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SEPTEMBER 28, 2006

VIA ELECTRONIC FILING AND FEDERAL EXPRESS

Filing Center
Public Utility Commission of Oregon
550 Capitol Street NE, Suite 215
Salem, Oregon 97308

Re: AR 506 -- Comments of NextG Networks, Inc.

Dear Clerk:

NextG Networks, Inc. respectfully submits an original plus five copies of the accompanying first round comments in Phase II of AR 506. NextG appreciates the Commission's interest in developing comprehensive pole attachment regulations and obtaining the input of affected parties as part of the regulation development process.

If you have any questions, please contact us.

Sincerely,

/s/ Maria T. Browne

Maria T. Browne

cc: Service List AR 506

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

PHASE II

In the Matter of

Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachments Use and Safety.

FIRST ROUND COMMENTS OF NEXTG NETWORKS, INC.

NextG Networks, Inc. on behalf of its operating subsidiary, NextG Networks of California, Inc. d/b/a NextG Networks West ("NextG"), respectfully submits these Comments pursuant to the Commission's Notice of Proposed Rulemaking Hearing[1] and Administrative Law Judge Christina Smith's September 5, 2006 Ruling establishing the "Issues List" for Division 028.[2]

I. INTRODUCTION

NextG provides a unique and innovative telecommunications service that is primarily wireline, but that also incorporates integrally to its network devices and equipment, such as

[1] Notice of Proposed Rulemaking Hearing, filed with the Secretary of State June 15, 2006.

[2] Issues List for Division 028 Established, Ruling (September 5, 2006) (hereinafter "Issues List").

antennas, that are used for the transmission of wireless telecommunications services. Some pole owners in Oregon have taken the position that the antennas and equipment related to NextG's network are not "attachments" governed by the Commission's rate formula. These pole owners seek to charge rates for antenna attachments that are hundreds of times more than the rates produced using the current and proposed Oregon pole attachment rate formulas. They argue that the Oregon formula extends only to the wires NextG attaches as part of its network. Yet, it is clear under both Oregon and federal law that NextG's antennas are pole attachments governed by the Oregon pole attachment rental formula.

Accordingly, NextG's comments will discuss the application of the Commission's rules and Oregon statutes to NextG's network, and demonstrate that all parts of NextG's network are "attachments" under the Commission's rules – existing and as proposed – and under Oregon statutes, and that as a result, all of NextG's facilities attached to utility poles are entitled to regulated rates, terms, and conditions of attachment.

II. BACKGROUND ON NEXTG AND ITS ROLE IN DEPLOYING BROADBAND INFRASTRUCTURE AND SERVICES

NextG is at the cutting-edge of the provision of telecommunications services using advanced technologies and capabilities. At the most basic level, NextG provides telecommunications services to wireless providers that enable those entities to provide next-generation broadband wireless services and offer greater coverage and capacity for existing services. NextG's fiber-based telecommunications network allows its wireless provider customers the ability to increase capacity and bandwidth, which furthers their ability to provide the next generation of broadband wireless services and provide capacity to serve the increasing numbers of subscribers who rely on their wireless devices for communications of all forms. NextG's telecommunications service and network are currently utilized by both Commercial

Mobile Radio Service ("CMRS") providers, and increasingly, wireless Internet Service Providers ("WISPs").

NextG's network and service address the fact that as wireless providers seek to deploy the next generation of broadband wireless services and meet the needs of current users, one of the central obstacles they face is the technical limitations of traditional "high site" antenna towers and local management of their placement. Traditional towers and rooftops may be reasonable solutions for providing low capacity, wide-area coverage (assuming the sites can be built or acquired where they are needed). As demand for capacity on the network grows, however, more and more sites must be added to the network so that the frequency spectrum that a particular operator owns can be re-used more often.[3]

One of the most effective ways to add sites is through the use of "low" site antennas. The low antenna sites facilitate a greater re-use of the wireless spectrum since low-height antennas can be more easily isolated from each other, thus resulting in a much higher capacity and quality network that cannot be delivered by a network consisting entirely of high-site antennas. In addition to capacity benefits, a network of "low" sites in an urban area can provide coverage in many uncovered areas, or so-called "dead spots," that would be "shadowed" under the traditional antenna locations or where zoning and planning laws simply prohibit the installation of high-site facilities. Higher capacity and greater coverage in turn are the necessary building blocks for broadband wireless.

[3] Capacity in a cellular network comes, in general, from reusing spectrum. The greater the number of radiating elements, the more often spectrum can be reused and the more capacity the network will have. Of course, this general statement varies somewhat depending on the type of technology used, *i.e.*, variants of TDMA or CDMA gain capacity and system performance in different ways. NextG's wireless solution is "protocol agnostic" and can accommodate all forms of wireless technologies.

