

ORIGINAL

FORMAL COMPLAINT



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Arizona Corporation Commission

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Attorneys for City of Scottsdale

BEFORE THE ARIZONA CORPORATION COMMISSION

T-20377A-10-0363

Commissioners:

Jeff Hatch-Miller, Chairman

William A. Mundell

Mike Gleason

Kristin K. Mayes

Barry Wong

Docket No.

**1) APPLICATION FOR INTERVENTION
BY CITY OF SCOTTSDALE, ARIZONA**

**2) APPLICATION FOR RESCISSION,
MODIFICATION AND/OR
ALTERATION OF CERTIFICATE OF
CONVENIENCE AND NECESSITY**

**3) COMPLAINT BY CITY OF
SCOTTSDALE AGAINST NEXTG
NETWORKS**

4) REQUEST FOR HEARING

IN THE MATTER OF THE
APPLICATION OF NEXTG
NETWORKS OF CALIFORNIA, INC.,
DBA NEXTG NETWORKS WEST FOR
APPROVAL OF A CERTIFICATE OF
CONVENIENCE AND NECESSITY
FOR TRANSPORT AND BACKHAUL
SERVICES TO OTHER CARRIERS,
INCLUDING BUT NOT LIMITED TO
WIRELESS TELECOMMUNICATIONS
SERVICES PROVIDERS AND
POTENTIALLY TO WIRELESS
INFORMATION SERVICES
PROVIDERS.

The City of Scottsdale, an Arizona Municipal Corporation ("the City") hereby applies to the Commission for 1) an order pursuant to Ariz. Adm. Code § R14-3-105 allowing the City to intervene as an interested party in the above-entitled proceedings and 2) an order rescinding, modifying or altering the certificate of convenience and necessity issued by the Commission to

1 NextG Networks of California, Inc. ("NextG"). The City also submits herein complaints
2 against NextG for 1) failing to submit and/or disclose financial information and records as
3 required by law, and 2) constructing or attempting to construct facilities without having the
4 required authorization or a valid certificate of convenience and necessity. Finally, the City
5 requests that the Commission set a hearing for consideration of the issues raised by the City
6 herein. The applications and complaint are supported by the memorandum of points and
7 authorities below and the entire docket in this matter.
8

9 MEMORANDUM OF POINTS AND AUTHORITIES

10 I. The City's Application to Intervene as an Interested Party.

11 This application is made because circumstances have arisen since this Commission's
12 order granting a certificate of convenience and necessity ("CCN") to NextG causing the
13 interests of the City of Scottsdale, and other cities and towns similarly situated in the State of
14 Arizona, to be impacted. The City is a municipal corporation duly organized under the laws of
15 the State of Arizona. The City has within its jurisdiction various rights-of-way and public
16 utility easements. The City regulates its rights-of-way through various provisions of its
17 municipal code including provisions relating to wireless communications facilities ("WCF").
18 The City currently has roughly two hundred (200) separate WCF within its rights-of-way that
19 have been constructed through permits issued to various wireless communication service
20 providers such as AT&T, Verizon, T-Mobile, Cricket and NewPath Networks. Each provider
21 with a WCF in a right-of-way pays the City an annual fee for use of the City's property.
22

23 On or about March 12, 2009 the City received notice that NextG was seeking to install a

1 distributed antenna system (“DAS”) in the City of Scottsdale. A DAS system typically consists
2 of individual wireless nodes, a base station and interconnecting fiberoptic cables. NextG’s
3 correspondence purported to rely on a CCN already issued in this docket as authority for
4 construction. (Exhibit A.) The City responded to the initial correspondence from NextG by
5 raising some initial questions regarding the service it intended to offer and raising some legal
6 issues. (Exhibit B.) Along with this correspondence, the City provided NextG with an
7 application for a telecommunications license for the City. However, a completed application
8 was not submitted by NextG. Instead, NextG has filed a lawsuit in Maricopa County Superior
9 Court against the City asserting claimed rights under the aforementioned CCN. Specifically,
10 the lawsuit seeks a declaration from the superior court that the City’s encroachment fees for
11 WCF in its rights-of-way are proscribed by the existence of NextG’s CCN. The lawsuit also
12 alleges, among other things, that the City cannot question the validity of the CCN in the
13 superior court proceedings.
14

15 A. Impact to the City's Interests

16 As a municipality, the City is charged with the management, maintenance and regulation
17 of its rights-of-way. This includes a responsibility to its citizens to assure that the City receives
18 fair and reasonable compensation for the use thereof. NextG has asserted that its possession of
19 a CCN from this Commission limits the City's ability to require compensation for the use of its
20 rights-of-way. The City does not agree. The City also believes that the CCN issued by this
21 Commission was not proper. The City has reviewed the Commission's docket for this matter,
22 as well as a transcript from the hearing before an Administrative Law Judge. (Exhibit C.)
23

1 This review makes clear that the interests of the City of Scottsdale and other municipalities,
2 counties, and towns in the state of Arizona are not adequately represented. Nor was the process
3 sufficient to present a full understanding of the issues surrounding the issuance for what is
4 claimed to be a statewide CCN.

5 B. The City Should be Granted Permission to Intervene

6 AZ ADC R14-3-105 provides for intervention by interested persons upon an order from
7 the Commission or presiding officer. There are material questions regarding the scope and
8 extent to which NextG should have been granted a CCN, if at all. The CCN issued by this
9 Commission is claimed to substantially affect the interests of the City of Scottsdale and other
10 political subdivisions of the Arizona government similarly situated despite their not being
11 parties to the proceedings. The interests of the public and the City of Scottsdale in relation
12 thereto are not currently being represented in these proceedings. Thus, the City hereby
13 requests approval from this Commission for the City to intervene as a party to these
14 proceedings.
15

16 II. The City's Application for Rescission or Modification.

17 As will be outlined below, the issuance of a CCN to NextG was defective for multiple
18 reasons including 1) failure to follow the procedural requirements of law, 2) lack of evidence
19 to support the findings of the Commission, and 3) lack of jurisdiction of the Commission.
20 These defects require rescission or, at a minimum, modification of the CCN issued to NextG.
21

22 A. The CCN was Invalidly Issued with Respect to Scottsdale and other Municipalities.

23 A certificate of convenience and necessity is a creature of statute. This Commission

1 does not have plenary power regarding CCNs. That power is reserved to the legislature. *See,*
2 *e.g., Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz. 49, 56, 864
3 P.2d 1081, 1088 (App. 1993). As such, the legislature has prescribed specific procedures for
4 the issuance of CCNs. *See* A.R.S. § 40-281 *et seq.* Specifically, the legislature has provided
5 that municipal consent is required before a CCN can be issued for a public service corporation
6 to conduct business within that municipality's boundaries:

7
8 B. Every applicant for a certificate shall submit to the commission evidence
9 required by the commission to show that the applicant has received the required
10 consent, franchise or permit of the proper county, city and county, municipal or
11 other public authority.

12 A.R.S. § 40-282. NextG's application for a CCN and the docket in this matter are devoid of
13 any evidence or indication that the City of Scottsdale has issued any franchise, license or
14 permit to NextG. In fact, Scottsdale has not.

15 The CCN issued by this Commission does not identify a specific area where NextG is
16 authorized to operate. Instead, the Commission's order merely concludes that such services can
17 be provided "within the State of Arizona." (Commission's Opinion and Order #68915, p. 7.)
18 This order is legally defective. Assuming *arguendo* that a statewide CCN can be issued, the
19 application for such a CCN would have to include evidence of the applicant having the required
20 franchise, license or permit from every political subdivision in the state. A.R.S. § 40-282(B).¹

21
22
23 ¹ Alternatively, the applicant can avail itself of the provisions of A.R.S. § 40-282(D)
which allow the Commission to issue a provisional order allowing a CCN upon submission of
proof of such a certificate.

1 The docket record does not demonstrate that NextG had obtained a franchise, license or permit
2 from any jurisdiction prior to seeking its CCN.

3 An order of the Commission which is issued without complying with the necessary
4 procedural requirements is void. *See Southern Pacific Transportation Co. v. Ariz. Corp.*
5 *Comm'n*, 173 Ariz. 630, 845 P.2d 1125 (App. 1992); *see also Walker v. De Concini*, 86 Ariz.
6 143, 3431 P.2d 933(1959). A.R.S. § 40-252 authorizes this Commission to rescind or modify a
7 CCN at any time. NextG's CCN should be rescinded because it is not validly issued under
8 A.R.S. § 40-281 *et seq.* At a minimum, an order should be issued making the CCN provisional
9 upon NextG obtaining the necessary franchise, license, or permit from the appropriate
10 jurisdiction.
11

12 B. The Commission does not have Jurisdiction Because NextG Provides Distributed
13 Antenna Services which are Mobile Services, and Regulation by the Commission is Preempted
14 by Federal Law.

15 The Federal Telecommunications Act ("FTA") provides:

16 3) State preemption

17 (A) Notwithstanding sections 152(b) and 221(b) of this title, **no State or local**
18 **government shall have any authority to regulate the entry of or the rates**
19 **charged by any commercial mobile service or any private mobile service,**
except that this paragraph shall not prohibit a State from regulating the
other terms and conditions of commercial mobile services.

20 47 U.S.C.A. § 332(c) (emphasis added). Although the FTA does allow a state to petition the
21 Federal Communications Commission ("FCC") for permission to regulate mobile services,
22 Arizona has not received such permission. In fact, Arizona petitioned the FCC for permission
23 to regulate the entry and rates of mobile services and was denied. *See In the Matter of Petition*

1 of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry
2 Regulation of All Commercial Mobile Radio Services and In the Matter of Implementation of
3 Sections 3(n) and 332 of the Communications Act, 1995 WL 316476, 8 (F.C.C.). Thus, this
4 Commission should be especially cautious that it does not overstep the federal preemption of
5 the FTA when it has already been denied permission to do so.

6
7 C. NextG is Offering "Mobile Service."

8 As noted above, the Commission's authority does not extend to regulation of "mobile
9 services."² Mobile service is defined by Congress in 47 U.S.C.A. § 153 (27):

10 The term "mobile service" means a radio communication service carried on
11 between mobile stations or receivers and land stations, and by mobile stations
12 communicating among themselves, and includes (A) both one-way and two-way
13 radio communication services, (B) a mobile service which provides a regularly
14 interacting group of base, mobile, portable, and associated control and relay
stations (whether licensed on an individual, cooperative, or multiple basis) for
private one-way or two-way land mobile radio communications by eligible users
over designated areas of operation . . .

15 (Emphasis added.)³ In its application to this Commission, NextG describes its proposed
16 services as:

17 RF Transport Services connect Customer-provided wireless capacity equipment
18 to Customer or Company-provided bi-directional RF-to-optical conversion
equipment at a hub facility. The hub facility can be Customer- or Company-

19
20 ² Although the preemption of 47 U.S.C. § 332(c) discusses commercial mobile service and
21 private mobile service, the FCC has determined that all mobile services fall into either one
22 category or the other. *Implementation of Sections 3(N) and 332 of the Communications Act,*
Regulatory Treatment of Mobile Services, 9 F.C.C.R. 1411 (1994) ("CMRS Order").

23 ³ 47 U.S.C.A. § 153 (33) defines radio communication as "the transmission by radio of
writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities,
facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of
communications) incidental to such transmission."

1 provided. The conversion equipment allows the Company to accept RF [radio
2 frequency] from the Customer and then send bi-directional traffic transmission
3 across the appropriate optical networks. At the remote end, Customer- or
4 Company-provided **RF** [radio frequency]-to-optical conversion equipment allows
bi-directional conversion between optical signals and RF signals. **RF signals can
be received and radiated at this remote node. . . .**

5 (*NEXTG APPLICATION AND PETITION FOR CERTIFICATE OF CONVENIENCE AND
6 NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES,*

7 ATTACHMENT B, Sheet No. 5)(emphasis added). The application also notes that it is made
8 for providing "Radio Frequency Transport and Backhaul Services." And, in its proposed tariff,
9 NextG defines its Distributed Antenna System ("DAS") as including "remote nodes," i.e., "land
10 stations," which, among other things, convert optical signals to radio signals for transmission.

11 While the ultimate receiver of this radiofrequency transmission from the "Remote Node" is
12 unidentified, it is safe to assume that the transmission is sent to a mobile telephone, a.k.a.
13 "mobile station" or "receiver."⁴ The "remote nodes" are the portion of NextG's DAS system
14 which fall squarely within the City's WCF ordinances.

