

# **EXHIBIT 3**

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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NEXTG NETWORKS OF NY, INC., : 03 CIVIL 9672 (RMB)

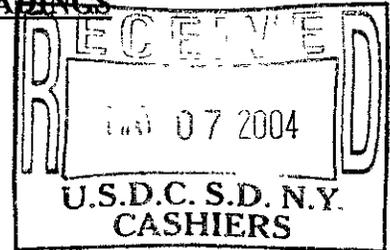
Plaintiff, :

-against- :

CITY OF NEW YORK; CITY OF NEW YORK :  
DEPARTMENT OF INFORMATION :  
TECHNOLOGY AND :  
TELECOMMUNICATIONS; and :  
GINO P. MENCHINI, in his official capacity, :

**PLAINTIFF'S REPLY IN  
SUPPORT OF ITS MOTION  
FOR PRELIMINARY INJUNCTION  
AND  
OPPOSITION TO DEFENDANTS'  
MOTION FOR JUDGMENT  
ON THE PLEADINGS**

Defendants. :  
-----X



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**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. SUMMARY OF FACTS AND PROCEDURAL POSTURE .....	1
A. NextG Is Not A Provider Of Wireless Services.....	2
B. The City Has Denied NextG The Ability To Even Apply For A Franchise And Has Unreasonably Delayed Its Right To Provide Telecommunications Services For Two Years .....	4
III. ARGUMENT .....	6
A. NextG States A Claim For Relief Under 47 U.S.C. § 253, And Is Substantially Likely To Succeed On Its Claim.....	6
1. The City’s Cross-Motion Is Based On Factual Assertions From Outside The Pleadings And Thus Is Meritless.....	6
2. NextG Is Substantially Likely to Succeed on Its Claims, As The City’s Requirements And Actions Violate Section 253 On Their Face And As Applied.....	7
3. The City’s Arguments Fail, As NextG Is Not A Wireless Carrier, And Street Light Poles Are Not The City’s Proprietary Property .....	11
a. Section 332 Of The Communications Act Is Not Raised By Or Relevant To NextG’s Section 253 Claims .....	11
b. Street Light Poles Are Part Of The Public Rights-Of-Way And The City May Not Exercise “Proprietary” Rights Over Them .....	13
B. NextG’s Claims Are Ripe And The Court Has Jurisdiction.....	16
C. NextG States A Claim For Damages Under 42 U.S.C. § 1983 And Attorney’s Fees Under 42 U.S.C. § 1988 .....	18
1. The Complaint Alleges a Deprivation of NextG’s Federal Right To Provide Telecommunications Services Under 47 U.S.C. § 253 .....	19
2. Congress Has Not Foreclosed A Remedy.....	21
3. The Deprivation of Federal Rights Occurred Under Color of State Law ....	23
D. NextG Has Satisfied The Standards For A Preliminary Injunction.....	23
IV. CONCLUSION.....	25

## TABLE OF AUTHORITIES

### Cases

	<u>Page</u>
<i>Abrams v. City of Rancho Palo Verdes</i> , 354 F.3d 1094 (9th Cir. 2004) .....	22
<i>AT&amp;T Communications v. City of Austin</i> , 975 F. Supp. 928 (W.D. Tex. 1997), vacated on other grounds, 235 F.3d 241 (5th Cir. 2000) .....	18
<i>AT&amp;T Wireless PCS, Inc. v. City of Atlanta</i> , 210 F.3d 1322 (11th Cir. 2000); vacated for lack of jurisdiction, 223 F.3d 1324 (11th Cir. 2000); reinstated 250 F.3d 1307 (11th Cir. 2001), and appeal dismissed on settlement, 264 F.3d 1314 (11th Cir. 2001) .....	22-23
<i>Bell Atlantic-Maryland v. Prince George's County</i> , 49 F. Supp. 2d 805 (D.Md.1999), vacated on other grounds, 212 F.3d 863 (4th Cir. 2000) .....	8
<i>BellSouth Telecommunications, Inc. v. Town of Palm Beach</i> , 252 F.3d 1169 (11th Cir. 2001) .....	19, 20
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	7
<i>City of Auburn v. Qwest Corp.</i> , 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002).....	8, 17, 19, 20, 21
<i>Cort v. Ash</i> , 422 U.S. 66 (1975).....	20
<i>Cotrone v. City of New York</i> , 237 N.Y.S.2d 487 (N.Y. Sup. Ct. 1962).....	14
<i>Cox Communications PCS, L.P. v. City of San Marcos</i> , 204 F. Supp. 2d 1260 (S.D. Cal. 2002).....	24, 25
<i>Cox Communications PCS, L.P. v. City of San Marcos</i> , 204 F. Supp. 2d 1272 (S.D. Cal. 2002).....	9, 10, 11, 17, 20, 21, 24
<i>David Tunick, Inc., v. Kornfeld</i> , 813 F. Supp. 988, 996 (S.D.N.Y. 1993).....	6
<i>E.Spire v. Baca</i> , 269 F.Supp.2d 1310 (D.N.M. 2003).....	22

	<u>Page</u>
<i>Golden State Transit Corp. v. City of Los Angeles</i> , 493 U.S. 103 (1989).....	21
<i>Gonzaga Univ. v. Doe</i> 536 U.S. 273 (2002).....	19, 21
<i>Interphoto Corp. v. Minolta Corp.</i> , 417 F.2d 621 (2d Cir. 1969).....	25
<i>Jacobson &amp; Co. v. Armstrong Cork Co.</i> , 548 F.2d 438 (2d Cir. 1977).....	25
<i>King v. American Airlines, Inc.</i> , 284 F.3d 352 (2d Cir. 2002).....	6
<i>Krijn v. Pogue Simone Real Estate Co.</i> , 896 F.2d 687 (2d Cir. 1990).....	6
<i>Merriweather v. Garrett</i> , 102 U.S. 472 (1880).....	14
<i>Middlesex Co. Sewerage Authority v. Nat'l Sea Clammers Ass'n</i> , 453 U.S. 1 (1981).....	22
<i>Monell v. Dep't of Social Serv. of the City of New York</i> , 436 U.S. 658 (1978).....	23
<i>New Jersey Payphone Ass'n, Inc. v. Town of West New York</i> , 130 F. Supp. 2d 631 (D.N.J. 2001), <i>aff'd on other grounds</i> , 299 F.3d 235 (3d Cir. 2002) .....	17
<i>New Jersey Payphone Ass'n, Inc. v. Town of West New York</i> , 299 F.3d 235, 241 (3d Cir. 2002).....	8, 16, 19
<i>New York Tel. Co. v. Jefferson Wood</i> , 259 N.Y.S. 365 (N.Y. Sup. Ct. 1931) .....	15
<i>Nextel Partners, Inc. v. Kingston Twp.</i> , 286 F.3d 687 (3rd Cir. 2002) .....	22, 23
<i>Omnipoint Communications Enterp., L.P. v. Town of Nether Providence</i> , 232 F. Supp. 2d 430 (E.D. Pa. 2002).....	14
<i>Omnipoint Comm., Inc. v. Port Authority of New York and New Jersey</i> , No. 99Civ. 0060(BJS), 1999 U.S. Dist. LEXIS 10534 (S.D.N.Y. July 12, 1999) .....	11

