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-	.	**ATTORNEY'S AFFIDAVIT IN SUPPORT OF REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**
CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS; and GINO P MENCHINI, in his official capacity,	:	
Defendants.	:	

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RECEIVED
MAY 07 2004
U.S.D.C.
CASHIERS

WASHINGTON)
: ss :
DISTRICT OF COLUMBIA)

T. SCOTT THOMPSON, being duly sworn, deposes and says

1 I am a partner in Cole, Raywid & Braverman, L L P. which along with Ingram Yuzek Gainen Carroll & Bertolotti, L L.P , is counsel to Plaintiff NextG Networks of NY, Inc. ("NextG") in this action I submit this affidavit in support of NextG's Reply In Support Of Its Motion for Preliminary Injunction and Opposition to Defendants' Motion for Judgment on the Pleadings ("Reply"). NextG's Reply supports its motion for preliminary injunction, pursuant to Fed R. Civ. P. 65, to enjoin Defendants City of New York, City of New York Department of Information Technology and Telecommunications ("DoITT"), and Gino Menchini (jointly "Defendants") from denying NextG its right to provide telecommunications services via fiber optic and

related telecommunications facilities in the public rights-of-way in the City of New York, including on utility, street light, and/or traffic signal poles installed therein. NextG's Reply also opposes Defendants' so-called Cross-Motion For Judgment On The Pleadings.

2 On March 15, 2004, NextG filed a Notice of Motion, Attorney's Affidavit in Support of Motion for Preliminary Injunction, and a Brief in Support of Motion for Preliminary Injunction (collectively "Motion").

3 On April 15, 2004, Defendants filed a Notice of Cross-Motion pursuant to Fed. R Civ. P. 12(c) for Judgment on the Pleadings and a Memorandum of Law in Support of Cross-Motion For Judgment on the Pleadings and in Opposition to Plaintiff's Motion for a Preliminary Injunction ("Opposition")

4 The grounds for NextG's Motion and the need for preliminary relief were fully set forth in its First Amended Verified Complaint ("Complaint"), its brief in support of its Motion for Preliminary Injunction, my affidavit with Exhibits 1 through 3 thereto (copies of the challenged enactments of the City), and the Affidavits of Robert L Delsman and David Cutrer, and accompanying exhibits thereto.

5 NextG's Reply refutes the factual and legal flaws that underlie Defendants' Opposition and in so doing provides further support for its Motion. First, NextG's Reply rebuts the factual flaws asserted by Defendants Specifically, Defendants ignore the fact that NextG's Verified Complaint and affidavits in support of its motion demonstrate that NextG is not a provider of wireless services, that NextG is also seeking to install fiber optic lines in the public rights-of-way, and that NextG must have access to the City-installed street light poles in the public-rights-of-way to provide its service because Defendants will not allow NextG to install its own poles The Reply Affidavit of Robert

L. Delsman further supports these points and also clarifies that the City's limited grant of permission to NextG to use two street light poles is a limited technical test conditioned on NextG not using the test network to provide telecommunications service. Mr. Delsman explains that the limited technical test expires on May 31, 2004, and does not negate the need for the preliminary injunction.

6. Second, the Reply rebuts Defendants' assertion that NextG is not substantially likely to succeed on the merits of its claims for Relief under 47 U.S.C. § 253. The Defendants fail to respond to NextG's showing that the City's challenged legal requirements, on their face, and actions in furtherance thereof, violate 47 U.S.C. § 253. *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 123 S Ct 1582 (2003); *see also New Jersey Payphone Assn, Inc. v. Town of West New York*, 299 F.3d 235 (3d Cir. 2002) Rather, Defendants extend their factual errors regarding NextG's service and facilities by relying on case law interpreting 47 U.S.C § 332(c)(7). However, Section 332 is applicable only to providers of wireless services, and more specifically, to local zoning decisions regarding specific wireless facilities sites. NextG is not a wireless provider, and it challenges the City's legal requirements for a franchise, not a denial of a single location Moreover, the Section 332 "gap in coverage" standard advanced by Defendants does not apply to Section 253 cases. Nor would it apply in this case, as the City has prohibited NextG from providing service throughout the City, not just a small "gap." Even if the "gap in coverage" issue were legally relevant, Defendant DoITT has issued a press release dated October 27, 2003 emphasizing the City's plan to track and eliminate "dead spots" in cell coverage. In the press release, the Mayor of New

York was quoted as saying "Cell phone 'dead spots' are frustrating and too common in this City." (The DoITT press release is attached hereto as Exhibit 1).

7. Defendants' argument that their rights in street light poles are "proprietary" and thus beyond Section 253 is also unsupported and meritless. As NextG previously demonstrated, street light poles are defined by the City Charter as being precisely the same "inalienable" property as the streets and rights-of-way themselves. In any event, the language of Section 253 is not limited only to requirements that concern the public rights-of-way.

8. NextG also refutes that its Section 253 claims are not ripe for adjudication. Numerous cases have already established that facial challenges to municipal franchise requirements are ripe, even if no application has been submitted or denied. *See, e.g., TC Systems, Inc v Town of Colonie*, 263 F. Supp.2d 471, 479-80 (N.D.N.Y. 2003)("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"). Moreover, in this case, NextG's Complaint alleges, and its affidavit evidence further demonstrates, that NextG submitted an application for a franchise, but the City refused to even accept it, much less grant it. Moreover, the two year delay imposed by the City is ripe for adjudication.

