Case File Number: A10129 **July 21, 2010**

Locations:	**Public Right-of-way at approximately 7294 Marlboro Terrace/4949 Grizzly Peak Boulevard** **Public Right-of-way at approximately 9950 Skyline Boulevard** **Public Right-of-way at approximately 10648 Skyline Boulevard** **Public Right-of-way at approximately 10000 Skyline Boulevard**
Proposal:	Appeal of the Zoning Manager's interpretation/determination that the proposed poles, to be located within the public right-of-way, are Monopole Telecommunication Facilities and are subject to the Planning Code.
Appellant:	NextG Networks
Owner:	City of Oakland
Planning Permits Required:	Major Conditional Use Permits (CUP) to erect Telecommunication Monopole Facilities within the R-30, Singe-family Residential Zone and the Open Space Zone. The site located at the corner of Marlboro Terrace and Grizzly Peak Boulevard, zoned R-30, will require Design Review, in addition to a major CUP.
General Plan:	Skyline Boulevard: Open Space Marlboro Tr / Grizzly Peak Blvd: Hillside Residential
Zoning:	Skyline Boulevard: OS Marlboro Tr / Grizzly Peak Blvd: R-30 / S-10 / S-11
Service Delivery District:	Skyline Boulevard: IV Marlboro Tr / Grizzly Peak Blvd: II
City Council District:	Skyline Boulevard: 4 Marlboro Tr / Grizzly Peak Blvd: 1
Action to be Taken:	Uphold Zoning Manager's Decision and deny the appeal.
Finality of Decision:	Final
For further information:	Contact case planner **Leigh McCullen** at **510-238-4977** or **lmcullen@oaklandnet.com.**

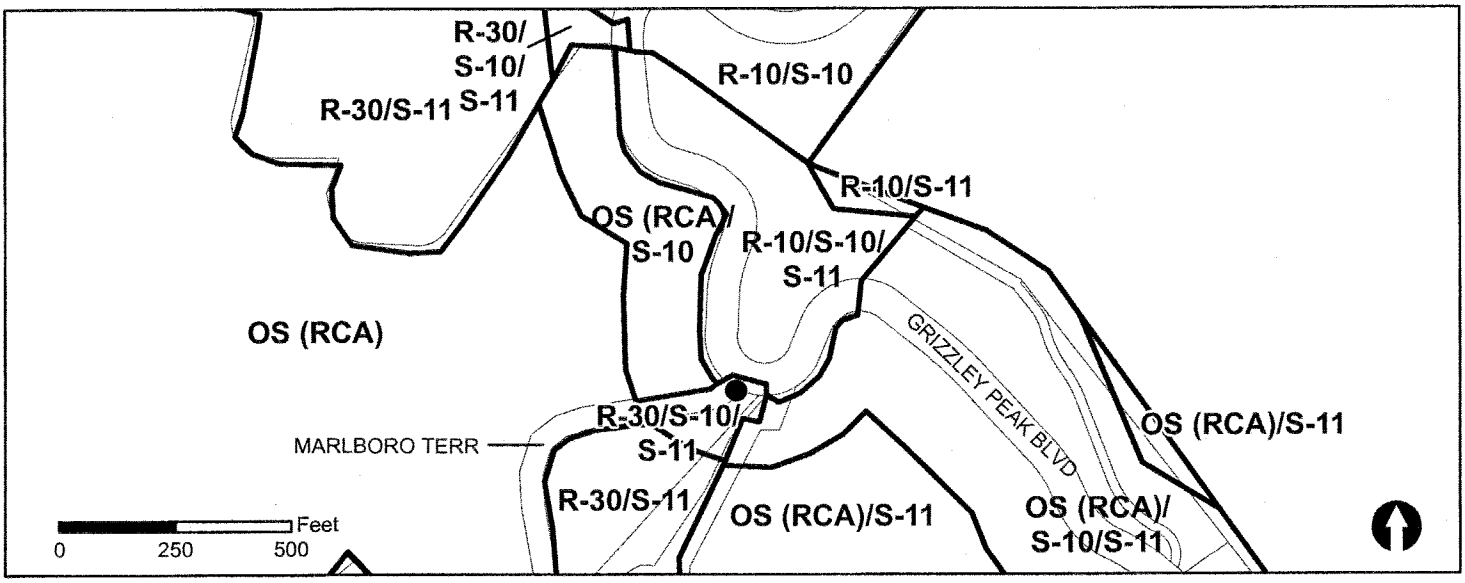
SUMMARY

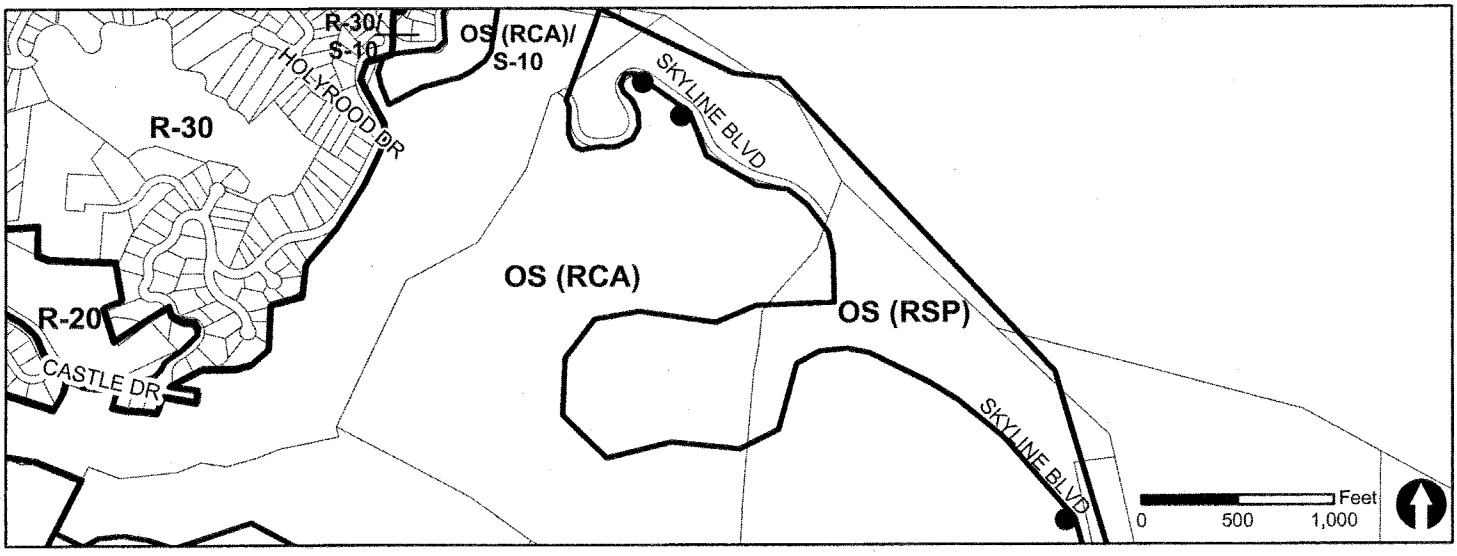
The Zoning Manager has determined that the erection of these new and independent poles within the public right-of-way intended for Wireless Telecommunications purposes are considered Monopole Wireless Telecommunications Facilities, as defined, and regulated, by the Oakland Planning Code including the requirement for Conditional Use Permits. This determination has been appealed by NextG Networks. The appeal is the subject of this report.

BACKGROUND

On March 12, 2010, the City of Oakland Zoning Division received from the appellant four (4) incomplete basic applications for the above four (4) referenced sites. Application fees were not paid at that time. These applications would provide for the erection of four (4) 40(+)-foot wooden poles, with attached wireless telecommunications antenna and equipment, within the public right-of-way. On April 9, 2010 staff sent an incomplete letter for these applications. The incomplete letter states that the poles qualify as Wireless Telecommunication Monopoles and subject to the Oakland Planning Code (OPC).

CITY OF OAKLAND PLANNING COMMISSION





Case File: A10-129
Appellant: NextG Networks c/o Natasha Ernst
Address: Public Right-of-ways at approximately:
7294 Marlboro Tr/4949 Grizzley Peak Blvd;
9950, 10000 & 10648 Skyline Blvd
Zone: Skyline Blvd: OS; Marlboro Tr/
Grizzley Peak: R-30/S-10/S-11

NextG Networks, the appellant, alleges that its wireless telecommunications operations fall under the exclusive jurisdiction of the California Public Utilities Commission (CPUC) and is not subject to local land use controls because they would be located within the public right-of-way and are utilities. They have not provided evidence to support this claim. Staff does not dispute that NextG Networks is a "Telephone Corporation" defined by California Public Utilities Code (PUC) and has obtained, as required by the PUC, a Certificate of Public Necessity and Convenience (CPNC) from the CPUC. However, the appellant has failed to provide evidence to substantiate their claim that their CPNC overrides local land use controls.

All Telephone Corporations, as defined by the PUC, with very limited exceptions, are required to obtain a CPNC. Verizon, T-Mobile, AT&T Wireless, Clearwire and many other telecommunication providers all have a CPNC but still submit to local land use authority. As a matter of fact, the Planning Commission often rules on applications for Wireless Telecommunications Facilities, including new facilities located within the public rights-of-way, consistent with their authority granted under the OPC. As an example, on May 5, 2010 the Planning Commission approved a Major Conditional Use Permit and Design Review for an AT&T Wireless Telecommunications Facility located within the public right-of-way on Moraga Avenue. Two Major Conditional Use Permit/Design Review applications, one located in the public right-of-way on Moraga Avenue another in the public right-of-way of Shepherd Canyon Road, have been filed by T-Mobile and are pending a public hearing before the Planning Commission. Neither AT&T nor T-Mobile has challenged the applicability of the Planning Code in relation to these projects. The applicant has failed to demonstrate why they should be treated differently from other wireless telecommunications providers.

ZONING ANALYSIS

The OPC defines Wireless Telecommunications Facilities to include attachment of antennas to buildings and similar facilities, the construction of support structures, and the provision of equipment associated with transmitting and receiving of radio frequencies. Consistent with this definition, NextG provides radiofrequency transport services for wireless carriers and constructs transport networks consisting of a central switch-like hub and a system of fiber optic cables, remote nodes, and small antennae attached to poles and other structures. The OPC defines Wireless Telecommunications Monopoles as a monopolar structure erected on the ground, terminating in one or more connecting appurtenances (OPC Section 17.11.900.). A review of NextG's elevations and photo simulations (**Attachment A**) would clearly demonstrate that the proposed poles meet this definition. Given the characteristics and intended use of NextG's proposed facilities the Zoning Manager determined that they are Monopole Wireless Telecommunications Facilities.

OPC Section 17.07.040 states that the 'zoning regulations shall apply, to the extent permissible under other laws, to all property within the City of Oakland....regardless of whether such property is in private or public ownership'. The scope and applicability of the Planning Code clearly includes public right-of-ways. Subsection C of this section further states that 'Whenever any provision of the zoning regulations and any other provision of law, whether set forth in this code, in the Oakland Building Code or Oakland Housing Code, or in any other law, ordinance, or resolution of any kind, impose overlapping or contradictory regulations, or contain restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards shall control, except as otherwise expressly provided in the zoning regulations.'

The four proposed NextG sites located along Skyline Boulevard are near Chabot Observatory and in the Open Space Zone. Major Conditional Use Permits are required to erect Wireless Telecommunications Monopoles in the Open Space Zone (OPC Section 17.11.090). The site located on Marlboro Terrace is zoned R-30, Detached Unit Residential, S-10 Scenic Route Combining Zone and S-11 Site Development and Design Review Combining Zone. A major Conditional Use Permit, with Design Review, is required to

erect a Wireless Telecommunications Monopole in the R-30 Zone (OPC 17.16.070, 17.16.030 and 17.134.020(e)).

BASIS FOR THE APPEAL

On May 13, 2010 the Zoning Manager issued an administrative interpretation / determination which stated that the erection of these new and independent poles within the public right-of-way intended for Wireless Telecommunications purposes are considered Monopole Wireless Telecommunications Facilities, as defined, and regulated, by the Oakland Planning Code including the requirement for Conditional Use Permits. Pursuant to OPC Section 17.132.020, NextG Networks filed an appeal of the Zoning Manager's interpretation / determination (see **Attachment B**, Appeal request and supporting documentation).

The following discussion combines related appeal issues where appropriate for efficiency and clarity of the report. Each key point of the appeal is summarized in *underlined italics* with Staff's responses to each point immediately following in regular text.

1. *The City erred by applying the Planning Code to the Public Rights-of-Way*

Staff Response

OPC Section 17.07.040 states that the 'zoning regulations shall apply, to the extent permissible under other laws, to **all property** within the city of Oakland....regardless of whether such property is in private or **public ownership**' (emphasis added). It is clear from this Section that the scope and applicability of the Planning Code includes public right-of-ways, which are lands under public ownership. Subsection C of this section further states that 'Whenever any provision of the zoning regulations and any other provision of law, whether set forth in this code, in the Oakland Building Code or Oakland Housing Code, or in any other law, ordinance, or resolution of any kind, impose overlapping or contradictory regulations, or contain restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards shall control, except as otherwise expressly provided in the zoning regulations. The Planning Code is more restrictive regarding this matter, therefore it governs. Separate permits, such as excavation, building and encroachment permits may be required by other agencies.

NextG admits in their appeal that should they propose their telecommunications infrastructure on private property then the construction would fall squarely under the Planning Code. As evidenced in the preceding paragraph, the Planning Code applies to all property within the City of Oakland, including public rights-of-way. And as detailed above, other Wireless Telecommunication Facility providers have obtained local land use approvals in the public right of way pursuant to OPC 17.128. Therefore, NextG's proposed telecommunications infrastructure falls squarely under the Planning Code.

NextG generally alleges that construction in the public rights-of-way is governed exclusively by the Building Services Division of CEDA which issues encroachment and excavation permits for the placement of improvements in the public rights-of-way. The appellant fails to site a specific Code or Ordinance to substantiate this claim. Many projects within the City of Oakland require the issuance of permits from multiple agencies, including Planning and Building. Indeed, NextG will be required to obtain all necessary encroachment, excavation and/or building permits required by the Building Services Division, if Major Conditional Use Permits are approved for the proposed facilities.