<i>PECO Energy Co. v. Township of Haverford</i> , 1999 U.S. Dist. LEXIS 19409 at ** 11-13 (E.D. Pa. Dec. 20, 1999).....	17
<i>Prime Co. v. City of Mequon</i> , 352 F.3d 1147 (7th Cir. 2003) .....	23
<i>Qwest Communications Corp. v. City of Berkeley</i> , 146 F. Supp.2d 1081 (N.D. Cal. 2001).....	25
<i>Qwest Corp. v. City of Santa Fe</i> , 224 F.Supp.2d 1305 (D.N.M. 2002) .....	21
<i>Rutgerswerke AG v. Abex Corp.</i> , No. 93 Civ. 2914 (JFK), 2002 U.S. Dist. LEXIS 9965 * 15 (S.D.N.Y. 2002).....	6
<i>Smith v. Robinson</i> , 468 U.S. 992 (1984).....	22
<i>Sprint Spectrum L.P. v. Mills</i> , 283 F.3d 404 (2d Cir. 2002).....	11, 12, 15
<i>Sprint Spectrum, L.P. v. Willoth</i> , 176 F.3d 630 (2d Cir. 1999).....	11, 12
<i>Sprint Telephony PCS, L.P. v. County of San Diego</i> , No. 03CV1398-K(LAB), 2004 WL 718424, *10 (S.D. Cal. Jan. 5, 2004) .....	9, 20, 21,22
<i>TC Sys. Inc. v. Town of Colonie</i> , 263 F. Supp.2d 471 (N.D.N.Y. 2003).....	8, 17, 18
<i>TCG New York, Inc. v. City of White Plains</i> , 305 F.3d 67 (2d Cir. 2002), <i>cert. denied</i> , 538 U.S. 923 (2003).....	<i>passim</i>
<i>Tom Doherty Assocs. v. Saban Ent., Inc.</i> , 60 F.3d 27 (2d Cir. 1995).....	25
<i>Underground Construction Co. v. City and County of San Francisco</i> , 2002 U.S. Dist. LEXIS 12994 (N.D. Cal. July 15, 2002).....	3
<i>Wright v. City of Roanoke Redevelopment and Housing Auth.</i> , 479 U.S. 418 (1987).....	21

**Statutes**

	<u>Page</u>
42 U.S.C. § 1983.....	10, 18, 19, 21, 22, 24
42 U.S.C. § 1988.....	10, 18
47 U.S.C. § 252.....	22
47 U.S.C. § 253.....	<i>passim</i>
47 U.S.C. § 332.....	10, 11, 12, 13, 22
Pub. L. No. 104-104, 110 Stat. 56 (1996).....	20
Pub.L. No. 104-104, § 601(c)(1), 110 Stat. 143 (1996) (47 U.S.C. § 152 note) .....	22

**Miscellaneous**

26 Am. Jur. 2d Eminent Domain §§ 24, 96 (1996).....	15
141 Cong. Rec. S8213 (June 13, 1995) .....	20
H.R. Rep. No. 104-458 (1996).....	20

## **I. INTRODUCTION**

On March 15, 2004, NextG filed a Motion For Preliminary Injunction (“Motion”), seeking an order from the Court prohibiting the City from preventing NextG from exercising its right to provide telecommunications services via facilities constructed in the public rights-of-way. In response, the City has filed an Opposition to NextG’s Motion, as well as a so-called Cross-Motion For Judgment On The Pleadings (“Cross-Motion”). The City’s combined filing confuses the “Opposition” and “Cross-Motion,” but nonetheless, it is clear that the City’s “Cross-Motion” is meritless. At a minimum, the City does not even pretend to confine itself to the allegations in NextG’s Complaint, relying, instead, entirely on affidavits from its own witnesses to assert a version of the facts that is unrelated to those in the Complaint (and also inaccurate). The City’s Opposition to NextG’s Motion is similarly flawed, as it ignores the Complaint and affidavit evidence regarding NextG’s telecommunications services and proposed network.

Ultimately, the City’s Opposition and Cross-Motion must be rejected because the City is attempting to impose the construct of “wireless” providers on NextG’s network, services, and claims. Yet, the facts are clear – NextG is not a wireless provider, and the basis for the City’s legal arguments fail as a result. The City’s second fundamental flaw is its assertion that its requirements are “non-regulatory” and that street light poles are “proprietary” property. The City’s assertions are irrelevant, as well as unsupported by fact or law. Thus, its Cross-Motion and its Opposition both must fail.

## **II. SUMMARY OF FACTS AND PROCEDURAL POSTURE**

Despite the fact that its Cross-Motion for judgment on the pleadings must be based solely on the allegations in NextG’s Complaint, the City’s Memorandum ignores NextG’s Complaint. Moreover, the City ignores the affidavit and documentary evidence introduced by NextG in

support of its Motion for Preliminary Injunction. Instead, the City relies entirely on its own affidavits and characterizations to create its own version of NextG's services and network plan. Using its distorted version of the facts, the City then seeks to apply irrelevant and inapplicable statutes and case law to NextG. While NextG will not repeat its entire Complaint or factual presentation from its Motion, the following will clarify and correct the factual distortions and inaccuracies propounded by the City.

**A. NextG Is Not A Provider Of Wireless Services**

The City's arguments depend heavily on its assertion that NextG is a provider of wireless services. But as NextG has alleged and demonstrated, that is not correct.

First, NextG seeks to install fiber optic lines in the public rights-of-way (*i.e.*, under the streets). (First Amended Verified Complaint ("Compl.") ¶¶ 9, 11.) Those fiber optic lines would lead to numerous utility poles (also located in the public rights-of-way), and then connect to small antennas located on those poles. (Compl. ¶¶ 9, 11; Affidavit of David Cutrer ¶¶ 8, 15-18, attached to Pl.'s Motion ("Cutrer Aff.")). Those antennas may be owned by NextG's wireless operator customers, or they may be owned by NextG. (Compl. ¶ 9.) In this respect, NextG's facilities and architecture are substantially different from traditional wireless/cellular providers, who install a very small number of antennas on towers or roof-tops, but do not install fiber optic facilities in the public rights-of-way. (Cutrer Aff. ¶¶ 6-14.)

Second, contrary to the City's fundamental assumption, NextG does *not* provide wireless services. (Compl. ¶¶ 7-9, 91; Affidavit of Robert Delsman ¶ 8, attached to Pl.'s Motion ("Delsman Aff.")). Rather, NextG provides fiber optic-based transmission services to providers of wireless services. (Compl. ¶ 9; Cutrer Aff. ¶ 12; Delsman Aff. ¶ 8.) NextG has been granted a certificate of public convenience and necessity by the New York Public Service Commission ("PSC"), which authorizes NextG as a facilities-based provider and reseller of telephone

service.<sup>1</sup> (Compl. ¶ 13 & Exh. 1; Delsman Aff. ¶ 5.) NextG is not licensed by the Federal Communications Commission (“FCC”) to provide Commercial Mobile Radio Services (“CMRS”) or any other wireless service, and it does not control any radio frequency spectrum. (Delsman Aff. ¶¶ 8, 22; Reply Affidavit of Robert Delsman (“Delsman Reply Aff.”) ¶ 3 (submitted herewith); Compl. ¶ 8.)