9. NextG's Reply further establishes that 42 U.S.C. § 1983, and therefore 42 U.S.C. § 1988, is applicable, and that NextG is substantially likely to succeed on its claims. Section 253 provides a federal right for NextG to provide telecommunications services, which is enforceable via a private right of action. Section 253 does not explicitly or impliedly express Congressional intent to eliminate Section 1983 remedies,

nor does Section 253 provide a comprehensive remedial scheme supporting the exclusion of Section 1983 damages.

10 In sum, there is no merit to the City's attacks on NextG's Section 253 claims. As alleged in the Complaint and supported by affidavits, the City's challenged laws are facially unlawful under Section 253(a), as a matter of law, 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). Therefore, NextG not only states a claim under Section 253 and Section 1983, but is substantially likely to succeed on the merits of its claims

11 Moreover, Defendants Rule 12(c) motion disregards the standards for Rule 12(c) motions for judgment on the pleadings. Defendants' "Cross-Motion" under Rule 12(c) is not limited to the facts alleged in the complaint, but rather relies entirely on facts from affidavits submitted by Defendants, which are directly contrary to those in NextG's Complaint As such, it cannot be granted, and indeed, does not appear to have been submitted in good faith

12. The City also fails to rebut NextG's showing of irreparable harm. As NextG has 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 NextG's irreparable harm is not speculative or hypothetical, and is fully consistent with other cases granting preliminary injunctions in Section 253 cases.

WHEREFORE, based on the foregoing, the Complaint, the Motion, the Reply brief and accompanying affidavits, NextG should be granted a preliminary injunction,

enjoining Defendants from denying NextG the ability to provide telecommunications services via fiber optic and related telecommunications facilities in the public rights-of-way in the City of New York, including on utility, street light, and/or traffic signal poles installed therein In addition, Defendants' "Cross-Motion" for judgment on the pleadings pursuant to Fed. R Civ P. 12(c) should be denied

T. Scott Thompson

Sworn to before me this
5th day of May, 2004.

Notary Public

Debra G Holland
Notary Public, District of Columbia
My Commission Expires 06-30-2007

Exhibit List for
Attorney's Reply Affidavit of T. Scott Thompson

Exhibit 1 – October 27, 2003 DoITT Press Release

FOR IMMEDIATE RELEASE
PR- 303-03
October 27, 2003

MAYOR MICHAEL R. BLOOMBERG, DOITT COMMISSIONER GINO MENCHINI, AND CONSUMER AFFAIRS COMMISSIONER GRETCHEN DYKSTRA ANNOUNCE PROGRAM TO TRACK CELL PHONE "DEAD SPOTS" CITYWIDE

Consumer Affairs to Explore Effectiveness of Cell Phone Industry's Own Best Practices

Mayor Michael R. Bloomberg, joined by Department of Information Technology and Telecommunications (DoITT (www nyc gov/html/doitt/)) Commissioner Gino Menchini and Department of Consumer Affairs (DCA (www nyc gov/html/dca/)) Commissioner Gretchen Dykstra, today announced a program to collect and map cell phone "dead spots" submitted by New Yorkers who call 311 or visit www nyc gov (www nyc gov/) In addition, the DCA will begin to monitor New York area wireless carriers to determine if they are abiding by newly adopted industry guidelines for consumer services These guidelines include requiring service providers to fully disclose rates and terms of service to consumers, make service maps available, and allow for a trial period on new purchases. The information submitted by New Yorkers will be made publicly available on www nyc.gov (www nyc gov/) beginning on November 24th On that date, new rules adopted by the FCC take affect which mandate that consumers can switch cell phone carriers and transfer their number to the new carrier. The information collected by 311 will help New Yorkers find the wireless carrier that provides the best possible service for their needs

"Cell phone 'dead spots' are frustrating and too common in this City," said Mayor Bloomberg "Now, whenever New Yorkers encounter one, they can dial 311 or visit www nyc.gov (www nyc gov/) to report it As cell phone use has increased dramatically, it is even more important to identify areas in the City that may be prone to problems This program will undoubtedly help the industry improve service and help consumers make more informed purchasing decisions "

"This is another example of Mayor Bloomberg's commitment to creating innovative partnerships between the public and private sector to improve the quality of life in the City for New Yorkers," said DoITT Commissioner Gino Menchini "In certain circumstances, cell phone dead zones create a hazardous condition for New Yorkers We hope the cell carriers will use this information to improve the quality of their service for the good of their customers and the City "

"New Yorkers should have access to all the information necessary to make good choices and know what they are paying for," said DCA Commissioner Gretchen Dykstra "Over the next month we will explore the effectiveness of the wireless industry's own best practices to ensure cell phone customers in New York are protected We look forward to working with industry representatives and consumer advocates."

In September, cell phone carriers announced the adoption of guidelines illustrating the industry's best of practices The guidelines are as follows

- Disclose rates and terms of service to consumers at the point of sale
- Make service maps available at the point of sale and on company web sites
- Allow for a 14-day trial period for new service
- Identify carrier charges from taxes on billing statements

- Provide customers the right to terminate service for changes in contract terms
- Provide contract terms to customers and confirm changes in service
- Provide specific disclosures in advertising
- Provide ready access to customer service
- Respond promptly to consumer inquires and complaints received from government agencies.
- Abide by policies for protection of customer privacy.

