



VIA ELECTRONIC MAIL & REGULAR MAIL

March 7, 2012

Susan Craig
Supervising Coastal Planner
California Coastal Commission
725 Front Street, Suite 300
Santa Cruz, CA 95060

RE: Appeal A-3-SCO-12-006 (filed Feb. 28, 2012) of Santa Cruz County Application #111114 (submitted June 21, 2011)

Dear Ms. Craig:

Thank you for this opportunity to provide the Coastal Commission with information regarding the application of NextG Networks of California, Inc. ("NextG") for six microcell attachments on existing utility poles and one telecommunications hub in Santa Cruz County ("County").

NextG understands and shares the Coastal Commission's goal of limiting unnecessary construction in the coastal zone. The following details how NextG, as a telephone corporation, is deploying a network on existing infrastructure in order to meet that goal and avoid constructing new structures in the public right of way. By using existing infrastructure efficiently, NextG is a partner in preserving the rustic beauty of this portion of Highway 1.

About NextG and Its DAS Network

NextG holds valid and unrevoked Certificates of Public Convenience and Necessity ("CPCN") from the California Public Utilities Commission ("CPUC") in its Decisions No. 03-01-061, issued January 30, 2003, and No. 07-04-045, issued April 12, 2007, attached for your reference. These certificates authorize NextG to operate in the public streets and ways as a full-facilities based "telephone corporation." As a telephone corporation, NextG has a statewide franchise under California Public Utilities ("P.U.") Code § 7901, which includes, but is not limited to, the right to place equipment on existing utility poles.

NextG is not a "wireless carrier," but rather a competitive local exchange carrier similar to the traditional telephone company. The CPUC has repeatedly reaffirmed that NextG is a "telephone corporation" with rights under P.U. Code § 7901.¹ The CPUC is also NextG's lead agency for purpose of the California Environmental Quality Act ("CEQA") and has determined that

¹ *In re Application of NextG Networks of California, Inc. (U6745C) for Authority to Engage in Ground-Disturbing Outside Plant Construction*, CPUC D.10-10-007 (Oct. 18, 2010).

NextG's attachment of cables and equipment to existing poles—as is the case here—is exempt under CEQA.

The network NextG is in the process of completing is called a distributed antenna system (“DAS”) network. A DAS network is largely comprised of fiber optic cable, which NextG has constructed from the City of Santa Cruz to Swanton Road by attaching to existing utility poles or going in existing conduit. Four utility poles for this portion of the network will have small wireless equipment attachments and another will have emergency power equipment.²

NextG originally designed the network to include a stretch of fiber optic cable between both Swanton Road intersections, which would have required placing new poles in the public right of way; however, the County made it clear that it would not allow any new utility poles. Therefore, NextG had to abandon that five mile portion of the network, which eliminated the need for the telecommunications hub originally proposed for 25 Swanton Road and left the two nodes north of Swanton Road without fiber connectivity.

This area of rural Santa Cruz County lacks adequate, much less advanced, wireless voice and broadband services. As a wholesale provider, NextG's DAS network will indirectly provide these essential services to the residents, businesses, visitors, and travelers through this remote rural area. However, utility infrastructure is not new to this coastal corridor.

In California, telegraph companies were the first to construct long stretches of telegraph poles to support their copper wires. These wires were augmented with the invention of the telephone. With the invention and proliferation of electric services, telephone poles were replaced by much larger electric utility poles to support numerous wires and large transformer equipment required for electricity. The 1970s saw a proliferation of cable television companies attaching wires and equipment to this and other existing pole lines in order to provide these new services to customers. The pole line on which NextG is proposing its equipment contains utility poles that were constructed well over 50 years ago, and large installations of power and other types of equipment are visible on both the landward and seaward side of Highway 1. Cables and equipment for wireless broadband and voice services are only the most recent pole attachments installed on this pole line for the benefit of the customers in the area.

It is NextG's understanding that it will be the third company to install pole attached equipment on this pole line in support of wireless services. NextG designed its installations to be as small as possible to meet the functional requirements of the network and comply with CPUC General Order (“GO”) 95, which governs all attachments to utility poles. NextG's DAS network will provide more advanced services than the microcells previously permitted on the pole line—advanced 4G technology requires slightly larger equipment than the arbitrary dimensions contained in the County's zoning code. Also, emergency power supplies are essential in the event of the loss of primary power due to a storm or other natural disaster—a policy the Federal Communications Commission (“FCC”) began asserting in the aftermath of Hurricane Katrina. As such, NextG is requesting access to the existing pole line that has previously been granted to numerous companies for telephone, electric, cable and wireless service attachments.

² There are two locations (DAV09 and DAV10) with pole attached equipment north of the northern intersection of Swanton Road, but those locations do not have fiber connectivity at this time.