Thus, while there are antennas connected to the end of NextG’s fiber optic lines, the service NextG provides is the transport of communications traffic over fiber optic lines. (Compl. ¶ 9; Cutrer Aff. ¶ 12; Delsman Reply Aff. ¶ 3.) NextG does not provide the wireless service that allows a wireless device to communicate with either a land station or another wireless device. In other words, NextG does not directly serve individual end users. Rather, NextG is a “carrier’s carrier.” Its fiber optic transmission service is provided to the wireless/cellular providers who are licensed by the FCC and who provide wireless service to end users.<sup>2</sup> (Cutrer Aff. ¶ 12; Delsman Aff. ¶ 8; *see* Compl. ¶¶ 8, 9.)

Third, while NextG proposes to install its facilities, in part, on City-installed street light poles, NextG would, in the alternative, install its own poles if permitted to do so. (Delsman Aff. ¶ 10; Compl. ¶ 109.) From a purely technical perspective, NextG does not have to use City-

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<sup>1</sup> For this reason, alone, the City’s assertion (Def. Br. at 9) that NextG is a “vendor providing only support services” and as a result is not entitled to bring an action under 47 U.S.C. § 253, is meritless. The case cited by the City in support of this position, *Underground Construction Co. v. City and County of San Francisco*, 2002 U.S. Dist. LEXIS 12994 (N.D. Cal. July 15, 2002), rejected a claim brought by a construction company. NextG is not a mere construction contractor for wireless providers. It seeks to protect its own rights to provide its own telecommunications services, and, therefore, the City’s argument is meritless.

<sup>2</sup> The City asserts that NextG’s facilities allow it to “amplify and extend” the signals of existing wireless carriers. (Def. Br. at 2.) The City gives no citation for its alleged quote. Even if it were a correct quote, it is clearly misused by the City. NextG’s services “amplify and extend” the reach of existing wireless carriers through fiber optic “backhaul” carriage and the unique architecture proposed by NextG. (Cutrer Aff. ¶¶ 12-14.) NextG’s service is not simply an amplification of the existing wireless signal, as the City appears to suggest.

installed light poles, but instead could install its own light poles in the public rights-of-way. (Delsman Aff. ¶ 10; Compl. ¶ 109.) However, it is NextG's understanding that the City will not permit such installation, and thus, the City has created the situation where in order to access the public right-of-way NextG must have access to City-installed poles. (Compl. ¶¶ 11, 109; Delsman Aff. ¶ 9-10; Delsman Reply Aff. ¶ 12.) The City never mentions or addresses this element of the facts.

The City's brief ignores all the foregoing critical facts. Indeed, the City never mentions the fundamental, fiber optic element of NextG's facilities' architecture. Similarly, the City never addresses NextG's description of its own service, relying instead on the City's own version of what NextG provides. Nor does the City address or mention NextG's willingness to install its own poles in the public rights-of-way (something that NextG understands other telecommunications providers, namely Verizon, have been permitted to do in parts of the City). Because it ignores all of these fundamental facts, the City's brief, and particularly its reliance on wireless tower siting cases (discussed below), is based on fatally flawed assumptions, and thus its assertions and conclusions are without merit.

**B. The City Has Denied NextG The Ability To Even Apply For A Franchise And Has Unreasonably Delayed Its Right To Provide Telecommunications Services For Two Years**

In addition to ignoring the facts regarding NextG, the City presents an inaccurate view of the City's actions, which again ignores the Complaint and the affidavits. Contrary to the City's assertions, the City has denied NextG not only the right to provide telecommunications services, but even the right to apply for the required franchise. Moreover, the City has imposed a two-year delay on NextG's access to the public rights-of-way and provision of service. NextG's Complaint and Mr. Delsman's Affidavit clearly explain that NextG first started to seek approval from the City in March 2002. (Compl. ¶ 85; Delsman Aff. ¶ 11.) Indeed, the City has admitted

this fact. (City Answer ¶ 55.) Yet, long before the City's conveniently-timed release of the 2004 RFP, the City refused to accept NextG's application for a franchise and access to the public rights-of-way. By letter dated June 21, 2002, NextG sought to formally apply to the City for the franchise required by the City's laws. (Compl. ¶ 93; Delsman Aff. ¶ 14.) Indeed, the letter is Exhibit 1 to the City's Agostino Cangemi Affidavit. Yet, the City refused to even accept that application, much less grant NextG a franchise. (Compl. ¶ 94; Delsman Aff. ¶ 14.) The City's excuse that under the Charter and Resolution 957 a "Request For Proposals" ("RFP") must be issued first, merely emphasizes that those City requirements are unlawful under Section 253 of the Communications Act. It certainly does not change the fact that the City has denied NextG the ability to apply for the required franchise, and the right to provide telecommunications services. The City's assertion (Def. Br. at 3) that it has not refused to entertain NextG's request for access to the public rights-of-way, including street light poles, is patently untrue.

The City also now asserts that it has permitted NextG to access street light poles via a test project on two poles. While it is correct that NextG has been able temporarily to install its facilities on two street light poles, that fact is not relevant, and does not support the conclusions implied by the City (it is also outside the pleadings). After one year and much effort, NextG was able to convince the City to allow it to do a limited technical test. (Delsman Reply Aff. ¶¶ 6-9.) As the test project agreement states, however, the test is for a very limited duration (expiring on May 31, 2004), and NextG is not permitted to use the test facilities to provide telecommunications service. (Cangemi Aff. Exh. 5, § 1.a. ("for non-commercial activity"); Delsman Reply Aff. ¶ 6.) Indeed, the City has asserted this position aggressively, and delayed NextG's installation of the test equipment until NextG provided assurances that the test network would not be used to provide telecommunications service. (Delsman Reply Aff. ¶¶ 6-7.) Thus,

while NextG has been able to install its facilities leading to and on two poles, the City will not allow it to provide telecommunications services using those facilities, and NextG will have to remove the facilities after May 31, 2004. The City's suggestion that through the test project it has given NextG the access that it requires is, therefore, misleading and wrong.

### **III. ARGUMENT**

#### **A. NextG States A Claim For Relief Under 47 U.S.C. § 253, And Is Substantially Likely To Succeed On Its Claim**

The City asserts as its first point of argument that NextG's Complaint fails to state a claim under Section 253 of the Communications Act. The City's arguments on this point fail to support either its Cross-Motion or its Opposition to NextG's Motion.