Since March 9th, 311 has received over 3 16 million calls – currently averaging 20,000 calls a day. 95% of calls to 311 are answered by a Citizen Service Specialist within 5 seconds. The most common types of calls are noise (NYPD (www nyc gov/html/nypd/)), landlord maintenance or heating (HDP (www nyc gov/html/hpd/)), CFC/Freon removal (DSNY. (www.nyc.gov/html/dos/)), blocked driveway (NYPD), traffic signal defect (DOT (www.nyc gov/html/dot/)), and open or leaking fire hydrant (DEP. (www nyc.gov/html/dep/)) As of October 27th, over 95% of all service requests called into 311 have been closed In addition, 311 provides translation service in over 170 languages.

To report a cell phone dead spot, dial 311 or visit www nyc.gov (www nyc gov/)

CONTACT:

Edward Skyler / Jonathan Werbell (212) 788-2958

Dina Improta (DCA) (www nyc gov/html/dca)
(212) 487-4283

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NEXTG NETWORKS OF NY, INC.
Plaintiff,

-against-

CITY OF NEW YORK, et al.,
Defendants.
----------X

Case No. 03 CIV 9672 (RMB)
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
s.s.:
COUNTY OF NEW YORK)

CONNIE ASARO, being duly sworn deposes and says that she is over the age of eighteen, is an employee of KEATING & WALKER ATTORNEY SERVICE, INC. and is not a party to this action.

That on the 7th day of May, 2004, deponent served a true copy of Attorney T. Scott Thompson's Affidavit in Support of Reply, Reply Affidavit of Robert L. Delsman and Plaintiff's Reply Memo of Law in Support upon Kristine D. Holden, Esq. at the City of New York Law Department, 100 Church Street, New York, New York
by personally delivering and leaving the same with a person of suitable age and discretion who informed deponent that he/she is authorized by Appointment to accept service at that address.

Connie Asaro
CONNIE ASARO #1126351

Sworn to before me this
7TH day of May, 2004.

John J. Walker
NOTARY PUBLIC

JOHN J. WALKER
Notary Public, State of New York
No. 41-4851557
Qualified in Queens County
Certificate Filed in New York County
Commission Expires Feb. 17, 2006

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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NEXTG NETWORKS OF NY, INC.,

Plaintiff,

-against-

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

Defendants.

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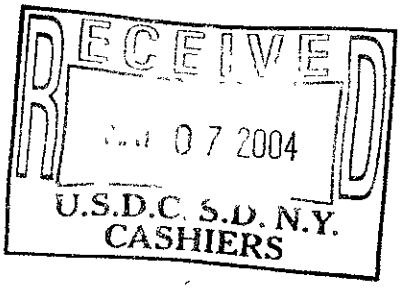
03 CIVIL 9672 (RMB)

REPLY AFFIDAVIT OF ROBERT L. DELSMAN IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION



STATE OF CALIFORNIA)
) ss.:
COUNTY OF Alameda)

I, Robert Delsman, being duly sworn according to law, upon my oath, hereby state:

1. I am Vice President, Government Relations & Regulatory Affairs of NextG Networks, Inc., which is the parent company of the Plaintiff in the above-captioned matter, NextG Networks, Inc. ("NextG").

2. I have previously executed an Affidavit in support of NextG's Motion For Preliminary Injunction. This Reply Affidavit is executed in support of NextG's Motion and in response to the Affidavits and assertions submitted by the Defendants City of New York, City of New York Department of Information Technology and Telecommunications ("DoITT"), and Gino P. Menchini (jointly "City") in opposition to NextG's Motion.

3. First, while it was the topic of both my and Mr. David Ćutrer's initial affidavits, it is important to reiterate in response to the City's groundless assertions that NextG is not a provider of Commercial Mobile Radio Service ("CMRS"). In other words, NextG is not a provider of wireless telecommunications service, like traditional cellular or PCS providers, but is rather a facilities-based competitive local exchange carrier providing RF transport service to wireless carriers (a "carrier's carrier"). NextG has throughout its communications with the City been unambiguous that it is not a provider of wireless services. NextG's CPCN and accompanying tariffs on file with the State of New York Public Services Commission also clearly show that NextG is not a wireless services carrier.

4. Moreover, NextG's communications to the City have, while perhaps having to focus on access to utility poles because of the City's intransigence on the matter, consistently made clear that NextG's proposed telecommunications network would also involve installation of fiber optic lines under the streets and other public rights-of-way. For example, paragraph F of NextG's June 21, 2002 Application, which Mr. Cangemi cites in his Affidavit, is entitled "Use of Poles ***and Streets; Trenching***." (Cangemi Aff. Exh. 1)(emphasis added). In that paragraph, NextG makes clear that its proposal will involve fiber optic cable in underground conduits and trenching or boring under the streets. Moreover, while NextG's June 21, 2002 Application indicated that NextG ultimately may seek access to up to 6,000 poles, it made clear that the initial plan was for only up to 300.

5. The City's assertions regarding the "Test Project" also require clarification. In the City's brief and in Mr. Cangemi's and Mr. Galgano's affidavits, the assertion is made, more or less explicitly, that the City has already given NextG access to the public rights-of-way and City-

installed poles through the Test Project, and thus, they suggest, NextG's preliminary injunction request is unnecessary. Their assertions are not correct.

6. As is clear from the Test Project "Occupancy License" attached to Mr. Cangemi's Affidavit, the project involves only 2 poles, and is for a very limited duration – from September 1, 2003 to May 31, 2004. Moreover, the City would permit the test only on the condition that NextG ***not*** provide telecommunications services on a commercial basis using the installed facilities. (Cangemi Aff. Exh. 5 § 1.a). Indeed, the City insisted that NextG's customer (the wireless provider) not use the test project facilities for provision of telecommunications service on a commercial basis.