California Law for Telephone Corporations in the Public Right-of-Way

The State of California took a proactive approach to telecommunications facilities in the public right of way by passing P.U. Code § 7901, which states:

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

The California Supreme Court has provided direction on the intent of this statute towards local regulations: “[T]he right and obligation to construct and maintain telephone lines has become a matter of state concern. For this reason, the city cannot today exclude telephone lines from the streets upon the theory that ‘it is a municipal affair.’” *Pac. Tel. & Tel. Co. v. City & County of San Francisco*, 336 P.2d 514, 519 (1959). While there is some debate over whether local governments may have input regarding the aesthetics of the telecommunications equipment in the public rights of way, it is clear that they may not deny permits based solely on aesthetics. In this way, the discretionary authority of local jurisdictions is greatly limited when the telecommunications equipment, such as NextG’s, is in the public right of way.

NextG was concerned by the County’s disparate application of a zoning ordinance to only “wireless” telecommunications equipment in the public right of way, inconsistent with state law P.U. Code § 7901.1, which requires equal treatment of entities in the public right of way. However, NextG agreed to submit itself to the process because the County was willing to work with NextG to find an acceptable equipment configuration to fulfill the functional requirements of NextG’s network. Through cooperation, dialogue, and multiple concessions made by NextG, which will greatly reduce the functionality of the overall network, NextG and the County were able to come to agreement about the size and scope of the permit. Both the Zoning Administrator and Planning Commission have approved the permit, and NextG believed the Coastal Commission had no objection since NextG was never contacted nor had its calls returned over the previous nine months since the permit was submitted on June 21, 2011. As such, NextG believed the County, and by extension the Coastal Commission, would comply with state law to allow telecommunications facilities in the public right of way.

NextG encourages the Coastal Commission to understand the rights of telephone corporations to operate in the public rights of way. As mentioned above, NextG fiber optic cable is already attached to the existing pole line, but the network cannot function without the related equipment boxes. Multiple other entities have been allowed to attach their equipment, which is often bigger and on the seaward side, to this pole line. NextG is asking only that it be treated equally and allowed access to the poles for its equipment as well, as required by section 7901.

Additionally, the CPUC has already determined that NextG’s network is in full compliance with CEQA and issued a Notice of Exemption on October 7, 2011.

Local Law Is Preempted by State Law

In California, “[s]tate law pre-empts local legislation if an ordinance duplicates, contradicts, or enters an area fully occupied by the general laws, either expressly or by implication.” *Tily B., Inc. v. City of Newport Beach*, 69 Cal.App.4th 1, 81 Cal.Rptr.2d 6, 18 (1998). NextG explained to the County that to the extent its code was inconsistent with P.U. Code § 7901 and GO 95, it was preempted by state law.

The County complied with state laws (GO 95, § 7901) and federal law (the Telecommunications Act of 1996) by making exceptions to its code as necessary to avoid violating either state or federal laws, which both allow telecommunications infrastructure in the public rights of way and limit local jurisdictions from prohibiting them. NextG detailed why its facilities qualified for exceptions under the County’s code in sections 14 and 15 of the application submitted by NextG on June 21, 2011. NextG provided this application to you on March 1, 2012, and it has been available for review at the County or by request from NextG since June 21, 2011.

In its appeal, the Coastal Commission mentions a concern that the permit was not issued in compliance with the Local Coast Plan (“LCP”) because it makes exceptions to the code. However, as discussed above, these exceptions were necessary in order to avoid violating state and federal law. NextG requests the Coastal Commission acknowledge that state and federal laws preempt local codes to the extent they are inconsistent.

Coastal Zone Regulations Exceptions

It is also unclear that NextG should have ever been required to obtain a coastal development permit under Santa Cruz County Code (“SCCC”) section 13.20.063(a)(5), which states that telephone equipment may be exempt from the Coastal Zone Regulations if it is an “[i]nstallation of new safety devices . . . within existing structures or equipment where land coverage, height or bulk will not be increased.” This exemption will be granted so long as it complies with section 13.20.063(b).

NextG’s telecommunications equipment will be used for safety, particularly the expansion of e911 services, along portions of Highway 1 where there is currently inadequate or no service. The equipment does not expand the footprint of the existing utility pole line, which has multiple cross arms supporting electric and communications wires, cables and equipment. There will be no increase to land coverage, height or bulk, and thus it complies completely with the requirements of SCCC section 13.20.063(a). NextG’s proposed telephone equipment is also in compliance with section 13.20.063(b) because there will be (1) no construction of any new roads to the site of work; (2) no grading of any kind; (3) no clearing of sensitive habitat; (4) no clearing of any land; or (5) no cutting of any trees.