##### **1. The City's Cross-Motion Is Based On Factual Assertions From Outside The Pleadings And Thus Is Meritless**

In order to succeed on a motion for judgment on the pleadings, under Fed. R. Civ. P. 12(c), the City must satisfy the same standards applicable to Rule 12(b)(6) motions where all factual allegations in the Complaint are taken as true and all reasonable inferences are drawn in favor of the non-moving party. *King v. American Airlines, Inc.*, 284 F.3d 352, 356 (2d. Cir. 2002). A motion under Rule 12(c) is limited to the facts alleged in the Complaint, and cannot rely on new facts from outside the pleadings. *David Tunick, Inc., v. Kornfeld*, 813 F. Supp. 988, 996 (S.D.N.Y. 1993). While the court in its discretion can consider materials outside the pleadings, if it does, it must treat the motion as one for Rule 56 summary judgment, the standards of which the City has clearly not satisfied. *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687, 689 (2d. Cir. 1990).<sup>3</sup>

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<sup>3</sup> If the court treats Defendants' motion as one for summary judgment, Defendants' motion fails as they have not met their "initial burden of informing the Court of the basis for its motion and identifying those portions of the 'pleadings [other discovery materials and] affidavits, if any, that show the absence of a genuine issue of material fact.'" *Rutgerswerke AG v. Abex Corp.*, No. 93 Civ. 2914 (JFK), 2002 U.S. Dist. LEXIS 9965 \* 15 (S.D.N.Y. 2002) (quoting *Celotex Corp. v.*

Yet, the City's Cross Motion is premised on its own version of the facts, not those set forth in NextG's Complaint. As discussed above, the City's arguments assume that NextG is seeking to provide wireless service, ignore the fact that NextG seeks to install fiber optics in public rights-of-way, and argues that City-installed street light poles are proprietary and not part of the public rights-of-way. Yet, the Complaint contains verified allegations that contradict each of the City's assumptions. (See Compl. ¶ 9 (NextG to install fiber in rights-of-way); ¶ 8 (NextG not a wireless provider); ¶ 107 (street light poles part of public rights-of-way)). Because they ignore the facts alleged in the Complaint and affidavits, the City's legal arguments are meritless.

The City's filing of this Cross-Motion does not appear to have been filed in good faith. If limited to the well-pleaded, verified allegations in the Complaint, as required by Rule 12(c), there is no good-faith basis for bringing such a motion. At a status conference on March 10, 2004, the Court cautioned the City against a filing for summary judgment at this time. Yet, the City's arguments rely entirely on factual assumptions from outside the Complaint, and as such are inappropriate under Rule 12(c). As a result, the City should be required to pay NextG's costs of responding to the City's motion, which does not even pretend to limit itself to the allegations in the Complaint.

**2. NextG Is Substantially Likely to Succeed on Its Claims, As The City's Requirements And Actions Violate Section 253 On Their Face And As Applied**

As NextG explained in its Memorandum In Support of its Motion For Preliminary Injunction, when the accurate facts are applied to this case, NextG is substantially likely to succeed on its claims that the City's laws and actions

First, the City's Charter, Resolution No. 957, and 2004 RFP *facially* violate Section 253 under the binding decision of the Second Circuit in *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) ("*White Plains*"), as well as numerous other Circuit and District court decisions. *See, e.g., New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241 (3d Cir. 2002); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176-80 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp.2d 471, 482-83 (N.D.N.Y. 2003); *Bell Atlantic-Maryland v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D.Md.1999), *vacated on other grounds*, 212 F.3d 863 (4<sup>th</sup> Cir. 2000). The City wholly ignores NextG's citations on this point. Indeed, the City appears to concede that *White Plains* would strike down the City's requirements if NextG sought to install landline cables. (Def. Br. at 5.) Of course, as demonstrated above, that is precisely the case. NextG does, as the defining element of its network, seek to install fiber optic cables in the public rights-of-way. (Compl. ¶ 9; Delsman Aff. ¶ 7.)

Since the City completely ignores NextG's arguments and authorities, NextG will not restate them all here. Rather, NextG will refer the Court to pages 13-18 of its Memorandum In Support, and submit that under the facts alleged in the Complaint, those authorities demonstrate that the City's Charter, Resolution No. 957, and 2004 RFP violate Section 253 on their face, as a matter of law. There is no basis to assert that *based on the facts alleged in the Complaint* the City is entitled to judgment as a matter of law under Section 253.

Second, in its Complaint and in its Memorandum In Support, NextG demonstrated that it was substantially likely to succeed on its claim that the City's actions enforcing the Charter, Resolution No. 957, and the 2004 RFP also violate Section 253 (*i.e.*, NextG's as applied claims —

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opinions cited in this brief that were not attached to Def.'s Br. are attached hereto.

Counts 2 & 3). As discussed above, the City has unreasonably delayed NextG for two years, which in and of itself is sufficient to demonstrate a violation of Section 253. *White Plains*, 305 F.3d at 76. Moreover, contrary to the City's assertions, the Complaint and NextG's evidence demonstrate that in June 2002, in response to the City's initial delays, NextG submitted a formal application for a franchise to access the public rights-of-way and City-installed light poles, but the City refused to even accept the application, much less grant it. (Compl. ¶ 94, Delsman Aff. ¶ 14.) NextG's Complaint and evidence also demonstrate that the City has discriminated against NextG in comparison to Verizon, Aerie Networks, and Metricom. (Delsman Aff. ¶¶ 19-27; Compl. ¶¶ 134-52, 166-74.) Again, the City essentially ignores all of NextG's authorities on these matters, and instead proffers arguments premised on an entirely different and inaccurate set of facts. Based on the facts alleged in the Complaint regarding the City's enforcement actions, there is no basis to assert that the City is entitled to judgment as a matter of law under Section 253. On the contrary, NextG's Complaint and affidavits in support of its Motion demonstrate that it is substantially likely to succeed on its Section 253 claims.

Even if NextG were a wireless provider, the City would be mistaken in its assertion that Section 253 does not apply to the City's actions and requirements. For example, in *Sprint Telephony PCS, L.P. v. County of San Diego*, No. 03CV1398-K(LAB), 2004 WL 718424, \*10 (S.D. Cal. Jan. 5, 2004) ("*Sprint Telephony*"), the court denied the County's Rule 12(c) motion, and held that Sprint PCS, a provider of wireless services, could state a claim for violation of Section 253. As discussed below, the court also held that Section 1983 damages and 1988 attorney's fees were potentially available in such cases. *Id.* at \*\*11-16; *see also Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1278-79 (S.D. Cal. 2002) ("*San Marcos II*") (wireless provider seeking access to poles in public rights-of-way stated

claims Section 253 and Section 1983). While Section 332 (on which the City relies) applies to municipal zoning of specific locations of wireless providers' towers, Section 253 applies more broadly to prohibit municipalities from imposing barriers to the provision of telecommunications services, by any entity. See *San Marcos II*, 204 F. Supp.2d at 1277 (distinguishing Sections 253 and 332).

The City's sole mention of the Second Circuit's binding Section 253 precedent, *White Plains*, misapplies the facts in this case. The City quotes the Second Circuit as saying that without access to local government rights-of-way, provision of service using land lines is "generally infeasible." (Def. Br. at 5.) The City then argues that existing cellular and other wireless providers currently provide wireless service without using City-installed street light poles. (Def. Br. at 5.) The City concludes that "It can hardly be said then that the provision of *such telecommunications services* in the City is 'generally infeasible' without mandating access to City-owned street poles." (Def. Br. at 5 (emphasis added)). The "such telecommunications services" to which the City refers, however, is wireless and cellular services. Yet, as explained above, NextG does not seek to offer wireless or cellular services. Rather, the wireline telecommunications service NextG seeks to provide requires access to public rights-of-way, including street light poles. As NextG's Complaint and Motion demonstrate, the City's laws and actions have not only made it "infeasible" for NextG to provide its telecommunications services, they have absolutely prohibited or had the effect of prohibiting NextG's ability to provide its unique telecommunications services, and thus violate Section 253.