The appellant generally alleges that the OPC does not mention or regulate any type of utility infrastructure in the public right-of-way. The OPC does regulate utilities as Essential Service

Civic Activities, includes those in the public rights-of-way (as discussed above the OPC regulates all land within the City of Oakland). OPC Section 17.11.140 defines Essential Service Civic Activities to include the maintenance and operation of the following installations:

A. Electric, gas, and telephone distribution lines and poles, and water, storm drainage, and sewer lines, with incidental appurtenances thereto, but excluding electric transmission lines;

...

H. Telecommunication activities include the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Essential Service Activities are permitted by right in each of the zoning districts contained in the OPC. The OPC sets forth additional regulations for Telecommunications *Facilities,* defined in the OPC to include attachment of antennas to buildings and similar facilities, the construction of support structures, and the provision of equipment associated with transmitting and receiving of radio frequencies. Staff has determined that the appellant's facilities, including the proposed support structures or poles, antennas and equipment intended to transmit and receive radio frequencies, are considered Telecommunications *Facilities*. See the Zoning Analysis section of this report for the permits required by the OPC for the applicant's proposed Telecommunication Facilities.

2. *The City inaccurately determined that a Utility Pole is a Monopole.*

Staff Response

The OPC defines Wireless Telecommunications Facilities to include attachment of antennas to buildings and similar facilities, the construction of support structures, and the provision of equipment associated with transmitting and receiving of radio frequencies. Consistent with this definition, NextG provides radiofrequency transport services for wireless carriers and constructs transport networks consisting of a central switch-like hub and a system of fiber optic cables, remote nodes, and small antennae attached to poles and other structures. The OPC defines Wireless Telecommunications Monopoles as a monopolar structure erected on the ground, terminating in one or more connecting appurtenances (OPC Section 17.11.900). The poles proposed by NextG are monopolar (**Attachment A**) and are intended to transmit radio frequencies. Given the characteristics of NextG's proposed facilities, as described above, the Zoning Manager determined that they are Monopole Wireless Telecommunications Facilities.

The appellant argues that their facilities are differentiated from monopoles because monopoles are made out of steel with large concrete foundations and connected to equipment cabinets by coaxial cable where their poles are wooden, set into the ground and outfitted with fiber cable or electric power connections. The definition for Monopole contained in the OPC is sufficiently broad to cover any type of monopolar structure, whether it is a steel pole, a wood pole or some other material. Further, the OPC does not discuss the type of foundation or the type of power supply required to fall within the Monopole category. The appellant's wooden poles, intended for wireless telecommunications purposes, clearly meet the definition of a Monopole.

The appellant suggests that their poles *could* support traditional wireline and power attachments. Staff would point out that wireline and power attachments would be permitted by right as Essential Service Activities on the proposed poles and in any zoning district. However, the proposed poles are being erected for Wireless Telecommunications purposes, not for wireline or power attachments.

The appellant has indicated that they intend to register the poles with the Northern California Joint Pole Association (NCJPA). Registration with the NCJPA does not guarantee that another utility will co-locate on these poles. Co-location by a typical Oakland utility is unlikely at the Grizzly Peak/Marlboro Terrace site given that this is an underground utility district and traditional wireline and power companies have already placed their cables and equipment underground. Further, co-location is unlikely along the section of Skyline Boulevard where three poles are proposed because this area is surrounded by parks and open space areas that do not require these utilities, nor do any utility poles exist in the immediate area. Essentially, there are not any other utility poles in these areas because they are not required by other utility providers.

3. *Even if the Planning Code governs, the City erred in its application*

Staff Response

The appellant generally alleges that if the OPC applies, Minor Conditional Use Permits would be required for Monopoles in the Open Space Zone. OPC Section 17.11.090 clearly indicates that Monopole Telecommunications Facilities require a Major Conditional Use Permit in the Open Space Zone (**Attachment C**). Staff did not err in this regard.

4. *The City seems to be abusing its discretion by treating NextG in a Discriminatory Manner.*

Staff Response

The City is merely treating NextG in the same fashion, and consistent with the authority granted under the OPC, as any other Wireless Telecommunications provider. For example, Verizon, T-Mobile, AT&T Wireless, Clearwire and many other telecommunications providers all have a CPNC but still submit to local land use authority As a matter of fact, the Planning Commission often rules on applications for Wireless Telecommunications Facilities, includes new facilities located within the public rights-of-way, consistent with their authority granted under the OPC. For example, on May 5, 2010 the Planning Commission approved a Major Conditional Use Permit/Design Review application for an AT&T Wireless Telecommunications Facility located within the public right-of-way on Moraga Avenue. Two Major Conditional Use Permit/Design Review applications, one located in the public right-of-way on Moraga Avenue another in the public right-of-way of Shepherd Canyon Road, have been filed by T-Mobile and are pending a public hearing before the Planning Commission. Neither AT&T nor T-Mobile has challenged the applicability of the Planning Code in relation to these projects. The applicant has failed to demonstrate why they should be treated differently from other wireless telecommunications providers.

CONCLUSION

The appellant has not provided sufficient evident to substantiate their allegations. The Zoning Manager, after thorough review of the projects, found that the proposed projects are Monopole Wireless Telecommunications Facilities subject to the Oakland Planning Code.

RECOMMENDATIONS: 1. Deny the Appeal and uphold the Zoning Administrator's determination.

Prepared by:

Leigh A. McCullen
Planner III

Approved by:

Scott Miller
Zoning Manager

Forwarded to the Planning Commission by:

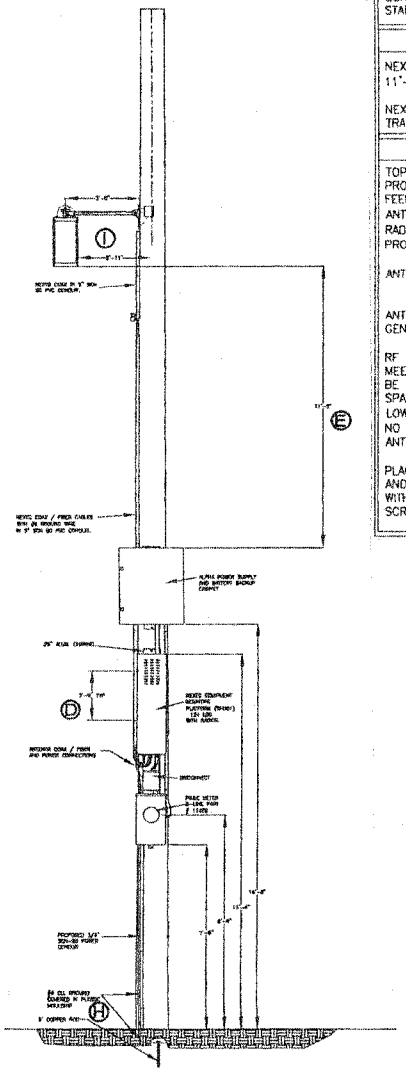
Scott Miller, for
Eric Angstadt
Deputy Director, Community and Economic Development Agency

ATTACHMENTS:

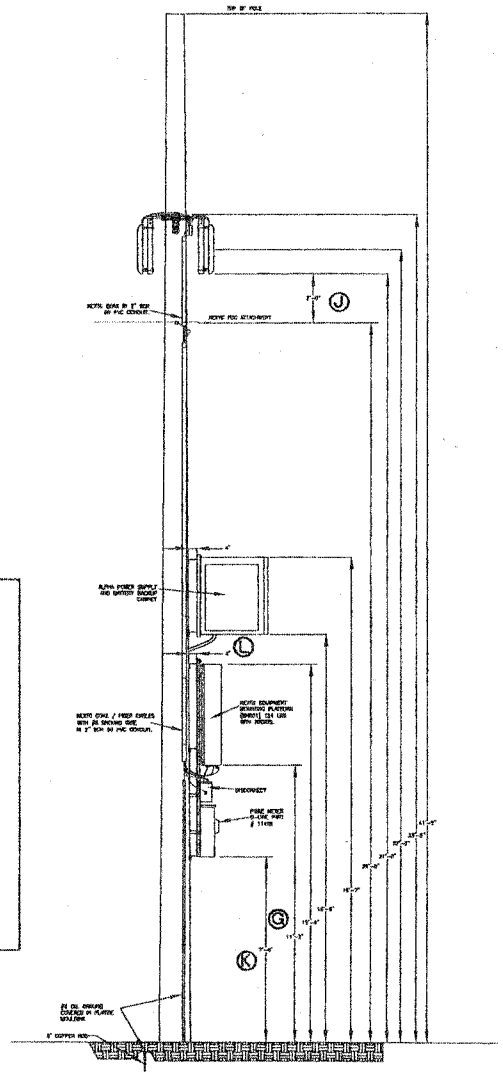
A. Elevations and Photo Simulations of proposed poles
B. Appeal request and supporting documentation
C. OPC Section 17.11.090

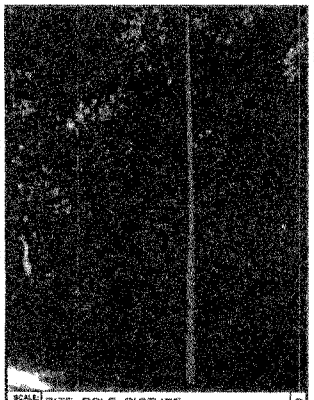
ATTACHMENT A

MAKE READY
QUARTER STEP POLE ACCORDING TO GO95 STANDARDS
NEW CONSTRUCTION
NEXTG TO INSTALL SHROUD KIT SH001 @ 11'-3" AGL NEXTG TO PLACE NEW METAL POLE AND TRANSFER ALL SIGNAGE.
NOTES:
TOP OF POLE: 41'-5" PROPOSED SECONDARY: UNDERGROUND FEED. ANTENNA KIT H.O.A: 33'-5" RAD CENTER OF ANTENNA: 32'-0" PROPOSED NEXTG H.O.A: 29'-0" ANTENNA TYPE: 12"X24" ANDREW DIRECTIONAL ANTENNA(S). ANTENNA OUTPUT DOES NOT EXCEED GENERAL POPULATION EXPOSURE LIMITS. RF EMISSION PLACARDS / SIGNAGE MEETING THE FCC REQUIREMENTS SHALL BE IN A LOCATION VISIBLE FROM CLIMBING SPACE AND BE AFFIXED TO THE POLE NO LOWER THAN 9'-0" ABOVE GROUND LINE & NO HIGHER THAN 3'-0" BELOW THE ANTENNA. PLACARDS / SIGNAGE ARE UVA RESISTANT AND SHALL BE ATTACHED TO THE POLE WITH GALVANIZED NAILS OR GALVANIZED SCREWS.



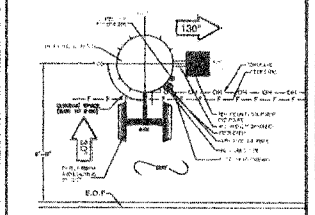
Ⓐ	-NOT APPLICABLE- 48" MIN. CLEARANCE BETWEEN SECONDARY POWER AND LOWEST POINT OF ANTENNA ASSEMBLY.
Ⓑ	-NOT APPLICABLE- STEP POLE TOP EXTENSION AS PER DETAIL DWG.
Ⓒ	-NOT APPLICABLE- 48" MIN CLEARANCE REQ'D.
Ⓓ	24" SPACING MAX.
Ⓔ	72" MIN. TO SECONDARY LEVEL.
Ⓕ	-NOT APPLICABLE- 12" MIN. SPACING FOR EQUIP TO CURB.
Ⓖ	15' MIN. (MAY BE REDUCED TO 9' WHEN NOT EXPOSED TO TRAFFIC).
Ⓗ	GROUND INSTALLED BY COMM COMPANY (INCLUDES 8' COPPER ROD).
Ⓘ	24" MIN. FROM CENTER OF POLE
Ⓙ	24" MIN. CLEARANCE REQ'D.
Ⓚ	7' MIN. / 8' MAX. REQ'D.
Ⓛ	4" MIN. CLEARANCE BETWEEN EQUIPMENT AND POLE.





SCALE: N.T.S.	SITE POLE PICTURE	C

POLE WILL BE STEPPED IN ACCORDANCE TO GO95 STANDARDS IN RESPECT TO CLIMBING SPACE.
REMOTE / NEXTG EQUIPMENT @ 3:00
1-3/4" SCH 80 PWR RISER @ 4:00
1-2" SCH 80 NEXTG RISER @ 4:30



	POLE# NEW POLE	
SCALE: N.T.S.	RISER POLE DETAIL	D

Call Before you Dig!

811

Know what's below.
Call before you dig.
Call 811 Before you Dig!

SCALE: N.T.S.	UTILITY POLE DETAIL	POLE# NEW POLE	LOOKING WEST	A

SCALE: N.T.S.	UTILITY POLE DETAIL	POLE# NEW POLE	LOOKING NORTH	B

UTILITY NODE / REPEATER POLE EQUIPMENT PROFILES

PROJECT INFO

CURRENT ISSUE

PERMIT SUBMI

REV.	DATE:	

PLANS PREPARED BY:

HP COMMUNICATIONS INC.
13341 Tamarind Cyn. Rd.
Corona, CA 92883
PHONE: (951) 471-1919

PLANS APPROVED BY:

NextG Networks Inc.