15
16 NextG's apparent lack of a radio frequency license from the FCC does not change the
17 result.⁵ NextG is functionally acting as an arm for the Commercial Mobile Radio Service
18 ("CMRS") providers with whom it enters long term leases for distributed antenna nodes. In
19 connection with proposed rulemaking which requires each cell site to have backup power, an

20
21
22 ⁴ It is also noteworthy that the nodes used by NextG for transmitting and receiving the
radio communications are the only service for which a rate is prescribed in the proposed tariff.
(NextG Tariff, Sheet 6.)

23 ⁵ However, the Commission must certainly question how NextG can be a "common
carrier" and a "public service company" when the primary customers it serves are large

1 FCC Committee has also determined that there is no reason to distinguish DAS from
2 traditional wireless carriers:

3
4 NextG explains that it provides telecommunications services to wireless carriers
5 via a network architecture that uses fiber-optic cable and small antennas mounted
6 in the public rights-of-way on infrastructure such as utility poles, street lights and
7 traffic signal poles. **NextG argues that DAS Nodes should not be treated as a**
8 **cell site** because the DAS Node does not include some of the features typically
9 associated with a cell site. The antenna is not associated with a base station or
10 network switching equipment at the DAS Node site. [citation omitted] NextG and
11 MetroPCS maintain that even if the Commission does treat the DAS Node as a
12 cell site this equipment should be exempt from the backup power rule because it
13 is "technologically, financially, and politically infeasible" to install eight hours of
14 backup power . . .

15 **We decline to exempt DAS Nodes** or other sites from the emergency backup
16 power rule. Rather, we believe that to the extent these systems are necessary to
17 provide communications services, **they should be treated similarly to other**
18 **types of assets that are subject to the rule.** We note that many of the arguments
19 made by petitioners are similar to the physical constraint arguments raised by
20 other parties. As we stated earlier, we see no reason why LECs and CMRS
21 providers who choose to place assets at locations with limited physical capacities
22 should generally be excused from compliance with the rule. We realize that many
23 providers have begun to use DAS and other small antenna systems as part of their
communications networks. That fact alone, however, is far outweighed by the
need to ensure a reliable communications network.

16 *IN THE MATTER OF RECOMMENDATIONS OF THE INDEPENDENT PANEL*
17 *REVIEWING THE IMPACT OF HURRICANE KATRINA ON COMMUNICATIONS*
18 *NETWORKS*, 2007 WL 2903938, 14, 22 F.C.C.R. 18013, 18030, 18030, 22 FCC Rcd. 18013 -
19 18031, 22 FCC Rcd. 18013 (emphasis added). In reality, the remote nodes offered by NextG
20 are really just signal boosters for its CMRS customers:

21 Signal boosters [footnote: Our use of the term "signal booster" in this Public
22 Notice is intended to include all manner of amplifiers, repeaters, boosters,

23 commercial mobile radio service providers who hold multi-million dollar FCC frequency
licenses.

1 **distributed antenna systems**, and in-building radiation systems that serve to
2 amplify CMRS device signals, Part 90 device signals, or extend the coverage area
3 of CMRS providers or Part 90 service licensees] are devices that amplify and/or
4 distribute wireless signals to areas with poor signal coverage, such as tunnels,
5 subways, large buildings, and rural areas. When properly installed, these devices,
6 which can either be fixed or mobile, can help consumers, wireless service
7 providers, and public safety first responders by expanding the area of reliable
8 service to unserved or weak signal areas

9 See FCC WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON
10 PETITIONS REGARDING THE USE OF SIGNAL BOOSTERS AND OTHER SIGNAL
11 AMPLIFICATION TECHNIQUES USED WITH WIRELESS SERVICES, WT Docket No.

12 10-4, Released: January 6, 2010 (emphasis added). The very nature of a CCN is this

13 Commission's regulation of the rates and the market entry of the company so seeking.

14 However, regulation of the rates and market entry of mobile services such as NextG by this

15 Commission is preempted by federal law. Thus, the Commission should have declined to

16 exercise jurisdiction over NextG or at least except from its regulation those portions of

17 NextG's service which involve provision of mobile radio services.⁶

18 D. NextG is not a Public Service Company because it is not a Common Carrier and There
19 is no Public Interest in Regulating its Business Activities.

20 The jurisdiction of this Commission is derived from the Arizona Constitution. Ariz.

21 ⁶ The City recognizes that the Commission may have issued a CCN to one or more
22 competitors of NextG who also provide DAS services. While the City agrees that competitors
23 should be treated fairly and equally by this Commission, the proper remedy when a public body
acts in excess of its jurisdiction is to rescind the acts which were taken in excess of that
jurisdiction, not perpetuate them further. Accordingly, A.R.S. § 40-252 vests this Commission
with the power to rescind, amend, or alter any previous order made by it.

1 Const., Article XV, Section 2 provides:

2 All corporations other than municipal engaged in furnishing gas, oil, or electricity
3 for light, fuel, or power; or in furnishing water for irrigation, fire protection, or
4 other public purposes; or in furnishing, for profit, hot or cold air or steam for
5 heating or cooling purposes; or engaged in collecting, transporting, treating,
6 purifying and disposing of sewage through a system, for profit; or in
7 **transmitting messages or furnishing public telegraph or telephone service,**
8 and all corporations other than municipal, operating as common carriers, shall be
9 **deemed public service corporations.**

10 (Emphasis added.) And Ariz. Const., Article XV Section 10 provides:

11 Railways heretofore constructed, or that may hereafter be constructed, in this
12 State, are hereby declared public highways and all railroads are declared to be
13 common carriers and subject to control by law. **All electric, transmission,**
14 **telegraph, telephone, or pipeline corporations, for the transportation of**
15 **electricity, messages, water, oil, or other property for profit, are declared to**
16 **be common carriers and subject to control by law.**

17 (Emphasis added.) On its face, these constitutional provisions appear to be all-encompassing.

18 However, the Arizona courts have determined that not all companies engaged in these
19 activities are public service companies. To be within the Commission's jurisdiction, a
20 company must engage in business activities which are a matter of public concern:

21 A corporation falling within the definition of "public service corporation" is
22 subject to the jurisdiction of the Arizona Corporation Commission. *General*
23 *Alarm, Inc. v. Underdown*, 76 Ariz. 235, 238, 262 P.2d 671, 672 (1953); A.R.S. §
40-202 (1985). . . .

Although *Trico Electric Cooperative v. Corporation Commission*, 86 Ariz. 27,
339 P.2d 1046 (1959), applied this definition literally, **our supreme court has**
held more recently that meeting the literal textual definition is insufficient.
In *Arizona Corporation Commission v. Nicholson*, the supreme court stated:
"To be a public service corporation, its business and activity must be such as
to make its rates, charges, and methods of operations a matter of public
concern. . . .

1 (Emphasis added.) *Southwest Gas Corp. v. Arizona Corp. Comm'n*, 169 Ariz. 279, 285-287,
2 818 P.2d 714, 720-22 (App. 1991). The issue is not whether the public may have some general
3 interest in the services which the company provides; rather, the question is whether or not the
4 business and activity of the company are such that its rates, charges, and methods of operation
5 are a matter of public concern. *Arizona Corporation Commission v. Nicholson*, 119 Ariz.
6 257, 259, 580 P.2d 718, 720 (1978). The record in this matter demonstrates that neither the
7 rates, charges, nor methods of operation of NextG are a matter of public concern sufficient to
8 warrant regulation by this Commission. To guide the analysis, the courts have set forth eight
9 important factors:
10

- 11 (1) What the corporation actually does.
- 12 (2) A dedication to public use.
- 13 (3) Articles of incorporation, authorization, and purposes.
- 14 (4) Dealing with the service of a commodity in which the public has been generally
15 held to have an interest.
- 16 (5) Monopolizing or intending to monopolize the territory with a public service
17 commodity.
- 18 (6) Acceptance of substantially all requests for service.
- 19 (7) Service under contracts and reserving the right to discriminate is not always
20 controlling.
- 21 (8) Actual or potential competition with other corporations whose business is clothed
22 with public interest.

23 *See, e.g., Gas Service Co. v. Serv-Yu Cooperative*, 70 Ariz. 235, 237-38, 219 P.2d 324, 325-36
(1956). To begin the analysis, it is useful for the Commission to look at a key factor -- that
NextG's customers are not individual consumers but rather large, sophisticated customers
which are not in need of Commission protection. Our Supreme Court has recognized that the
purpose of regulation by the Commission is to protect public consumers from excessive and
discriminatory rates and inferior service:

1 The purposes of regulation are to preserve and promote those services which are
2 indispensable to large segments of our population, and to prevent excessive and
3 discriminatory rates and inferior service where the nature of the facilities used in
4 providing the service and the disparity in the relative bargaining power of a utility
5 ratepayer are such as to prevent the ratepayer from demanding a high level of
6 service at a fair price without the assistance of governmental intervention in his
7 behalf.

8 *Petrolane-Arizona Gas Service v. Arizona Corporation Commission*, 119 Ariz. 257, 259, 580
9 P.2d 718, 720 (1978)(quoting *In Re Geldbach Petroleum Co.*, 56 P.U.R.3d 207 (Mo. 1964)).

10 In light of that standard, this Commission must determine if regulation of NextG's rates,
11 charges or methods of operation is in the public interest in a market where the customers have
12 more power than the company. Here, NextG does not serve the general public; instead, it does
13 business with major wireless carriers on an individual contract basis. (Testimony of Robert
14 Delsman, July 27, 2006 Hearing, 9:15-11:15.) In a marketplace dominated by the Customer, it
15 seemingly goes without saying that regulation is unnecessary.

16 E. NextG and the Other DAS Providers Applying to this Commission for CCNs Really
17 Seek Only Illusory Regulation from this Commission.

18 Turning to the nature of the DAS business, NextG and other DAS providers seemingly
19 have this Commission engaged in a complex game of "cat and mouse." Essentially, they seek a
20 CCN from this Commission which they apparently believe provides them some competitive
21 advantage in the marketplace, but they balk at any real regulation by this Commission.⁷ Nor is

22 ⁷ NextG can do business without a CCN. Although the City does require a CCN for a
23 "telecommunications license" in Scottsdale, that is not the exclusive way for a provider to
access the City's right-of-way. In fact, the City currently has approximately 200 wireless
communication facilities in its right-of-way and none of the respective owners have a
telecommunications license with the City. Further, the City also enters agreements allowing

1 there any reference in the statutes or rules to a class of service known as "transport and
2 backhaul services."⁸

3 Ironically, this Commission's internet information site seemingly classifies DAS
4 providers under the category of a Competitive Local Exchange Carrier ("CLEC"). Facially,
5 this may make sense because CLEC is a recognized class of service and the DAS providers
6 make numerous references to being in competition with CLECs authorized by this
7 Commission. However, this is nothing more than part of the "cat and mouse" game the DAS
8 providers are playing with this Commission.

9 CLEC status is recognized by this Commission's rules. *See* Ariz. Adm. Code, Title 14,
10 Chapter 2, Articles 5 and 11. However, NextG's application for a CCN is facially invalid
11 under those rules. NextG has not identified the actual number of customers within the service
12 area or the estimated number of customers to be served within the first five years of operation
13 as required by R14-2-502(A)(1)(g). Nor has it explained how it will provide local dial tone
14 service like CLECs do and how it will comply with the interconnection requirements of R14-2-
15 1111 and -1112. This is probably because NextG expressly disclaims being a CLEC despite
16 comparing itself to that status. *See* NextG Application for CC&N, Section A-14 ("[Bond]
17 [n]ot applicable because applicant does not propose to provide long distance or local exchange
18 services in Arizona."). If the DAS providers are truly competing with actual CLECs for
19
20

21
22 for conduit and/or optical fiber in the right-of-way with providers who do not have a
23 telecommunications license.

⁸ In its application to this Commission, NextG declined to check any of the standard boxes for recognized services by this Commission including the box for "Facilities-Based'

1 business, the Commission's treatment of the DAS providers is patently unfair for the CLEC
2 providers. The CLECs have to comply with actual regulations and responsibilities imposed by
3 the Commission, while the DAS providers are simply seeking the benefits of a CCN while not
4 accepting the burdens of regulation associated therewith.⁹

5 This fact is exemplified by the failure of the DAS providers to comply with the
6 Commission's rules regarding contribution to the Universal Service Fund. Ariz. Adm. Code,
7 Title 14, Chapter 2, Article 12. In particular, R14-2-1210(B) requires that:
8

9 [a]ny telecommunications provider, which begins providing telecommunications
10 service after the effective date of this Article shall, within 30 days of beginning to
11 provide intrastate service in Arizona, provide a letter to the Administrator
12 acknowledging that provider's obligation under this Article to make monthly
13 payments for the local and/or toll portion, as appropriate, of the AUSF
14 contribution in accordance with this Article."¹⁰

15 ExteNet, another DAS provider, has engaged in similar regulatory dodging with this
16 Commission. Docket No. T-20597A-08-0320. In its Response to the Staff's First Set of Data
17 Requests, ExteNet informed the Commission that it does not even intend to have a customer
18 service center in the State. Later, when asked to explain why its rates were competitive in

19 Local Exchange Telecommunications Services." Instead, NextG simply checked the box for
20 "Other" and made up its own category of service. (NextG Application, p.1, Section A.)