7. In addition, while the term of the Occupancy License started on September 1, 2003, the City would not permit NextG to begin construction until November 5, 2003. First, by letter dated October 10, 2003, in response to NextG's expression of its possible need to institute this lawsuit because of the City's delay and unlawful requirements, Mr. Cangemi asserted that the Test Project must cease until further notice. (A copy of Mr. Cangemi's letter is attached hereto as Exhibit 1). Next, the City further delayed NextG's ability to construct under the Test Project until NextG had established to the City's satisfaction that the test would not be commercial, as required under Section 1.a. of the Occupancy License. Further substantial delay resulted from the City's unilateral requirement of a change in the construction methods that were clearly specified in the executed agreement.

8. In contrast to the City's suggestion that DoITT and the City were assisting NextG, in reality, the City's actions regarding the Test Project were unreasonable and delayed. The test project was initially proposed in August of 2002. Many months of delay resulted from Mr. Cangemi's insistence that the Test Project be approved by the New York City Art

Commission despite its lack of authority over such temporary installations. After waiting more that six months to get on an Art Commission agenda, during which NextG was not permitted to communicate directly with the Commission or its staff, the Commission declined jurisdiction over the Test Project in recognition of its lack of authority when the matter came before it on September 8, 2003. Thus, it took a year simply to have the Occupancy License approved.

9. While the Test Project has been useful in a limited technical sense, it in no way substitutes for the relief NextG needs to obtain through its request for a preliminary injunction. By the terms of the Occupancy License, NextG cannot provide commercial service to its wireless carrier customers and is suffering a severely impaired reputation as a reliable and available provider of RF transport services to the limited universe of wireless carriers. The license will expire at the end of May 2004, and the City ultimately reserves the right to cancel for any reason on 48 hours' notice (Cangemi Exh. 5, § 39). Moreover, by permitting NextG to install facilities for two poles, for a very limited purpose and duration, the City has not undermined or mooted in any way the fundamental fact that the City has prohibited NextG from providing telecommunications services.

10. Additional actions demonstrating the unlawful nature of the City's requirements and the irreparable harm to NextG have also occurred since my last affidavit. On April 16, 2004, NextG filed an application in response to the DoITT February 9, 2004 "Request For Proposals For Franchise For The Installation And Use, On City-Owned Street Light Poles, Traffic Light Poles And Highway Sign Support Poles, Of Telecommunications Equipment And Facilities, Including Base Station And Access Point Facilities, In Connection With The Provision Of Mobile Telecommunications Services" ("2004 RFP"). NextG filed its application under protest and made clear that it was submitting the application conditioned upon the outcome of this

litigation and without waiving its rights or any claims that it makes in this case. NextG submitted the application because it had no choice, despite the fact that the process is unlawful, as it might otherwise have forfeited some rights to apply.

11. By letter dated April 30, 2004, DoITT contacted NextG regarding its application. A copy of the letter is attached hereto as Exhibit 2. In the letter, DoITT purports to require NextG to agree to a number of conditions, primarily focusing on DoITT's intention of making the RFP process into a blind bid situation. For example, DoITT now insists that NextG agree to pay a "minimum" compensation for each "zone" of the City, which would be in addition to any per pole compensation. The minimum "additional" compensation now asserted by DoITT is $100,000 per year, for the area in Manhattan South of 96th Street. In addition, DoITT now asserts that if NextG's per pole compensation proposal does not meet DoITT's minimum fee (which was not identified in the 2004 RFP), NextG's application will not be considered. The per pole minimum compensation "bid" for Manhattan south of 96th Street is $3,000 per pole per year.

12. DoITT's "minimum" compensation amounts emphasize the unlawfulness of its requirements. For example, it would cost NextG approximately $5,000 to purchase and install its own pole in the public rights-of-way. The City, however, will not allow NextG to install its own poles in the public rights-of-way. So instead, DoITT is insisting that NextG pay $3,000 per pole per year, plus $100,000 per year, for the right to provide telecommunications services in the public rights-of-way in Manhattan. Thus, the City is seeking to reap a windfall profit from its monopoly and regulatory control over the public rights-of-way and utility poles.

13. In addition, DoITT's insistence on the payment of a minimum annual fee in addition to the minimum annual pole fees (*i.e.*, NextG must pay a pole use fee and also a fee essentially

for the right to operate) clearly demonstrates that the franchise is for the right to provide telecommunications services, not for just access to poles.

14. DoITT also refines its efforts to auction off the public rights-of-way to the highest bidder. The Letter requires NextG to agree to "accept a priority rating for a particular Zone, if awarded a franchise, based on how well NextG's per pole bid compared to other qualifying bids." (Letter ¶ 8) (emphasis in original). DoITT then clarifies that the entity with the highest priority rating, based on its bid, will receive an effective exclusive right to all poles in a particular zone of the City for the first year after any franchises are issued. (Letter ¶ 10).

15. The requirements set forth in DoITT's April 30th Letter were not identified in the 2004 RFP. Thus, the April 30th Letter, although styled a request for "clarification," is in reality imposing entirely new requirements. Yet, now DoITT asserts that failure to respond and agree will "disqualify" NextG's application (or presumably lead to its perfunctory denial). This simply emphasizes how DoITT is exercising unfettered discretion over NextG's ability to provide telecommunications services in the City. NextG has no power over its own ability to provide service. It must succumb to the unlimited and constantly changing whims of the City and DoITT, or be denied the ability to provide service using the public rights-of-way.

