon James after the Commission's hearing—purporting to provide one of the bases relied upon in denying NextG's permit—the Commission indicated that NextG's proposed node does not meet the undergrounding standard. This position is essentially adopted in the Commission's finding 2.2.4. Yet, there are no undergrounding standards in Montecito at the site in question. Further, there are no undergrounding standards applicable to NextG's proposed node found anywhere in federal, State, or local law. Accordingly 09LUP-00000-00320 must be granted and the Commission's decision reversed.

The Commission's finding references "Development Standard 2d," which appears to be a reference to MLUDC § 35.444.010.D.2.d, as grounds for denying NextG's application. However, NextG's proposed node is exempt from the requirements of MLUDC § 35.444.010.D.2.d. NextG's proposed facility does not include any "support facilities" identified by that section. That provision refers to large intrusive and cumbersome support facilities such as vaults, equipment rooms, utilities, equipment enclosures. See MLUDC § 35.444.010.D.2.d. NextG's node consists of an antenna and its

associated equipment which, under Tier 1, is classified as a "very small facility" with a total volume of approximately 1,212 cubic inches – or approximately 500 cubic inches less than the one cubic foot of antenna and associated equipment allowed under Tier 1. See MLUDC § 35.444.010.C.1.a.1. Furthermore, not undergrounding NextG's proposed facilities eliminates the potential for harmful ground disturbing activities since NextG's facility may be attached to and blend in with an operational utility pole. Moreover even if MLUDC § 35.444.010.D.2.d was somehow applicable to NextG's proposed node, it is obviously not technically feasible to underground NextG's antenna and still provide service. Therefore, any such requirement would effectively prohibit NextG's deployment of its telecommunications facilities in violation of Sections 253 and 332 of the Telecommunications Act of 1996. 47 U.S.C. §§ 253 & 332(c)(7).

Likewise, evidence was presented to the Commission on the undergrounding standard adopted by the Montecito Association in its "Overhead Utility Policy." However, the Montecito Association's "Overhead-Utility Policy" is not grounds for denial of a land use permit and cannot be the basis for a decision by P&D, the Commission, or this Board. In addition to the fact that federal and state laws prohibit the County, or Montecito, from discriminating against NextG by prohibiting it from attaching to existing utility poles where other telephone corporations are allowed to attach, a wholesale undergrounding requirement is not in any of the applicable local Codes or ordinances. The policy adopted by the Montecito Association does not, and cannot, have any binding effect on P&D, the Commission, or the Board, each of whom is bound by federal, State, and local law, not by the goals of a community association. Thus, the Commission cannot overturn P&D's approval based on a desired goal of undergrounding all utilities.

Indeed, the establishment of an underground district is a formal process that is far beyond a community association's desires – even if a written desire by the Association – and requires that funds be allocated pursuant to the process set forth by the California Public Utilities Commission ("CPUC") in Case No. 8209 (Sep. 19, 1967). Essentially, under the applicable CPUC tariffs and rules that apply, Southern California Edison (under Rule 20) and AT&T (under Rule 32) must be participants. Additionally, an official Underground Utility District ("UUD") must be formed, and a UUD can *only* be formed after consultation with the affected utilities and after a public hearing to establish the project. Santa Barbara County Code of Ordinances ("SBCCO") at Section 34-2. In Santa Barbara, this Board has established an Underground Utilities Committee, consisting of more than 24 members, which considers these issues. The pole in question is not subject to any approved UUD nor is it formally scheduled for any public hearing for consideration as such.

Ultimately, as applied, the Commission's denial on this ground violates Sections 7901 and 7901.1 of the California Public Utilities Code. There is undisputed evidence that other telephone corporations are, and have been, permitted to install facilities overhead on public utility poles in the public rights-of-way at the same location. Denying NextG an

equal opportunity to do the same is a blatant violation of Section 7901.1 of the California Public Utilities Code. Section 7901.1 requires that regulations governing right-of-way deployment by telephone corporations must treat all entities equally. The Commission acknowledged, and indeed relied upon, the existence of significant telecommunications and other utility infrastructure already present overhead on the pole in question, and surrounding poles. The County cannot now demand that NextG underground its facilities. Such a requirement is not "equivalent" treatment of all entities and violates Section 7901.1.