**3. The City's Arguments Fail, As NextG Is Not A Wireless Carrier, And Street Light Poles Are Not The City's Proprietary Property**

**a. Section 332 Of The Communications Act Is Not Raised By Or Relevant To NextG's Section 253 Claims**

The bulk of the City's legal arguments rely on the faulty premise that NextG is a wireless provider, and thus, seek to apply cases decided under Section 332 of the Communications Act, which are inapplicable. Section 332 applies to municipal actions regarding "personal wireless service." 47 U.S.C. § 332(c)(7)(A). As discussed above, NextG does not provide personal wireless service, and as a result Section 332 does not apply.

Moreover, Section 253 and Section 332 address different issues and apply in different contexts. Section 332 addresses local zoning decisions regarding the "placement, construction and modification" of individual site locations for the provision of wireless telecommunications. 47 U.S.C. § 332(c)(7). Section 253, in contrast, addresses any local requirement or broad municipal policies that have the effect of prohibiting the provision of telecommunications service, in general. *See San Marcos II*, 204 F. Supp.2d at 1277. Thus, the Section 332 cases relied on by the City concern installations in a single or few specific locations. *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 635 (2d Cir. 1999); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 407 (2d Cir. 2002). Similarly, *Omnipoint Comm., Inc. v. Port Authority of New York and New Jersey*, No. 99Civ. 0060(BJS), 1999 U.S. Dist. LEXIS 10534 (S.D.N.Y. July 12, 1999), although decided under Section 253, concerned access only to a specific location.<sup>4</sup> Yet, NextG's claims do not challenge access to a specific pole or location. Rather, NextG's claims address the City's overarching, unlawful regulatory requirements and policies for access throughout the City, and

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<sup>4</sup> *Omnipoint* is also distinguishable on the grounds that NextG does not challenge the City's ability to insist on some appropriate agreement on liability, and NextG's challenge is not limited to the fees. Moreover, to the extent that it was decided prior to *White Plains*, the *Omnipoint* Section 253 analysis has been superseded.

are therefore properly brought under Section 253. Moreover, *Willoth* and *Mills*, are inapt because they were decided under the standards of Section 332, which does not apply here because NextG does not provide personal wireless services.

Even if one assumes that *Mills* applied, the City's reliance on *Mills* to say that the regulations and actions challenged by NextG are not "regulatory," is not credible. Contrary to *Mills*, in this case, the challenged requirements are clearly regulatory. The Charter, Resolution 957, and 2004 RFP have nothing to do with the procurement of needed goods and services by the City. *Id.* at 420. The challenged actions are not narrow in scope. The City Charter and Resolution 957 apply to everyone and also apply to all "inalienable" property of the City, not just street light poles. (Compl. Exhs. 2 and 3.) Indeed, the level of oversight imposed is clearly a regulatory scheme. Resolution 957 specifically states that any franchise granted must contain "provisions to ensure adequate *oversight and regulation* of the franchisee by the City." (Compl. Exh. 3 at 3 (emphasis added)). The Charter, Resolution 957, and the 2004 RFP all clearly reflect the policy of the City, and are regulatory requirements imposed as a condition of providing telecommunications services using the "inalienable" property of the City (which includes the public rights-of-way). Thus, even under *Mills*, which is not applicable in this case, the City's analysis is wrong.

The City's attempt to impose the "regulatory" versus "non-regulatory" issue onto Section 253 actions is inappropriate. While Section 332(c)(7)(B) addresses municipal "regulation" of personal wireless services, Section 253(a) preempts any "regulation, or any other . . . legal requirement. . . ." 47 U.S.C. § 253(a). Thus, whether the City's actions are technically "regulatory" or not is irrelevant under Section 253 (even though in this case they are quite clearly regulatory). Under Section 253, the City Charter, Resolution 957 and the 2004 RFP all clearly

constitute “legal requirements” imposed by the City on NextG’s ability to provide telecommunications services, and as such are subject to and in violation of Section 253.

The Section 332 “gap in coverage” theory the City seeks to superimpose is misplaced as well. First, the City has not denied NextG the ability to fill in a “gap,” but rather has denied it access to the whole City. Second, the gap analysis has never been applied under Section 253. NextG establishes a Section 253(a) violation if it demonstrates that the City’s requirements or actions, individually or as a whole, materially inhibit NextG’s ability to compete on a fair and reasonable regulatory basis. *White Plains*, 305 F.3d at 76. The simple fact that the City reserves unfettered discretion to deny NextG’s ability to construct in the rights-of-way and thus provide service is sufficient to establish that the regulatory scheme violates Section 253. *Id.* (See also Pl. Br. at 15-18.) Section 253 does not evaluate “gaps” in coverage nor whether they are significant.

Finally, NextG notes that the City’s argument regarding the absence of service gaps is inconsistent with the stated policy of the City, as expressed by the Mayor and Defendant Menchini only months ago. On October 27, 2003, Mayor Bloomberg, joined by Defendant Menchini, held a press conference regarding the City’s new program to track and eliminate “dead spots” in cell phone coverage. Mayor Bloomberg is quoted as saying “Cell phone ‘dead spots’ are frustrating and too common in this City.” (October 27, 2003 DoITT Press Release, a copy of which is attached as Exhibit 1 to Attorney T. Scott Thompson’s Reply Affidavit, submitted herewith). Thus, the facts once again undermine the credibility of the City’s argument, even as to a theory that is irrelevant in this case.

**b. Street Light Poles Are Part Of The Public Rights-Of-Way And The City May Not Exercise “Proprietary” Rights Over Them**

The City cites no authority for this assertion, and indeed, as NextG explained in its initial Motion, the street light poles are subject to the same treatment and restrictions as any other part of the public rights-of-way. (Pl. Br. at 2-4.)

Under the 2004 RFP, street light poles are characterized as “inalienable” property of the City. (Compl. Exh. 5.) Section 383 of the City Charter defines “inalienable property of the City” as “[t]he rights of the city in and to its water front, ferries, wharf property, bridges, land under water, public landings, wharves, docks, streets, avenues, highways, parks, waters, waterways and all other public places are hereby declared to be inalienable.” (City Charter § 383; Thompson Aff., Exh. 1) (emphasis added)). Thus, the City itself has defined the street light poles as being the same classification of property as the streets and public rights-of-way.

Street light poles, like the rest of the public rights-of-way, are held by the City in trust for the public, and as such the City may not exercise “proprietary” control over them. The City, itself, describes the poles as having a “primary public purpose – to provide the lights and traffic signals necessary for public safety on City streets.” (Def. Br. at 6.) New York courts have long recognized that in the “inalienable” property referred to in Section 383 of the City’s Charter the City “has no proprietary rights distinct from the trust for the public.” *See, e.g., Cotrone v. City of New York*, 237 N.Y.S.2d 487, 489 (N.Y. Sup. Ct. 1962) (quoting *Meriwether v. Garrett*, 102 U.S. 472, 513 (1880)).