16. This new letter from the City also emphasizes the irreparable harm that NextG is suffering from the unreasonable and unlawful actions of the City. Through ever-changing requirements and successive rounds of inquiry, the City and DoITT are simply further delaying and burdening NextG's ability to provide telecommunications services, and in the process irreparably harming NextG. NextG cannot reasonably calculate nor possibly recover the "time to market" advantage that it is losing because of the City's and DoITT's actions. In effect, NextG

has or will lose over two years of marketing and service opportunities as a result of the City's unlawful franchise scheme and delays.

17. By letter dated May 5, 2004, a copy of which is attached hereto as Exhibit 3, NextG responded to the City's April 30th Letter. In its response, NextG declines to agree to the City's new demands. Accordingly, pursuant to the April 30th Letter, NextG's application will either be summarily denied or not even considered. Thus, for the second time, the City has denied NextG's ability to use the public rights-of-way to provide telecommunications services.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

By: Robert L. Delsman

Robert L. Delsman

Dated: May 5, 2004

Sworn to before me this
5th day of May, 2004.

Sarah C. Umbenhower
Notary Public

SARAH C. UMBENHOWER
Commission # 1405643
Notary Public - California
Alameda County
My Comm. Expires Apr 5, 2007

58 11.01

DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

11 MetroTech Center, 3rd Floor
Brooklyn, NY 11201
(718) 403-8076
(718) 403-8508 (fax)
(212) 788-6685 (TTY)

GINO MENCHINI
Commissioner

Agostino Cangemi
Deputy Commissioner & General Counsel

October 10, 2003

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

T. Scott Thompson
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., N.W., Suite 200
Washington, D.C. 20006-3458

Mr. Thompson:

I am in receipt of your letter of October 9, 2003. Your letter alleges, on behalf of your client NextG Networks of NY, Inc., that the City of New York is in "blatant and knowing violation of Section 253" of the Communications Act. Your letter further threatens that "NextG will immediately file suit against the City . . . pursuant to 42 U.S.C. § 1983 and other available grounds for liability" unless the City meets certain specified "demands" by October 24, 2003.

As I believe you know, the City and NextG have been engaged in ongoing, good faith discussions in an attempt to resolve the significant operational complexities that are entailed in enabling NextG to attach certain equipment to two light poles in Lower Manhattan for the purpose of testing its equipment (for a limited period of time and for non-commercial activity). The parties had planned for these ongoing discussions to move ahead with a conference call this afternoon between the City and NextG. The "attendees" were to include representatives from NextG and the City whose work responsibilities are primarily technical in nature.

Given that in your letter, and in our conversation yesterday afternoon, you have threatened the City with imminent litigation, I am for now requesting that only authorized City attorneys communicate with NextG and its representatives until this matter is resolved. Accordingly, we will cancel this afternoon's conference call. In addition, NextG should desist, until further notice, from any activity on the test project that entails entry to City light poles, streets or other municipal property.

Sincerely,

/s/

Agostino Cangemi

cc: Steven Galgano
Philip Damashek
Bruce Regal

The City of New York

DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

75 Park Place, 9th Floor
New York, NY 10007
Phone. (212) 788-6640
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E-mail· acangemi@doitt nyc.gov

GINO P. MENCHINI
Commissioner
Chief Information Officer

AGOSTINO CANGEMI
Deputy Commissioner
Franchise Administration and Planning/General Counsel

April 30, 2004

VIA· CERTIFIED MAIL and E-MAIL

Mr Robert L. Delsman
Vice President of Government Relations
NextG Networks of NY, Inc
1759 South Main Street, Suite 128
Milpitas, CA 95035

Dear Mr Delsman

Thank you for responding to the New York City Department of Information Technology and Telecommunications ("DoITT") "Request for Proposals for Franchises for the Installation and Use, on City-owned Street Light Poles ["SLPs"], Traffic Light Poles ["TLPs"] and Highway Sign Support Poles ["HSSPs"], of Telecommunications Equipment and Facilities, Including Base Station and Access Point Facilities, in Connection with the Provision of Mobile Telecommunications Services" issued on February 9, 2004 ("the RFP"). DoITT also received a number of other responses, and in order to complete its evaluation of NextG Networks of NY, Inc 's ("NextG") response to the RFP, DoITT requires clarification of a few matters

DoITT requests clarifications to the following items in writing. NextG's response to this request is to be received by the agency contact person not later than 5.00PM on May 10, 2004.

In order to fully evaluate NextG's response under the criteria described in Section 5 of the RFP, DoITT is asking NextG to respond to the following item

1 A number of proposals presented multiple options for equipment to be installed on the poles, some of which fall within the design and technical parameters of the RFP, some of which do not. Please show how NextG will commit to meet the equipment specifications set forth in the RFP.

In light of the proposals that have been received and in light of the finite number of poles available, to manage the allocation of SLPs, TLPs, and HSSPs (collectively referred to as "poles") the City has invited NextG to propose minimum compensations based on the following three zones

Zone A. Manhattan South of 96th Street, inclusive;

Zone B· All areas of the city not including Zones A or C;

Zone C: New York City Community Districts where 5% or more of the occupied housing units do not have telephone service, according to the 2000 U.S. Census. These

areas are: Bronx Community Districts 1-7; Brooklyn Community Districts 3-5 and 16; and Manhattan Community Districts 10 and 11.