Notably, all of these points were made in our letter filed on April 26, 2010, and no one that opposed the appeal, or the Commission, addressed these points, and in particular, any legal basis for claiming that the utility poles in the area should somehow be treated as a de facto underground district absent any formal action. A copy of NextG's letter dated April 26, 2010 is attached hereto.

#### *VIII. NextG's Proposed Node Meets All Other Applicable MLUDC Requirements For Commercial Telecommunications Facilities*

Ultimately, the Commission found that NextG's application satisfied all other applicable requirements of the MLUDC. Nonetheless, because additional points were challenged by the initial citizens' appeal, NextG will address them briefly below.

As explained above, NextG's node facilities comply with and should be considered under the Tier 1 standard. Moreover, as the P&D staff correctly found in originally approving the permit, NextG's facilities also meet all the other development standards applicable to "Commercial Telecommunications Facilities" as outlined in MLUDC § 35.444.010.D.

NextG's proposed node need not comply with any setback requirements because it is to be located on an existing, operating public utility pole. MLUDC § 35.444.011.D.1.a. Also by virtue of its being attached to existing utility pole, NextG's proposed node will comply with all zoning height requirements and will be installed at a height above the reach of the general public, and thus in compliance with MLUDC § 35.444.010.D.1.b, c, & d. There is no basis to require more of a setback for the facility in question than the current setback that exists throughout Montecito for all utility poles and thus MLUDC § 35.444.011.D.1.a explicitly exempts antennas on utility poles from setback requirements.

Similarly, because NextG's proposed node will be attached to an existing utility pole, no new structures will be constructed that would require any ground disturbing activity. Therefore, the node will not disturb existing vegetation, environmentally sensitive areas, or prime agricultural soils, in compliance with MLUDC § 35.444.010.D.1.1 & D.2.b, e, & f.

The node at issue is not located in or on a designated historical landmark, and thus is in compliance with MLUDC § 35.444.010.D.1.e. NextG submitted a radiofrequency emissions report with its application. The report, by Jerrold Bushberg, Ph.D. dated April 29, 2009 establishes that the proposed facilities would meet the FCC's emissions requirements, as required by MLUDC § 35.444.010.D.1.f. The proposed facility is to be located in the public right-of-way, thus, in compliance with MLUDC § 35.444.010.D.1.g, there are already roads available to access the facility, and any temporary parking necessary will be provided by existing public parking in the surrounding area. NextG's proposed node does not include any lights or lighting, therefore it complies with MLUDC § 35.444.010.D.1.h. The proposed facility is not located within an airport safety zone. MLUDC § 35.444.010.D.1.i. NextG's node is proposed to be painted with non-reflective brown paint to match the pole to which it will attach. See MLUDC § 35.444.010.D.1.j & k. NextG's node will derive its electric power from Southern California Edison on the utility poles to which it is attached. NextG does not propose any new utility conduits or back-up generators to supply power to its facility in compliance with MLUDC § 35.444.010.D.2.a.

#### *IX. NextG Is Not Required To Establish That A Gap In Service Exists Or Eliminate Potential Alternative Sites*

NextG has no explicit statement from the Commission, but to the extent the Commission overturned P&D's decision to approve 09LUP-00000-00320 based on the argument that NextG has not established that there is a gap in service that needs to be filled or gone through an analysis of potential alternatives, the Board must reverse the Commission's decision and reinstate P&D's approval. There is no requirement in the MLUDC or any other County Code requiring that NextG establish such a gap or demonstrate the lack of alternatives. Accordingly, it cannot be grounds for denial of NextG's permit.