REP:

COMMENTS:

SHEET TITLE:

NEXTG NETWORKS
OAKLAND HILLS PROJECT
POLE PROFILE VRZ1013A-OHN30

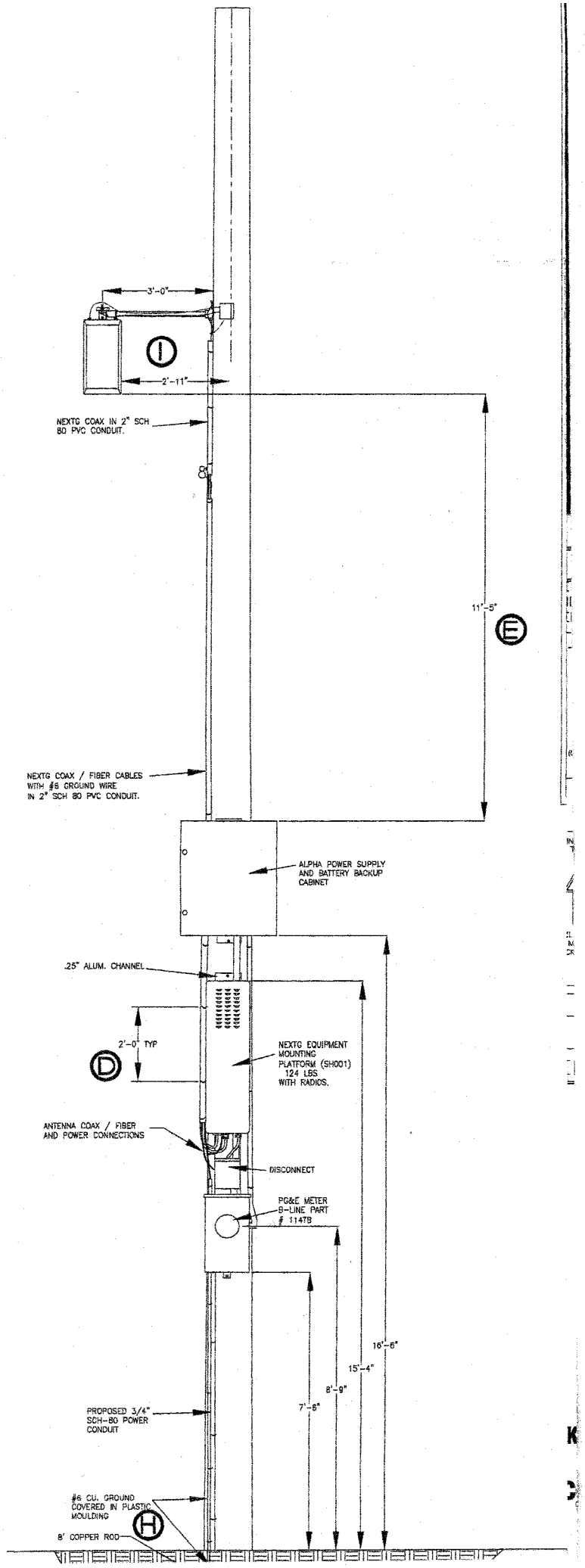
SHEET NUMBER: 2

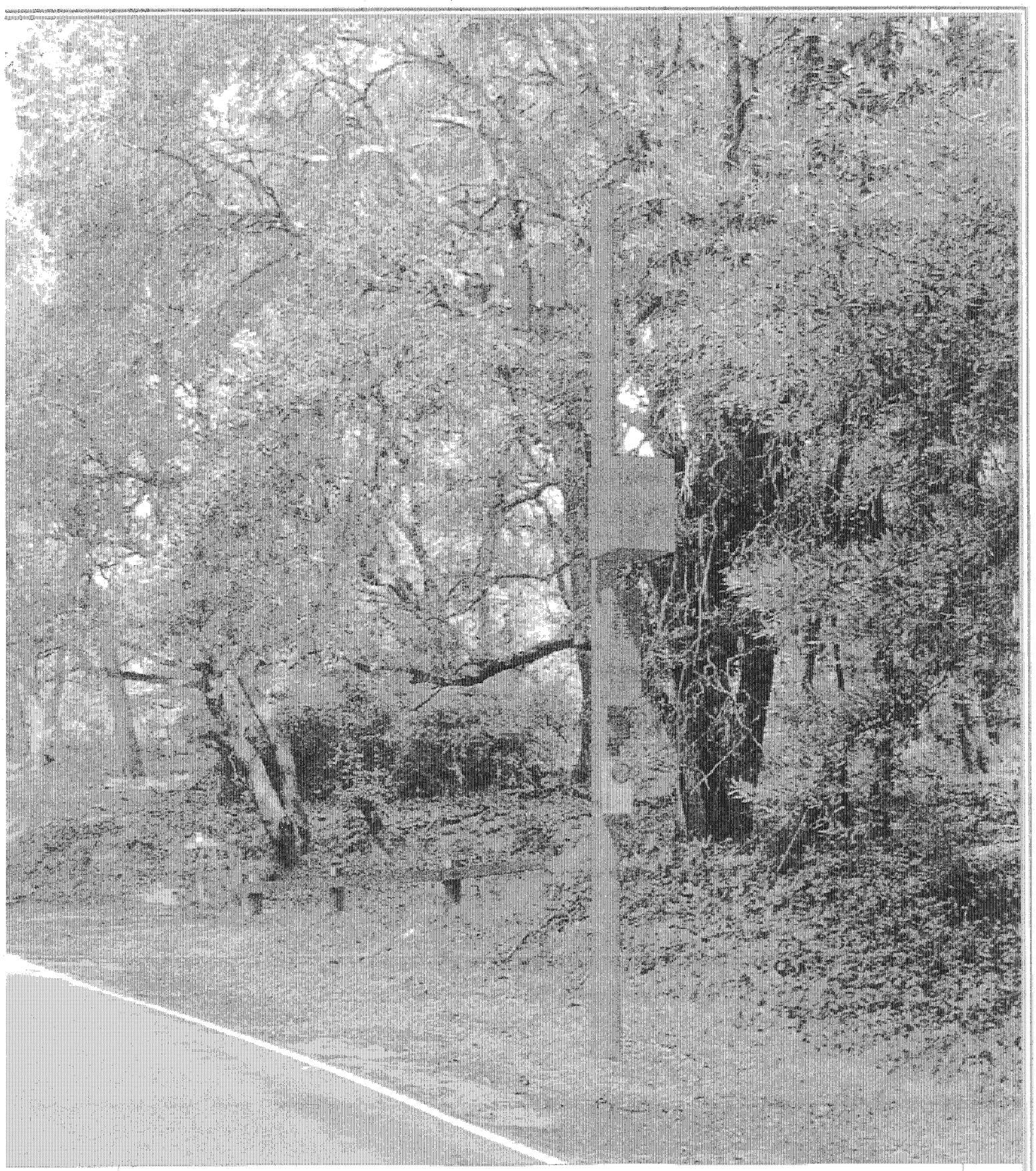
REVISION: 2 OF 4

SCALE: N.T.S.

PROPOSED PHOTO / EQUIPMENT REPRESENTATION

F


3'-0"
I
2'-11"
NEXTG COAX IN 2" SCH 80 PVC CONDUIT.
11'-5"
E
NEXTG COAX / FIBER CABLES WITH #8 GROUND WIRE IN 2" SCH 80 PVC CONDUIT.
ALPHA POWER SUPPLY AND BATTERY BACKUP CABINET
.25" ALUM. CHANNEL
2'-0" TYP
D
NEXTG EQUIPMENT MOUNTING PLATFORM (SH001) 124 LBS WITH RADIOS.
ANTENNA COAX / FIBER AND POWER CONNECTIONS
DISCONNECT
PG&E METER B-LINE PART # 1147B
16'-6"
15'-4"
8'-9"
7'-6"
PROPOSED 3/4" SCH-80 POWER CONDUIT
#6 CU. GROUND COVERED IN PLASTIC MOULDING
H
8' COPPER ROD



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PROPOSED PHOTO / EQUIPMENT REPRESENTATION

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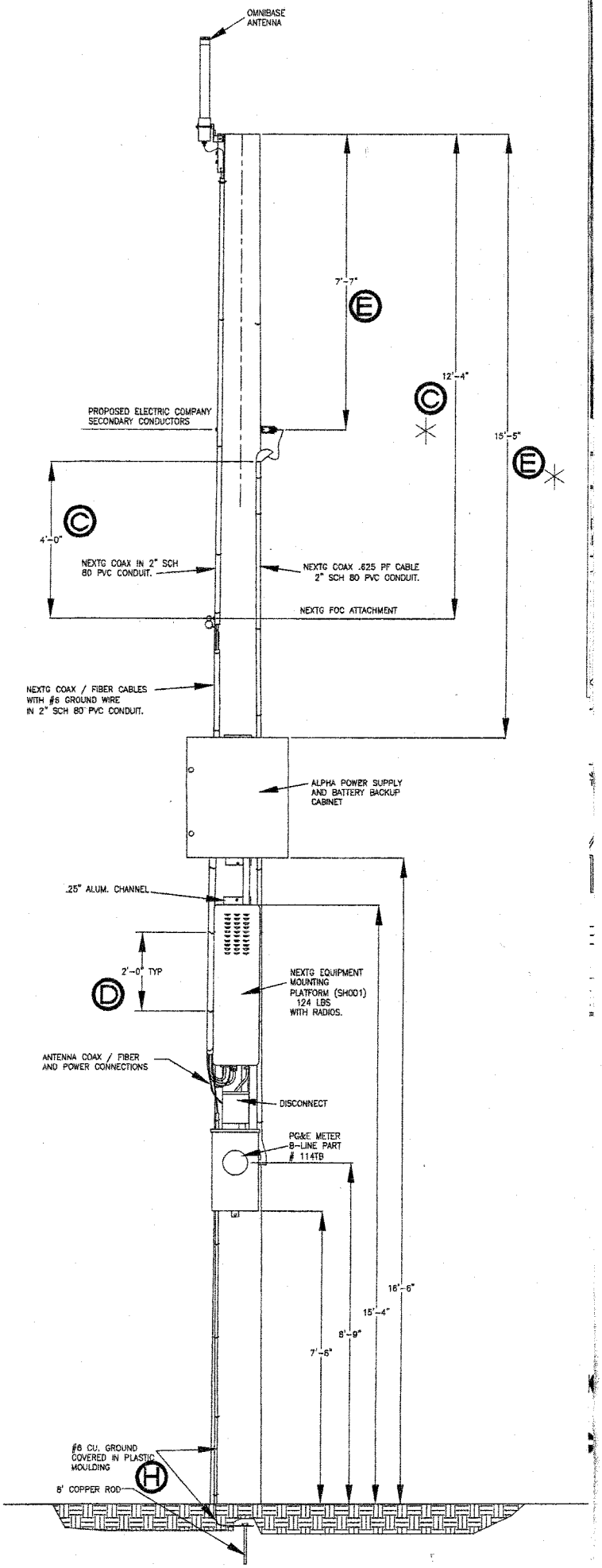
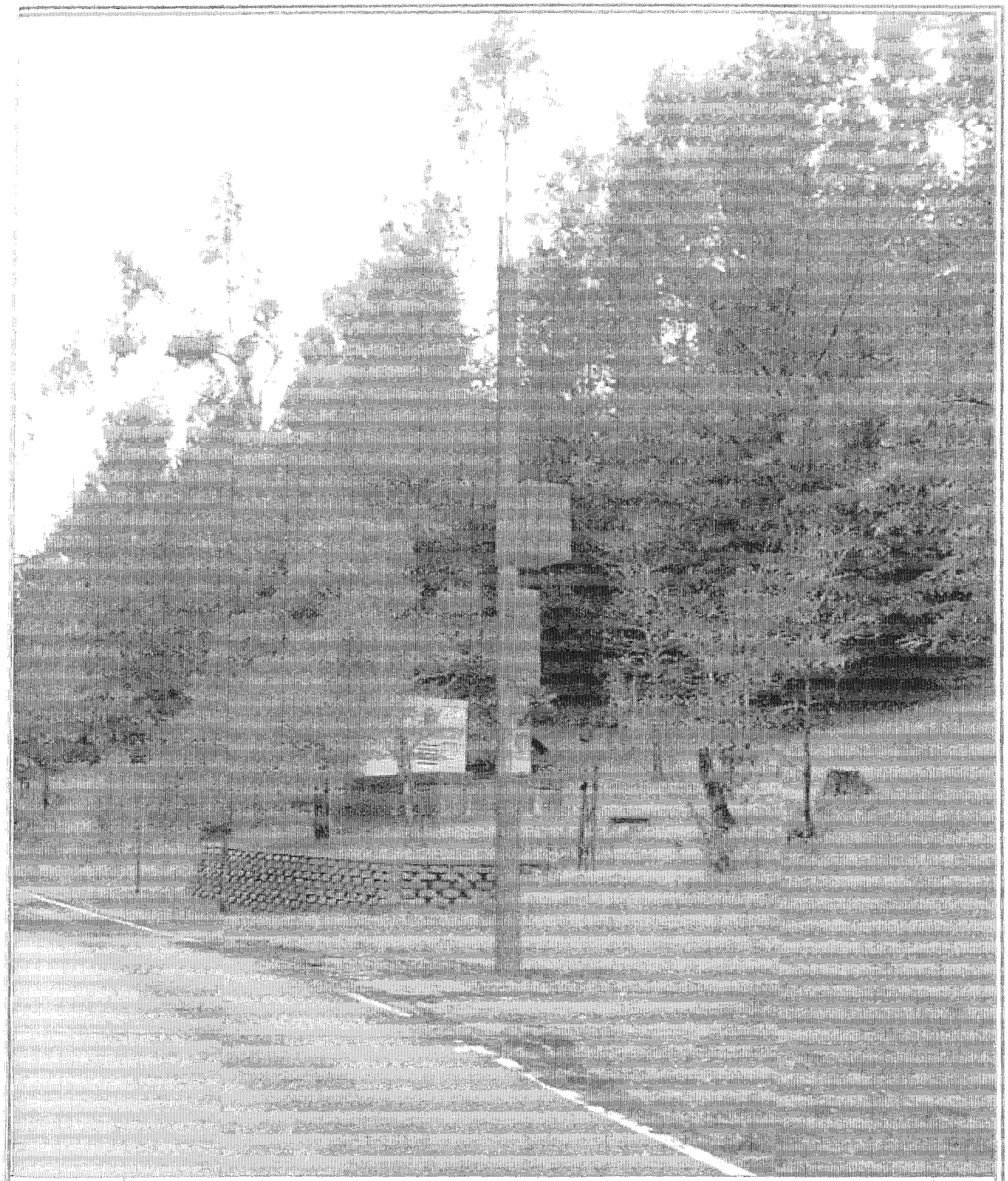