To view these areas, NextG may wish to refer to the "City of Neighborhoods" interactive map found on the New York City Department of City Planning's website. http://www nyc gov/html/dcp/html/neighbor/neigh.html.

In order to fully evaluate NextG's response under the criteria described in Sections 6 and 7 of the RFP, DoITT is asking NextG to:

2. Elaborate on NextG's business plan and provide an estimated number and location of poles that will be necessary to effectuate this business plan, if awarded a franchise. A more detailed response will be required in item number 7 below.

3 Select the specific Zone(s) in which it is interested in using poles.

For Example:

Company 1 selects Zones A, B, and C
Company 2 selects Zones A, B, and C.
Company 3 selects Zones A and B.
Company 4 selects Zones B and C

4. Commit to pay a minimum annual Zone Compensation, should NextG be offered a franchise, that would be **in addition** to any per pole compensation, that would give NextG the opportunity to use poles according to the following structure, for the duration of the franchise agreement

a	$100,000 annually	Opportunity to use poles in Zones A, B, and C;
b	$50,000 annually	Opportunity to use poles in Zones B and C;
c	$10,000 annually	Opportunity to use poles in Zone C only.

Using the Example from #3 above:

Company 1 would pay a $100,000 annual Zone Compensation.
Company 2 would pay a $100,000 annual Zone Compensation
Company 3 would pay a $100,000 annual Zone Compensation.
Company 4 would pay a $50,000 annual Zone Compensation.

5. Propose a monthly compensation it would be prepared to pay per pole in each Zone(s), commencing at the time any physical alteration is made to the pole or any structure is attached to the pole The minimum monthly bids as determined by the City are the following:

a.	Zone A·	minimum bid of $250/pole/month
b	Zone B·	minimum bid of $50/pole/month
c	Zone C.	minimum bid of $10/pole/month

Bids for each Zone that do not meet the minimums will not be considered.

For Example:

Company 1 bids $250/pole/month for Zone A, $150 for B, and $10 for C
Company 2 bids $500/pole/month for Zone A, $100 for B, and $15 for C.

Company 3 bids $350/pole/month for Zone A, $60 for B, and no bid for C.
Company 4 bids no bid for Zone A, $40 for B, and $10 for C.

The following bids, which do not meet the minimums, will not be considered:
Company 3's bid in Zone C.
Company 4's bids in Zones A and B.

6. Propose an annual escalation to this monthly per pole compensation at least equal to the CPI increase of the previous year

7. Commit to re-submit a qualifying bid should a tie occur in a Zone until no ties exist.

Using the Example from #5 above:

Companies 1, 2, and 4 submitted bids that met the minimum of $10/pole/month for Zone C However, two of their bids tied at $10/pole/month. As a result, all three companies are informed by DoITT that they may re-submit bids for Zone C poles due to a tie Company 1 re-bids at $12, Company 2 decides not to change its bid and stays at $15, and Company 4 re-bids at $20/pole/month As these bids meet the minimum requirements and result in no ties, the bid process for Zone C concludes with $12, $15, and $20/pole/month for Companies 1, 2 and 4 respectively

8 Agree to accept a priority rating for a particular Zone, if awarded a franchise, based on how well NextG's per pole bid compared to other qualifying bids

Using the Examples from #5 and #7 above:

Zone A poles	1st priority--$500/pole (Company 2)
	2nd priority--$350/pole (Company 3)
	3rd priority--$250/pole (Company 1)
Zone B poles	1st priority--$150/pole (Company 1)
	2nd priority--$100/pole (Company 2)
	3rd priority--$60/pole (Company 3)
Zone C poles:	1st priority--$20/pole (Company 4)
	2nd priority--$15/pole (Company 2)
	3rd priority--$12/pole (Company 1)

9 **If offered a franchise**, submit a specific list of poles, by Zone, on which it intends to locate equipment over the next one year period, or other time period agreed upon between the franchisees and DoITT, which will be anonymously shared with the other franchisees utilizing poles in that Zone. NextG must also agree to submit a list of intended locations at regular intervals as requested by DoITT

10. **If offered a franchise**, agree to a process to handle "competing requests," defined as two or more requests that cannot both or all be accommodated based on the poles available. DoITT contemplates that when a pole is available for equipment siting and is requested by more than one company, the requesting company with the highest priority rating in that Zone will, for a period of time, have first option to utilize it DoITT anticipates that this time period would be one year, but invites comments. If the company hasn't started compensating the City for the use of the pole(s) after the specified time period, the other companies, according to priority rating, will have the same opportunity to utilize the poles.

For Example:

In Year 1 of the franchise agreement, Companies 1, 2, and 3 submit lists of their requested poles in Zone A. After reviewing the locations, DoITT finds that all of the poles are available for use; however, fifty (50) of the locations requested by Company 2 are also requested by Company 3. No other competing requests exist. Companies 1, 2, and 3 can begin developing their networks utilizing the poles that are not common to any of them.

To resolve the competing requests for the 50 poles, the Zone A priority numbers are used. At the start of the franchise, Company 2 bid the highest for Zone A poles and obtained a 1st priority rating. Company 3 bid the next highest in Zone A and received a 2nd priority rating. Company 1 received a 3rd priority rating.