21 ⁹ An examination of NextG's docket, T-20377A-05-0484, indicates that the Commission
22 has no apparent interest in regulating the DAS providers anyway. NextG was issued a CCN by
23 order of this Commission on August 29, 2006 and then filed its tariff in October, 2006. Since
that time, there has been no activity in the docket, no annual reports, no regulation, and the
Commission has decided to close its file despite NextG's continuing to do business. (August 5,
2008 Compliance Memorandum.)

¹⁰ 47 U.S.C.A. § 254(f) provides that "[e]very telecommunications carrier that provides
intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory
basis, in a manner determined by the State to the preservation and advancement of universal
service in that State."

1 comparison to competitors, ExteNet asserted, "Within ExteNet's industry, services are highly
2 customized in ICB [Individual Contract Basis] contracts, so there is no standard method for
3 charging for individual services." It then noted, "ExteNet negotiates ICB contracts for all its
4 telecommunications services." In its response to ACC staff inquiries, NextG was also quick to
5 point out that "[t]he vast majority of [NextG]'s customers, therefore, negotiate individual case
6 basis contracts. . ." Docket No. T-20377A-05-0484. NextG also made sure to point out to the
7 Commission that its "customers are sophisticated carriers and communications companies
8 experienced in negotiating charges and other contract terms . . ."

9
10 F. Applying the *Serv-Yu* Factors Leads to the Conclusion that the Regulation of NextG's
11 Business is not Clothed with Public Interest.

12 Returning to the factors announced in *Serv-Yu*, it is clear that NextG's business activities
13 are of a private interest, not a public one. While NextG's articles of organization are a neutral
14 consideration, the other factors do not support issuing a CCN. What NextG actually does is
15 provide Distributed Antenna Systems for commercial mobile radio services. The nature of its
16 business is fully analyzed above. There is no evidence that these services are dedicated to
17 public use; instead, they are dedicated to use by an exclusive class of large commercial wireless
18 telephone carriers who possess multi-million dollar FCC frequency licenses.¹¹ The public use
19

20
21 ¹¹ One DAS provider has expressed concern that it may not be able to sell excess fiber
22 capacity which it may have from installation of its DAS systems to large businesses or schools.
23 There is no evidence that excess capacity could not be sold without a CCN and Arizona courts
have made clear that Commission jurisdiction does not necessarily extend beyond those
functions of a public utility which are essential to its public service anyway. *See, e.g.,*
Mountain States Tel. and Tel. Co. v. Arizona Corp. Commission, 132 Ariz. 109, 115, 644
P.2d 263, 269 (App. 1982)("It is clear both under prior Arizona decisions and the decisions of

1 factor also fails. *Southwest Transmission Co-op., Inc. v. Arizona Corp. Comm'n*, noted that
2 dedication to public use is a key consideration:

3 The purposes of regulation are to preserve those services indispensable to the
4 population and to ensure adequate service at fair rates where the disparity in
5 bargaining power between the service provider and the utility ratepayer is such
6 that government intervention on behalf of the ratepayer is necessary. *Sw. Gas*,
7 169 Ariz. at 286, 818 P.2d at 721 (citing *Petrolane-Ariz. Gas Serv. v. Ariz. Corp.*
8 *Comm'n*, 119 Ariz. 257, 259, 580 P.2d 718, 720 (1978)). Competition is the
9 general rule. *Gen. Alarm*, 76 Ariz. at 238, 262 P.2d at 672. **However, when an
10 entity dedicates private property to a use in which the public has an interest,
11 it grants the public an interest in that use and must submit to regulation for
12 the public good.** *Ariz. Corp. Comm'n v. Nicholson*, 108 Ariz. 317, 320, 497 P.2d
13 815, 818 (1972). The right to public protection then outweighs the right of
14 competition. *Gen. Alarm*, 76 Ariz. at 238, 262 P.2d at 672.

15 213 Ariz. 427, 432, 142 P.3d 1240, 1245 (App. 2006)(emphasis added). Thus, dedication of
16 private property to public use appears to be the essence of a "public service company." NextG
17 has not designated any of its private property for public use.

18 While NextG does generally deal with telecommunications, the commodity which it
19 offers -- DAS -- is not one to be generally of a public interest. As made clear, its services are
20 dedicated to large, sophisticated wireless telephone carriers who are quite capable of ensuring
21 that they protect themselves without assistance from the Commission. The next two factors,
22 acceptance of substantially all requests for service and service under individual contracts,
23 essentially contemplate an analysis of whether or not the company is a "common carrier."

other states that a public utility may provide services which are not imbued with a public
interest and thus may not be subject to Commission regulations.").

1 NextG is not a common carrier. And while that is not always controlling, here it is persuasive
2 because of the lack of any other indication of a need for regulation.¹²

3 NextG confirms this when it states that it is a "carrier's carrier." (Testimony of Robert
4 Delsman, July 27, 2006 Transcript, 9:13-23.) NextG has also noted that most, if not all,
5 contracts are done on an individual case basis. *Id.* at 11:13-15. "Carriers' carriers" are not
6 "common carriers." The case of *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C.
7 Cir. 1999), is instructive. In *Virgin Islands Telephone*, AT&T contracted with a subsidiary,
8 ATT-SSI, to install underwater fiber optic cable between the U.S. mainland and Virgin Islands.
9 The FCC classified ATT-SSI as a non-common carrier and a competing carrier challenged the
10 classification.¹³ In reviewing the FCC decision, the D.C. Circuit upheld the classification as a
11 non-common carrier noting that 1) ATT-SSI did not sell its capacity directly to the public, and
12 2) ATT-SSI engaged in individual price negotiations with customers on price and terms
13 depending on needs, duration of contract, and technical specifications. Thus, the court held
14 that a company will not be a common carrier where its practice is to make individualized
15 decisions in particular cases whether and on what terms to serve. Here, such individualized
16 decisions are the mainstays of NextG's business model. The *Virgin Islands Telephone* court
17 also declined to look to the customer's customers to determine common carrier status. 198
18 F.3d at 926-30. Similarly, in *Southwest Gas Corp. v. Arizona Corp. Com'n*, this Commission
19
20

21
22 ¹² The court in *American Cable Tel. v. Ariz. Public Service Co.*, 143 Ariz. 273, 693 P.2d
23 928 (App. 1983), noted that for a message transmitting company to be a public service
company it must be a common carrier.

¹³ The classification as a non-common carrier allowed ATT-SSI to avoid various
regulations and requirements imposed by the FCC upon common carriers.

1 declined to treat a wholesaler of natural gas as a public service corporation in part because of
2 its limited base of approximately ten customers. 169 Ariz. 279, 285-287, 818 P.2d 714, 720-22
3 (App.1991). NextG is a “carrier's carrier” providing a few major industry players with signal
4 boosting services on an individual case basis. It is not a common carrier.¹⁴

5
6 The final factor for consideration is whether or not there is potential competition with
7 other companies whose business is clothed with public interest. This also fails. Although
8 NextG suggests that it may compete with CLECs, it expressly does not offer local exchange
9 service. And, there is no evidence in the record of the docket to suggest that CLECs are
10 offering distributed antenna systems to the major wireless carriers in competition with NextG
11 or any other DAS providers.

12 When the *Serv-Yu* factors are considered, NextG’s claim that it is a public service
13 company fails on all counts. There is no evidence to support the conclusion that the public has
14 an interest in the regulation of NextG’s business.

15 **III. The City’s Complaint Against NextG’s Business Activities.**

16 **A. NextG has not Made Available its Financial Records and Contracts as Required by Law.**

17 A.R.S. § 40-365 provides:

18 Under rules and regulations the commission prescribes, every public service
19 corporation shall file with the commission, **and shall print and keep open to**

20
21 ¹⁴ NextG may rely upon *Southwest Transmission Co-op., Inc. v. Arizona Corp. Com'n*,
22 but this is misplaced. Although the cooperative that was found to be a public utility did not sell
23 directly to customers, it was a cooperative formed by members who did. Further, the
cooperative was already subject to regulation under federal law. Thus, on those facts, which do
not exist in NextG’s case, a public utility was found. 213 Ariz. 427, 429, 142 P.3d 1240,
1242 (App. 2006).

1 **public inspection, schedules showing all rates, tolls, rentals, charges and**
2 **classifications to be collected or enforced, together with all rules, regulations,**
3 **contracts, privileges and facilities which in any manner affect or relate to**
4 **rates, tolls, rentals, classifications or service.** The commission may, from time
5 to time, approve or fix rates, tolls, rentals or charges in excess of or less than
6 those shown by the schedules. The commission may, from time to time,
7 determine and prescribe by order such changes in the form of the schedules as it
8 finds expedient, and modify the requirements of any of its orders, rules, or
9 regulations.

10 (Emphasis added.) In the litigation mentioned above, the City has requested financial records
11 and customer contracts, but NextG has refused to provide them. This is a clear violation of the
12 statute.¹⁵ NextG should be ordered to file all of its contracts with this Commission and provide
13 a copy of the requested information to the City.

14 B. NextG is Misrepresenting the Nature of its Business.

15 In its letter to the City of Scottsdale, NextG specifically claimed that it did not provide
16 wireless services. (Exhibit A.) NextG appears to routinely make this assertion because of its
17 recognition that the fact that it seeks to install wireless communication facilities undermines its
18 position with this Commission due to the preemption of 47 U.S.C. § 332. However, when
19 convenient for its own purposes, NextG does not hesitate to claim rights under the very statute
20 it claims does not apply to NextG's business. (See NextG Letter to City of Glendale asserting

21 ¹⁵ The City is aware that the Commission Rules suggest that such information may be
22 withheld. Ariz. Adm. Code § R14-2-1115. However, in light of the clear mandate of the
23 statute, the Commission is without authority to enact contradictory rules. *See e.g., Arizona*
State Bd. of Regents ex rel. Arizona State University v. Arizona State Personnel Bd., 195
Ariz. 173, 175, 985 P.2d 1032, 1034 (1999); *Phelps Dodge Corp. v. Arizona Elec. Power Co-*
op., Inc., 207 Ariz. 95, 111-112, 83 P.3d 573, 589 - 590 (App. 2004).

1 rights under an FCC Ruling regarding wireless siting applications, Exhibit D.)¹⁶ NextG has
2 made similar misrepresentations in its business dealings claiming it is actually a local exchange
3 carrier. (Exhibit E, NexG Power Point Presentation to City of Glendale.)

4 **IV. CONCLUSION.**

5 The City should be granted permission to intervene in this docket. Proceedings have
6 already occurred which NextG claims affect the City's rights, but the City was never provided
7 notice or made a party to the proceedings. In addition, the CCN already issued to NextG is
8 void for failure to obtain the City's consent to NextG conducting operations within the City.
9 This Commission also lacks jurisdiction over NextG's services because it is preempted by
10 federal law. NextG offers distributed antenna systems to customers who are primarily wireless
11 telephone carriers, such as AT&T. These services involve the transmission and receipt of
12 radiofrequency signals and meet the definition of mobile services. Thus, this Commission is
13 preempted by 47 U.S.C. § 332(c) from exercising jurisdiction -- at least to the extent of the
14 wireless services provided by NextG. Even if jurisdiction is not preempted by federal law, this
15 Commission should decline to regulate because NextG's business activities are not clothed
16 with a public interest to make them a public service company. To the contrary, NextG's
17
18

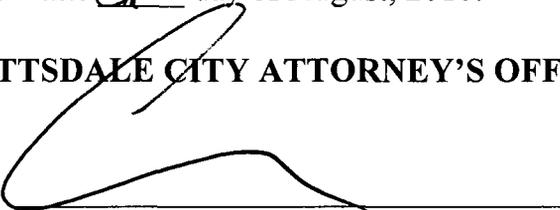
19
20 ¹⁶ The FCC Ruling in question established timeframes under which municipalities had to
21 act upon applications for permits to install wireless communication facilities. *See IN THE*
22 *MATTER OF PETITION FOR DECLARATORY RULING TO CLARIFY PROVISIONS*
23 *OF SECTION 332(C)(7)(B) TO ENSURE TIMELY SITING REVIEW AND TO*
PREEMPT UNDER SECTION 253 STATE AND LOCAL ORDINANCES THAT
CLASSIFY ALL WIRELESS SITING PROPOSALS AS REQUIRING A VARIANCE, 24
F.C.C.R. 13994, 13994 (Nov., 2009).