NEXTG TO PLACE NEW CL4 40' PC



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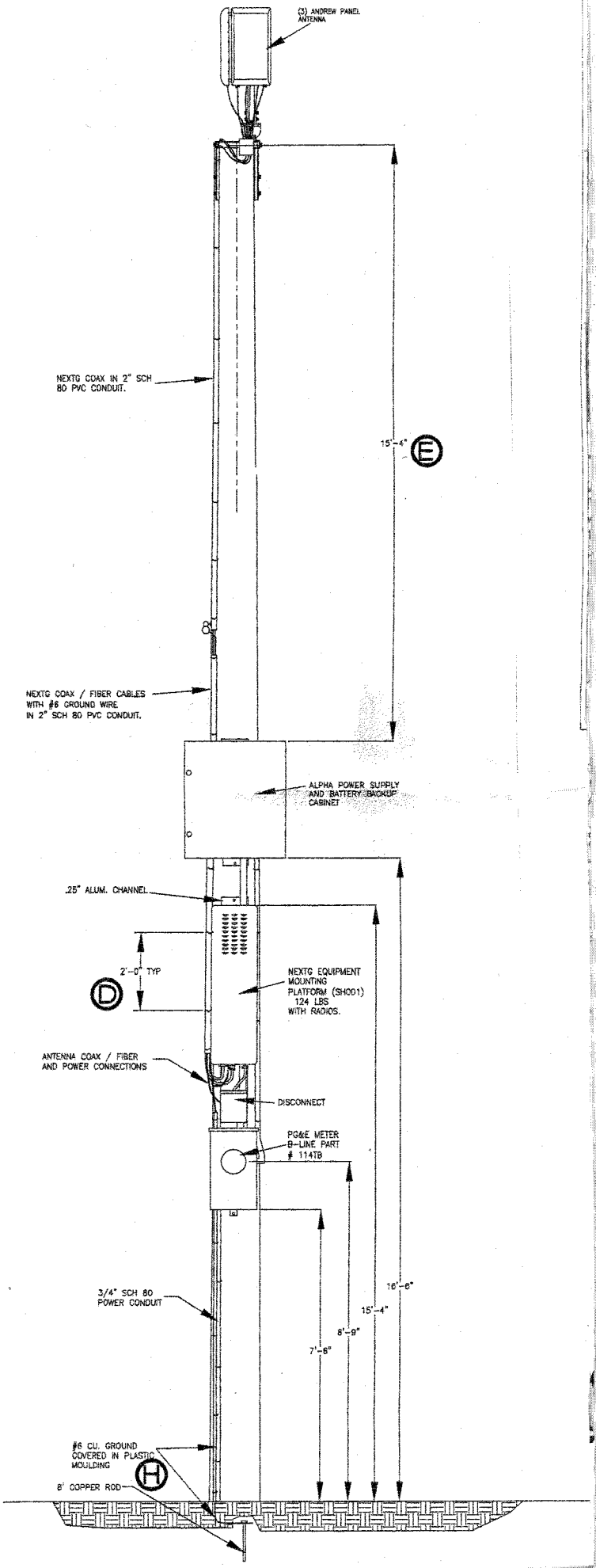

NEXTG TO PLACE NEW

SCALE:	PROPOSED PHOTO / EQUIPMENT REPRESENTATION	F
N.T.S.		

NextG Networks

EMPOWERING NEXT GENERATION WIRELESS NETWORKS

Corporate Headquarters:

NextG Networks, Inc.
2216 O'Toole Ave.
San José, California 95131

Tel: (408) 954-1580
Fax: (408) 383-5397
Web: www.nextgnetworks.net

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NextG Networks of California, Inc.

Tel: (206) 419-9800
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Email: nernst@nextgnetworks.net

RECEIVED
MAY 24 2010
City of Oakland
Planning & Zoning Division

May 24, 2010

City of Oakland
Attn: Leigh McCullen
Planning and Zoning Services Division
250 Frank H. Ogawa Plaza, Ste 2114
Oakland, CA 95131
Attention: Scott Miller, Zoning Manager

RE: Installation of Telecommunications Facilities within the Public Right-of-Way
Project Addresses: Public Right-of-way at approximately 7294 Marlboro Terrace/
4949 Grizzly Peak Boulevard
Public Right-of-way at approximately 9950 Skyline Boulevard
Public Right-of-way at approximately 10648 Skyline Boulevard
Public Right-of-way at approximately 10000 Skyline Boulevard

Dear Ms. McCullen,

Pursuant to City of Oakland Planning Code ("O.P.C.") section 17.132.020, NextG Networks of California, Inc. ("NextG") appeals the Administration Determination issued by the Zoning Administrator on May 13, 2010 (attached as Exhibit A). At the same time, NextG is submitting major conditional use permit ("CUP") applications for the four (4) locations referenced above and concedes to processing of these CUPs in this instance; however, we are filing this appeal in order to preserve NextG's rights as to permit processing for similar applications in the future.

As discussed in the correspondence sent to the City of Oakland ("City") dated April 16, 2010 and April 29, 2010 (attached as Exhibit B), NextG is a "telephone corporation" with a statewide franchise under Public Utilities Code §7901.[1] Through the process required by Public Utilities Code §1001 *et seq*, NextG was granted a certificate of public convenience and necessity ("CPCN") by the California Public utilities Commission ("CPUC"), authorizing a statewide franchise under the terms of D 03-01-061 (Jan. 30, 2003). NextG's initial authorization was as a "limited-facilities based provider of telecommunications services," which meant that NextG had

[1] Cal. P.U. Code § 7901 states: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

ATTACHMENT B

no right to install its own poles. However, in D 07-04-045 (Apr. 12, 2007), the CPUC granted NextG "full-facilities based authority," including the right to install its own utility infrastructure in the public rights-of-ways.

NextG's model is to use the public rights-of-way, which have been dedicated for the benefit of telephone corporations and electric utilities by the establishment of corridors for utility installations. City's typically embrace—and prefer—NextG's networks over traditional large wireless towers and monopoles on private property precisely because NextG's facilities are located in the public rights-of-way and use small and unobtrusive attachments a fraction of the size of those attachments on monopoles, towers, and rooftop-mounted equipment. Indeed, NextG's equipment is approximately the same size or smaller than the many other attachments on utility infrastructure, such as transformers, telephone junction boxes, cable routers, Wi-Fi antennae, meters, switches and other similar attachments.

NextG has already installed approximately twenty-one (21) wireless attachments and miles of fiber optic cable in the City in its first phase network completed last year. Prior to submitting permits for the second phase of its telecommunications network (also consisting of fiber optic cable and wireless attachments), NextG proactively sought direction from the City Planning and Zoning Division of the Community and Economic Development Agency ("CEDA") regarding the placement of four (4) new utility poles that would ultimately have wireless attachments in addition to electric and communication wire attachments. NextG's government-relations director Sharon James was advised by the City's staff member, Mr. Eric Angstadt in February 2010, that the process should be Small Project Design Review. Relying on this direction, NextG prepared master applications and submitted them on March 12, 2010 (attached as Exhibit C). Further analysis has made it unclear if the Planning and Zoning Division has jurisdiction over these poles at all since the Building Services Division is charged with development in the public rights-of-way, and this issue is discussed in further detail below.

On April 9, 2010, NextG received a letter from the Planning and Zoning Division stating a contrary position to the one taken when Ms. James consulted with Mr. Angstadt, *i.e.*, that NextG's four new utility poles were considered "monopoles" under the City Planning Code. However, no detailed reasoning or explanation was provided for the determination. On April 16, 2010, NextG responded to the City's letter and, hoping to illustrate the stark difference between utility infrastructure (in the right-of-way) and monopoles (installed on private property), NextG provided examples of a utility pole with wireless attachments versus a "monopole" (see Exhibit B for photos). On April 19, 2010, NextG met with the City for further discussion, and the City requested more information regarding NextG's regulatory status and analysis of the City's Planning Code, which was provided on April 29, 2010 (attached in Exhibit B).

NextG expected Deputy City Attorney, Ms. Kiran Jain, to examine these points and provide a legal explanation of the City's position under the code. However, two weeks later, May 13, 2010, the City's only response was restatement from April 9, 2010 that NextG's utility poles are "monopoles" requiring major CUP permits and a general reference to the telecommunications section 17.128, without elaboration or explanation of NextG's questions about the open space zoning section. For the following reasons, the City's decision is in error, an abuse of its

discretion, and unsupported by substantial evidence, and therefore, should be reversed by the Planning Commission.[2]

I. The City Erred by Applying the Planning Code to the Public Rights-of-Way

The City erred when it applied its Planning Code to NextG's request to set new utility poles in the public right-of-way because the Planning Code applies to private property, not the public right-of-way. NextG has found nothing in the Planning Code regulating construction of utility infrastructure in the public right-of-way at all, and it is our understanding that the incumbent local exchange carrier ("ILEC"), AT&T, as well as the electric company, PG&E, and the cable companies, Time Warner and Comcast, make their pole installations and attachments with no input from the Planning & Zoning Division, but rather through the Building Services Division. Should NextG, AT&T, PG&E, Time Warner, Comcast or any other company propose telecommunications infrastructure on private property or even publicly-owned fee-simple property, such as a police station, then the construction would fall squarely under the Planning Code; but this is not the situation with NextG's current applications.

In Oakland, construction in the public rights-of-way is governed by the Building Services Division of CEDA who issues encroachment and excavation permits for the placement of improvements in the public rights-of-way.[3] NextG has worked with the Building Services Division to obtain encroachment permits for wireless attachments to existing joint-use utility poles, which NextG partially owns. NextG requested to place four (4) utility poles that are indistinguishable to all existing utility poles in Oakland. As a member of the Northern California Joint Pole Association ("NCJPA), which is a cooperative ownership of utility infrastructure, NextG will have a vested ownership interest in the proposed poles equivalent to the ownership interest of AT&T and PG&E.[4] These poles will be registered with the NCJPA for use by additional utilities in the future. By extension, these utility poles should fall under the jurisdiction of the Building Services Division.

When NextG sought input initially on the project from the Planning and Zoning Division, the Planning and Zoning Division instructed NextG to submit Small Project Design Applications for the four (4) utility poles, which NextG did not challenge because this process is administrative and takes a reasonable length of time, estimated as a five (5) day over-the-counter process. NextG did not expect the City's to reverse its prior instruction and assert the authority of the Planning Code, as occurred in the City's April 9, 2010 letter, wherein the City made a reference to NextG's request being governed by O.P.C section 17.128.

The City has summarily concluded, without evidence, that O.P.C. section 17.128 applies to construction of telecommunications infrastructure in the public rights-of-way. As previously noted, a review of Planning Code reveals no mention or regulation of any type of utility infrastructure (including telecommunications, cable, electric or other similar infrastructure) in the public right-of-way. As drafted, the Planning Code contemplates *private* property and becomes nonsensical when applied to the public right-of-way. By way of example, O.C.P. section

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[2] Oakland Planning Code §§ 17.132.020 & 17.32.030 (*hereinafter* "O.P.C.")
[3] http://www.oaklandnet.com/government/ceda/revised/build_ser/1buildsr.htm (lasted visited May 21, 1010).
[4] See http://www.ncjpa.org/ (last visited April 15, 2010).

17.11.060 states that a minor CUP is required for "[e]lectric, gas, and telephone distribution lines and poles" in the Open Space Zone. Yet, if the City were to apply this requirement to the public rights-of-way (which it never has), a substantial delay of essential services by PG&E, AT&T, Time Warner, Comcast and others would result. In point of fact, there are hundreds of utility poles in the public rights-of-way in the Open Space Zone throughout Oakland, none of which went through the Planning & Zoning Division. This demonstrates not only that the Planning Code does not literally apply (as it is written) to the public rights-of-way, but also that the Planning Code does not (as it is applied) carry over to the public right-of-way. Therefore, the City's application of the Planning Code to the public right-of-way is in error.

II. The City Erred by Inaccurately Determining that a Utility Pole is "Monopole"

NextG has requested to place four (4) new utility poles in the public rights of way, which the City is characterizing as "monopoles." This is in error because utility poles are physically and functionally different than monopoles. NextG described this difference in its letter to the City dated April 16, 2010, incorporated herein by reference and attached as in Exhibit B, including a photo of an existing utility pole with wireless attachments versus a monopole, both of which are located in the Oakland Hills.

NextG's four (4) new utility poles poles will be wood and set into the ground like any other utility pole. They will have fiber cable and electric power attachments in addition to the wireless equipment. They will also be made available for use by other utility companies, such as AT&T, Comcast, PG&E and any other member of the NCJPA. The one use that will not be allowed is additional wireless attachments because wood utility poles are typically designed to only accommodate one wireless attacher, pursuant to pole-attachment guidelines promulgated by the CPUC in General Order 95.

By contrast, monopoles are made out of steel and set into a large concrete caisson foundation, which requires a very deep bore into the earth—making them in most practical cases impossible to set in a public right-of-way. Rarther than being outfitted with fiber cable or electric power connects, coaxial cable runs from the antennas to the base station equipment, often located in a separate "shelter" to house equipment and air-conditioning equipment. Power and fiber connections are handled at the base station, often with a generator outlet, batteries, and other equipment. The only attachments to a monopole are the relatively large antennas, often "sectorized," with 6-12 antennas in a typical configuration.

O.P.C. code 17.128.080 contemplates a typical monopole in its discussion of the "General Development Standards for Monopoles." First, the code requires owners to allow use by future wireless communication companies, something that is not functionally possible with a wood utility pole.[5] Second, the code requires the equipment shelter or cabinet to be concealed from public view, which is necessary when using equipment cabinets the size of large refrigerators or stand alone structures, as can be seen behind the monopole in NextG's April 16, 2010 letter.[6]

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[5] O.P.C. § 17.128.080(A)(1)
[6] O.P.C. § 17.128.080(A)(2)

The definition contained in O.P.C. section 17.10.900 states, "[a] Monopole Facility is a wireless communication facility that supports wireless communications antennas with a monopolar structure erected on the ground, terminating in one or more connecting appurtenances." However, this definition does not apply to utility poles because a utility poles is not a "wireless communication facility." Indeed, all utility poles are "monopolar" and capable of supporting "wireless communication antennas," some of which already do, as shown in NextG's letter dated April 16, 2010.