NextG considered requesting an exception to the coastal development permit, but because the County assured NextG that it would work with it to secure the permits, NextG agreed to follow the County’s extensive process to find an acceptable design. NextG had been told the Coastal Commission supported the design as well, particularly when the additional height of pole top

antennas was eliminated by placing them in the communications space, fully within the existing footprint of the utility pole.

Federal “Shot Clock” Law Governing Collocated Wireless Installations

NextG further requests the Coastal Commission acknowledge that this application is governed in part by *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, FCC Order 09-99 (Nov. 18, 2009) (“FCC Shot Clock Order”). According to the FCC Shot Clock, “[A] ‘reasonable period of time’ for a State or local government to act on a personal wireless service facility siting application is presumptively 90 days for collocation applications.” FCC Shot Clock Order ¶ 71. “‘Collocation’ means the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.” 47 CFR Part 1, App B.

NextG’s application contains six locations where wireless facilities are being collocated on existing utility poles. NextG requested the County comply with this federal law and approve NextG’s application within the timeline. The County requested additional time and NextG granted an extension until January 2, 2012. The letter explaining this law to the County is enclosed for your reference. Under the FCC Shot Clock Order, NextG’s permits should have been issued on or about October 26, 2011. The long discretionary process and extensive appeal period has caused a four month delay at this point, which NextG must limit as much as possible going forward.

The impetus to the FCC Shot Clock Order was in part a Presidential initiative to bring increased wireless broadband services to customers across the country, but particularly in rural America. NextG would like the Coastal Commission to acknowledge that this area of Santa Cruz County is woefully underserved. For this reason, the Zoning Administrator and County Planning Commission supported this project to provide essential services to the residents, business, visitors and travellers in this remote area of the coast. NextG requests the Coastal Commission expedite this matter so that essential services are not further delayed.

NextG Has Made Multiple Concessions to the County/Coastal Commission

As mentioned above, NextG’s original network design would have provided excellent wireless voice and broadband services from the border of the City of Santa Cruz up to the county line with San Mateo County. In order to have full functionality, this design required placing the antennas on the top of the existing utility poles as well as constructing a new utility pole line with 124 new poles on the landward side of Highway 1 where there is no existing infrastructure.

For the last nine months, NextG has worked very closely with the County, who in turn was working with the Coastal Commission, to find an acceptable design. This has meant NextG making multiple compromises and greatly reducing the functionality of its original network design in order to find something acceptable.

First, the County told NextG that the Coastal Commission preferred the antennas be placed in the communications space, rather than on the top of the utility poles. Many local jurisdictions prefer pole top placement, which also provides greater functionality, because the antennas are out of the line of site. NextG also explained that due to GO 95 Rule 94.4, the antennas would have to be placed on four-foot cross arms in the communication space. The County assured NextG that the communication space was preferred even though it will require NextG to construct an additional location along the coast to make up for the lost functionality at DAV03. The photo simulations of the antenna placement for DAV03 are enclosed for your reference.

Second, due to the concerns of a nearby property owner, NextG agreed to move DAV01 to an alternate location. NextG informed the County Planning Commission of this concession at the Planning Commission Hearing on January 12, 2012, which pleased both the property owner and the County. NextG will go through another application process for DAV01 at the new location, which will result in a delay of services for the southern portion of the network.

Third, the County told NextG that the Coastal Commission would never approve a new utility pole line between the intersections of Swanton Road along Highway 1. Without this portion, NextG's DAS network will have no functionality for a five mile portion of Santa Cruz County. In addition, the two northern microcells (DAV09 and DAV10) lack fiber connectivity, and therefore will not have functionality until a portion of the network is completed in San Mateo County.

Fourth, the elimination of the middle section of the network eliminated the necessity of the proposed telecommunications hub at 25 Swanton Road. When NextG found out about the Coastal Commission's concern two hours before the expiration of the appeal period, NextG readily agreed to have the County remove the hub portion from the permit and put the appeal on hold, which the County tried to do by calling and leaving messages with the Coastal Commission. It is unfortunate that the Coastal Commission was not responsive because this concern could have been eliminated entirely if the Coastal Commission had contacted NextG or the County more than a couple hours in advance of the end of the appeal period.

At this time, the functionality of NextG's network has been reduced from over ten miles of coverage to four miles of less than optimal coverage. NextG hopes to increase coverage and functionality by adding additional locations near the southern and Coast Road portions of the network. NextG has been working with the residents who are anxiously awaiting these improved wireless voice and broadband services. NextG requests the Coastal Commission consider how many concessions NextG has already made, and it hopes to work with the Coastal Commission to deliver this greatly scaled down network without further delay because something is better than nothing.