1 services are offered primarily on an individual case basis to a small market of large
2 commercial wireless providers in a marketplace where the customers have more power than
3 the providers.

4 The City respectfully requests that this Commission: 1) grant the City leave to intervene
5 in these proceedings, 2) schedule a hearing to determine if NextG's CCN should be rescinded,
6 modified or altered in accordance with A.R.S. § 40-252 and 3) order NextG to disclose
7 financial records and contracts in accordance with A.R.S. § 40-365.
8

9 **RESPECTFULLY SUBMITTED** this 31st day of August, 2010.

10 **SCOTTSDALE CITY ATTORNEY'S OFFICE**

11 By: 

12 Bruce Washburn, City Attorney
13 Eric C. Anderson, Assistant City Attorney
14 3939 North Drinkwater Boulevard
15 Scottsdale, Arizona 85251
16 Attorneys for City of Scottsdale
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22
23

1 **ORIGINAL** and 13 copies of the
2 foregoing filed this 3/18 day of
3 August, 2010 with:

4 Arizona Corporation Commissions
5 Docket Control
6 1200 West Washington Street
7 Phoenix, AZ 85007

8 **COPY** of the foregoing delivered this
9 3/18 day of August, 2010, to:

10 Arizona Corporation Administration
11 Teena Wolfe, Administrative Law Judge
12 1200 West Washington Street
13 Phoenix, AZ 85007

14 **COPY** of the foregoing mailed this
15 3/18 day of August, 2010, to:

16 Thomas H. Campbell
17 LEWIS AND ROCA, LLC
18 40 North Central Avenue
19 Phoenix, AZ 85004
20 On behalf of NextG Networks of California, Inc.,
21 Dba NextG Networks West

22 T. Scott Thompson
23 DAVIS, WRIGHT, TREMAINE, LLP
1919 Pennsylvania Avenue NW, Suite 200
Washington, DC 20006
On behalf of NextG Networks of California, Inc.,
Dba NextG Networks West

Mr. Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

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Ms. Janice M. Alward
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

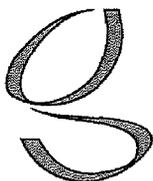
Ms. Lyn Farmer
Chief Administrative Law Judge, Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Keith Layton
Staff Attorney, Legal Division
On behalf of the Commission's Utilities Division Staff
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

By:  _____

A

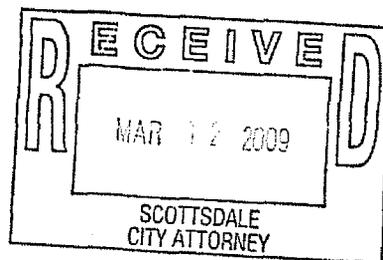
~~CC: CITY ATTORNEY~~



NextG Networks

8000 Research Forest Dr, #115-250 • The Woodlands, TX • 77382

March 10, 2009



CITY OF SCOTTSDALE
Attn: Mr. David Ellison, Assistant City Manager
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

RE: NextG Networks Inc., Request for License to Use the Public ROW for the Provision of Regulated Telecommunications Services

Dear Mr. Ellison

Please accept this letter as the formal application of **NEXTG NETWORKS OF CALIFORNIA INC.**, a Delaware corporation *dba* **NextG Networks West** ("NextG") to deploy its fiber optic-based network facilities in the public rights of way in the City of Scottsdale. As part of this network deployment, NextG Networks is requesting an appropriate form of authorization from Scottsdale (the "City") to conduct business as a state regulated public utility providing telecommunication services with infrastructure located in public ways. This request is submitted to the City in accordance with § 253 of the federal Telecommunications Act of 1996, Section 9-583 of the Arizona State Statutes, and Chapter 47, Article VI of the City of Scottsdale Municipal Code governing the regulation of public utilities in the city rights of way. **PLEASE NOTE:** This is not a solicitation. NextG Networks is a state certified public utility seeking direction on the approval/permit process required to deploy it's network facilities in the public right-of-way.

A. Any Necessary Approvals, License or Agreement.

NextG hereby requests authorization in the form of a license or agreement from the City of Scottsdale in order to install, operate, and maintain fiber optic cable and associated equipment, including optical repeaters and antennae, on, over, and under the public way in the City in connection with the delivery of state regulated services provided by NextG as a carrier's carrier to its wireless carrier customers. As a certificated regulated Telecommunications Company in the state of Arizona, NextG is willing to comply with the process requirement imposed on other public utilities operating in the city. If the City owns any of its streetlights or utility poles and is interested in co-location, NextG would also seek permission to attach to these facilities as well.

B. Information about NextG.

Information about NextG and its technology and services is contained in a separate document entitled "NextG Benefits to Cities" enclosed with this application letter. Additional information can be supplied to the City upon request.

C. NextG Business Model.

NextG is a fiber-based network system, providing an optical-to-radio frequency ("RF") conversion and RF transport services. NextG Networks is NOT a wireless service provider, as we do not own spectrum or sell wireless services to consumers or other third parties. However, NextG Networks' customers are the wireless carriers themselves. When an operator cannot cover an area with traditional antenna/cell sites, they often turn to NextG's service to fill this gap in coverage. NextG's services will amplify capacity and extend the carrier's RF signals in these coverage areas. NextG customers will then be able to offer improved service to their customers (consumer wireless phone user) under agreements through which NextG will construct and operate fiber-fed node networks. Although, NextG Network's equipment includes small antennae, they should not be classified as wireless communication facilities. The purpose of an antenna in our network is to interface and convert our customer's RF signal into an optical signal for transport over our fiber network.

D. Regulatory Status.

NextG is a state regulated utility, having been granted a Certificate of Convenience and Necessity ("CCN") Docket #T-20377A-05-0484 from the Arizona Corporations Commission of. This certificate classifies NextG as public service corporation providing state regulated telecommunication services. NextG's status and services are not cellular, PCS or other wireless services, which is an important distinction in how NextG is to be seen by the City.

E. Use of Poles and Streets; Trenching.

NextG Networks facilities depend on the ability to attach to existing utility infrastructure. Towards that end, NextG Networks has entered into agreements with Arizona Public Service and Qwest Communications to attach to their utility poles within their respective service areas.

As previously mentioned, if the City is interested in making any City-owned streetlight and traffic light poles (collectively "poles") available for the deployment of our network equipment, NextG would be willing to do so in lieu of installing new utility poles in areas where there are no above ground utility poles.

F. Compensation to City.

NextG will compensation the city for the use of its right-of-way use agreement consistent with the requirements of Arizona Statutes Section 9-583(B) including i.) a reasonable application fee ii.) a transaction privilege tax, and; iii.) appropriate construction/encroachment permit fees. NextG is also offering to pay Five Hundred Dollars (\$500.00) per City-owned pole utilized per annum. In addition, NextG desires to negotiate terms for the use of any City-owned fiber and/or conduit space that may be available.

As NextG is a new service type and our network design incorporates various telecommunications technologies, we expect and understand that this initial submittal will probably raise additional questions from the city. We

have found it more efficient and productive to schedule an initial meeting as a follow up to this application package and would request that be the next step. If you have any further questions, please do not hesitate to contact me at (281) 205-9185 . I look forward to hearing from you soon.

Regards,
NEXTG NETWORKS, INC.



Joe Milone
Director of Government Relations

Enclosures: - *NextG Networks Certificate of Public Need and Convenience (CPCN)*
 - *NextG Benefits to Cities*
 - *NextG Press Release - Network Deployment in Del Mar, CA*

CC: ~~Ms. Deborah Robberson, Esq., City Attorney, City of Scottsdale~~
 Mr. Patrick Ryan, Esq. NextG Networks Outside Counsel

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

Arizona Corporation Commission

DOCKETED

AUG 29 2006

DOCKETED BY nr

IN THE MATTER OF THE APPLICATION OF
NEXTG NETWORKS OF CALIFORNIA, INC.
DBA NEXTG NETWORKS WEST FOR
APPROVAL OF A CERTIFICATE OF
CONVENIENCE AND NECESSITY FOR
TRANSPORT AND BACKHAUL SERVICES TO
OTHER CARRIERS, INCLUDING BUT NOT
LIMITED TO WIRELESS
TELECOMMUNICATIONS SERVICES
PROVIDERS AND POTENTIALLY TO
WIRELESS INFORMATION SERVICES
PROVIDERS.

DOCKET NO. T-20377A-05-0484

DECISION NO. 68915

OPINION AND ORDER

DATE OF HEARING: July 27, 2006

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Teena Wolfe

APPEARANCES: Thomas H. Campbell, LEWIS AND ROCA, LLP, on behalf of NextG Networks of California, Inc. dba NextG Networks West;

T. Scott Thompson, COLE, RAYWID & BRAVERMAN, LLP, on behalf of NextG Networks of California, Inc. dba NextG Networks West; and

Keith Layton, Staff Attorney, Legal Division, on behalf of the Commission's Utilities Division Staff.

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. On July 1, 2005, NextG Networks of California, Inc. dba NextG Networks West ("NextG" or "Applicant") filed with the Commission an application for a Certificate of Convenience

1 and Necessity ("Certificate") to provide private line and intrastate access services in order to supply
2 transport and backhaul services to other carriers, including but not limited to wireless
3 telecommunications services providers and potentially to wireless information services providers
4 within the State of Arizona.

5 2. On August 17, 2005, the Commission's Utilities Division Staff ("Staff") docketed a
6 copy of a letter informing Applicant of further information required for Staff to complete its analysis
7 of the application.
8

9 3. On October 17, 2005, Applicant docketed its responses to Staff's request for
10 additional information.

11 4. On June 6, 2006, Staff filed a Staff Report on the application, recommending approval
12 subject to certain conditions.

13 5. On June 16, 2006, a Procedural Order was issued setting the matter for hearing to take
14 place on July 27, 2006, and setting associated procedural deadlines.

15 6. On July 14, 2006, NextG filed an Affidavit of Publication demonstrating that notice of
16 the application was published in *The Arizona Republic*, a newspaper of general circulation in the
17 requested Certificate service area, on June 30, 2006. No requests for intervention were filed.
18

19 7. On July 26, 2006, Thomas H. Campbell and Michael T. Hallam filed a Motion and
20 Consent of Local Counsel for *Pro Hac Vice* Admission of Scott Thompson.

21 8. The hearing convened as scheduled on July 27, 2006. Admission *pro hac vice* was
22 granted to Scott Thompson at the commencement of the hearing. Applicant and Staff appeared
23 through counsel and presented evidence. No members of the public appeared to provide public
24 comment.
25

26 9. NextG is organized under the laws of Delaware as a C corporation, and has been
27 authorized to do business in Arizona since December 23, 2004.
28

1 10. NextG plans to offer private line and intrastate access services in order to provide
2 transport and backhaul services of voice and data signals, primarily for wireless providers. NextG's
3 "RF Transport Services" use optical technology, including multi-wavelength optical technology, over
4 dedicated transport facilities to provide telecommunications companies with more efficient transport
5 and greater overall network service options. RF Transport Services connect customer provided
6 wireless capacity equipment to customer-provided or NextG provided bi-directional RF-to-optical
7 conversion equipment at a hub facility. The hub facility can be customer or NextG provided. The
8 conversion equipment will allow NextG to accept RF traffic from the customer and then send bi-
9 directional traffic transmission across the appropriate optical networks. At the remote end, NextG or
10 the telecommunications company will provide RF-to-optical conversion equipment to allow bi-
11 directional conversion between optical signals and RF signals. RF signals can be received and
12 radiated at this remote node. NextG will offer service subject to the availability of the necessary
13 facilities and/or equipment. NextG currently has plans to operate in 27 states, and has commenced
14 operations in California, Georgia and Illinois. At the hearing, NextG's witness testified that NextG
15 plans to commence provision of service in Arizona within one year of receiving a Certificate.
16
17

18 11. NextG states in its application that it will rely on the financial resources of its parent
19 company, NextG Networks, Inc. The Staff Report states that the 2005 financial statements provided
20 by NextG list total assets of \$44,638,000, total equity of \$17,514,000, and net income of
21 (\$5,739,000).
22

23 12. The Staff Report states that NextG's parent and affiliates operate in 8 states and have
24 approximately 36 employees and 11 contract workers with more than 150 years of combined
25 experience in the wireless industry.