The City has failed to produce substantial evidence that its assertion is accurate. It has ignored the fact that these four (4) utility poles will support traditional wireline and power attachments, in addition to wireless attachments. The City has also ignored that these will be joint use poles, capable of being used by many non-wireless providers, but no additional wireless companies. During the April 19, 2010 meeting, the City acknowledged that NextG has a right to set new utility poles in the public rights-of-way through the Building Services Division without falling under the Planning Code in support of wireline attachments. The fact that utility poles have wireless attachments in addition to other types of attachments has not been determinative in the past, nor should it be now, for permitting purposes.

III. Even if the Planning Code Governs, the City Erred in Its Application

The City has not provided, and NextG has not been able to find, relevant sections of the Planning Code that provide direction for building utility infrastructure in the public rights-of-way; however, NextG found some language in the Open Space Zone section 17.11, which surrounds three (3) of the four (4) utility poles, that shows that if the Planning Code does apply to the public rights-of-way, then the City is erring in its application. NextG presented the following to the City in its April 29, 2010 letter, but received no response.

According to section 17.11.060, all "[e]lectric, gas, and telephone distribution lines and poles" require a minor conditional use permit in all areas of the Open Space Zone. The City has produced no evidence that this section of the code applies to public rights-of-way passing through the Open Space Zone; nor has NextG ever been instructed to obtain minor conditional use permits for the telephone lines it has constructed in the public rights-of-way previously. This implies that the Planning Code does not apply to the public rights-of-way, but rather to electric, gas, and telephone distribution lines and poles running directly over open space zoned private property, such as through a park, where one would expect the City to require a minor conditional use permit.

Although it remains NextG's position that the requested utility poles are not monopoles, NextG examined how monopoles are treated under in the Open Space Zone as well. O.P.C. section 17.11.090 shows that a minor conditional use permit is needed for a monopole in most areas of the open space zone with the exception of the active mini-park ("AMP") and the passive mini-park ("PMP") where they are prohibited. Indeed, mini, micro, and macro telecommunications facilities are treated equal to electric, gas, and telephone distribution lines and poles and require minor conditional use permit in all areas of the Open Space Zone. This further implies that the code was intended for private property, not the public rights-of-way.

That being said, if it is determined that the Planning Code applies to the public rights-of-way, the City erred by instructing NextG to obtain a major CUP for three (3) of the above referenced locations because the Planning Code only requires *minor* CUP in the Open Space Zone. Also, the City failed to present substantial evidence that it requires minor CUPs for electric, gas, and telephone distribution lines and poles in the public rights-of-ways in the Open Space Zone, which is necessary to show that the City is not treating NextG in a discriminatory, anti-competitive fashion as prohibited under state and federal law.[7]

IV. The City Seems to be Abusing Its Discretion by Treating NextG in a Discriminatory Manner

NextG does not dispute that the City has jurisdiction over the public rights-of-way; however, its management of the public rights-of-way cannot "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[8] Additionally, the City's time, place and manner management of the public rights-of-way must treat all utilities equality as required by Public Utilities Code section 7901.1(b) and the federal Telecommunications Act section 253.[9] Municipalities are bound to treat competitive local exchange carriers ("CLEC") equivalent to the ILEC. For example, White Plains, New York ran afoul of the law when it treated the ILEC differently than a CLEC.[10] As such, if the City of Oakland allows the ILEC to set new utility poles through a simple approval process, then NextG should be offered the same process.

Pursuant the authorization granted to NextG by the CPUC, NextG has the right under Public Utilities Code section 7901.1(b) to construct utility infrastructure, such as utility poles, in the public rights-of-way in an "equivalent manner" as other utilities. In practical terms, this means that the city must apply the same permitting processes on NextG that it also applies on other utilities, such as PG&E, AT&T, Comcast, and others. NextG has requested that the City produce evidence of the permitting requirements for other utilities placing utility poles in the public rights-of-way, but the City has offered nothing to show that NextG is being treated equally.

The City's vague reference to section 17.128 it is not helpful because it provides no detailed support pursuant to the Planning Code or any other section of City code. NextG has reviewed and re-reviewed section 17.128 for a scintilla of clear direction for placing utility poles with wireless attachments or a monopole in the public rights-of-way and found nothing. Since the City's code does not require CUPs for other users of the rights-of-way, the City cannot arbitrarily create new criteria just to fit NextG. Indeed, federal courts have held that a local government cannot "arbitrarily invent new criteria" and new processes that do not "go to any of the criteria set out in the Zoning Code."[11]

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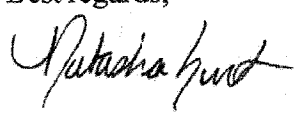
[7] Cal. P.U. Code §7901.1(b), 47 U.S.C. 253(b).
[8] 47 U.S.C. 253(a).
[9] 47 U.S.C. § 253.
[10] See *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 79–80 (2nd Cir. 2002).
[11] *T-Mobile vs. Wyandotte County*, 546 F.3d 1299 (10th Cir. 2008), *citing Virginia Metronet, Inc. v. Bd. of Supervisors of James City County., Va.*, 984 F.Supp. 966, 974 n. 14 (E.D.Va.1998); *also see New Par v. City of Saginaw*, 301 F.3d 390, 398 (6th Cir.2002), *Town of Amherst, N.H. v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 14 (1st Cir.1999).

The City's failure to produce substantial evidence of equal treatment suggests that the City is abusing its discretion by applying its code in an arbitrary manner, first, by stating that the Planning Code applies to utility construction in the public rights-of-way, and second, by inaccurately classifying a utility pole as a "monopole."

V. Conclusion

For the reasons stated above, NextG respectfully requests that the Planning Commission reverse the Administrative Decision provided to NextG on May 13, 2010 because its four (4) new utility poles are not monopoles and the Planning Code does not apply to standard utility construction in the public rights-of-way. NextG's utility pole permits should be handled by the Building Services Division equal to the treatment of new utility poles placed by other companies, e.g., AT&T, Comcast, and PG&E, in the public rights-of-way.

Best regards,



Natasha Ernst
Government & Utility Counsel

Enclosures:
Exhibit A
Exhibit B
Exhibit C

EXHIBIT A

CITY OF OAKLAND

DALZIEL BUILDING • 250 FRANK H. OGAWA PLAZA, SUITE 2114 • OAKLAND, CALIFORNIA 94612-2031

Community and Economic Development Agency
Planning & Zoning Services Division

(510) 238-3911
FAX (510) 238-4730
TDD (510) 238-3254

VIA U.S. MAIL AND ELECTRONIC MAIL

May 13, 2010

Natasha Ernst, NextG Networks of California
2216 O'Toole Ave
San Jose, CA 95131

RE: **Installation of Telecommunications Facilities within the Public Right-of-Way**

Project Addresses: **Public Right-of-way at approximately 7294 Marlboro Terrace/4949 Grizzly Peak Boulevard**
Public Right-of-way at approximately 9950 Skyline Boulevard
Public Right-of-way at approximately 10648 Skyline Boulevard
Public Right-of-way at approximately 10000 Skyline Boulevard

Dear Ms. Ernst,

On March 12, 2010, the City of Oakland Zoning Division received incomplete basic applications with plans for the above four (4) referenced sites. Application fees were not paid. Notwithstanding this, staff sent an incomplete letter on April 9, 2010 (see attached). NextG then inquired as to which local regulatory processes its projects fell under. NextG has argued that its wireless telecommunications operations fall under the exclusive jurisdiction of the California Public Utilities Commission (CPUC), and that it does not need to apply for local land use permits. NextG is apparently relying on a "CPUC determination," which is merely an ex parte communication by the CPUC to the judge presiding over NextG's ongoing case with the City of Huntington Beach simply requesting exclusive jurisdiction in this matter. Further, the Certificate of Public Convenience & Necessity (CPCN) issued by the CPUC states you are a utility, but the determination also states that NextG must adhere to local planning processes. (The CPCN states that NextG shall provide a construction workplan to the CPUC, including, among other things, a list of other agencies contacted with respect to siting, land use and environmental resource issues).

Based upon the available facts, the Zoning Manager maintains staff's determination that the erection of new poles within the public right-of-way intended for Telecommunications purposes are considered Monopoles, as defined by the Oakland Planning Code and regulated by the City's Telecommunications Regulations under Oakland Planning Code Chapter 17.128. Therefore, NextG's above referenced projects require major Conditional Use Permits (CUP), including environmental review consistent with the CPCN. The site located at the corner of Marlboro Terrace and Grizzly Peak Boulevard is zoned residential and will, therefore, also require Design Review, in addition to a major CUP. Please refer to Chapter 17.134 of the Oakland Planning Code for procedures for consideration of a major CUP.

Therefore, if you wish to proceed with the application process, and thus waive your ability to contest the City's jurisdiction, please submit all the required application materials, including payment of all fees, in order for the City to process the applications.

If you disagree with this determination/administrative interpretation, you **must** file an appeal to the City Planning Commission and such appeal **must** be submitted within ten (10) calendar days after the date of this letter, and by 4:00 p.m. (May 24, 2010). The appeal shall be on a form provided by the Planning and Zoning Division of the Community and Economic Development Agency, and submitted to the Planning and Zoning Division at 250 Frank H. Ogawa Plaza, Suite 2114, to the attention of Leigh McCullen, Planner III. The appeal shall state specifically wherein it is claimed there was error or abuse of discretion by the Zoning Manager or wherein his/her decision is not supported by substantial evidence, and must include payment of $1,181.93 in accordance with the City of Oakland Master Fee Schedule. Failure to timely appeal will preclude you, or any interested party, from challenging the City's decision in court. The appeal itself must raise each and every issue that is contested, along with all the arguments and evidence in the record which supports the basis of the appeal; failure to do so may preclude you, or any interested party, from raising such issues during your appeal and/or in court. If you challenge the Planning Commission's decision in court, you may be limited to issues raised at the appeal hearing or in correspondence delivered to the Planning and Zoning Division at, or prior to, the appeal hearing; provided, however, such issues were first raised in the appeal itself.

Please contact the case planner, Leigh McCullen, Planner III, at (510) 238-4977 or lmccullen@oaklandnet.com, if you have any questions.

Sincerely,

Scott Miller
Zoning Manager

Attachment: April 9, 2010 Incomplete Letter

cc. Kiran Jain, Deputy City Attorney
Ann Clevenger, Planner III

Sharon James, NextG Networks of California
2216 O'Toole Ave
San Jose, CA 95131

EXHIBIT B

NextG Networks

EMPOWERING NEXT GENERATION WIRELESS NETWORKS

Corporate Headquarters:

NextG Networks, Inc.
2216 O'Toole Ave.
San José, California 95131

Tel: (408) 954-1580
Fax: (408) 383-5397
Web: www.nextgnetworks.net

Writer's Contact Information:

Natasha Ernst, Esq.
NextG Networks of California, Inc.

Tel: (206) 419-9800
Fax: (408) 383-5397
Email: nernst@nextgnetworks.net

VIA EMAIL & HAND DELIVERY

April 16, 2010

Ms. Kiran Jain
Deputy City Attorney, Land Use & Development
City of Oakland Office of the City Attorney
One Frank H. Ogawa Plaza, Sixth Floor
Oakland, CA 94612

Re: Public Right-of-way at approximately 7294 Marlborough Terrace
Public Right-of-way at approximately 9950 Skyline Boulevard
Public Right-of-way at approximately 10648 Skyline Boulevard
Public Right-of-way at approximately 10000 Skyline Boulevard

Dear Ms. Jain:

Thank you for this opportunity to give you more information about NextG Networks of California, Inc. ("NextG"). As you will see below, NextG is a telephone corporation that provides telecommunications services. As such, it has the right to construct utility infrastructure, such as utility poles, in the public rights-of-way in a manner equal to other utilities.

A. Information about NextG

NextG is a "telephone corporation" with a statewide franchise under Public Utilities Code §7901.[1] Through the process required by Public Utilities Code §1001 *et seq*, NextG was granted a certificate of public convenience and necessity ("CPCN"), authorizing a statewide franchise pursuant to Public Utilities Code §7901 under the terms of D 03-01-061 (Jan. 30, 2003), which granted NextG initial authorization as a limited-facilities based provider of telecommunications services. In D 07-04-045 (Apr. 12, 2007), the California Public Utilities Commission ("CPUC") granted NextG full-facilities based authority, including the right to install its own utility infrastructure in the public rights-of-ways.

[1] Cal. P.U. Code § 7901 states: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

Pursuant the authorization granted to NextG by the CPUC, NextG has the right under Public Utilities Code §7901.1(b)[2] to construct utility infrastructure, such as utility poles, in the public rights-of-way in an "equivalent manner" as other utilities. In practical terms, this means that the city must apply the same permitting processes on NextG that it also applies on other utilities, such as PG&E, AT&T, Comcast, and others.

In addition, NextG has obtained "blanket" authority from the Federal Communications Commission ("FCC") as a telecommunications provider pursuant to 47 U.S.C. 214. Please note that this registration was granted by the wireline bureau, which is because NextG's registered "RF Transport Service" is a wireline service. NextG is not a wireless carrier because it does not own or operated radio spectrum licenses, but instead builds distributed antenna system ("DAS") networks as a "carrier's carrier."

DAS networks are deployed on utility poles and utilize fiber optic cable that connects small radio nodes over geographic areas. Even though wireless attachments are a component of the network, it is essentially a wireline network similar to that of AT&T. DAS networks allow wireless carriers to cover hard-to-reach areas, such as the Oakland Hills, resulting in increased coverage and safety advantages for customers without having to construct large towers or monopoles. Cities typically embrace DAS solutions because they integrate cleanly into surrounding communities.