“Inalienable” property such as street light poles and streets are in direct contrast to the publicly-owned buildings, for example, that were the subject of the cases relied upon by the City. *Mills*, 283 F.3d at 421 (school building); *Omnipoint Communications Enterp., L.P. v. Town of Nether Providence*, 232 F. Supp. 2d 430, 431 (E.D. Pa. 2002) (“Municipal Building”).

“Inalienable” property cannot be sold by the City; in comparison, the City can typically buy or

sell individual buildings. Moreover, individual buildings owned by the City are not necessarily held in trust for use by the general public. Whereas, the streets and street light poles are for the use and protection of the public.<sup>5</sup>

Also distinguishing *Mills* and the City's argument is the fundamental fact that the City is requiring a "franchise." City Charter Section 362(b) and Resolution 957 require the grant of a "franchise" to provide telecommunications services using "inalienable" property of the City – e.g., the streets and public rights-of-way. (Compl. Exhs. 2 and 3.) This is substantially different from seeking to lease space in a City-owned building. Compare Charter Section 383 (pertaining to inalienable property) with City Charter Section 384 (pertaining to the lease, sale and disposal of the City's real property.) The matters at issue in this case are the City's control over the provision of telecommunications services using the public rights-of-way and the facilities therein. The City's reliance on *Mills* and its unsupported allegations about "non-regulatory" control over "proprietary" property rights are inapplicable and unpersuasive.

Even if the poles were "proprietary," there is no limitation in the language of Section 253 that suggests that its preemption applies any differently if the property at issue is "proprietary." Indeed, the fact that Section 253(c) provides a limited "safe harbor" for municipal management only of the public rights-of-way suggests that municipal requirements that relate to any other property are *not* even capable of falling within the saving confines of Section 253(c). Thus, if the City is correct, its actions deserve less protection from preemption, not more. The Second

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<sup>5</sup> In NextG's Certificate of Public Convenience and Necessity, the PSC held that it was in the public interest to allow NextG to provide its service. Under Section 27 of the New York Transportation Corporations Law, the State has deemed the construction of NextG's facilities to constitute a public purpose. See *New York Tel. Co. v. Jefferson Wood*, 259 N.Y.S. 365, 368 (N.Y. Sup. Ct. 1931); see also 26 Am. Jur. 2d *Eminent Domain* §§ 24, 96 (1996). Thus, NextG's use of the public rights-of-way and street light poles is consistent with the public interest and public nature of those properties.

Circuit in *White Plains* recognized that the purpose of Section 253 was to prevent “monopolistic pricing by towns.” 305 F.3d at 79. The court reasoned that “[w]ithout access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates.” *Id.* That concern is right on point here. The City of New York controls a monopoly not only over the public rights-of-way, but also over utility poles located in the public rights-of-way, and it is abusing that power to control market entry and extract monopoly rents and concessions.

(Delsman Reply Aff. ¶¶ 11-13.)

The City’s own actions continue to emphasize that its actions are unlawful. Caught in a “Catch-22,” on April 16, 2004, NextG responded to the City’s 2004 RFP (although clearly reserving its rights in this matter). (Delsman Reply Aff. ¶ 10.) By letter dated April 30, 2004, DoITT demanded that NextG agree to a series of minimum compensation obligations. (Delsman Reply Aff. ¶ 11.) One key demand is for payment of a “minimum” annual compensation *in addition* to the annual payment per pole. (*Id.*) This requirement demonstrates that the City’s franchise and fee requirements are for access to the public right-of-way and for the right to provide telecommunications services, not just for access to City-installed poles. Moreover, the City’s April 30<sup>th</sup> Letter further emphasizes that the City’s scheme is precisely like the bidding process found unlawful in *New Jersey Payphone*, 299 F.3d at 241.

**B. NextG’s Claims Are Ripe And The Court Has Jurisdiction**

The City asserts that it is entitled to judgment “on the pleadings” because NextG’s claims are not ripe and as a result the Court lacks jurisdiction. The City’s argument is meritless. As a threshold matter, the City again advances an argument based on facts which are outside the Complaint, and thus improper for a Rule 12(c) motion. For example, the City asserts that it “has not refused to entertain or foreclosed plaintiff’s request for permission to install its equipment on

City-owned street poles.” (Def. Br. at 12.) Yet, in paragraphs 93 and 94 of the Complaint, NextG alleges quite the contrary:

on or about June 21, 2002, NextG submitted to DoITT a formal application seeking a mobile telecommunications services franchise (“NextG Application”).

DoITT and the City refused to accept, recognize, or treat the NextG Application as a legitimate application for a mobile telecommunications services franchise.

(Compl. ¶¶ 93-94.) NextG’s allegations must be taken as true for purposes of a Rule 12(c) motion, and thus, the City’s argument is baseless. Even if it had not applied, NextG has alleged a ripe controversy, as it has challenged the very requirement that it apply for and obtain a franchise under the terms of the City Charter, Resolution 957 and 2004 RFP. (Compl. ¶¶ 18-40, 103-33, 153-60.) There is nothing uncertain, hypothetical, or contingent about the facts alleged by NextG.

Section 253 precedent confirms that NextG’s claims are ripe for adjudication. NextG’s complaint states a Section 253 claim both on the face of the City’s Charter, Resolution 957, and 2004 RFP, and as those laws are applied. (Compl. ¶¶ 16-40, 85-165.) Under similar circumstances, numerous courts have explicitly and implicitly held that the claims are ripe even before an application for a franchise is submitted or denied (in this case NextG has already once applied and been rejected). *See, e.g., White Plains*, 305 F.3d at 73-76 (implicit); *City of Auburn*, 260 F.3d at 1171-73 (implicit); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp.2d 471, 479-80 (N.D.N.Y. 2003) (explicit; “Plaintiff TC New York is claiming injury based on the very existence of the Local Law. Thus, the constitutional component of the inquiry is satisfied”); *San Marcos II*, 204 F. Supp. 2d at 1278-79 (explicit); *New Jersey Payphone Ass’n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 633, 635 (D.N.J. 2001), *aff’d on other grounds*, 299 F.3d 235 (3d Cir. 2002) (explicit); *PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist.

LEXIS 19409 at \* 10-13 (E.D. Pa. Dec. 20, 1999) (explicit); *AT&T Communications v. City of Austin*, 975 F. Supp. 928, 937-38 (W.D. Tex. 1997), *vacated on other grounds*, 235 F.3d 241 (5<sup>th</sup> Cir. 2000) (explicit).

Like the carriers in *Colonie*, *White Plains*, and other cases, NextG faces a realistic danger of sustaining a direct injury as a result of the operation of the City's laws. NextG has suffered "injury in fact" from the City's Charter, Resolution 957, and 2004 RFP requirements because it has been denied the right to provide telecommunications services by the numerous unlawful provisions in those City enactments. Similarly, NextG has suffered a direct injury in fact from the City's unreasonable, two-year delay of NextG's ability to provide telecommunications services. (Compl. ¶¶ 162-65; Delsman Aff. ¶¶ 17, 28-32.) Most compellingly, NextG has suffered direct injury as a result of the City's refusal to even accept NextG's proffered application (Compl. ¶¶ 93-94, 100, 162-65; Delsman Aff. ¶¶ 14, 17, 28-32.) This harm is directly traceable to the City's facially unlawful requirements that NextG comply with the City's RFP process and that any franchise agreement include the challenged terms. Finally, a decision by this Court would give NextG a remedy for the harms imposed by the City's demands.