26 13. The application states that on March 9, 2005, the City and County of San Francisco
27 filed a complaint against NextG associated with a dispute between NextG and the City regarding
28

1 NextG's ability to construct in the public rights-of-way. Staff states in its Staff Report that on
2 January 19, 2006, Staff received a copy of a January 12, 2006 Order of the California Public Utilities
3 Commission (CPUC Decision 06-01-006) finding on behalf of NextG. Staff noted that the complaint
4 did not involve issues related to customer service, but only jurisdictional issues raised by the City.
5 NextG certified that neither the Applicant nor any of its officers, directors, partners or managers have
6 been or are currently involved in any other formal or informal complaint proceedings pending before
7 any state or federal regulatory commission, administrative agency, or law enforcement agency, or in
8 any civil or criminal investigations, and that NextG's parent and affiliates have not had an application
9 for service denied, or authority revoked, in any state.
10

11 14. Applicant has the financial, technical, and managerial capabilities to provide the
12 private line services and intrastate access services it is requesting authority to provide.

13 15. Applicant will be providing service in areas where incumbent local exchange carriers
14 ("ILECs"), along with various competitive local exchange carriers ("CLECs") and interexchange
15 carriers ("IXCs") are providing telephone and private line services.
16

17 16. Staff recommended that Applicant's proposed services be classified as competitive
18 because there are alternatives to Applicant's services; Applicant will have to convince customers to
19 purchase its services; Applicant has no ability to adversely affect the local exchange or interexchange
20 service markets; and Applicant will therefore have no market power in those local exchange or
21 interexchange service markets where alternative providers of telecommunications services exist.
22

23 17. It is appropriate to classify all of Applicant's authorized services as competitive.

24 18. NextG's proposed tariff lists a maximum rate for its proposed private line services and
25 intrastate access services. Staff reviewed NextG's proposed tariff, and states that while it lists a
26 maximum rate, NextG's proposed tariff is based on actual rates, and notes that Commission rules
27 require that the rate charged for a service may not be less than a company's total service long-run
28

1 incremental cost of providing the service. Staff states that since the services to be offered are highly
2 competitive and targeted for sophisticated carriers and communications companies experienced in
3 negotiating charges and other contract terms for point-to-point wireless voice and data services, Staff
4 believes the proposed rates are just and reasonable. Staff also notes that the majority of NextG's
5 customers are expected to purchase services under individual case basis ("ICB") arrangements and
6 pricing. Staff stated that while it considered the fair value rate base ("FVRB") information submitted
7 by the Applicant, it did not believe the information deserved substantial weight in setting Applicant's
8 rates.
9

10 19. The rates proposed by the application are for competitive services, and in general,
11 rates for competitive services are not set according to rate of return regulation. Staff obtained
12 information from the Applicant that indicates its FVRB is zero. Staff has reviewed the rates to be
13 charged by the Applicant and believes they are just and reasonable as they are comparable to those of
14 other competitive local carriers offering service in Arizona and comparable to the rates Applicant
15 charges in other jurisdictions. The rates to be ultimately charged by Applicant will be heavily
16 influenced by the market. Because of the nature of the competitive market and other factors, a FVRB
17 analysis is not necessarily representative of Applicant's operations.
18

19 20. Staff recommends that Applicant be granted a Certificate to provide the requested
20 intrastate telecommunications services subject to the condition that Applicant docket tariffs for each
21 certificated service conforming to the tariffs proposed in the application, within 365 days from the
22 date of an Order in this matter or 30 days prior to providing service, whichever comes first, and that
23 the Certificate should become null and void after due process if it does not timely comply with the
24 condition.
25

26 21. Staff further recommends the following:

- 27 (a) that Applicant be ordered to comply with all Commission rules, orders, and
28 other requirements relevant to the provision of intrastate telecommunications
services;

- 1 (b) that Applicant be ordered to abide by the quality of service standards that were
- 2 approved by the Commission for Qwest in Docket No. T-0151B-93-0183;
- 3 (c) that Applicant be required to notify the Commission immediately upon
- 4 changes to Applicant's name, address, or telephone number; and
- 5 (d) that Applicant be ordered to cooperate with Commission investigations
- 6 including, but not limited to customer complaints.

7 22. Staff's recommendations, as set forth herein, are reasonable.

8 23. Applicant's fair value rate base is determined to be zero for purposes of this
9 proceeding.

10 CONCLUSIONS OF LAW

11 1. Applicant is a public service corporation within the meaning of Article XV of the
12 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

13 2. The Commission has jurisdiction over Applicant and the subject matter of the
14 application.

15 3. Notice of the application was given in accordance with the law.

16 4. A.R.S. § 40-282 allows a telecommunications company to file an application for a
17 Certificate to provide competitive telecommunications services.

18 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised
19 Statutes, it is in the public interest for Applicant to provide the telecommunications services set forth
20 in its application.

21 6. Applicant is a fit and proper entity to receive a Certificate authorizing it to provide
22 private line and intrastate access services in order to supply transport and backhaul
23 telecommunications services in Arizona as conditioned by Staff's recommendations to other carriers,
24 including but not limited to wireless telecommunications services providers and wireless information
25 services providers within the State of Arizona.

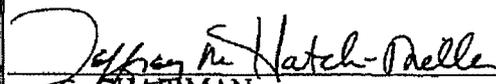
26 7. The telecommunications services that Applicant intends to provide are competitive
27 within Arizona.

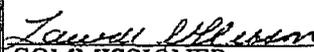
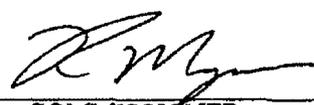
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1 IT IS FURTHER ORDERED that the services NextG Networks of California, Inc. dba NextG
2 Networks West is authorized to provide herein are hereby classified as competitive.

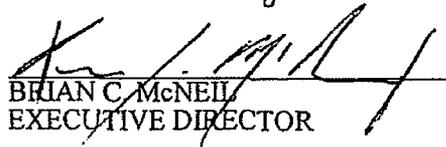
3 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

4 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

5
6  
7 CHAIRMAN COMMISSIONER

8
9   
10 COMMISSIONER COMMISSIONER COMMISSIONER

11
12 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
13 Director of the Arizona Corporation Commission, have
14 hereunto set my hand and caused the official seal of the
15 Commission to be affixed at the Capitol, in the City of Phoenix,
16 this 29th day of August, 2006.

17 
18 BRIAN C. McNEIL
19 EXECUTIVE DIRECTOR

20 DISSENT _____

21 DISSENT _____

22 TW:mj

23
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28



NextG Networks

Empowering Next Generation Wireless Networks:

Municipal Benefits from NextG Deployment

Wireless Industry Context

In order to accommodate customer demand for additional voice traffic (2G) and the introduction of broadband wireless data services (2.5G, 3G, WiFi [802.11b]), it is estimated that wireless operators will need to triple the number of wireless sites dedicated to expanding their networks by 2006. Developing such an ambitious wireless footprint will require creative solutions to meet coverage and capacity demands. NextG Networks is committed to providing wireless operators with a flexible fiber network architecture that delivers wireless microcell sites for deployment in areas that would be difficult or impossible to cover using traditional means.

NextG Brings Needed Solutions to Cities

In order to meet the demand of their wireless customers (many of whom have abandoned LAN-line wired telephone service), carriers must find ways to increase both the quality of their coverage and their caller traffic capacity. The high-site macrocell networks currently in place are mature and offer basic coverage, albeit with inadequate capacity. The result for many callers is the frequent inability to place a call and dropped or interrupted calls. Adding more high-site macrocells can fix coverage holes, but this traditional solution cannot address the problem that each carrier has a limited amount of spectrum to be used by its customers in the coverage area of each macrocell site.

Microcell sites at street-level offer a solution to the capacity limitations currently facing carriers by allowing the frequent re-use of carriers' existing spectrum. Because the coverage area of each microcell site is only 10-20% of the coverage shadow cast by each traditional macrocell site, the same spectrum can be re-used 5-10 times as customers move and hand off their calls among the resulting larger number of microcells handling traffic at street level instead of broadcasting from high-rise buildings. Wireless carriers know that they will have to migrate to a microcellular architecture in the near future to address the need for better coverage and increased capacity that 3G and broadband service will

Contact: NextG Networks, Inc.; 8000 Research Forest Drive, Suite 115-110, The Woodlands, TX 77382
www.nextgenetworks.net

6/1/2005



NextG Networks®

NEXTG LAUNCHES DAS WIRELESS NETWORK IN LESS THAN EIGHT MONTHS

Innovative Network Enhances Wireless Performance For Ocean-Side Community

San Jose, CA- January 23, 2007 – NextG Networks, the leading provider of Distributed Antenna System (DAS) networks, announced it launched a DAS Network in Del Mar, California, which was fully operational in less than eight months. The Network enhances the wireless performance for the ocean-side community by filling in coverage gaps and increasing the capacity of the existing infrastructure.

"The NextG DAS Network is a carrier-class system that was installed and carrying traffic in record time," said Steve Casey, Cingular's executive director of network operations. "It is a significant cooperative project enabling us to provide coverage and support for our new high-speed wireless services for the residents and visitors to Del Mar."

Equally important to enhancing the mobile performance for this ocean-side community, NextG's system met the city's desire for unobtrusive network equipment with minimal impact to the environment.

"The City of Del Mar has a long-standing commitment to preserving our community's natural setting," said Del Mar City Council member Crystal Crawford, who was mayor during the development and launch of the network. "I really appreciated how NextG Networks worked with us to make the DAS Network as unobtrusive as possible. As a long-time cellular customer, I can personally attest to the improved mobile coverage."

NextG's DAS Networks use strategically placed low-power, fiber-optic-fed antenna nodes that blend very well with the surrounding landscape by using existing street lights and utility poles. The DAS Networks also are protocol-neutral, scaling easily to support multiple wireless carriers, services, and technologies.

"The challenge in cities such as Del Mar is to design and deploy a mobile communications system that is not noticed by most residents, yet supports the carriers' services for voice, instant messaging, ringtone downloads, Internet surfing and all the new services," said John Georges, CEO and co-founder of NextG Networks. "This Network can support any carrier that wants to offer service in Del Mar."

###



"Most Livable City"
U.S. Conference of Mayors

INFORMATION SYSTEMS

7384 E. 2ND STREET
SCOTTSDALE, AZ 85251

(480) 312-2622 PHONE
(480) 312-2623 FAX

Kevin Sonoda
City of Scottsdale
7384 E. 2nd Street
Scottsdale, AZ 85251

April 23, 2009

Mr. Joe Milone, Director of Government Relations
NextG Networks
8000 Research Forest Dr., #115-250
The Woodlands, TX 77382

Re: March 10, 2009 Correspondence

Dear Mr. Milone,

Your March 10, 2009 correspondence directed to David Ellison has been forwarded to my office for response. I have also conferred with the City's legal department regarding the matters stated therein. At the outset, please be advised that your letter cannot be accepted by the City as a formal application for deployment of a fiber optic-based network facilities in the public rights-of-way (ROW).

For your convenience, I have enclosed the City's standard application form for obtaining a telecommunications license from the City. While you should feel free to complete and submit the application for a telecommunications license, you should be advised that the City does not agree with the positions stated in your letter.

A telecommunications license can be issued under § 47-161 *et seq.* of the Scottsdale City Code if the criteria stated therein are met. After submission of a properly completed application, the City will determine if it is appropriate to issue a telecommunications license. You should also be aware that the City also allows installation of underground cables in the ROW through an appropriate contractual agreement which does not require the issuance of a telecommunications license. Most recently, the City reached an agreement with a dark fiber company for permission to encroach upon the ROW at a price of \$1.81 per lineal foot. I will also note that the City has some questions whether or not the CC&N held by NextG was properly issued by the Arizona Corporation Commission.

I have also reviewed the nature of the facilities which NextG proposes to install. From that review, it is apparent that the proposed network includes the installation of wireless communication facilities ("WCF") within the meaning of the Scottsdale Zoning Ordinance, § 7.200(H). The installation of WCF in the City's rights of way is not allowed under a City telecommunications license alone. In fact, all WCF currently installed in the City's rights of way belong to companies who do not have a telecommunications license with the City.

There is a separate approval and permitting process for each proposed WCF site which you will find outlined in the Zoning Ordinance. There are also separate permitting fees and annual fees for encroachment in the ROW. The annual permission for private improvement in the ROW (PIR) encroachment permit fee is \$8,475. The annual (PIR) fees are currently scheduled to increase by 1.5% effective July 1, 2009. However, the annual encroachment fee is currently under review by the City and may be subject to change.