Our model is to use the public rights-of-way, which have been dedicated for the benefit of telephone corporations and electric utilities by the establishment of corridors for utility installations. Additionally, NextG is a member of the Northern California Joint Pole Association ("NCJPA), which is a cooperative ownership of utility infrastructure. As such, NextG will have a vested ownership interest in the proposed poles equivalent to the ownership interest of AT&T and PG&E.[3] These poles will be registered with the NCJPA for possible use by additional utilities in the future.

B. NextG's Request

In order to expand the wireless coverage in the Oakland Hills for one of NextG's customers, a well-known wireless service provider, NextG needs to construct four (4) new utility poles in the public rights-of-way. These four (4) locations are as follows:

1. Public Right-of-way at approximately 7294 Marlborough Terrace
2. Public Right-of-way at approximately 9950 Skyline Boulevard
3. Public Right-of-way at approximately 10648 Skyline Boulevard
4. Public Right-of-way at approximately 10000 Skyline Boulevard

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[2] Cal. P.U. Code § 7901.1 requires that cities treat telecommunications companies equally, stating: "(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed. (b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner. (c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities."

[3] See http://www.ncjpa.org/ (last visited April 15, 2010).

NextG Networks

This is the second phase of NextG's existing network in the Oakland Hills, which was permitted on existing utility poles without incident. NextG always looks for existing utility poles when building networks; however, in this area of Oakland Hills, the existing utility infrastructure is not running along side the public right-of-way. All of NextG's fiber optic cable will be underground to avoid placing additional utility poles, however, antennas and radio equipment must be above ground.

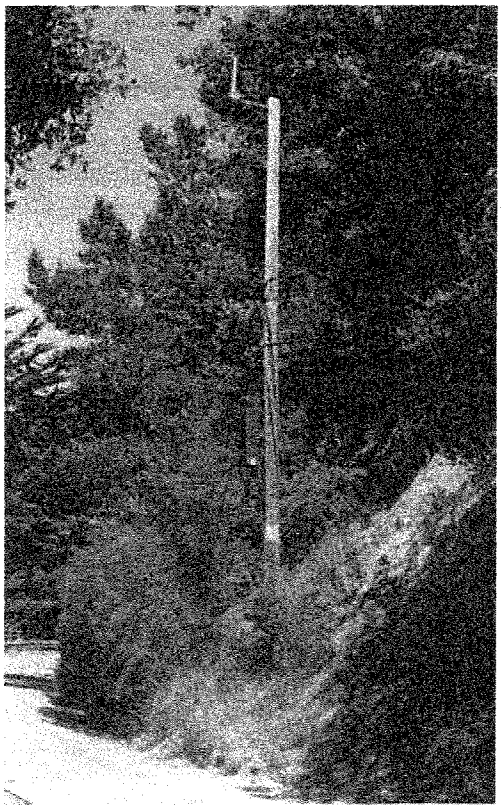
The four (4) utility poles will have fiber optic cable and power attachments in addition to the antenna and radio equipment. In all aspects, these new utility poles will look and function just like all the utility poles currently in use for this project. The only difference is that they do not currently exist, hence, NextG's request.

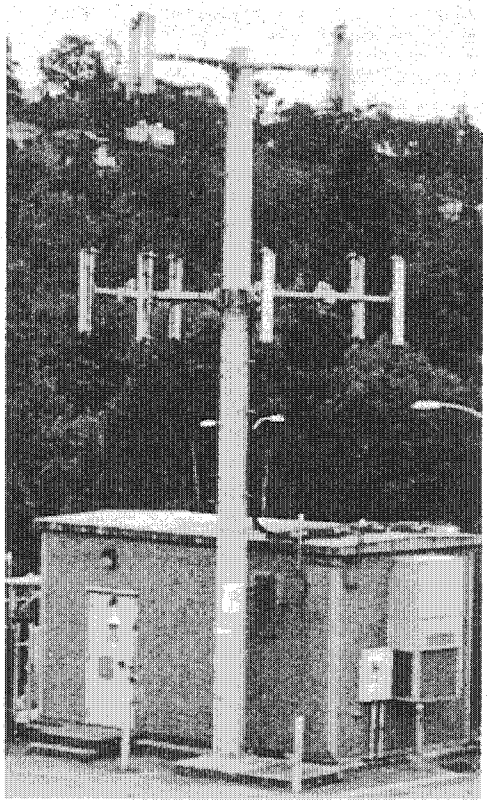
C. Utility Pole v. Monopole

The above information demonstrates that NextG is a telecommunications utility and should be treated in a nondiscriminatory manner similar to other telecommunications utilities, such as AT&T, in accordance with California Public Utility Code § 7901.1(b).

To illustrate this point, below are pictures of two installations in the Oakland Hills. The picture on the left is essentially what NextG will be building. The picture on the right is a monopole on private property constructed by a wireless carrier.

Oakland Hills Joint Use Utility Pole with NextG's DAS Attachments v. a Monopole:





NextG Networks

As you can see, these are very different facilities from a legal and practical stand point.

It has been suggested that NextG seeks to install a "monopole" in the right-of-way. This is not the case. The term "monopole" is generally reserved for full-size cell deployments, typically consisting of an array of 9-12 antennas, a deep casson-style (deep concrete) foundation, and a connection to a full base station (typically located on private property). Of course, if NextG were placing a monopole, or any other instillations of this magnitude on private property, then the code sections mentioned in the letter from the City of Oakland dated April 9, 2010 would be appropriate. However, that is not the situation. NextG does not want to build four (4) monopoles in the public rights-of-way, but rather four (4) *utility* poles of the same general size, stature and purpose of the near-by existing utility poles. Thus, NextG's proposal is appropriate for the aesthetics of the surrounding community.

D. ***Conclusion***

Earlier this year NextG director Sharon James was advised by Eric Angstadt of the City of Oakland Planning and Zoning Department that the process for these four (4) new utility poles should be Small Project Design Review. Trusting that information we prepared master applications and submitted them on March 12, 2010. We request that the city honor the original instructions we were given and allow our project to move forward. We are ready and willing to provide any missing items originally required under the Small Project Design Review.

Thank you for your assistance with this matter, and I look forward to meeting with you on Monday, April 19, 2010. Should you have any questions or concerns in advance of or after our meeting, please feel free to contact me at 206.419.9800 or by email at nernst@nextgnetworks.net.

Best regards,

Natasha Ernst
Government & Utility Counsel

cc: Patrick Ryan, Esq. (NextG)

CITY OF OAKLAND

DALZIEL BUILDING • 250 FRANK H. OGAWA PLAZA, SUITE 2114 • OAKLAND, CALIFORNIA 94612-2031

Community and Economic Development Agency
Planning & Zoning Services Division

(510) 238-3911
FAX (510) 238-4730
TDD (510) 238-3254

April 9, 2010

Sharon James, NextG Networks of California
2216 O'Toole Ave
San Jose, CA 95131

VIA U.S. MAIL AND ELECTRONIC MAIL

RE: **Installation of Telecommunications Facilities within the Public Right-of-Way**

Project Addresses: **Public Right-of-way at approximately 7294 Marlboro Terrace**
Public Right-of-way at approximately 9950 Skyline Boulevard
Public Right-of-way at approximately 10648 Skyline Boulevard
Public Right-of-way at approximately 10000 Skyline Boulevard

Dear Ms. James,

Section 65943 of the California Code requires a determination in writing as to the completeness of an application for a development project. This letter does not constitute either an approval or a denial of your application. Your applications to erect four wooden Telecommunications Monopole Facilities at the above referenced addresses have been found to be:

[X] INCOMPLETE

At this time, staff has determined that the erection of new poles within the public right-of-way intended for Telecommunications purposes are considered Monopoles, as defined by the Oakland Planning Code and regulated by the City's Telecommunications Regulations. Please note that the City is continuing to investigate the applicabity of the Joint Powers Authority Agreement to these projects.

The following information will be needed to complete the four applications submitted on March 12, 2010:

Public Right-of-way at approximately 7294 Marlboro Terrace

This site is located in the R-30, One-family Residential Zone. A Major Conditional Use Permit and Design Review is required to place a Telecommunications Monopole within a residential zone. The following information will be needed to complete this application:

- Basic Application Form signed by the property owner
- Design Review Supplement Form (see Part B of form for applicable findings)
- Conditional Use Permit Supplement Form
- Site Design Alternatives Analysis (see Section 17.128.120 of Oakland Planning Code)
- EMF Study demonstrating compliance with federal emissions standards
- Fees (6,555.97)

Public Right-of-way at approximately 9950 Skyline Boulevard
Public Right-of-way at approximately 10648 Skyline Boulevard
Public Right-of-way at approximately 10000 Skyline Boulevard

These sites are located in the Open Space Zone. A Major Conditional Use Permit is required for Monopoles with this zone. The following information will be needed to complete these applications:

- Basic Application Form signed by the property owner
- Conditional Use Permit Supplement Form
- Site Design Alternatives Analysis (see Section 17.128.120 of Oakland Planning Code)
- EMF Study demonstrating compliance with federal emissions standards
- Fees ($7,061.23)

Should it be determined that these proposed facilities full under the authority of the Joint Powers Authority these facilities would require Design Review in lieu of a Conditional Use Permit.

Please direct any comments or questions to me at (510) 238-4977 or lmccullen@oaklandnet.com .

Sincerely,

Leigh McCullen
Planner III

cc. Scott Miller, Zoning Manager
Kiran Jian, Deputy City Attorney
Ann Clevenger, District 2 Supervisor

NextG Networks

EMPOWERING NEXT GENERATION WIRELESS NETWORKS

Corporate Headquarters:

NextG Networks, Inc.
2216 O'Toole Ave.
San José, California 95131

Tel: (408) 954-1580
Fax: (408) 383-5397
Web: www.nextgnetworks.net

Writer's Contact Information:

Natasha Ernst, Esq.
NextG Networks of California, Inc.

Tel: (206) 419-9800
Fax: (408) 383-5397
Email: nernst@nextgnetworks.net

VIA EMAIL & OVERNIGHT COURIER

April 29, 2009

Ms. Kiran Jain
Deputy City Attorney, Land Use & Development
City of Oakland Office of the City Attorney
One Frank H. Ogawa Plaza, Sixth Floor
Oakland, CA 94612

Re: Public Right-of-way at approximately 7294 Marlborough Terrace
Public Right-of-way at approximately 9950 Skyline Boulevard
Public Right-of-way at approximately 10648 Skyline Boulevard
Public Right-of-way at approximately 10000 Skyline Boulevard

Dear Ms. Jain:

I am writing to follow up on our recent discussions regarding the regulation of NextG Networks of California, Inc. ("NextG") in the City of Oakland ("City"). While we are happy to provide this additional information, we are deeply concerned about the information that the City's Right-of-Way Supervisor, Fred Loeser, conveyed to us April 27, 2010. Briefly, Mr. Loeser informed NextG's representatives that the Department of Public Works would no longer be issuing NextG any permits, including the nondiscretionary construction, excavation, and encroachment permits to existing infrastructure, until the question of new utility pole placements was resolved.

While I know you have been working to get what seems to be a miscommunication cleared up, at this time, NextG is still effectively stopped from doing any and all construction in the City. We ask the City to take immediate action to resolve this issue. NextG has signed a binding agreement with its customer to deliver the network within a specified timeframe, and the agreement was made after a prior course of dealing and an understanding of the process through prior deployments with the City. This late development is deeply troubling, and we hope that it will be immediately resolved.

Turning to your request from our meeting of April 19, 2010 for an analysis NextG's regulatory status, as a threshold matter, NextG is a "telephone corporation" with a statewide franchise under California Public Utilities Code ("P.U. Code") section 7901.[1] NextG's status as a "telephone

[1] Cal. P.U. Code § 7901 states: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and

corporation" is neither optional nor discretionary in any way; certification by the California Public Utilities Commission ("CPUC") is a requirement under state law. Indeed, section 1001 of the P.U. Code provides that to deploy telephone lines and offer telephone service, a "telephone corporation" must obtain a certificate from the CPUC. Specifically, section 1001 provides that "No . . . telephone corporation . . . shall begin the construction of . . . a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction." In January 2003, the CPUC granted, through D 03-91-061 NextG the authority to operate as a limited facilities-based carrier in California. In April 2007, the CPUC expanded NextG's authority to include full-facilities based construction. In the meantime—between the initial application and the later expansion—in 2006, the City and County of San Francisco challenged NextG's status as a telephone corporation, in a matter that was heard at both the CPUC and in federal court. NextG's status was made particularly clear in Decision 06-01-006 in the proceeding *City and County of San Francisco v. NextG Networks of California, Inc.* which found the following:

- "***NextG is currently providing telephone service*** in accordance with the limited facilities-based authority granted in D.03-01-061." *Id.* at 14 (emphasis added).
- "NextG provides wireless carriers certain radiofrequency transport services, which augment those carriers' geographic wireless coverage and improve system capacity."
- "We reaffirm that the authority granted in D.03-01-061 includes the provision of radiofrequency transport services." *Id.* at 2.
- "In providing radiofrequency transport services, NextG installs microcells and antennas on existing utility poles. Allowing placement of microcells and antennas on existing utility poles is consistent with limited facilities-based authority. . . ." *Id.*
- "We have found wholesale services to be competitive local exchange services. For example, we granted Southern California Edison a CPCN as a [competitive local exchange carrier] to provide wholesale services to other CLCs and to other telecommunications providers, including wireless carriers, as a facilitator of local communications services, rather than as a competitor." *Id.* at 5-6.
- "We have made no distinction between carriers providing wholesale services to wireline or wireless carriers or certificated or uncertificated providers." *Id.* at 6.

P.U. Code section 1759(a) deprives the municipality—and any even the trial courts in California—of subject matter jurisdiction to adjudicate NextG's status as a telephone corporation in contradiction of the CPUC's orders. It states:

> (a) No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the

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

commission in the performance of its official duties, as provided by law and the rules of court.