Since Company 2 has a higher priority rating than Company 3, the other requesting company, it retains the ability to utilize the 50 commonly requested poles for a period of one year (or an alternative period agreed upon by the franchisees and DoITT). During this period, Company 3 may seek to find an equal or lesser number of substitute poles, in this case 50 poles, which do not conflict with any other franchisee's poles or poles reserved for the City. If after the one year period, Company 2 has not yet started compensating the City for the use of any or all of the 50 poles, they are offered to the other companies in Zone A. They are first offered to Company 3, as it has the next highest priority rating. If it does not choose to utilize this option, or subsequently does not develop the sites after one year, the poles are offered to Company 1, which has the lowest priority rating in Zone A.

If instead of Companies 2 and 3 having competing requests, it were Companies 2 and 1, then the same process would be followed. The commonly requested poles would first be offered to the requesting company with the highest priority number. After a one year period, they would automatically be offered to the other companies in that Zone, in priority order.

Please submit your responses to these ten (10) items in writing to me by 5:00PM on May 10, 2004 Please ensure that you have addressed all 10 items If NextG does not submit a written response, the Evaluation Committee shall consider NextG's proposal withdrawn from consideration.

Sincerely,

Agostino Cangemi
Deputy Commissioner/General Counsel
75 Park Place, 9th Floor
New York, NY 10007
acangemi@doitt nyc gov

Cc
Fernando DeGuia, Steve Galgano, Chris Montgomery, Bruce Regal
Anthony Rodriguez

NextG Networks, Inc. 1759 South Main Street, Suite 128, Milpitas, CA 95035 Telephone 408 719 8510 Fax 408 719 8509

May 5, 2004

Via Fedex Express

CITY OF NEW YORK, DEPT. OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS
Attn: Rosario Cangemi, Esq., Deputy Commissioner/General Counsel
75 Park Place, 9th Floor
New York, NY 10007

Re: Response of NextG Networks of NY, Inc. to Request for Clarifications under RFP for Mobile Telecommunications Franchise Issued by the City of New York on April 9, 2004 (the "RFP")

Dear Mr. Cangemi:

Enclosed is the response of NEXTG NETWORKS OF NY, INC., a Delaware corporation ("NextG") to the request for clarifications set forth under cover dated April 30, 2004 (the "Addendum") in connection with NextG's proposal dated April 16, 2004 (the "Proposal") in response to the RFP issued by the City of New York (the "City"). The numbered responses below correspond to the question numbers in the Addendum.

1. NextG Equipment Specifications.

NextG has submitted to DoITT fully-dimensioned specifications for typical equipment it intends to install on poles in the City's public ways under the proposed franchise in Exhibit C attached to the Proposal. NextG commits to meet the equipment specifications set forth in the RFP, examples of which commitment are shown in the drawings contained in Exhibit C attached to the Proposal.

2. Business Plan; Estimated Number and Location of Poles.

NextG conducts its business on the basis of long-term, open-ended contracts and thus cannot predict the locations or number of poles it might utilize in the City. The overall identified number of locations that NextG has requested for an initial deployment and DoITT is aware that NextG has requested a deployment in Battery Park City over two years. NextG projects that it would utilize at a minimum several hundred poles and at a maximum several thousand poles under a franchise. The number of the poles would depend upon the coverage and capacity needs of NextG's customers.

3. **Zones to Bidders**

NextG has no objection to the poles in Zones A, B and C.

4. **Minimum Annual Zone Compensation**

NextG finds the City's requirement of a minimum annual Zone compensation is impermissible under the Telecommunications Act and declines to offer minimum compensation beyond that stated in the Proposal.

5. **Monthly Pole Compensation**

NextG has clearly stated its proposed pole attachment rates in the Proposal and declines to commit to the minimum compensation level requested by the City. NextG would prefer to construct its own poles in the public way rather than pay the rates the City requires for use of its poles.

6. **Escalation of Annual Pole Compensation**

NextG does not commit to an annual escalation in the per pole compensation equal to the CPI increase over the previous year, if any.

7. **Resubmission of Qualifying Bids**

For the reasons stated in ¶ 4 above, NextG declines to commit to resubmit a qualifying bid as requested.

8. **Zone Priority Ratings**

NextG declines to accept the priority rating system for Zone bids proposed by the City and believes such a scheme would violate applicable laws because it would not be competitively neutral.

9. **Commitment to Specify Pole Locations**

NextG will commit to specify pole locations that it intends to utilize in an commercially reasonable manner in its business model based upon signed customer agreements for long term service. NextG can typically provide such locations with sufficient specificity approximately 6-12 months prior to the commencement of service.

10. **Agreement to Commence Services**

For reasons already stated in this response, NextG declines to commit to the commencement of service as stated in the Proposal and instead proposes Zone priorities. NextG suggests that the City revert to the previous competing requests.

Resolution [illegible] set forth in the City's Cingular Mobile telecommunications franchise with Metricom.

If you have any questions, please do not hesitate to call me at (510) 845-9681.

Very truly yours,

Robert B. Delmont, Vice President, Governmental Relations & Regulatory Affairs

cc: [illegible]

Metricom, Inc. 21789 South Main Street, Suite 120, Milpitas, CA 95035 Telephone 408.719.8510 Fax 408.719.8560

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NEXTG NETWORKS OF NY, INC.
Plaintiff,

-against-

CITY OF NEW YORK, et al.,
Defendants.

----------X

Case No. 03 CIV 9672 (RMB)
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
s.s.:
COUNTY OF NEW YORK)

CONNIE ASARO, being duly sworn deposes and says that she is over the age of eighteen, is an employee of KEATING & WALKER ATTORNEY SERVICE, INC. and is not a party to this action.