As a final note, I will advise you that the City does not agree with the contentions stated in your letter regarding the effect of NextG's CC&N or that the reasonable fees the City charges for WCF or fiber optic cable installation are in any way preempted by state or federal law. I hope you find this information helpful. If you have further questions or need additional information, please feel free to contact my office. I can be reached at 480 312-4138 or via email at ksonoda@scottsdaleaz.gov

Sincerely,

Kevin Sonoda

Wireline Telecommunications Administrator

APPLICATION – NEXTG NETWORKS
CITY OF SCOTTSDALE – TELECOMMUNICATIONS LICENSE

LIST OF CONTENTS

- I. Cover Sheet and Contact Information
(COS Revised Code §47-164(b)(1): The names, addresses, and telephone numbers of the applicant, including those for responsible parties during the application, construction and implementation process. This includes a 24-hour emergency telephone contact)

- II. Certificate of Convenience & Necessity
(COS Revised Code §47-164(b)(2): A copy of the applicant's valid certificate of public convenience and necessity which has been issued by the Arizona Corporation Commission; except that this requirement shall not apply to a telecommunication corporation that provides solely interstate telecommunications within the state as demonstrated to the city's satisfaction)

- III. Statement of Other Telecommunications Licenses
(COS Revised Code §47-164(b)(3): A statement identifying by place and date any other telecommunications or cable licenses awarded to the applicant, its parent or subsidiary; and the status of said licenses)

- IV. Specific Route Maps for Infrastructure
(COS Revised Code §47-164(b)(4): Specific route maps for the applicant's infrastructure in Scottsdale including all areas proposed to be served for both 1) initial construction and 2) full project build-out. The initial construction map shall serve as Exhibit "A" as indicated in subsection 47-165(b)(1))

- V. Statement of Timetable for Installation of Facilities and Infrastructure
(COS Revised Code §47-164(b)(5): A proposed time schedule for the installation of all facilities necessary to become operational throughout the entire service area together with a document comparing the schedule with the city's proposed street maintenance schedule and the city's five-year capital improvement plan)

- VI. Copy of Existing Interconnect or Leasing Agreements in License Area
(COS Revised Code §47-164(b)(6): A copy or abstract of any agreement covering the license area, if existing, between the applicant and the local telephone company and/or other utilities providing for the use of the utility including but not limited to poles, lines or conduit)

- VII. Other Information
(COS Revised Code §47-164(b)(7): Any other details, statements, information or references, pertinent to the subject matter of such application which shall be required or requested by the city manager and/or city council, or by any other provision of law)

- VIII. Sworn Statement of Company

I. Cover Sheet and Contact Information

The names, addresses, and telephone numbers of the applicant, including those for responsible parties during the application, construction and implementation process. This includes a 24-hour emergency telephone contact.

Name of Applicant (Company): NextG Networks

Address of Applicant:

Date Application Submitted:

Name, Address, Title and Telephone Number of Persons Who Inquiries Should Be Made:

Telecommunications License Contact

Name:

Title:

Address:

Telephone:

Fax:

Construction Contact

Name:

Title:

Address:

Telephone:

Fax:

24-Hour Emergency Contact

Name:

Title:

Address:

Telephone:

Pager or Cell phone:

II. Certificate of Convenience & Necessity

Attach a copy of the valid certificate of public convenience and necessity which has been issued by the Arizona Corporation Commission; except that this requirement shall not apply to a telecommunication corporation that provides solely interstate telecommunications within the state as demonstrated to the city's satisfaction. Provide copy and label as Attachment "B."

III. Statement of Other Telecommunications Licenses

Provide a list identifying by place and date any other telecommunications or cable licenses awarded to the applicant, its parent or subsidiary; and the status of said licenses.

IV. Specific Route Maps for Infrastructure

Specific route maps for the applicant's infrastructure in Scottsdale including all areas proposed to be served for both 1) initial construction and 2) full project build-out. The initial construction map shall serve as Exhibit "A" as indicated in subsection 47-165(b)(1).

V. Statement of Timetable for Installation of Facilities and Infrastructure

A proposed time schedule for the installation of all facilities necessary to become operational throughout the entire service area together with a document comparing the schedule with the city's proposed street maintenance schedule and the city's five-year capital improvement plan.

VI. Copy of Existing Interconnect or Leasing Agreements in License Area

A copy or abstract of any agreement covering the license area, if existing, between the applicant and the local telephone company and/or other utilities providing for the use of the utility including but not limited to poles, lines or conduit.

VII. Other Information

Any other details, statements, information or references, pertinent to the subject matter of such application which shall be required or requested by the city manager and/or city council, or by any other provision of law.

VIII. Sworn Statement of Company

On behalf of NextG Networks, and in support of its application for a Telecommunications Licenses from the City of Scottsdale, the undersigned represents and swears:

- A. This application is submitted for consideration to receive a Telecommunications Licenses from the City of Scottsdale, Arizona. The undersigned representative of the Applicant has been duly authorized to make representations herein on behalf of the Applicant.
- B. Applicant recognizes that all representations are binding on it and that failure to adhere to any representations may, at the City's option, result in revocation of any license that may be granted in reliance upon this information.
- C. Consent is hereby given to the City to inquire into the legal, character, technical, financial, and other qualifications of the Applicant by contacting any persons or organizations named herein as references, or by any other appropriate means.
- D. NextG Networks will comply with all requirements and conditions of the Telecommunications License agreement and all lawful directives and reasonable requests for information by the City in connection with this application.
- E. NextG Networks will comply with all applicable federal, state, and local laws regarding nondiscrimination in the operation of its telecommunications network.

NEXTG NETWORKS

By: _____
(signature)

Name: _____

Title: _____

Subscribes and sworn before me on this _____ day of _____, 200__.

Notary Public

T-20377A-05-0484
OPEN MEETING ITEM

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BEFORE THE ARIZONA CORPORATION

IN THE MATTER OF THE APPLICATION) DOCKET NO.
OF NEXTG NETWORKS OF CALIFORNIA,) T-20377A-05-0484
INC. dba NEXTG NETWORKS WEST FOR A)
CERTIFICATE OF CONVENIENCE AND)
NECESSITY FOR TRANSPORT AND BACKHAUL)
SERVICES TO OTHER CARRIERS, INCLUDING)
BUT NOT LIMITED TO WIRELESS)
TELECOMMUNICATIONS SERVICES PROVIDERS)
AND POTENTIALLY TO WIRELESS)
INFORMATION SERVICES PROVIDERS.)

At: Phoenix, Arizona
Date: July 27, 2006
Filed: **AUG 15 2006**

RECEIVED
2006 AUG 15 P 3:43
AZ CORP COMMISSION
DOCUMENT CONTROL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Arizona Corporation Commission
DOCKETED
AUG 15 2006
DOCKETED BY
[Signature]

ARIZONA REPORTING SERVICES, INC.
Court Reporting
Suite Three
2627 North Third Street
Phoenix, Arizona 85004-1126
By: MICHELE E. BALMER, RPR
Certified Court Reporter
Certificate No. 50489

Prepared for:
ACC

ORIGINAL

1	INDEX TO EXAMINATIONS	
2	WITNESS	PAGE
3	ROBERT L. DELSMAN	
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	Cross-Examination by Mr. Layton	9
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6		
	ARMANDO FIMBRES	
7	Direct Examination by Mr. Layton	13
8	Examination by ALJ Wolfe	16

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10

11

INDEX TO EXHIBITS

12	NO.	DESCRIPTION	Identified	Admitted
13	A-1	Application of NextG Networks	7	13
14	S-1	Staff Report	8	16

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1 BE IT REMEMBERED that the above-entitled and
2 numbered matter came on regularly to be heard before the
3 Arizona Corporation Commission, 1200 West Washington
4 Street, Phoenix, Arizona, commencing at 1:30 p.m. on the
5 27th day of July, 2006.

6 BEFORE: TEENA WOLFE, Administrative Law Judge

7
8 APPEARANCES:

9 For the Arizona Corporation Commission Staff:

10 KEITH LAYTON
11 Staff Attorney, Legal Division
12 1200 West Washington Street
13 Phoenix, Arizona 85007

14 For NextG Networks:

15 COLE, RAYWID & BRAVERMAN, L.L.P.
16 By: Mr. T. Scott Thompson
17 1919 Pennsylvania Avenue, N.W., Suite 200
18 Washington, D.C. 20006

19 - and -

20 LEWIS AND ROCA, L.L.P.
21 By: Mr. Thomas H. Campbell
22 40 North Central Avenue
23 Phoenix, Arizona 85004

24

25

MICHELE E. BALMER
Certified Court Reporter
Certificate No. 50489

26

27

1 ALJ WOLFE: Let's go on the record.

2 Welcome to the Arizona Corporation Commission.
3 This is the time and place set for the hearing in the
4 matter of the application of NextG Networks of
5 California, Inc., doing business as NextG Networks West,
6 for a Certificate of Convenience and Necessity for
7 transport and backhaul services to other carriers,
8 including but not limited to wireless telecommunications
9 services providers and potentially to wireless
10 information services providers. The Docket No. is
11 T-20377A-05-0484.

12 My name is Teena Wolfe, and I'm the
13 Administrative Law Judge assigned to this proceeding.

14 Before we take appearances, I would like to
15 address an issue. Yesterday I received the motion and
16 consent of counsel for pro hac vice admission of
17 T. Scott Thompson filed in this docket by Michael T.
18 Hallam and Thomas H. Campbell, to which is attached a
19 copy of the notice of receipt of complete application
20 provided by the State Bar of Arizona, which copy in turn
21 includes as attachments copies of the nonresident
22 attorney pro hac vice application filed with the State
23 Bar of Arizona by Mr. Thompson, and a certificate of
24 good standing for Mr. Thompson provided by the District
25 of Columbia Court of Appeals.

1 I have reviewed the motion and its attachments,
2 and it is ordered today that in the discretion of the
3 Commission, T. Scott Thompson shall be permitted to
4 appear and participate in this matter pursuant to Rule
5 308(A) of the Arizona Supreme Court.

6 It is further ordered that Michael T. Hallam
7 and Thomas H. Campbell are designated as local counsel
8 in association with Mr. Thompson in this matter.

9 It is further ordered that the addresses for
10 services of papers and other communication for
11 Mr. Thompson and for local counsel shall be as they
12 appear in the motion and consent of counsel for pro hac
13 vice admission filed in this docket.

14 It is further ordered that Mr. Campbell,
15 Mr. Hallam, and Mr. Thompson must comply with Rule 38(A)
16 of the Rules of the Arizona Supreme Court with respect
17 to practice of law and admission pro hac vice.

18 It is further ordered that withdrawal of
19 representation must be made in compliance with
20 A.A.C R14-3-104(E) and Rule 1.16 of the Rules of
21 Professional Conduct under Rule 42 of the Arizona
22 Supreme Court.

23 And, finally, it is ordered that representation
24 before the Commission includes the obligation to appear
25 at all hearings and procedural conferences, as well as

1 all Open Meetings for which the matter is scheduled for
2 discussion, unless counsel has previously been granted
3 motion or permission to withdraw.

4 With that, I'll take appearances of counsel,
5 beginning with the Applicant.

6 MR. CAMPBELL: Thomas Campbell and Scott
7 Thompson on behalf of the Applicant, NextG Networks.

8 ALJ WOLFE: Okay. And for Staff?

9 MR. LAYTON: Good afternoon, Your Honor. Keith
10 Layton on behalf of Staff.

11 ALJ WOLFE: Thank you.

12 Are there any members of the public present who
13 would like to make public comment on the application?

14 (No response.)

15 ALJ WOLFE: Let the record reflect that there
16 are none.

17 Mr. Campbell, how many witnesses do you plan to
18 call?

19 MR. CAMPBELL: We'll have one witness, and
20 Mr. Thompson will be handling the witness.

21 ALJ WOLFE: Thank you.

22 And Mr. Layton?

23 MR. LAYTON: One witness, Your Honor.

24 ALJ WOLFE: Are there any other procedural
25 matters that we need to address before we begin?

1 MR. THOMPSON: No.

2 ALJ WOLFE: Mr. Thompson, if you would like to
3 call your witness.

4 MR. THOMPSON: Thank you, Your Honor. We call
5 Robert Delsman from NextG Networks.

6

7 ROBERT L. DELSMAN,
8 called as a witness on behalf of the Applicant, having
9 been first duly sworn by the Certified Court Reporter to
10 speak the whole truth and nothing but the truth, was
11 examined and testified as follows:

12

13 DIRECT EXAMINATION

14

15 Q. (BY MR. THOMPSON) Mr. Delsman, will you state
16 your full name and by whom you're employed.

17 A. Yes. Robert L. Delsman. I'm vice president
18 for government relations and regulatory affairs for
19 NextG Networks.

20 Q. Okay. I believe in front of you should be a
21 copy of the application filed by NextG in this matter,
22 maybe marked Applicant's Exhibit A-1.

23 Do you recognize that application?

24 A. Yes, I do.

25 Q. Okay. And was that prepared under your

1 supervision or at your direction?