Telecommunications Hub

During NextG's conversation with you on February 29, 2012 and in the related appeal, you mentioned that there was a great deal of concern regarding the proposed telecommunications hub at 25 Swanton Road. This building was designed to be the size of a shed, 192 square feet, and fabricated to match the faded-blue, existing buildings on the parcel, which include a number of

dilapidated outbuildings, an abandoned house with broken windows that is full of trash, and a rusting shipping container, amongst other various and sundry things.

As mentioned above, the necessity of the hub was eliminated when the County rejected the required infrastructure for five miles of fiber optic cable. Again, if the Coastal Commission had mentioned its concern about this aspect of the project even just a few hours earlier, NextG and the County could have worked together to remove it from the permit. NextG remains willing to remove the hub from the permit, which will eliminate any use of CA-zoned agricultural land.

Swanton Area

During NextG's conversation with you on February 29, 2012 and in the related appeal, you mentioned particular concern regarding anything on Swanton Road. The road itself is not "special scenic," but rather surrounded only by scenic (see attached map). There is existing utility infrastructure running along the public right of way, which creates a visual impact to the landscape. NextG's wireless and power equipment needed for DAV05 was specially designed to minimize any further visual impact.

First, NextG will use a small cylindrical antenna placed a minimum distance on the pole top to avoid having to use a standoff bracket, as required by GO 95 Rule 94.4 for equipment in the communications space. Second, NextG placed the emergency power supply on a separate pole, and by using two locations, reduced the visual impact at any one location. NextG shares the Coastal Commission's goal of reducing visual impact along the coast and requests the Coastal Commission acknowledge that visual impact must be balanced with the rights of telephone corporations to attach telecommunications equipment to telephone poles in the public right of way.

The Resident's Concern Is About Radio Frequency "Environmental Effects"

Even though Mr. Hart's appeal mentions visual impact, his appeal appears to be primarily motivated by concerns regarding radio frequency "environmental effects," which are discussed extensively in the appeal and in outside materials he has posted along the coast, a copy of which is enclosed. Mr. Hart acknowledges that the FCC governs radio frequency by acknowledging 47 USC § 332(c)(7)(B)(iv), which states:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

However, Mr. Hart then allocates the majority of his appeal to detailing why the Coastal Commission should deny the permit for various reasons related to concerns about "health damage." Mr. Hart also seems to confuse wireless handsets (i.e., cell phones) with wireless service related infrastructure located on utility poles and not proximate to people, and he misrepresents NextG's installations as "cell towers" in his public postings. His chief motive for his opposition to NextG's project seems to be a wider based concern about all electromagnetic

fields, including PG&E “smart” meters, handsets, and wi-fi. NextG’s installations do not violate the Americans with Disabilities Act or the 14th Amendment of the United States Constitution.

NextG provided the County with evidence of its compliance with the FCC standards in order to satisfy that aspect of the application and is enclosing copies of these engineering reports for the Coastal Commission’s convenience. NextG requests the Coastal Commission reject Mr. Hart’s appeal in its entirety because any reference to “aesthetics” is only a proxy for Mr. Hart’s opposition to radio frequency and desire that the Coastal Commission deny the application for alleged impacts on “human health.”

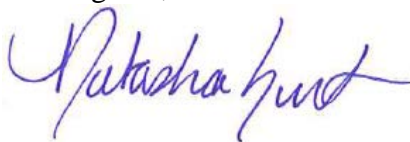
Conclusion

The County Planning Commission thanked NextG for investing in this rural area of County. NextG requests the Coastal Commission recognize the number of concessions NextG has made to resolve the concerns of the County, and by extension the Coastal Commission, to provide a greatly scaled down version of its network. NextG is willing to resolve the Coastal Commission’s concerns regarding the telecommunications hub and would have done so sooner if NextG had known about them more than two hours prior to the expiration of the appeal period.

NextG requests the Coastal Commission support NextG’s application No. 111114 for the pole attached equipment. NextG looks forward to working with the Coastal Commission on this mission to provide critical infrastructure to a neglected part of our state. NextG hopes to expedite this matter so that there is no further delay to providing these critical communication services in this remote rural area that is vulnerable to tsunamis and has a great amount of high-risk recreation, such as surfing and mountain biking.

Please review the enclosed material and contact me to discuss how to move forward. I may be contacted by phone at 408-409-6606 or by email at nernst@nextgnetworks.net.

Best regards,

A handwritten signature in blue ink that reads 'Natasha Ernst'.

Natasha Ernst
Director of Government Relations

Enclosures:
2003 & 2007 CPCNs
FCC Shot Clock Letter
DAV03 Photo Simulations
Swanton Scenic Area Map
Josh Hart Poster
Radio Frequency Reports

cc: Frank Barron
Josh Hart