NextG provides its telecommunications service via a network architecture, frequently called a "Distributed Antenna System" or "DAS," that uses fiber-optic cable and small antennas and equipment mounted in the public rights-of-way (ROW), on infrastructure such as utility poles. Specifically, the DAS network that NextG intends to install in Oregon is comprised of (1) fiber-optic cable, which is attached to utility poles in the traditional manner; (2) small pole-mounted antennas; and (3) pole-mounted equipment connected to the fiber and antennas containing transmission electronics for the system. While NextG serves wireless providers and incorporates antennas into its network, the system consists primarily of *wireline* (fiber-optic cable) attachments to existing poles and/or conduits. The ancillary antennas and cabinets are typically attached on seven percent or less of the total poles utilized in the DAS network.

III. THE COMMISSION'S RULES CLEARLY APPLY TO ENTITLE NEXTG'S ATTACHMENTS TO REGULATED RATES, TERMS, AND CONDITIONS OF ACCESS

In seeking to deploy its network in Oregon, NextG has encountered some pole owners that assert that NextG's attachments are not protected by the Commission's rules establishing a rental formula for pole attachments and ensuring reasonable rates, terms, and conditions of attachment. Specifically, it has been asserted that the antenna (and perhaps also the cabinet) components of NextG's DAS network are not "attachments." This same issue has apparently been raised in this proceeding. In the Issues List, the question has been raised in relation to OAR 860-028-0020 whether the definition of "licensee" includes wireless carriers. As demonstrated below, any assertion that because it has wireless facilities or equipment NextG, or indeed any telecommunications provider that uses wireless elements, is not within the definition of "licensee" and its facilities are not within the definition of "attachment" is flatly contradicted by Oregon law. NextG is a "licensee" and its attachments are fully within the Oregon statutes and

the Commission's rules. To the extent that pole owners seek to question that conclusion in this proceeding, their efforts should be explicitly rejected, and the Commission should clarify that the statute and its rules apply to NextG's attachments, including antenna or similar "wireless-related" attachments, as required by federal law.

A. NextG Is A "Licensee" And All Of Its Facilities Are "Attachments"

The Commission's rules, and the Staff's proposed rules, define "attachment" as having "the meaning given in ORS 757.270 and 759.650." OAR § 860-028-0020(1). Oregon Revised Statute § 757.270 defines the term "attachment" as:

> any wire or cable for the transmission of intelligence by … telephone, light waves, ***or other phenomena*** … and ***any related device, apparatus, or auxiliary equipment***, installed upon any pole … owned or controlled, in whole or in part, by one or more public utility … ." (emphasis added).

Similarly, the Commission's rules, and the Staff's proposed rules, define "licensee" as having "the meaning given in ORS 757.270 or ORS 759.650. . . ." OAR § 860-028-0020(10). Oregon Revised Statute § 757.270 defines the term "licensee" as:

> any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association that is authorized to construct attachments upon, along, under or across the public ways.

Unquestionably, NextG, and each of the components that comprise a NextG DAS network, satisfies these definitions. NextG is authorized to provide telecommunications services pursuant to its certificate from the Commission,[4] and is authorized to construct attachments in the public rights-of-way.[5] As such, it is a "licensee." Similarly, NextG's facilities and equipment are "attachments." Obviously, the fiber-optic cable in NextG's network is "wire or

[4] NextG Networks of California, Inc dba NextG Networks West was issued a Certificate of Authority to Provide Telecommunications Service in Oregon and was classified as a Competitive Provider by the Commission pursuant to the Order No. 05-189, entered April 20, 2005.

[5] *See* 47 U.S.C. § 253.

cable for the transmission of intelligence by … light waves." But in addition, each antenna and the pole-mounted cabinet is a "related device, apparatus or auxiliary equipment" that is an integral part of NextG's network providing its telecommunications service. Moreover, the antennas transmit intelligence using electromagnetic waves, which constitute "other phenomena" as that term is used in the statute. Accordingly, NextG's facilities and equipment are "attachments."

Because NextG is a licensee and each of the components of NextG's DAS network is an attachment under Oregon law, the requirement that all "rates, terms and conditions made, demanded or received by any public utility … for any attachment made by a licensee shall be just, fair and reasonable" (O.R.S. § 757.273) is fully applicable to the fiber optics as well as the related antenna and cabinet attachments. Accordingly, attachment rates for the antennas and the cabinet must be determined in accordance with the Commission's rules.

Although the Commission has not spoken directly to the issue of attachment rates for these devices, its current pole attachment rate formula, and the formula proposed by Staff, can be adjusted as necessary for these devices. Specifically, the "space occupied" component of the Oregon formula (as set forth in O.A.R. § 860-028-0110) can be adjusted for the specific poles on which such devices are attached to account for the actual space occupied by the antennas and the cabinet – an adjustment the FCC and other certified states have made for wireless devices. The other components of the formula – pole cost and carrying charges – are precisely the same as those used for wireline attachments.

