

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of NextG Networks of California, Inc.
(U-6745-C) for Authority to Engage In Ground-
Disturbing Outside Plant Construction

Application No. 09-03-007
(Filed March 3, 2009)

**APPLICATION OF NEXTG NETWORKS OF CALIFORNIA, INC. (U-6745-C)
FOR AUTHORITY TO ENGAGE IN GROUND-DISTURBING OUTSIDE PLANT
CONSTRUCTION IN THE CITY OF HUNTINGTON BEACH**

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On behalf of NextG Networks of California, Inc.

March 3, 2009

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Pursuant to the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), NextG Networks of California, Inc. (U-6745-C) (“NextG”), hereby files this Application for Authority to Engage in Ground-Disturbing Outside Plant Construction in the City of Huntington Beach (“Application”). Specifically, through this Application NextG seeks to confirm the authority it has received from the Commission to construct a Distributed Antenna System (“DAS”) network primarily in the right-of-way in the City of Huntington Beach, California, and portions of Westminster and Fountain Valley (the “Huntington Beach Project” or “Project”) and to have the Commission review the Proponent’s Environmental Assessment (“PEA”) filed herewith.

Background

The entirety of the Huntington Beach Project was previously authorized by the Commission through a Notice to Proceed (“NTP”) issued December 3, 2007, and subsequent NTPs authorizing minor modifications to the Project.¹ Each of those NTPs explicitly state that

...the proposed construction activities are consistent with the activities identified by the Commission as categorically exempt from [the California Environmental Quality Act (“CEQA”)]. The Energy Division hereby grants NextG with the authority to proceed with the construction of the project as described in the [amended] NPC[s].²

In accordance with that authorization, NextG constructed the majority of the network, with only 7 of 15 nodes and a relatively minor portion of the fiber remaining to be constructed today.

On April 23, 2008, the City of the Huntington Beach (the “City”) filed a Complaint, alleging (in part) that the Commission should not have issued the NTP because the Project was not exempt from CEQA and because the City had an underground ordinance that prohibited portions of the network from being constructed.³ Although NextG asserts that the entirety of the Project is exempt from CEQA and that NextG has already received the appropriate authorization from the Commission to construct the entirety of the Project through the NTP process, NextG stipulated to filing this Application in order to resolve the parties’ remaining disputes in the Complaint Docket 08-04-037⁴ (“Docket 08-04-037”). On December 31, 2008, the parties stipulated, in Docket 08-04-037, that NextG would file a PEA in accordance with Rule 2.4 of the

¹ NextG was authorized to submit a Notice of Proposed Construction (“NPC”) by the Commission in D.07-04-045. *See also* Letters from Jensen Uchida, Commission Energy Division, to Sharon James, NextG Networks, Inc., issued Dec. 3, 2007, Mar. 17, 2008, Jun. 6, 2008, and Jul. 22, 2008 (collectively referred to as “Notices to Proceed” or “NTPs”).

² *See id.*, Notices to Proceed.

³ The City further alleged that NextG is not a “telephone corporation” and therefore is not authorized to use the right-of-way pursuant to Public Utilities (“PU”) Code § 7901. *See Complaint*, Docket 08-04-037.

⁴ It should be noted that the NTPs issued by the Commission are still valid and enforceable. The authority issued to NextG to construct its network by the Commission in those NTPs has not been revoked or suspended, nor has the City requested any such stay, revocation, or suspension.

Commission's Rules of Practice and Procedure and seek a negative declaration, mitigated negative declaration or environmental impact report for the Project.