2 A. Yes, it was.

3 Q. Okay. Are there any changes that need to be
4 made to that application today?

5 A. I note one change should be made. The name of
6 the treasurer listed as Tom Kais now should be Ray
7 Ostby, O-S-T-B-Y, who is the CFO of the corporation.

8 Q. Just for the record, that's located on -- that
9 would be on Attachment A; is that right? To the
10 application?

11 A. Yes. So substitute the name Ray Ostby for Tom
12 Kais as treasurer.

13 Q. And are there any other changes?

14 A. None.

15 Q. Okay. So with that change made, is the
16 application true and correct to the best of your
17 knowledge?

18 A. Yes.

19 Q. And also in front of you is a Staff Report that
20 I believe is premarked S-1. Have you reviewed the Staff
21 Report by the Corporation Commission Staff?

22 A. Yes, I have.

23 Q. And do you have any objections to the Staff
24 Report?

25 A. No. I do not.

1 MR. THOMPSON: Your Honor, we make Mr. Delsman
2 available for cross at this time.

3 ALJ WOLFE: Thank you.

4 Mr. Layton, do you have questions for this
5 witness?

6 MR. LAYTON: Just a couple, Your Honor. Thank
7 you.

8

9

CROSS-EXAMINATION

10

11 Q. (BY MR. LAYTON) Good afternoon, Mr. Delsman.

12 A. Good afternoon.

13 Q. Could you briefly describe the various services
14 that the company is requesting to provide?

15 A. The company is requesting to provide what
16 essentially, I believe, in Arizona is characterized as
17 private line service. It is what we call, as a sort of
18 trademark for marketing to our customers, RF Transport,
19 which is essentially a service -- a telecommunications
20 service provided as a carrier's carrier to other
21 telecommunications carriers. It could be RF Transport
22 or backhaul, or it might be service offered to an
23 information service provider.

24 But most of our business is provision of this
25 service to the limited universe of CMRS carriers, that

1 is, the wireless carriers.

2 Q. How many states does the company have authority
3 to provide similar services?

4 A. I believe that this would be the
5 twenty-seventh.

6 Q. And does the company currently operate in all
7 of these states?

8 A. We do not operate in all of the states. We
9 operate in three currently, but we are actively pursuing
10 networks and customer contracts in many of those other
11 states.

12 Q. And when do you expect to be providing services
13 in those other states?

14 A. It's a difficult question to answer. One to
15 three years. These are long lead-time regulatory
16 approvals that we need to obtain along with franchise
17 agreements in various municipalities. In order to be
18 able to offer this service and in order to sell our
19 services to our customers, they want to know that we
20 have the authority generally. So that's the reason why
21 that part of the cycle must occur prior to marketing our
22 services in those states.

23 Q. And if the Commission grants a CC&N to the
24 company, when would the company expect to begin
25 providing services in Arizona?

1 But if all things were equal, because we do
2 deal with such a limited universe of customers, we would
3 expect that pricing even in a negotiated context to be
4 very close.

5 MR. LAYTON: Thank you, Mr. Delsman. I have no
6 further questions.

7

8

EXAMINATION

9

10 Q. (BY ALJ WOLFE) Good afternoon, Mr. Delsman.

11 A. Good afternoon, Judge.

12 Q. The Staff Report says that your proposed tariff
13 is based on actual rates that equal the maximum rates;
14 is that correct?

15 A. Yes.

16 Q. Is that a correct characterization?

17 A. I believe so, yes.

18 Q. So the monthly recurring charge of 15,000,
19 that's the maximum rate that you would charge?

20 A. That's the maximum, yes.

21 ALJ WOLFE: Those are all of the questions that
22 I have. Do you have any redirect?

23 MR. THOMPSON: No, Your Honor.

24 ALJ WOLFE: Thank you for your testimony today.
25 You're excused as a witness.

1 THE WITNESS: Thank you.

2 ALJ WOLFE: Mr. Layton, would you like to call
3 your witness?

4 MR. LAYTON: Yes, Your Honor. Staff calls
5 Mr. Fimbres to the stand.

6 MR. THOMPSON: Your Honor, before the Staff
7 calls its witness, if I may, I would like to move for
8 the introduction and admission of NextG's application,
9 which has been marked as Exhibit A-1.

10 ALJ WOLFE: Thank you. Is there any objection?

11 MR. LAYTON: No, Your Honor.

12 ALJ WOLFE: Exhibit A-1 is admitted.

13 (Exhibit A-1 was received into evidence.)

14 MR. THOMPSON: Thank you, Your Honor.

15

16

ARMANDO FIMBRES,

17 called as a witness on behalf of Staff, having been
18 first duly sworn by the Certified Court Reporter to
19 speak the whole truth and nothing but the truth, was
20 examined and testified as follows:

21

22

DIRECT EXAMINATION

23

24 Q. (BY MR. LAYTON) Good afternoon, Mr. Fimbres.

25 A. Good afternoon.

1 Q. Could you please state your name and business
2 address for the record.

3 A. Armando Fimbres. I work for the Arizona
4 Corporation Commission, Utilities Division, at 1200 West
5 Washington.

6 Q. And could you briefly describe your duties in
7 that position.

8 A. My duties are largely in telecommunications as
9 an analyst.

10 Q. And in the course of your employment, did you
11 review and evaluate a request for a CC&N from NextG
12 Networks of California, doing business as NextG Networks
13 West?

14 A. I did.

15 Q. And was the request for a CC&N made in this
16 docket?

17 A. Yes, it was.

18 Q. Do you have up there a Staff exhibit previously
19 marked as S-1?

20 A. Yes. I have it in front of me.

21 Q. Could you please identify this exhibit for the
22 record.

23 A. S-1 is the Staff Report filed -- docketed by
24 Staff on June 6.

25 Q. And was the Staff Report prepared by you or

1 under your direction?

2 A. Yes, it was.

3 Q. Do you adopt Staff Exhibit S-1 as part of your
4 sworn testimony here today?

5 A. I do.

6 Q. Based on your review and evaluation of the
7 application, is it your opinion that NextG is a fit and
8 proper entity to provide the proposed services?

9 A. Yes, I do. Yes.

10 Q. And, Mr. Fimbres, I would like to just clarify
11 one thing in your Staff Report. Could you turn to
12 Page 5 of the Staff Report.

13 A. Yes.

14 Q. The two paragraphs right above the section
15 numbered -- that recommendation, would you consider that
16 a condition for approval of the CC&N?

17 A. Yes. It is appropriate for compliance, yes.

18 Q. And do you have any other comments that you
19 would like to add at this time?

20 A. No. I do not.

21 MR. LAYTON: Your Honor, Staff moves for the
22 admission of Exhibit S-1.

23 ALJ WOLFE: Thank you.

24 Is there any objection?

25 MR. THOMPSON: No, Your Honor.

1 ALJ WOLFE: S-1 is admitted.

2 (Exhibit S-1 was received into evidence.)

3 MR. LAYTON: Mr. Fimbres is now available for
4 cross-examination.

5 ALJ WOLFE: Thank you.

6 Mr. Thompson, do you have questions for this
7 witness?

8 MR. THOMPSON: No, Your Honor.

9 ALJ WOLFE: Okay.

10

11

EXAMINATION

12

13 Q. (BY ALJ WOLFE) Good afternoon, Mr. Fimbres.

14 A. Good afternoon.

15 Q. I have to ask you at least one question.

16 A. All right.

17 Q. In the body of your Staff Report, you go over
18 the financial capability of the Applicant to provide the
19 requested services. I know you said in response to
20 Mr. Layton that you believe that the Applicant is a fit
21 and proper entity to receive a CC&N, but I just like to
22 ask.

23 Does the Applicant, in your opinion, have the
24 financial capability to provide the proposed services?

25 A. I need to kind of think about how to answer

1 that. In the context of the way Staff looks at these,
2 it's yes. Understanding that, first of all, the
3 customer set that's being served are customers that are
4 very much in a position to evaluate the service
5 provider. They're not providing services to a set of
6 customers such as consumers, residential consumers.

7 I think they say in their application that it's
8 a very unique set of customers, and I would have to
9 agree with that. So I think in the context of the way
10 we evaluated it, yes.

11 Q. And this Applicant is planning to provide
12 services over facilities that it will construct and own;
13 is that correct?

14 A. That's my understanding.

15 ALJ WOLFE: Thank you. Those are all of the
16 questions that I have.

17 Do you have anything further, Mr. Layton?

18 MR. LAYTON: No, Your Honor. Thank you.

19 ALJ WOLFE: Thank you for your testimony today.
20 You're excused as a witness.

21 Mr. Thompson, do you have anything further for
22 your case?

23 MR. THOMPSON: No, Your Honor. I think that
24 the application and the Staff Report speak for
25 themselves and support the Commission ultimately

1 granting the application.

2 ALJ WOLFE: Thank you.

3 Mr. Layton, anything further?

4 MR. LAYTON: No, Your Honor.

5 ALJ WOLFE: Do you want to make any sort of
6 closing statement?

7 MR. LAYTON: No.

8 ALJ WOLFE: Thank you.

9 Well, that will conclude the evidentiary
10 portion of this proceeding. And I'll take this matter
11 under advisement pending my submission of a recommended
12 opinion and order to the Commission for their final
13 disposition.

14 Thank you for your attendance today.

15 (The hearing concluded at 1:50 p.m.)

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1 STATE OF ARIZONA)
) ss.
 2 COUNTY OF MARICOPA)

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6 I, MICHELE E. BALMER, Certified Court Reporter
 7 No. 50489 for the State of Arizona, do hereby certify
 8 that the foregoing printed pages constitute a full, true
 9 and accurate transcript of the proceedings had in the
 10 foregoing matter, all done to the best of my skill and
 11 ability.

12

13 WITNESS my hand this 10th day of August, 2006.

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Michele E. Balmer
 MICHELE E. BALMER
 Certified Court Reporter
 Certificate No. 50489

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May 20, 2010

VIA EMAIL AND UPS DELIVERY

City of Glendale
Craig Tindall, City Attorney
5850 West Glendale Avenue, Suite 450
Glendale, AZ 85301

re: *City of Glendale's Postponement of City Council Hearing Date for the Approval of NextG Networks of California, Inc. Right of Way Use Agreement*

Dear Mr. Tindall:

NextG is sending this letter to express its concern about the City of Glendale's (the "City") continued delay in bringing the Right-Of-Way Use Agreement ("RUA") with NextG Networks of California, Inc. ("NextG") before the City Council for consideration. NextG began negotiations with the City more than a year ago and has had a fully negotiated RUA, signed by NextG on March 25, 2010 and ready for City Council action since that time. In addition, the permit applications for the underlying network were submitted to and have been in the City's possession since February, 2010. NextG accepted City staff's proposed City Council date of May 11, 2010, because of representations that that City Council date was real and that it would take place without further delay. Unfortunately, that assessment was incorrect and the RUA was bumped off the City Council Agenda. NextG is now being informed by City staff that the RUA will not be heard until some unspecified date in the future.

Although NextG respects the City's need to prioritize issues being brought before the City Council, such as the budget and negotiations with the NHL, NextG strongly believes that such prioritization should not delay business that is and has been ripe for City Council consideration. The RUA has undergone extensive review and scrutiny by City staff in several different City departments and should be put on the next available City Council date. Failure to do so will bring about severe economic damage to NextG and its contractual obligations with its client, since NextG detrimentally relied upon the assertions of City staff.

Additionally, NextG has set its network build out expectations to be consistent with the timeframes set forth in the Federal Communications Commission's *Declaratory Ruling*, FCC 09-09, WT Docket No. 08-165 (Nov. 18, 2009). As to the NextG's application for its network, the City must issue NextG a notice within thirty (30) days of any written deficiencies as submitted. No notice of deficiencies was received within the first thirty (30) days. While NextG had assumed that the City intended to adopt the RUA before issuing permits, this is not a requirement for NextG, and was negotiated principally to provide protections for the City. Thus, according to the timeframes established in the *Declaratory Ruling*, the Application that NextG made to the City has been deemed complete by operation of default. *Id.*, at §53. Having completed the first phase, NextG requests that the City issue permits consistent with the *Declaratory Ruling*, which finds that the decision should issue within 90 days of the initial Application for collocations on utility poles, and within 150 days of the initial Application for new poles. *Id.*, at §32.

City staff has been cordial to NextG; however, each delay further frustrates NextG's need to bring the RUA to a conclusion. Below is a chronology of events that has brought us to this point. NextG respectfully requests that the RUA be scheduled for June 8, 2010, City Council hearing so that both the City and NextG can attend to their respective needs.

Please contact me should you have any questions.