Accordingly, NextG's claims are ripe and appropriate for judicial resolution.

**C. NextG States A Claim For Damages Under 42 U.S.C. § 1983 And Attorney's Fees Under 42 U.S.C. § 1988**

NextG has adequately stated a claim under 42 U.S.C. § 1983 by alleging that "[t]he City Charter, Resolution No. 957, the 2004 RFP, and the actions of Defendants violate NextG's rights under 47 U.S.C. § 253, under color of law, and pursuant to an official policy of the City" resulting in the suffering of damage by NextG. (Compl. ¶ 177.) NextG also supports this allegation with factual detail regarding the City's efforts. (Compl. ¶¶ 16-40, 85-174.) These

allegations more than satisfy the pleading requirements established by the courts of this Circuit and the U.S. Supreme Court, and thus preclude judgment on the pleadings.

**1. The Complaint Alleges a Deprivation of NextG's Federal Right To Provide Telecommunications Services Under 47 U.S.C. § 253**

In the most obvious sense, Section 253 creates a “right” to provide telecommunications service. Under Section 253(a), the City cannot deny “any entity” the ability to provide telecommunications services or impose requirements that have the effect of prohibiting their ability. 47 U.S.C. § 253(a); *White Plains*, 305 F.3d at 76.

Under *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the Court held that a “right” is established for purposes of Section 1983 if an implied private right of action exists. *Id.*; *see also id.* at 285, 290. As the City recognizes, the most important part of this inquiry is whether the statute’s “text [is] ‘phrased in terms of the persons benefited.’” *Id.* at 284. Once that threshold is established by a Plaintiff, “the right is presumptively enforceable by § 1983.” *Id.*<sup>6</sup>

It is well established that NextG has an implied private right of action under Section 253. Indeed, the City does not argue otherwise. Several courts have explicitly held that Section 253 creates a private right of action for aggrieved telecommunications providers, like NextG. *See, e.g., BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1189-91 (11<sup>th</sup> Cir. 2001). Other courts have found it unnecessary to resolve the issue, and instead have proceeded to resolve the merits. *See, e.g., White Plains*, 305 F.3d at 74; *New Jersey Payphone*, 299 F.3d at 241; *City of Auburn*, 260 F.3d at 1175.

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<sup>6</sup> Although the Court noted that a statute should “manifest an intent to create not just a private right but also a private remedy,” the Court explained that “[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.” *Gonzaga*, 536 U.S. at 284.

Even a summary review of the *Cort v. Ash*, 422 U.S. 66 (1975), factors confirms that Section 253 establishes a private right of action, and thus a federal “right” enforceable under Section 1983.

First, Section 253 was phrased in terms to benefit telecommunications providers, like NextG by prohibiting any state or local law that “may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253 (emphasis added); see *White Plains*, 305 F.3d at 76; *City of Auburn*, 260 F.3d at 1175-76; *Sprint Telephony*, 2004 Westlaw 718424 at \* 7 (“the statute specifically benefits telecommunications providers, like plaintiffs, by restricting the authority of states and localities to regulate the industry”). “The intent of Section 253 was to benefit [telecommunications providers] by limiting the authority of local governments over telecommunications service providers.” *San Marcos II*, 204 F. Supp.2d at 1282.

Second, Congress intended to permit private rights of action. See, e.g. 141 Cong. Rec. S 8213 (June 13, 1995) (“any challenge to take place in the Federal district court in that locality . . .”); *BellSouth Telecommunications*, 252 F.3d at 1188–91; *Sprint Telephony*, 2004 WL 718424 at \* 7-8. Third, implying a private remedy is consistent with the underlying purposes of the legislation to “promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies.” Pub. L. No. 104-104, 110 Stat. 56 (1996); see also H.R.Rep. No. 104-458 (1996) (“the purpose of the statute is to provide for a ‘procompetitive de-regulatory national policy framework’”). As the court explained in *Sprint Telephony*, “[r]estricting the availability of remedies under § 253 results in limiting the benefits telecommunications providers, and, therefore, consumers, receive from the TCA.” 2004 WL 718424 at \* 9; see also *San Marcos II*, 204 F. Supp.2d at 1282; *White Plains*, 305 F.3d at 79

(violations of Section 253 “would run directly contrary to the pro-competitive goals of the TCA.”). Finally, Section 253 embodies a federal, national policy. *See City of Auburn*, 260 F.3d at 1175; *Sprint Telephony*, 2004 WL 718424 \* 10.

## 2. Congress Has Not Foreclosed A Remedy

Having established that an implied private right of action exists under Section 253, and thus a deprivation of rights under Section 1983, the burden shifts to the City to demonstrate that Congress intended to foreclose a remedy under Section 1983 for deprivation of those rights. *See Gonzaga*, 536 U.S. at 284; *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). The City has failed to show that Congress foreclosed section 1983 either through the text of the statute itself, or “impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.” *Gonzaga*, 536 U.S. at 285; *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 423 (1987) (City has a substantial burden).

The City ignores cases finding Section 1983 actions available in conjunction with Section 253 violations. *Sprint Telephony*, 2004 WL 718424 at \* 16; *San Marcos II*, 204 F. Supp.2d at 1282. Its reliance on *Qwest Corp. v. City of Santa Fe*, 224 F.Supp.2d 1305 (D.N.M. 2002), is misplaced. *Santa Fe* implies that because there is an administrative remedy provided in section 253(d), it is a “comprehensive enforcement scheme incompatible with individual enforcement under § 1983.” *Id.* at 1315. In *White Plains*, however, the Second Circuit rejected this argument regarding the FCC’s role under Section 253(d). 305 F.3d at 75; *see also Wright*, 479 U.S. at 424 (holding that “the administrative scheme of enforcement” did not foreclose other remedies); *Sprint Telephony*, 2004 WL 718424 at \* 9-10. Moreover, *Santa Fe*’s reading of the legislative history does not support its conclusions. *Sprint Telephony*, 2004 WL 718424 at \* 12; *San Marcos II*, 204 F. Supp.2d at 1282. Finally, the plain language of the 1996 Telecommunications

Act, which included Section 253, provides that it has “[n]o implied effect. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in such Act or amendments.” Pub.L. No. 104-104, § 601(c)(1), 110 Stat. 143 (1996) (reprinted in 47 U.S.C. § 152 note). This language negates any possible finding that Congress impliedly foreclosed a Section 1983 remedy for violations of Section 253 as *Santa Fe* finds. See *Sprint Telephony*, 2004 WL 718424 at \* 15. The City cannot satisfy its heavy burden to overcome the presumption in favor of a Section 1983 remedy, and Congress’ explicit statement that the Act has “no implied effect.”<sup>7</sup> *Id.* at \* 12, 15 (rejecting the reasoning of *City of Santa Fe* and finding the same language in 47 U.S.C. § 152 note to “reflect an intent by Congress to leave available a § 1983 remedy.”).