Under CEQA, the public agency with discretionary decision-making authority and the "greatest responsibility for supervising or approving the project as a whole" shall serve as the Lead Agency for purpose of compliance with environmental review requirements.⁵ The Commission has held that it is the Lead Agency for DAS projects proposed to be undertaken by Commission jurisdictional telephone corporations. NextG is a Commission jurisdictional telephone corporation and under Decision ("D.") 03-01-061 and D.07-04-045 must obtain additional discretionary approval from the Commission for the installation of DAS network facilities that require "full facilities-based" ("FFB") authority rather than "limited facilities-based" authority. NextG's proposed project requires FFB authority from the Commission and consequently NextG must obtain such additional discretionary approval for the Project from the Commission. Furthermore, the Commission is the agency with the greatest responsibility for supervising or approving the Project and thus is the Lead Agency under CEQA

Other public agencies with decision-making responsibility regarding a proposed project are Responsible Agencies. With certain limited exceptions, Responsible Agencies are required to use the environmental document prepared by the Lead Agency in determining whether a proposed project will have any potentially significant environmental impacts and, if so, whether any additional permit conditions should be imposed (which must be within the scope of the Responsible Agency's lawful statutory authority).⁶

Portions of the Project are located in three cities: (1) Huntington Beach; (2) Westminster; and (3) Fountain Valley. Approvals from each of these local agencies are required for the

⁵ CEQA Guidelines § 15051(b).

⁶ CEQA Guidelines §§ 15096(a) and (f).

Project. All of the facilities to be located Westminster and Fountain Valley have, however, already been permitted and constructed pursuant to the Commission's prior approvals under the NPC process and pursuant to local permits and approvals granted by the cities. Portions of the Project to be located in Huntington Beach have also been permitted and constructed under prior approvals of the Commission under the NPC process and permits granted by the City of Huntington Beach. Other portions to be located in Huntington Beach, while previously approved by the Commission, have not yet been permitted by the City of Huntington Beach or constructed. These portions of the Project that remain pending are subject to this Application for additional environmental review of the Project by the Commission, and resolution of pending civil litigation between NextG and the City regarding the validity of certain local ordinances enacted by the City, which the City seeks to apply to the Project. As a result, the City of Huntington Beach is the principal Responsible Agency for the Project.

Under Cal. Const., art. XII § 8, a city, county or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. As a result, an order of the Commission controls over a local ordinance where the two conflict.⁷ Telephone companies that obtain CPCN authority from the Commission, such as NextG, have the right to install facilities in public highways and rights of way under Pub. Util. Code § 7901. Local agencies retain certain limited rights, however, with respect to the installation of telecommunications facilities within their boundaries. Under Pub. Util. Code § 7901.1 (a), they have the right to "exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed" for the installation of telecommunications facilities.

The City of Huntington Beach has enacted certain local ordinances, including a utility

⁷ *Rainbow Disposal Co. v. City of Escondido Mobile Home Rent Review Board* (1998) 64 Cal. App.4th 1159, 1170.

undergrounding ordinance and a wireless ordinance, which it claims are within its authority under both state and federal law. The City has sought to apply these ordinances to the Project and pursuant to these ordinances has sought to compel NextG to underground portions of the Project that NextG has proposed to install above ground.

As a result of the stipulation between the parties, NextG requests in this Application that the Commission address the City of Huntington Beach's assertion that additional portions of the Project should be undergrounded in compliance with its local ordinances by conditioning approval of the Project on compliance by NextG with any lawful local ordinances and regulations. In this manner, the Commission may determine whether the Project will have any potentially significant impact on the environment, condition approval on mitigation of any potentially significant impacts that can be reduced to insignificance through adoption of applicant proposed measures or additional mitigation measures and ensure compliance with any valid local ordinances, including if they are upheld by the courts, the City of Huntington Beach's undergrounding ordinance and wireless ordinance.

NextG has described the ordinances in the PEA because the City has asserted that some or all of the ordinances apply to the Project. The inclusion of such ordinances in the PEA or this Commission process is not an admission by NextG that the ordinances do apply. To the contrary, the applicability and lawfulness of these ordinances to the Project is now at issue in pending litigation between the parties. The City and NextG have stipulated that in Docket 08-04-037 in which this Application will be considered, the scope of the proceeding "will not adjudicate the validity of the City's Undergrounding Ordinance, Wireless ordinance, or other ordinances or regulations of the City."⁸

⁸ Stipulation and [Proposed] Order to Establish Certain Facts and Law in the Adjudication of the Complaint (Dec. 26, 2008).

1. Name and Location of Applicant (Rule 2.1(a))

Applicant's legal name is NextG Networks of California, Inc. Applicant is a Delaware corporation with its principal place of business in California located at 2216 O'Toole Avenue, San José, CA 95131.