B. Federal Law Requires That NextG's Attachments, Including Any Wireless Elements, Be Protected By The Commission's Regulations

Although the Oregon statute clearly includes NextG's DAS network components within the definition of "attachments" under Oregon law, even if it did not, such devices are considered

"attachments" under *federal* pole attachment law and therefore must be protected by the Commission's rules. Specifically, the term "pole attachment" under federal law includes "***any*** attachment by a … provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[6] As noted above, NextG's DAS is a telecommunications network and NextG is a provider of telecommunications service, as that term is defined in federal law.[7] The wires, antennas and cabinet that comprise its DAS network each are "attachments by … a provider of telecommunications service," and therefore are "attachments" under federal law.

The FCC has stated that its historic cost-based formula for telecommunications attachments applies to wireless attachments. Specifically, the Commission stated: "There is no clear indication that our rules cannot accommodate wireless attachers' use of poles when negotiations fail. When an attachment requires more than the presumptive one-foot of usable space on the pole or otherwise imposes unusual costs on a pole owner, the one-foot presumption can be rebutted."[8] And the FCC has indicated that it is fully prepared to adjudicate rate disputes for wireless attachments if necessary, stating: "[i]f parties cannot modify or adjust the [FCC's pole attachment rate] formula to deal with unique [wireless] attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis."[9] Other certified states have taken a similar approach.[10]

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[6] 47 U.S.C. § 224(a)(4) (emphasis added).

[7] *See* 47 U.S.C. § 153(46) ("The term 'telecommunications service' means the offering of telecommunications for a fee … regardless of the facilities used.") and 47 U.S.C. § 153(43) ("The term 'telecommunications' means 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 or received.").

[8] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777 at ¶ 42 (1998).

[9] *Id*.

The FCC has held that "[w]ireless carriers are entitled to the full benefits of Section 224," because the language of Section 224 "encompasses wireless attachments."[11] In so ruling, the FCC found that Congress did not intend to limit the protection of Section 224 only to wireline carriers, but instead intended to encompass wireless carriers.[12] The FCC is the technical expert agency charged with interpreting the Communications Act and its interpretation of Congress' intent is entitled to deference. Indeed, the FCC's determination was upheld on appeal by the United States Supreme Court.[13]

Principles of federal preemption dictate that the Commission could not subvert this national policy established by Congress and FCC to provide regulatory protection for wireless attachments, either by proclamation or by omission. 47 U.S.C. § 224(c)(3) provides that "a State shall not be considered to regulate the rates, terms, and conditions for ***pole attachments*** – (A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments." (Emphasis added). "Pole Attachments," in turn, are defined as "any attachment by a cable television system or provider of telecommunications service. . . ." 47 U.S.C. § 224(a)(4). Thus, to satisfy Section 224(c), a state's regulations must cover all "pole attachments" as broadly as set forth in Section 224. Otherwise, the FCC has

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[10] *See, e.g., Joint Petition of Niagara Mohawk Power Corp. and Grid Communications, Inc. for Approval of a Pole Attachment Rate for Certain Wireless Attachments*, N.Y. PSC Case 03-E-1578 (Apr. 7, 2004) at 3-4 (applying the space occupied component of the NY PSC formula to account for DAS antennas)

[11] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777 at ¶ 39 (1998); *see also Omnipoint Corp. v. PECO Energy Co*., 15 FCC Rcd. 5484 at ¶ 6 (Enf. Bur. 2003) ("the Commission has jurisdiction over wireless telecommunications service attachments.").

[12] *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777 at ¶ 39 (the statutory definitions of telecommunications, telecommunications service and telecommunications carrier found in federal law "precludes a position that Congress intended to distinguish between wire and wireless attachments.").

[13] *National Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327, 339-341 (2002).

stated that "Section 224(c)(3) directs that jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments."[14] Based on this analysis, even if the Oregon statute and rules were to be erroneously interpreted so as not to apply to attachments of antennas, then federal law and regulations would fill this regulatory void, and the FCC Formula would apply. However, as discussed above, the statute and the regulations plainly apply to all of the components of NextG's DAS system, including the antennas and the cabinet.

IV. CONCLUSION

There is ultimately no change in the Commission's rules proposed by Staff that would alter any of the analysis presented above. NextG's wireless elements are currently covered by the Oregon statutes and the Commission's rules. Nonetheless, given the difficulties encountered by NextG and the efforts made by some utilities in this proceeding to alter the status of wireless attachments, the Commission should clearly and explicitly confirm that wireless devices and equipment are "attachments" under the Commission's rules and the Oregon statute, and as a result, pole owners may not impose on NextG and other telecommunications providers unjust and unreasonable rates, terms, and conditions.

[14] *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 12 FCC Rcd. 11725 at ¶ 5, n. 13 (1997).

Respectfully Submitted,

/s/ Maria T. Browne

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September 28, 2006

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Comments of NextG Networks, Inc. upon all parties of record in AR 506 by delivering a copy in person or by mailing a copy properly addressed with first class postage pre-paid, or by electronic mail pursuant to OAR 860-013-0070, to all parties or attorneys of parties listed on the Commission's service list in this matter.

/s/ T. Scott Thompson
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