Very truly yours,



Paul R. O'Boyle
Counsel for NextG

cc: Patrick Ryan, Esq. (NextG)
Joe Milone, (NextG)

RUA Chronology

- On March 10, 2009, Joe Milone, NextG's Director of Government Relations, sent a letter to Ed Beasley, City Manager for the City. In the March letter, Mr. Milone described NextG's regulatory model and requested the opportunity to confer with the City about the possibility of entering into a Right of Way Use Agreement.
- On May 12, 2009, Mr. Milone met with Mark Gibson, Construction Engineering Manager, Paul Li, Assistant City Attorney and Dick Janke, Deputy Transportation Director for an initial meeting to discuss, generally, NextG's model and the benefits to both parties for entering into such agreement.
- On September 24, 2009, after several exchanges of draft agreements between NextG and the City, NextG submitted their license application fee.
- In February, 2010, NextG submitted plans to the City for review and approval.
- During negotiations, in March 2010, we made it very clear to Mr. Li that it was vital to have the agreement go to City Council as soon as possible in order to meet our contractual obligations to our client. Due to the City's budget issues, Mr. Li indicated that the earliest hearing date available would be May 11, 2010. This delay was due to budget deliberations. NextG was concerned, but accepted the May 11, 2010 City Council date based on representations from staff that the May 11th date was real and would happen by then without any issues.
- On March 22, 2010, negotiations between NextG and Mr. Li were concluded, and NextG signed the RUA on March 25, 2010. A final fully negotiated Right of Way Use Agreement was ready for City Council review and decision.
- Unfortunately on May 7, 2010, Mr. Li informed us that the NextG agreement was pulled from May 11, 2010, City Council agenda to a date not certain since you wanted to review the agreement.

NextG Networks

City of Glendale
Initial Staff Meeting

May 12th 2009

Empowering

Next Generation

Wireless Networks

Joe Milone

Director of Government Relations

About NextG Networks

- ❖ NextG is a fiber based, carrier-neutral service provider. Using our proprietary fiber-optic technology and fiber infrastructure, NextG provide wireless capacity and coverage solutions to the wireless carriers, including data and improved 911 services.
- ❖ NextG Networks' provides solid balance between citizen demand for wireless services and minimizing environmental and visual impacts of telecommunications installations.
- ❖ NextG strives to utilize existing utility infrastructure and has a pole attachment agreements in place with Arizona ^{can be} ~~Public Service and Salt River Project~~ ^{Arizona, Salt} ~~NextG~~. Further, NextG is also proposing using city-owned facilities (light poles) in lieu of installing new utility poles.



NextG Networks

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NextG's Regulatory Status

- ❖ NextG is NOT a Wireless Service Provider, we are a Fiber Transport service using an RF over Fiber technology.
- ❖ NextG operates under the rights granted under the Telecom Act, Sections 253 and 332.
- ❖ NextG Networks is a Public Utility (CLEC) granted by a CC&N (Docket T-20377A) from the Arizona Corporations Commission to provide regulated transport services to wireless telecommunication service providers.
- ❖ NextG expects equal access to public ROW through non-discriminatory treatment and processing in the city as other regulated public utilities. This includes provisions of the Arizona Revised Statutes § 9-582, specifically related to fees and the Transaction Privilege Tax provisions. *5.4% of Base TPT*



NextG Networks

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Page 3, May 11, 2009

Network Facilities

- ❖ Fiber-optic cables to enable transport services from access point to customer location.
 - ❖ Aerial Fiber on existing above ground utility poles (Aerial)
 - ❖ Fiber placement in existing underground conduits and ducts (Lease Duct)
 - ❖ New fiber construction utilizing traditional trench and boring practices OR non-invasive micro-trench technology
- ❖ Electronic switching/conversion equipment.
 - ❖ Multiplexor to convert fiber optic signal to RF signal and vice-versa
 - ❖ Electric power fuse and disconnect switch
 - ❖ Wires – coax cable and Romex electrical wire
- ❖ Antenna
 - ❖ Single omni-whip or dual panel configuration which allows NextG to interface with our customers (convert RF to optical signal)

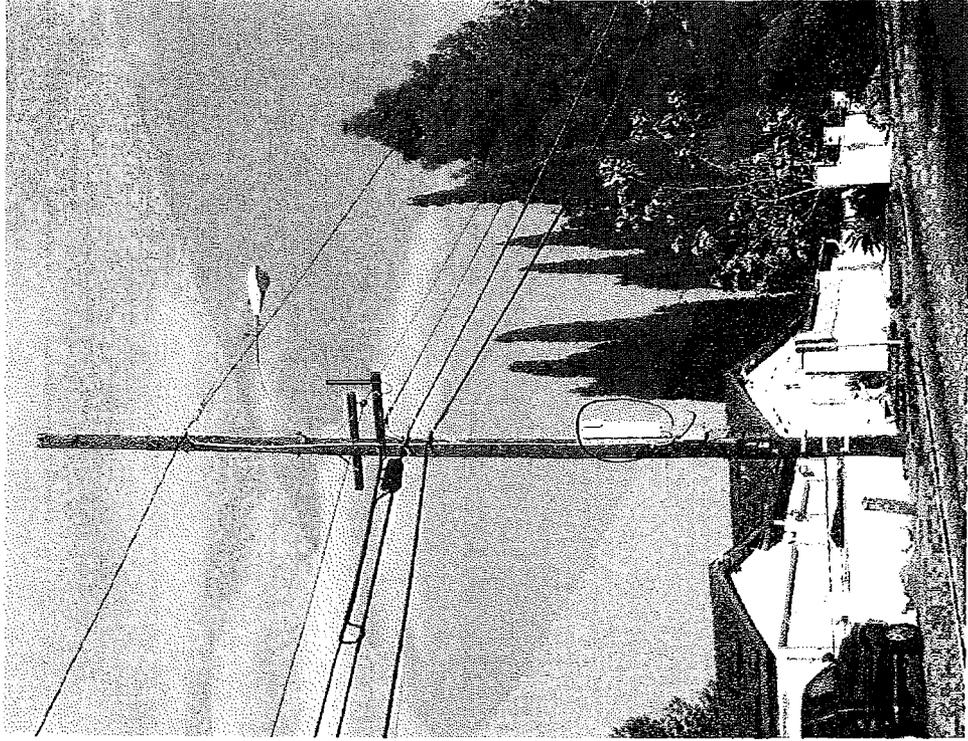
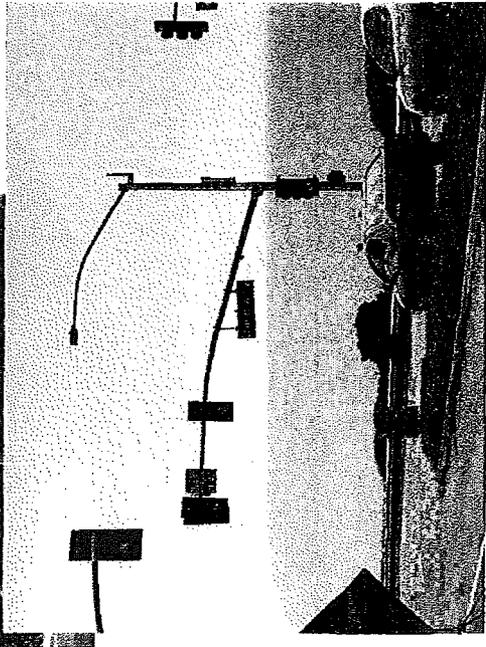
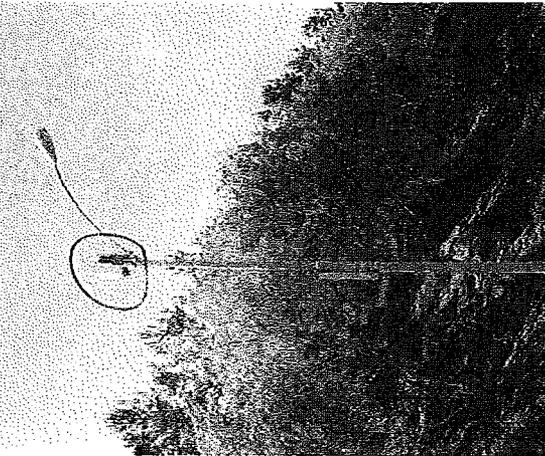


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Node Pictures



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Page 5, May 11, 2009



Win-Win Solution

- ❖ The NextG Networks technology makes sense for any City and is a valuable infrastructure asset.
- ❖ Equipment is small and unobtrusive.
- ❖ Makes reliable wireless services (voice, data and E911) available in all areas of the City, especially in areas without solid coverage and traditional cell installations are not appropriate.
- ❖ Maximizes the use of existing above ground facilities vs. placing new utility poles in city.
- ❖ Opportunity for city to capture revenue for use of these public ROW and city-owned facilities.
- ❖ Network is carrier neutral and can accommodate multiple operators.



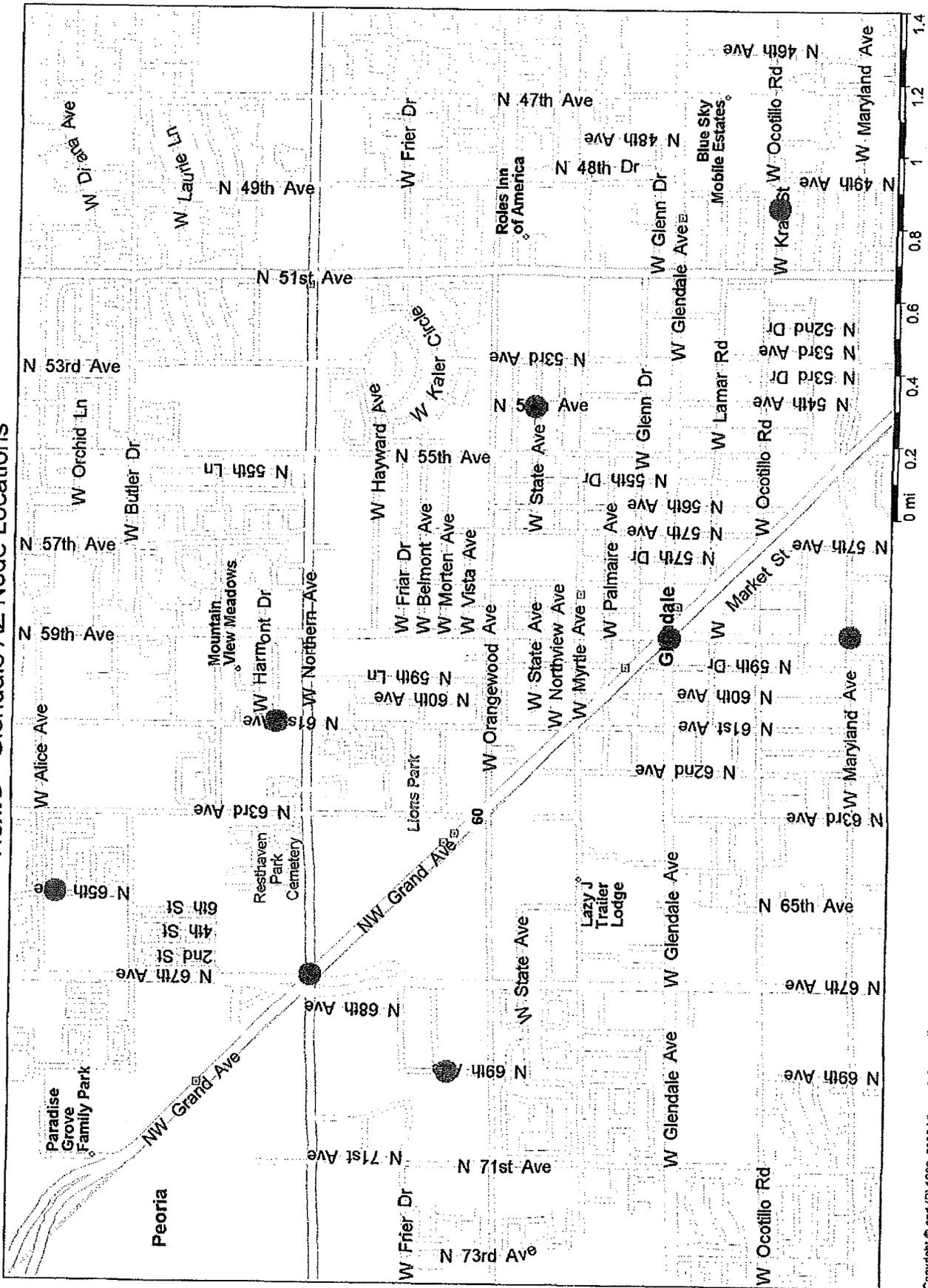
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Page 6, May 11, 2009



NextG - Glendale AZ Node Locations



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