2. Correspondence or Communications (Rule 2.1(b))

Correspondence or communications regarding this Application should be addressed to:

Suzanne Toller
Robert Millar
Davis Wright Tremaine LLP
505 Montgomery Street,
Suite 800
San Francisco, CA 94111-6533
Email: suzannetoller@dwt.com
Email: robertmillar@dwt.com

with a copy to:

Sharon James
NextG Networks of California, Inc.
2216 O'Toole Avenue
San José, CA 95131
Email: sjames@nextgnetworks.net

Notices, orders and other papers may be served upon these persons, and such service shall be deemed to be service upon NextG.

3. Proposed Category and Schedule (Rule 2.1(c))

NextG submits that this proceeding should be categorized as ratesetting. Given the amount of Commission review this Project has already undergone in various proceedings and the straight forward nature of the case and the lack of disputable facts, as well as the need for expeditious resolution of the matter, NextG asserts that hearings would neither be required nor appropriate for this matter. The sole purpose of this proceeding is to obtain confirmation that that there are no significant impacts under CEQA and that NextG has been appropriately

authorized by the Commission to proceed with the construction of its DAS network in Huntington Beach.

This proceeding can and should proceed on an expedited basis. NextG supplied an NPC to the Commission's CEQA staff for its Huntington Beach Project when it submitted its original request for exemption from CEQA and request for issuance of a NTP on November 13, 2007. On December 3, 2007, the CEQA Staff issued the NTP, and there have been no significant changes to the project since that time that would affect the environmental analysis. NextG expects that the CEQA staff will be prepared to issue a proposed Negative Declaration on an expedited basis, based on the previous review of the project. Thus, NextG proposes the following schedule for this Application:

Application filing date	March 3, 2009
Notice in Commission Daily Calendar	March 5, 2009
Consultation with Responsible Agencies Begins	March 5, 2009
Determination of completeness for PEA	March 19, 2009
Issuance of Notice of Preparation	March 19, 2009
Protests due	April 4, 2009
Response to Protest	April 14, 2009
Draft Negative Declaration issued for Comment	April 18, 2009
Prehearing Conference (if needed)	April 21, 2009
Comments Due on Draft Negative Declaration	May 19, 2009
Final Negative Declaration Issued	June 2, 2009
ALJ Proposed Decision Issued	June 30, 2009
Comments Due on ALJ Proposed Decision	July 20, 2009
Commission Final Decision	July 30, 2009

4. Organization, Qualification to Transact Business (Rule 2.2 and 2.3)

NextG filed the information required by Rules 2.2 and 2.3 as part of its application in A.02-09-019, and respectfully directs the Commission's attention to the record in that proceeding.

5. CEQA Compliance (Rule 2.4)

NextG has prepared a Proponent's Environmental Assessment that fully complies with Rule 2.4. This PEA is attached hereto as Exhibit 1. As noted above, the Commission's CEQA staff has already reviewed NextG's NPC and amendments thereto, including relevant authority for the categorical exemption of the Project, and has issued NTPs during that process.

6. Fees for Recovery of Costs in Preparing Negative Declaration (Rule 2.5)

Pursuant to Rule 2.5(c), one-third of the total deposit is due when the Application is filed. Accordingly, a deposit of \$5,000 accompanies this Application, which represents approximately 35 percent of the total deposit calculated pursuant to the requirements of Rule 2.5(a).

7. Description of Proposed Construction of Facilities (Rule 3.1(a))

NextG's Huntington Beach Project requires ground-disturbing outside plant construction in the right-of-way in Huntington Beach, California, in order to deploy a fiber-fed DAS network. The entirety of the Huntington Beach Project runs from the City of Westminster through Huntington Beach and the City of Fountain Valley to the Pacific Coast Highway. However, only a portion of the Project remains to be constructed. The Huntington Beach Project will allow NextG to offer its DAS-based services to support multiple wireless carriers with a single infrastructure.