Indeed, the County and the Commission are prohibited from denying NextG access to the public rights of way based on alleged potential alternative locations, and NextG is not required to demonstrate a gap in service that creates a need for the deployment. Public Utilities Code § 7901 grants NextG a state-wide franchise to occupy the public rights of way that cannot be denied. In particular, it cannot be denied based on the assertion that there may be alternative locations for NextG to use, and NextG is not required to establish any "gap in service" that requires its deployment. Pursuant to California law, NextG is a "telephone corporation" that constructs "telephone lines." Section 7901 of the California Public Utilities Code grants "telephone corporations" an absolute right to deploy their "telephone lines" in the public rights of way throughout the state. The Public Utilities Code defines "telephone lines" to include "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wire." Cal. Pub. Util. Code § 233. Accordingly, the

California Legislature has decided that installation of telephone lines, such as NextG's equipment, on utility poles in the public rights of way is compatible with the use and location of public utility poles generally.

Moreover, even if alternative options were within the province of the Commission or the Board to consider, the evidence shows that NextG considered such alternatives before deciding on the node location at issue here. The alternative options are part of the published online record, and they were discussed by NextG representatives at the hearing. In fact, the location at issue here is the result of such alternative analysis performed by NextG. NextG initially proposed a site on San Ysidro Lane that was more attractive to NextG from an engineering perspective, but was also closer to the nearby school. Although that site complied with all the relevant requirements of the MLUDC, in response to community feedback, NextG undertook an extensive search for alternative sites finding only one feasible alternative - the current proposed location. Despite NextG's efforts to accommodate community concern, it is clear that the Commission simply does not want any nodes in or near Montecito, period, creating a standard that can never be met.

#### *X. NextG's Proposed Node Meets All Relevant CEQA Requirements*

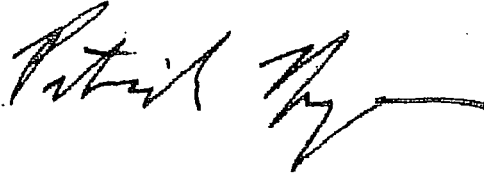
Finally, NextG has satisfied all relevant requirements under the California Environmental Quality Act ("CEQA"). The California Public Utilities Commission ("CPUC") is the only entity with broad discretionary decision-making authority over NextG's proposed services, facilities and construction throughout the state, and as such, is 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. The CPUC published a Notice of Exemption through the CEQA clearinghouse, and no party has challenged it. A copy of the Notice to Proceed that was issued by the CPUC on July 14, 2009, as well as the Notice of Exemption that was published by the CPUC, is attached.

#### *XI. Conclusion*

Clearly, as stated at the outset of this Appeal, the Commission is basing its decision on an irrational fear of EMF, as promoted in the Montecito Union School's resolution, and in numerous public statements that led up to the decision. Even if the Commission's findings were taken on face value, they are not supported by substantial evidence in the record. Indeed, the only evidence presented supports P&D's initial approval of 09LUP-00000-00320 for NextG's proposed node as a Tier 1 very small commercial telecommunications facility. General discontent regarding existing utility infrastructure in the public rights of way is not grounds for denying NextG's application. The MLUDC, Section 7901 of the California Public Utilities Code, and Sections 253 and 332 of the federal

Communications Act all require that NextG's permit be granted. Accordingly, the Board should overturn the Commission's decision, find that under the MLUDC this permit application qualifies as Tier 1 installation, and reinstate P&D's approval of 09LUP-00000-00320.

Very truly yours,



Patrick S. Ryan  
*Vice President of Government Relations  
& Regulatory Affairs*

Enclosures

1. Original Application Package
2. Application Form for Appeal
3. Appeal fee
4. CPUC Notice to Proceed
5. CPUC Notice of Exemption
6. Published Findings
7. Photographs and Photosimulations of Proposed Installation
8. NextG's April 26, 2010 Letter to the Montecito Planning Commission
9. Staff Report
10. Proposed Findings
11. Letters Regarding EMF dated October 14, 2009, October 26, 2009 and November 14, 2009.
12. Resolution from the Montecito Union School in November 2009

cc: Michael Ghizzoni, Esq. (County of Santa Barbara) (w/o Enclosures)