The City’s reliance on cases interpreting other sections of the Communications Act is also misplaced. (Def. Br. at 13). *E.Spire v. Baca*, 269 F.Supp.2d 1310, 1326 (D.N.M. 2003), relied on the poorly decided decision in *Santa Fe* and concerned Section 252, which is radically different from Section 253. *Nextel Partners, Inc. v. Kingston Twp.*, 286 F.3d 687 (3<sup>rd</sup> Cir. 2002) concerned only Section 332, which has a different scheme than Section 253. Moreover, there is a split in authority in the Section 332 cases, with two circuits having ruled that Section 1983 is available for violations of Section 332 because there is no comprehensive remedial scheme. See *Abrams v. City of Rancho Palo Verdes*, 354 F.3d 1094 (9<sup>th</sup> Cir. 2004); *AT&T Wireless PCS, Inc.*

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<sup>7</sup> In fact, the Act contains no explicit remedy whatsoever for violations of Section 253 that are adjudicated in court, and cannot fairly be read to provide the kind of comprehensive remedial scheme necessary to foreclose Section 1983 remedies. The Supreme Court has only found three federal statutes’ remedial schemes to be sufficiently comprehensive to indicate that Congress impliedly intended to foreclose a section 1983 remedy. See *Middlesex Co. Sewerage Authority v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) (Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA); *Smith v. Robinson*, 468 U.S. 992 (1984) (Education for all Handicapped Children Act (EHA)). There is no comparable scheme in Section 253.

*v. City of Atlanta*, 210 F.3d 1322 at 1324-30 (11<sup>th</sup> Cir. 2000); *vacated for lack of jurisdiction*, 223 F.3d 1324 (11<sup>th</sup> Cir. 2000), *reinstated* 250 F.3d 1307 (11<sup>th</sup> Cir. 2001), and *appeal dismissed on settlement*, 264 F.3d 1314 (11<sup>th</sup> Cir. 2001). *But see Prime Co. v. City of Mequon*, 352 F.3d 1147 (7<sup>th</sup> Cir. 2003) and *Nextel Partners*.

**3. The Deprivation of Federal Rights Occurred Under Color of State Law**

The City does not appear to challenge that the challenged requirements and actions were “under color of law, and pursuant to an official policy of the City.” Moreover, as discussed above, the City’s assertion that its extensive regulatory regime is not “a general municipal policy” (Def. Br. at 7) is groundless. There can be no question that the City’s Charter, Resolution 957, and the 2004 RFP reflect the regulatory policy of the City, and thus, the City’s violation of NextG’s federal right has been under color of law. *See Monell v. Dep’t of Social Serv. of the City of New York*, 436 U.S. 658, 690-91 (1978),

The weight of these authorities, viewed through the Supreme Court’s guidance in *Gonzaga*, demonstrates that NextG is substantially likely to succeed on its Fourth Cause of Action, and that the City is liable for damages and attorney’s fees under Section 1983.

**D. NextG Has Satisfied The Standards For A Preliminary Injunction**

In its Motion, NextG demonstrated that it satisfied each element of even the most stringent standard for the issuance of a preliminary injunction. The City’s Opposition fails to rebut NextG’s showing.

As demonstrated above, there is no merit to the City’s attacks on NextG’s Section 253 claims. The City’s challenged laws are facially unlawful under Section 253(a), and the City’s actions (the two year delay, refusal to grant NextG’s application, and discriminatory enforcement) also violate Section 253(a). The City does not even contend that the challenged

laws or actions are within the confines of Section 253(c). Thus, as demonstrated above and in NextG's opening brief, it is substantially likely to succeed on the merits of its claims.

The City also fails to rebut NextG's showing of irreparable harm. First, the City argues that access to only nine poles, initially, will not remedy NextG's irreparable harm. (Def. Br. at 15.) Clearly, while nine poles will not allow NextG to provide service City-wide, it will allow it to provide service to customers in the defined area. Why would NextG request the proposed configuration if it would not allow NextG to begin providing service – at least on a limited basis – and thus limit its irreparable harm. NextG was being conservative by not seeking a preliminary injunction for a broader scope of access, which the City would have then argued sought the ultimate relief. The City's attempt at mis-direction is without merit.

The City's response to NextG's irreparable harm showing appears to just be a continuation of its assumptions regarding NextG's use of the public rights-of-way. As NextG demonstrated, it is quite clear that it is being completely denied the ability to provide service in the City, and as such is suffering irreparable harm. (Delsman Aff. ¶¶ 28-32; Delsman Reply Aff. ¶ 16.)

A significantly similar case is *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260 (S.D. Cal. 2002) ("*San Marcos I*").<sup>8</sup> In *San Marcos I*, the plaintiff was a wireless services provider who sought to install antennas on utility poles in the public rights-of-way. The defendant city refused the plaintiff's application, unless the plaintiff complied with the city's permitting process, which, among other things, reserved to the city unlimited discretion to

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<sup>8</sup> In *San Marcos*, like here, the plaintiff had moved for preliminary injunction and the defendant city had moved for failure to state a claim, albeit under Rule 12(b)(6). The court issued two opinions, *San Marcos I*, granting the preliminary injunction, and *San Marcos II*, denying the Rule 12(c) motion as to the Section 253 and Section 1983 claims.

grant or deny permits. *Id.* at 1262. The court granted the plaintiff's motion for a preliminary injunction, holding that it was likely to succeed on the merits of its Section 253 claims, and that because it was being denied access to the public rights-of-way, it was suffering irreparable harm to its goodwill and reputation. *Id.* at 1263. NextG's irreparable injuries are the same. *See also Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp.2d 1081, 1103 (N.D. Cal. 2001) (holding that irreparable harm established in Section 253 action when company could not install telecommunications facilities in a particular city).

Contrary to the City's assertion, harm to goodwill and reputation are not remote, speculative or hypothetical. The Second Circuit and other courts have repeatedly held that loss of goodwill and reputation are "irreparable" precisely because they are real, yet impossible to adequately remedy with money. *See, e.g., Tom Doherty Assocs. v. Saban Ent., Inc.*, 60 F.3d 27, 29-30 (2d Cir. 1995); *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 445 (2d Cir. 1977); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969); *San Marcos I*, 204 F. Supp.2d at 1263. Moreover, the City's arguments again ignore the evidence. The City asserts that NextG's harm is insufficient because it lacks indication that "the company itself would be destroyed." (Def. Br. at 15.) While destruction of the company is not the test for irreparable harm, Mr. Delsman specifically stated in his affidavit that "if NextG is forced to wait until the completion of this litigation, its economic viability may even be threatened." (Delsman Aff. ¶ 32.) Thus, even under the most stringent of tests, NextG has demonstrated the necessary level of immediately threatened irreparable harm to justify a preliminary injunction.

#### **IV. CONCLUSION**

Based on the foregoing, and NextG's initial Motion filing, it is clear that NextG's requested injunction should be granted, and the City's motion for judgment on the pleadings denied.

Respectfully Submitted,

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