A full description of the proposed construction, including the manner and techniques to be used in such construction, is included in the PEA, which is attached hereto as Exhibit 1. A

map of the project is included in the PEA attached hereto at Exhibit 1. Summarily, the entire

Project includes:

- Installation of approximately 9,848 linear feet (1.8 miles) of underground fiber-optic polyvinyl chloride (“PVC”) conduit installed via trenching;
- Installation of approximately 148,676 linear feet (28.2 miles) of aerial fiber installed via utility poles;
- Installation of three new poles (and one replacement pole); and
- Installation of 15 communications nodes, repeater enclosures, fiber optic splice boxes, and electrical splice boxes.

All construction necessary in the cities of Westminster and Fountain Valley has been completed. Additionally, construction of the replacement pole (Node 5) and Nodes 1-6, 9, and 15 has been completed, along with a significant portion of the fiber installation necessary for the Project. Those portions of the Project remaining to be constructed, and for which NextG seeks authorization to construct in this Application are represented in a map included in the PEA attached hereto at Exhibit 1, summarily including:

- Installation of underground fiber-optic PVC necessary to connect Nodes 8, 12, and 14 to the network;
- Installation of overhead aerial fiber and underground fiber-optic PVC from the intersection of Magnolia Ave. and Atlanta Ave. to Nodes 9, 10, and 13-15 installed via poles;
- Installation of 3 new poles; and
- Installation of Nodes 7, 8, and 10-14, repeater enclosures, fiber optic splice boxes, and electrical splice boxes.

8. Names of Competitors and Names of Counties (Rule 3.1(b))

NextG will compete with Verizon California, Inc., Time Warner Cable and other local exchange carriers and interexchange carriers in the provision of its proposed services that will be supported by the Huntington Beach Project. NextG’s services will be provided in Orange

County. Pursuant to D.97-06-107, issued in Commission Proceeding R.94-02-003, I.94-02-004, NextG understands that it no longer must comply with Commission Rule 3.1(b) (formerly Rule 18(b)) and General Order 96-A, subsections (G)(1) and (G)(2). NextG will make a copy of this Application available upon request to potential competitors and counties.

9. Location of Proposed Construction (Rule 3.1(c))

The Project area is located in Orange County, California and primarily within the City of Huntington Beach, although some portions of the network extend into the cities of Westminster and Fountain Valley. Complete maps of the Huntington Beach Project and associated drawings, are included in the PEA, which is attached hereto as Exhibit 1.

10. Identification of Required Franchise and Health and Safety Permits (Rule 3.1(d))

The following permits have been issued for construction of the Project to date⁹:

PERMIT TYPE	AGENCY	APPLICATION NO.	NPC SUBMITTAL	PERMIT RECEIVED
Encroachment	City of Huntington Beach	MPC1026CA-HBN01 to 06 and 09 nodes including – replace exiting 40’ wood pole at HB05	11-12-07 Original submittal for HB05 pole replacement	08-301
Encroachment	City of Huntington Beach	MPC1026CA-HBN08 – new 28’ concrete pole	11-12-07 Original submittal	
Encroachment	City of Huntington Beach	MPC1026CA-HBN12 - new 18’ steel pole	11-12-07 Original submittal	
Encroachment	Cal Trans – District 7	MPC1026CA-HBN13–	N/A	1207-6UC-0961
Encroachment	Cal Trans – District 7	MPC1026CA-HBN14m1 – new 25’ steel pole	12-21-07 1st Amendment	1208-6RW-0314 but denied on 5/21.
Encroachment	Cal Trans – District 7	MPC1026CA-HBN15–	N/A	1207-6UC-0960
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL03 – 407’	11-12-07 Original submittal	Permit 08-447

⁹ The need for an additional permit from the Coastal Development Commission (“CDC”) at node 14 may also be necessary if the location is not exempt. NextG intends to seek verification by the CDC and obtain any additional permits necessary.