Because NextG has a statewide franchise under P.U. Code section 7901 to construct its facilities, it can also enjoy the benefits of P.U. Code section 7901.1(b)[2] to construct utility infrastructure, such as wood utility poles, in the public rights-of-way ("ROW") in an "equivalent manner" as other utilities. In addition to the foregoing, this letter outlines more federal and state law bases for governing telecommunications utilities constructing telecommunications infrastructure in the right-of-way ("ROW") so that the City may better understand why it must apply the same permitting process to NextG that it applies to other entities in the public ROW, such as PG&E, AT&T, Comcast, and others when setting new utility poles in the ROW.

*A. **Background***

NextG is in the process of constructing a telecommunications network in the Oakland Hills and, Oakland areas. This network consists of approximately six (6) new miles of fiber optic cable running aerially on wood utility poles and underground in the ROW with eight (8) periodic associated wireless equipment attachments. This network is an extension of NextG's existing network in the area, which consists of 11.7 miles of fiber optic cable and 24 locations of associated wireless equipment attachments. The existing network was constructed by obtaining nondiscretionary permits from the Department of Public Works under the City's ordinance governing the ROW.

In the meeting between the City and NextG on April 19, 2010, the City acknowledged NextG's right as a utility company to place standard wooden utility poles in the ROW for wireline attachments, which is a routine and simple process handled by the Department of Public Works because it does not fall within the purview of the City's Planning Code. However, the City objects to NextG setting the four (4) wood utility poles at the locations referenced above for wireline, associated wireless equipment, and electricity attachments.

NextG contends, and an analysis of which follows, that it is a telecommunications utility under both federal and state law with the right to nondiscriminatory treatment for use of the ROW. The City's current position, as stated in its letter to NextG dated April 9, 2010, targets NextG for discriminatory treatment in its use of the ROW based on the type of associated equipment it uses, running contrary to the City's standard practice of having the placement of new wood utility poles go through the Department of Public Works.

NextG wishes to amicably resolve this issue by outlining for the City how the City's current position is out of compliance with both federal and state law because it violates the mandate that telecommunications utilities be treated in a non-discriminatory, competitively neutral manner, an

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[2] Cal. P.U. Code § 7901.1 requires that cities treat telecommunications companies equally, stating: "(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed. (b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner. (c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities."

extension of which is an equal permitting process for like entities. In any case, as stated at the outset of this letter, *there is absolutely no basis* for the City to hold up all permitting from NextG until the issue of new pole placements is resolved.

Please note that because NextG is not a wireless service provider, nothing in this letter should be construed as to how the City should handle an application from a wireless service provider to construct infrastructure in the ROW. This analysis is limited to telecommunications utilities constructing telecommunications infrastructure with associated equipment in the ROW because those are the laws that govern NextG's use of the ROW.

B. Under Federal Law NextG is a Telecommunications Utility, not a Wireless Service Provider

As mentioned in my letter dated April 16, 2010, NextG has obtained blanket authority across the United States of America from the Federal Communications Commission ("FCC") as a telecommunications carrier and enjoys "blanket" certification conferred by 47 U.S.C. 214. While "blanket" certifications are not separately certificated, NextG sought and obtained confirmation from the FCC that its § 214 service applies nationwide.[3]

As a telecommunications carrier, NextG is afforded certain rights, such as attaching to utility poles[4] and placing its own poles in the public rights-of-way to build telecommunications infrastructure.[5] By contrast, wireless service providers, which are also sometimes referred to as "commercial mobile radio service" ("CMRS") providers, own proprietary wireless spectrum licenses and may follow different regulatory guidelines at both the federal and state level. At the same time, however, the U.S. Supreme Court has found that telecommunications carriers (both wireline and CMRS) are entitled to make their wireless attachments to utility poles.[6]

NextG is "telecommunications carrier" with "telecommunications equipment" under the federal Telecommunications Act of 1996 ("TCA").[7] In addition to that, NextG has particular responsibilities unique to wireline providers because NextG must grant access to all other forms of utilities to attach equipment, regardless of type, to its infrastructure, including utility poles.[8] The TCA defines "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any *wire* communications."[9] Specifically, NextG falls under the definition of "utility" precisely because of the wireline nature of its infrastructure. In other

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[3] *See Domestic Section 214 Application Filed for the Transfer of Control of NextG Networks, Inc.*, WC Docket No. 09-94, DA 09-1305 (rel. June 10, 2009); *also see Notice of Domestic Section 214 Authorization Granted,* WC Docket No. 09-94, DA 09-1522 (rel. July 13, 2009).
[4] 47 U.S.C. § 224.
[5] § 253.
[6] *See National Cable & Telecomms. Ass'n v. Gulf Power Co.* 534 U.S. 327, 340-42 (2002) (hereinafter, *"Gulf Power")* (providers using wireless equipment included in "telecommunications service" under the Communications Act).
[7] § 153(44)–(45).
[8] § 224.
[9] § 224(a)(1) (emphasis added).

words, if NextG were a wireless service provider it would not be mandated by federal law to grant other utilities access to its poles.

As a "telecommunications carrier," a "telecommunications utility" or as a "telephone corporation," NextG must allow access to all electrical, telephone, cable and other certificated carriers with any necessary "associated equipment," whether wireline or wireless.[10] This has been the consistent policy of the FCC and affirmed by the United States Supreme Court in *Gulf Power*. There the Supreme Court was explicitly clear that discrimination between wireline and wireless associated equipment is not allowed, stating, "Yet the proposed distinction-between proto-typical wire-based 'associated equipment' and the wireless 'associated equipment' which allegedly falls outside of the rationale of the Act-finds no support in the text, and, based on our present understanding of the record before us, appears quite difficult to draw."[11] Indeed, the requirement under the TCA to grant regulated rights of access to telecommunications and utility companies of all ilks is a fundamental precept of the TCA in order to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition ...."[12]

As you know, the TCA also mandates that cities not create barriers to entry for telecommunications utilities and must treat them equally.[13] As such, cities must behave in a nondiscriminatory, competitively neutral manner when allowing telecommunications infrastructure into the ROW.[14] Creating a separate and more laborious process to set a standard wood utility pole in the ROW based on the nature of future "associated equipment" is contrary to the federal requirement that cities treat telecommunications utilities equally.

C. Palos Verdes Estates

As this point in time, the federal interpretation of law in California is in a bit of flux given the recent Ninth Circuit Court of Appeals decision, *Sprint PCS Assets v. City of Palos Verdes Estates* (hereinafter "*Palos Verdes Estates*").[15] The precedential value of this case is questionable because it involves the federal courts interpreting a matter of California state law in, as some would say, a manner that lies in contrast to extensive state precedent to the contrary. Because *Palos Verdes Estates* is not binding on the state courts, it is unclear how a California state court may interpret P.U. Code sections 7901 and 7901.1; however, until that time, NextG understands that cities may be looking to *Palos Verdes Estates* for guidance.

First and foremost, *Palos Verdes Estates* was a significant departure from one hundred years of established California case law holding that aesthetics could not be considered with permitting

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[10] *Gulf Power, supra,* at 340-41 (2002).
[11] *Id.* at 341.
[12] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996).
[13] 47 U.S.C. § 253.
[14] § 253(b)–(c).
[15] *Sprint PCS Assets v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 1009) (hereinafter "*Palos Verdes Estates*").

telecommunications infrastructure in the ROW.[16] However, the aesthetic nature of the standard wood utility poles NextG wishes to set in the ROW is not at issue. The issue is NextG's right to set those utility poles in a nondiscriminatory manner as all other "entities," as required by § 7901.1(b). Importantly, *Palos Verdes Estates* is a discrete federal interpretation of California state law, with no basis or foundation in California law for its holding.

Palos Verdes Estates did nothing to overturn established federal or state law requiring equal treatment among entities; rather, it was the opposite. Because the court does not distinguish between the *type* of telecommunications infrastructure in the ROW, the decision is in no way limited to wireless infrastructure. In other words, since Ninth Circuit issued *Palos Verdes Estates*, it is clear that if a city wants to set a standard for telecommunications infrastructure, including the request for a new wood utility pole, in the ROW based on aesthetics or any other sort of time, place and manner restriction, the city *must* apply its ordinance equally to *both* wireline and wireless infrastructure requests.

In addition, the holding in *Palos Verdes Estates* is very fact based and involves a very different ordinance than the one that has been published in the City. For example, the court was convinced that the *private* rights-of-way in Palos Verdes created a unique character for consideration, which is very different than the situation in the City. However, in all cases, the applicability of Palos Verdes Estates will depend on the municipality's published ordinances *for deployments in the rights-of-way*. It may not be relevant in a situation like the one with the City, where an ordinance seems to be intended for private property, not the public ROW, as discussed further below

D. Under California Law NextG is a Telecommunications Utility, not a Wireless Service Provider

As mentioned in my letter dated April 16, 2010, and stated at the outset of this letter, NextG is also a "telephone corporation" with a statewide franchise under P.U. Code section 7901.

As discussed extensively in our meeting of April 19, 2010, NextG is also a member of the Northern California Joint Pole Association ("NCJPA"). The NCJPA is an organization that is more than 100 years old in California and was founded as a cooperative among utilities in order to share utility infrastructure and minimize the need for multiple deployments by companies in the same utility corridor. As a member, NextG is required to allow other members of the NCJPA to become joint owners of its utility poles upon request. This means that while NextG may be the first owner of the requested wood utility poles, at any point they may be incorporated into part of another utility company's infrastructure and used for electric, cable, internet or additional telephone services.

The CPUC has stated that "competitive local carriers" ("CLC") must be treated equally when attaching equipment to utility infrastructure in the ROW. The CPUC's policies are captured in a

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[16] *See generally Western Union Tele. Co. v. City of Visalia*, 149 Cal. 744 (1906); *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766 (1959); *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 197 Cal. App.2d 133 (Cal. Ct. App. 1961).

comprehensive rulemaking referred to in industry and government as the "ROW Decision."[17] NextG is a CLC, also known as a CLEC, because it has a CPCN from the CPUC, which means it can neither discriminate or be discriminated against on the basis of the type of associated equipment, whether wireline or wireless. It is important to recognize that the CPUC was explicit that this decision covers the CLCs, but not the wireless service providers/CMRS providers.[18] Accordingly, NextG must be treated like other certificated telecommunications utilities in the ROW, not a wireless services provider.

The CPUC's ROW Decision is consistent with the P.U. Code section 7901.1(b) requirement that cities treat "all entities" requesting access to the ROW in an "equivalent manner."[19] NextG acknowledges that "The California Constitution authorizes local governments to make and enforce within their limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." [20] However, these limits must still conform to state and federal laws.

Because of the CPUC's broad authority and the need to preserve consistent treatment of the highly regulated industry, there are several statutes that clarify that only the CPUC is authorized to make relevant findings on the scope of attachments. For example, P.U. Code section 1759(a) is not limited to cases that directly challenge CPUC orders, which would be the case if the City attempts to attack NextG's regulatory status. Section 1759(a) deprives the court of jurisdiction to hinder, frustrate, interfere with or obstruct the CPUC in carrying out its broad, exclusive jurisdiction over telephone corporations.[21] In the seminal *San Diego Gas* case (also known as "*Covalt*" based on the real party in interest's name), the California Supreme Court explained that "'[t]he PUC has exclusive jurisdiction over the regulation and control of utilities, and once it has assumed jurisdiction, it cannot be *hampered*, interfered with, or *second-guessed* by a concurrent superior court action addressing the same issue.'"[22] Accordingly, the California Supreme Court held that "when the relief sought [in the Superior Court] would have interfered with a broad and continuing supervisory or regulatory program of the commission, the courts have found such a hindrance and barred the action under section 1759."[23]

Therefore, pursuant to state law, NextG respectfully requests the City treat it equally to other entities operating in the ROW and allowed it to set four (4) wood utility poles in the ROW, in compliance with the City's routine process of having such permits go through the Department of Public Works.

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[17] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, D. 98-10-058 (Oct. 22, 1998).
[18] *Id.* at 27.
[19] Cal. P.U. Code § 7901.1(b).
[20] *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 722 (9th Cir. 2009) (quoting Cal. Const. art. XI, 5 7).
[21] *See, e.g., San Diego Gas & Elec. Co v. Superior Court of Orange County*, 13 Cal.4th 893, 918 (1996).
[22] *San Diego Gas*, 13 Cal.4th at 918 n.20 (quoting *Barnett v. Delta Lines, Inc.*, (1982) 137 Cal. App.3d 674, 681)(emphasis in original).
[2323] *Id.* at 919.

NextG Networks

E. NextG's Customers Do Not Determine Its Legal Status nor the Nature of Its Infrastructure

As we discussed at length during our meeting on April 19, 2010, NextG builds wireline networks with periodic associated wireless attachments, but the existence of a periodic wireless attachment does not make NextG a wireless service provider. Similarly, the fact that NextG is a "carrier's carrier" that leases the use of its networks to wireless service providers does not turn it into a wireless service provider, nor does it turn its network into wireless infrastructure.

As outlined above, the form, function, and laws governing wireless services providers, such as T-Mobile, Sprint, etc, vary in some critical ways from the laws governing wireline telecommunications companies, such as NextG. Like many CLECs, NextG leases the use its networks to wireless services providers. ILECs also provide extensive services to wireless services providers, but no one treats their wireline networks as wireless infrastructure whenever a piece of associated wireless equipment is inserted into the overall network. Again, wireless elements of a network do not control the nature of the telecommunications infrastructure or turn a wireline carrier into a wireless service provider.

As a practical matter, NextG fiber optic cable may be used for a number of purposes, including use by municipalities, dark fiber leasing, backhaul, or lit services to other wireline carriers. The specific services that NextG provides to its initial customer, while they facilitate the provision of wireless communications, are not ultimately relevant. In addition, the wood utility poles NextG seeks to place in the ROW will be used for a variety of distinctly traditional, non-wireless, utilities services, such as electricity.

NextG's network and utility pole infrastructure will provide a variety of different services at different times that are impossible for wireless infrastructure, such as a monopole, to perform. For example, monopoles do not have non-wireless attachers, nor are electric power and fiber optic cables ever attached to monopoles. By trying to put a standard wood utility pole into the wireless infrastructure box, not only is the City discriminating against a CLEC, it is creating an incongruous situation wherein the status of a utility pole flips back and forth depending on the arbitrary nature of the attachers. NextG is a utility company making a request to set utility poles just like any other utility company.