PERMIT TYPE	AGENCY	APPLICATION NO.	NPC SUBMITTAL	PERMIT RECEIVED
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL04 – 2817'	11-12-07 Original submittal	
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL05- 179'	11-12-07 Original submittal	
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL09-	05-07-08 3 rd Amendment	08-303
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL10 – 566'	05-07-08 3 rd Amendment	
Encroachment	Cal Trans – District 7	MPC1026CA-HBUFL13- 441, 715', 462', (1618')	05-07-08 3 rd Amendment	
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL14- 368', 517', 484' (1369')	05-07-08 3 rd Amendment	
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL15- 431'	05-07-08 3 rd Amendment	
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL16- 330'	05-07-08 3 rd Amendment	
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL17- 213', 415'	06-25-08 4 th Amendment	
Encroachment	Cal Trans – District 7	MPC1026CA-HBUFL18- 415', 213' (628')	06-25-08 4 th Amendment	
Encroachment	City of Huntington Beach	MPC1026CA-HBUFL19- 706', 603', (1309')	06-25-08 4 th Amendment	
Encroachment	Cal Trans – District 7	MPC1026CA-HBAFL01	N/A	1208-6UC-0032
Encroachment	Cal Trans – District 7	MPC1026CA-HBAFL02-	N/A	1208-6UC-0033
Encroachment	UPRR	MPC1026CA-HBAFL12-	N/A	5/28/08 LTR

11. Other Rule 3.1 Provisions (Rule 3.1(e) through 3.1(j))

NextG filed the information required by Rules 3.1(e) through 3.1(j) as part of its application in A.02-09-019, and respectfully directs the Commission's attention to the record in that proceeding.


12. Exhibits

In accordance with the requirements of Rules 2.2, 2.3 and 3.2 of the Commission's Rules of Practice and Procedure, NextG provides the following information and exhibit:

Exhibit 1 – Proponent's Environmental Assessment

WHEREFORE, NextG Networks of California, Inc., respectfully requests that the Commission enter an Order granting NextG the authority to construct those remaining portions left to be completed in the proposed Huntington Beach Project, including the authority to engage in ground-disturbing outside plant construction in order to deploy a fiber-fed DAS network and supporting facilities and equipment in the City of Huntington Beach, Orange County, California.

Respectfully submitted,



Suzanne Toller

Robert Millar

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San Francisco, CA 94111-6533

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E-mail: robertmillar@dwt.com

Dated: March 3, 2009

On behalf of NextG Networks of California,
Inc.

CERTIFICATE OF SERVICE

I, Judy Pau, certify:

I am employed in the City and County of San Francisco, California, am over eighteen years of age and am not a party to the within entitled cause. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533.

On March 3, 2009, I caused the following to be served:

**APPLICATION OF NEXTG NETWORKS OF CALIFORNIA, INC. (U-6745-C)
FOR AUTHORITY TO ENGAGE IN GROUND-DISTURBING OUTSIDE PLANT
CONSTRUCTION IN THE CITY OF HUNTINGTON BEACH**

via electronic mail or US Mail to the parties listed below.

JENNIFER McGRATH
SCOTT F. FIELD
ASSISTANT & CITY ATTORNEY
CITY OF HUNTTINGTON BEACH
2000 MAIN STREET
HUNTINGTON BEACH, CA 92648

VIA US MAIL AND EMAIL

RICHARD JONES
CITY ATTORNEY
CITY OF WESTMINSTER
WESTMINSTER CIVIC CENTER
8200 WESTMINSTER BOULEVARD
WESTMINSTER, CA 92683

VIA US MAIL

JASON REIGER
CALIFORNIA PUBLIC UTILITIES
COMMISSION
505 VAN NESS AVE
SAN FRANCISCO, CA 94102

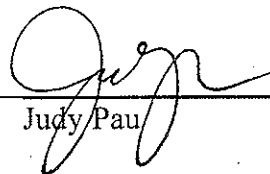
VIA HAND DELIVERY AND EMAIL

ALAN R. BURNS
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CITY OF FOUNTAIN VALLEY
10200 SLATER AVENUE
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505 VAN NESS AVE
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VIA HAND DELIVERY AND EMAIL




Judy Pau

VERIFICATION

I, Robert L. Delsman, am Vice President, Government Relations and Regulatory Affairs of NEXTG NETWORKS OF CALIFORNIA, INC., have read the attached application, and am informed and believe, and on that ground allege, that the matters stated therein are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San José, California, this 2nd day of March, 2009

By: 
Robert L. Delsman
NextG Networks of California, Inc.