F. City Planning Code

As discussed above, NextG has already constructed a portion of the network through obtaining routine nondiscretionary permits from the Department of Public Works for the installation of fiber optic cable, both aerial and underground, and associated wireless equipment. However, based on the City's April 9, 2010 letter, wherein it was suggested that the wood utilities poles in the ROW fall under the City's Planning Code, NextG looked at section 17.11, OS Open Space Zoning Regulations, where three (3) of the four (4) proposed poles will be located. The fourth pole is currently in a residential zone, but there has been internal discussion at NextG about moving it.

NextG Networks

NextG examined how standard telephone lines and poles are treated under the code. According to section 17.11.060, all "[e]lectric, gas, and telephone distribution lines and poles" require a minor conditional use permit in all areas of the open space zone. Based on NextG's experience to the contrary, this section of the code implies that it does not apply to the ROW, but rather electric, gas, and telephone distribution lines and poles running directly over open space zoned private property, such as through a park. Should NextG or anyone else want to build a pole line through a park, one would expect the City to require a minor conditional use permit.

Although it remains NextG position that the requested utility poles are not monopoles, we looked at how monopoles are treated under the open space code as well. Section 17.11.090 shows that a minor conditional use permit is needed for a monopole in most areas of the open space zone with the exception of the active mini-park ("AMP") and the passive mini-park ("PMP") where they are prohibited. Meanwhile, mini, micro, and macro telecommunications facilities are treated similar to electric, gas, and telephone distribution lines and poles where a minor conditional use permit is required in all areas of the open space zone. This further implies that the code was intended for property, not the ROW.

G. Conclusion

NextG requests that the City treat NextG equal to any other utility requesting to set a standard wood utility pole in the ROW. Based on our previous conversation with the City, it appears this process is handled by the Department of Public Works. As such, NextG would like to work with the Department of Public Works on the placement of the utility poles.

Additionally, we thank you and the City in advance for clearing up the current confusion relating to the undisputed permit requests. Please instruct the Department of Public Works to begin issuing the nondiscretionary construction, excavation, and encroachment permits immediately.

Should you have any questions or concerns, please feel free to contact me at 206.419.9800 or by email at nernst@nextgnetworks.net.

Best regards,

Natasha Ernst

Natasha Ernst
Government & Utility Counsel

cc: Patrick Ryan, Esq. (NextG)

EXHIBIT C

RECEIVED

MAR 1 2 2010

CITY PLANNING COMMISSION
ZONING DIVISION

Community and Economic Development Agency

CITY OF OAKLAND

BASIC APPLICATION FOR DEVELOPMENT REVIEW

250 Frank H. Ogawa Plaza, Suite 2114, Oakland, CA 94612-2032
Zoning Information: 510-238-3911
www oaklandnet com

CERTAIN APPLICATIONS ARE ACCEPTED BY APPOINTMENT ONLY!

Please call (510) 238-3940 to schedule an appointment if your project involves any of the following:

- **Conditional Use Permit**
- **Variance**
- **Regular Design Review**
- **Parcel Map Waiver**
- **Tentative Parcel Map**
- **Tentative Tract Map**
- **New dwelling unit(s)**
- **1,000 sq. ft. or more of new floor area/footprint**
- **Additions ≥ 100% of existing floor area/footprint**

All other projects may be submitted to the zoning counter without an appointment.
Submit applications for Small Project Design Review to station #12 at the zoning counter by signing the sign-up sheet.

1. TYPE OF APPLICATION

(Check all that apply)

Development Permits

- ☐ Conditional Use Permit (Major, Minor, or Interim)
- ☐ Variance (Major or Minor)
- ☐ Regular Design Review
- ☒ Small Project Design Review
- ☐ Tree Preservation or Removal Permit
- ☐ Creek Protection Permit (separate application required)
- ☐ Other: _____

Subdivision Applications

- ☐ Parcel Map Waiver (Lot Line Adjustment/Merger)
- ☐ Tentative Parcel Map (subdivision for 1 – 4 lots)
- ☐ Tentative Tract Map (subdivision for 5 or more lots)
- ☐ Planned Unit Development/Mini-Lot Development

Other Applications

- ☐ Request for Environmental Review
- ☐ General Plan Amendment
- ☐ Rezoning

2. GENERAL INFORMATION

APPLICANT'S NAME/COMPANY: NextG Networks of California, Inc.

PROPERTY ADDRESS: Public Right of Way at approximately ~~9950~~ 10648 Skyline Blvd

ASSESSOR'S PARCEL NUMBER: N/A **LOT AREA (ACRES/SQ. FT.):** N/A

EXISTING USE OF PROPERTY: Public Right-of-Way

DESCRIPTION OF PROPOSAL (including type of use, hours of operation, number of employees, etc., on additional sheets if needed.):

Install one wood utility pole near the 10648 Skyline Blvd to accommodate a small 26" omni antenna at pole top and two equipment boxes; 33"x6"x6" and 24"x36"x14" to support wireless telephone coverage via a distributed antenna system.

TO BE COMPLETED BY STAFF

GENERAL PLAN LAND USE CLASS: _____ ZONING: _____

FEES[1]:

APPLICATION FEE: $ _____
POSTER DEPOSIT[2]: $ _____
VIOLATION FEE[3]: $ _____
TREE PERMIT FEE: $ _____
CREEK PERMIT FEE: $ _____
TOTAL FEES DUE: $ _____

EXPECTED PROCESSING TIME[4]: _____

[1] Fees are subject to change without prior notice. The fees charged will be those that are in effect at the time of application submittal.
[2] For permit applications requiring public notice, a refundable security deposit is required for the on-site poster containing the public notice.
[3] For permit applications to legalize work that has already been started, the REPORT FEE portion of any permit application fee is DOUBLED.
[4] Expected processing time is only an estimate and is subject to change without notice due to staff workload, public hearing availability, and the completeness or complexity of the application.

RECEIVED

MAR 12 2010

CITY PLANNING COMMISSION

ZONING DIVISION

Community and Economic Development Agency

CITY OF OAKLAND

BASIC APPLICATION FOR DEVELOPMENT REVIEW

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- **Parcel Map Waiver**
- **Tentative Parcel Map**
- **Tentative Tract Map**
- **New dwelling unit(s)**
- **1,000 sq. ft. or more of new floor area/footprint**
- **Additions ≥ 100% of existing floor area/footprint**

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- ☐ Regular Design Review
- ☒ Small Project Design Review
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- ☐ Tentative Tract Map (subdivision for 5 or more lots)
- ☐ Planned Unit Development/Mini-Lot Development

Other Applications

- ☐ Request for Environmental Review
- ☐ General Plan Amendment ☐ Rezoning

2. GENERAL INFORMATION

APPLICANT'S NAME/COMPANY: NextG Networks of California, Inc.

PROPERTY ADDRESS: Public Right of Way at approximately 7294 Marlborough Terrace

ASSESSOR'S PARCEL NUMBER: N/A **LOT AREA (ACRES/SQ. FT.):** N/A

EXISTING USE OF PROPERTY: Public Right-of-Way

DESCRIPTION OF PROPOSAL (including type of use, hours of operation, number of employees, etc., on additional sheets if needed.):

Install one wood utility pole near the intersection of Grizzly Peak Blvd and Marlborough Terrace for a small 26" omni antenna at pole top and two equipment boxes; 33"x6"x6" and 24"x36"x14" to support wireless telephone coverage via a distributed antenna system.

TO BE COMPLETED BY STAFF

GENERAL PLAN LAND USE CLASS: _____ ZONING: _____

FEES[1]:		EXPECTED PROCESSING TIME[4]:
APPLICATION FEE:	$	
POSTER DEPOSIT[2]:	$	
VIOLATION FEE[3]:	$	
TREE PERMIT FEE:	$	
CREEK PERMIT FEE:	$	
TOTAL FEES DUE:	$	

[1] Fees are subject to change without prior notice. The fees charged will be those that are in effect at the time of application submittal.
[2] For permit applications requiring public notice, a refundable security deposit is required for the on-site poster containing the public notice.
[3] For permit applications to legalize work that has already been started, the REPORT FEE portion of any permit application fee is DOUBLED.
[4] Expected processing time is only an estimate and is subject to change without notice due to staff workload, public hearing availability, and the completeness or complexity of the application.

RECEIVED

MAR 1 2 2010

CITY PLANNING COMMISSION
ZONING DIVISION

Community and Economic Development Agency

CITY OF OAKLAND

BASIC APPLICATION FOR DEVELOPMENT REVIEW

250 Frank H. Ogawa Plaza, Suite 2114, Oakland, CA 94612-2032
Zoning Information: 510-238-3911
www.oaklandnet.com

CERTAIN APPLICATIONS ARE ACCEPTED BY APPOINTMENT ONLY!

Please call (510) 238-3940 to schedule an appointment if your project involves any of the following:

- **Conditional Use Permit**
- **Variance**
- **Regular Design Review**
- **Parcel Map Waiver**
- **Tentative Parcel Map**
- **Tentative Tract Map**
- **New dwelling unit(s)**
- **1,000 sq. ft. or more of new floor area/footprint**
- **Additions ≥ 100% of existing floor area/footprint**

All other projects may be submitted to the zoning counter without an appointment.

Submit applications for Small Project Design Review to station #12 at the zoning counter by signing the sign-up sheet.

1. TYPE OF APPLICATION

(Check all that apply)

Development Permits

- ☐ Conditional Use Permit (Major, Minor, or Interim)
- ☐ Variance (Major or Minor)
- ☐ Regular Design Review
- ☒ Small Project Design Review
- ☐ Tree Preservation or Removal Permit
- ☐ Creek Protection Permit (separate application required)
- ☐ Other: _____

Subdivision Applications

- ☐ Parcel Map Waiver (Lot Line Adjustment/Merger)
- ☐ Tentative Parcel Map (subdivision for 1 – 4 lots)
- ☐ Tentative Tract Map (subdivision for 5 or more lots)
- ☐ Planned Unit Development/Mini-Lot Development

Other Applications

- ☐ Request for Environmental Review
- ☐ General Plan Amendment
- ☐ Rezoning

2. GENERAL INFORMATION

APPLICANT'S NAME/COMPANY: NextG Networks of California, Inc.

PROPERTY ADDRESS: Public Right of Way at approximately 10000 Skyline Blvd

ASSESSOR'S PARCEL NUMBER: N/A **LOT AREA (ACRES/SQ. FT.):** N/A

EXISTING USE OF PROPERTY: Public Right-of-Way

DESCRIPTION OF PROPOSAL (including type of use, hours of operation, number of employees, etc., on additional sheets if needed):

Install one wood utility pole near the 10000 Skyline Blvd to accommodate a small 26" omni antenna at pole top and two equipment boxes; 33"x6"x6" and 24"x36"x14" to support wireless telephone coverage via a distributed antenna system.

TO BE COMPLETED BY STAFF

GENERAL PLAN LAND USE CLASS: _____ ZONING: _____

FEES[1]:

APPLICATION FEE: $_____

POSTER DEPOSIT[2]: $_____

VIOLATION FEE[3]: $_____

TREE PERMIT FEE: $_____

CREEK PERMIT FEE: $_____

TOTAL FEES DUE: $_____

EXPECTED PROCESSING TIME[4]:

_____

[1] Fees are subject to change without prior notice. The fees charged will be those that are in effect at the time of application submittal.

[2] For permit applications requiring public notice, a refundable security deposit is required for the on-site poster containing the public notice.

[3] For permit applications to legalize work that has already been started, the REPORT FEE portion of any permit application fee is DOUBLED.

[4] Expected processing time is only an estimate and is subject to change without notice due to staff workload, public hearing availability, and the completeness or complexity of the application.

17.11.090 Special provisions for permitted and conditionally permitted facilities and facilities allowed by variance in the OS zone.

USE/PARK TYPE	RSP	CP	NP	AMP	PMP	LP	SU	RCA	AF
FACILITY TYPES									
ONE-FAMILY RESIDENCE									
Caretaker's Quarters	✪	✪	✪			✪	✪		✪
TELECOMMUNICATIONS FACILITIES									
Mini	★	★	★	★	★	★	★	★	★
Micro	★	★	★	★	★	★	★	★	★
Macro	✪	✪	✪	✪	✪	✪	✪	✪	✪
Monopole	✪	✪	✪	✪	✪	✪	✪	✪	✪
Lattice Tower									

* Limited to the circumstances outlined in 17.11.090A.

Legend: ✪ = Requires Major Conditional Use Permit; ★ = Requires Minor Conditional Use Permit

RSP (Region-Seeking Park); CP (Community Park); NP (Neighborhood Park); AMP (Active Mini-Park); PMP (Passive Mini-Park); LP (Linear Park); SU (Special Use Park); RA (Resource Conservation Area); AF (Athletic Field)

Attachment C

17.11.090 Special provisions for permitted and conditionally permitted facilities and facilities allowed by variance in the OS zone.

USE/PARK TYPE	RSP	CP	NP	AMP	PMP	LP	SU	RCA	AF
FACILITY TYPES									
ONE-FAMILY RESIDENCE									
Caretaker's Quarters	✪	✪	✪			✪	✪		✪
TELECOMMUNICATIONS FACILITIES									
Mini	★	★	★	★	★	★	★	★	★
Micro	★	★	★	★	★	★	★	★	★
Macro	✪	✪	✪	✪	✪	✪	✪	✪	✪
Monopole	✪	✪	✪	✪	✪	✪	✪	✪	✪
Lattice Tower									

* Limited to the circumstances outlined in 17.11.090A.

Legend: ✪ = Requires Major Conditional Use Permit; ★ = Requires Minor Conditional Use Permit

RSP (Region-Seeking Park); CP (Community Park); NP (Neighborhood Park); AMP (Active Mini-Park); PMP (Passive Mini-Park); LP (Linear Park); SU (Special Use Park); RA (Resource Conservation Area); AF (Athletic Field)

Attachment C