That on the 7th day of May, 2004, deponent served a true copy of Attorney T. Scott Thompson's Affidavit in Support of Reply, Reply Affidavit of Robert L. Delsman and Plaintiff's Reply Memo of Law in Support upon Kristine D. Holden, Esq. at the City of New York Law Department, 100 Church Street, New York, New York
by personally delivering and leaving the same with a person of suitable age and discretion who informed deponent that he/she is authorized by Appointment to accept service at that address.

Connie Asaro

CONNIE ASARO #1126351

Sworn to before me this
7th day of May 2004.

John J. Walker

NOTARY PUBLIC

JOHN J. WALKER
Notary Public, State of New York
No. 41-4851557
Qualified in Queens County
Certificate Filed in New York County
Commission Expires Feb. 17, 2006

EXHIBIT 4

DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

The City of New York

75 Park Place, 9th Floor
New York, NY 10007
Phone (212) 788-6640
Fax (212) 788-7536
E-mail acangemi@doitt nyc gov

GINO P. MENCHINI
Commissioner
Chief Information Officer

AGOSTINO CANGEMI
Deputy Commissioner
Franchise Administration and Planning/General Counsel

April 30, 2004

VIA CERTIFIED MAIL and E-MAIL

Mr Robert L Delsman
Vice President of Government Relations
NextG Networks of NY, Inc
1759 South Main Street, Suite 128
Milpitas, CA 95035

Dear Mr Delsman

Thank you for responding to the New York City Department of Information Technology and Telecommunications ("DoITT") "Request for Proposals for Franchises for the Installation and Use, on City-owned Street Light Poles ["SLPs"], Traffic Light Poles ["TLPs"] and Highway Sign Support Poles ["HSSPs"], of Telecommunications Equipment and Facilities, Including Base Station and Access Point Facilities in Connection with the Provision of Mobile Telecommunications Services" issued on February 9, 2004 ("the RFP") DoITT also received a number of other responses, and in order to complete its evaluation of NextG Networks of NY, Inc 's ("NextG") response to the RFP, DoITT requires clarification of a few matters

DoITT requests clarifications to the following items in writing. NextG's response to this request is to be received by the agency contact person not later than 5 00PM on May 10, 2004.

In order to fully evaluate NextG's response under the criteria described in Section 5 of the RFP, DoITT is asking NextG to respond to the following item

1 A number of proposals presented multiple options for equipment to be installed on the poles, some of which fall within the design and technical parameters of the RFP, some of which do not <u>Please show how NextG will commit to meet the equipment specifications set forth in the RFP.</u>

In light of the proposals that have been received and in light of the finite number of poles available, to manage the allocation of SLPs, TLPs, and HSSPs (collectively referred to as "poles") the City has invited NextG to propose minimum compensations based on the following three zones

Zone A Manhattan South of 96th Street, inclusive,

Zone B All areas of the city not including Zones A or C,

Zone C New York City Community Districts where 5% or more of the occupied housing units do not have telephone service, according to the 2000 U S Census These

areas are Bronx Community Districts 1-7; Brooklyn Community Districts 3-5 and 16, and Manhattan Community Districts 10 and 11

To view these areas, NextG may wish to refer to the "City of Neighborhoods" interactive map found on the New York City Department of City Planning's website. http //www.nyc gov/html/dcp/html/neighbor/neigh html

In order to fully evaluate NextG's response under the criteria described in Sections 6 and 7 of the RFP, DoITT is asking NextG to·

2 Elaborate on NextG's business plan and provide an estimated number and location of poles that will be necessary to effectuate this business plan, if awarded a franchise A more detailed response will be required in item number 7 below

3 Select the specific Zone(s) in which it is interested in using poles

For Example:

Company 1 selects Zones A, B, and C
Company 2 selects Zones A, B, and C
Company 3 selects Zones A and B
Company 4 selects Zones B and C

4 Commit to pay a minimum annual Zone Compensation, should NextG be offered a franchise, that would be **in addition** to any per pole compensation, that would give NextG the opportunity to use poles according to the following structure, for the duration of the franchise agreement·

a $100,000 annually Opportunity to use poles in Zones A, B, and C,

b $50,000 annually Opportunity to use poles in Zones B and C;

c $10,000 annually Opportunity to use poles in Zone C only

Using the Example from #3 above:

Company 1 would pay a $100,000 annual Zone Compensation
Company 2 would pay a $100,000 annual Zone Compensation
Company 3 would pay a $100,000 annual Zone Compensation
Company 4 would pay a $50,000 annual Zone Compensation

5 Propose a monthly compensation it would be prepared to pay per pole in each Zone(s), commencing at the time any physical alteration is made to the pole or any structure is attached to the pole The minimum monthly bids as determined by the City are the following

a Zone A minimum bid of $250/pole/month

b Zone B minimum bid of $50/pole/month

c Zone C minimum bid of $10/pole/month

Bids for each Zone that do not meet the minimums will not be considered.

For Example:

Company 1 bids $250/pole/month for Zone A, $150 for B, and $10 for C.
Company 2 bids $500/pole/month for Zone A, $100 for B, and $15 for C

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Using the Example from #5 above:

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Zone A poles
1st priority--$500/pole (Company 2)
2nd priority--$350/pole (Company 3)
3rd priority--$250/pole (Company 1)

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1st priority--$150/pole (Company 1)
2nd priority--$100/pole (Company 2)
3rd priority--$60/pole (Company 3)

Zone C poles
1st priority--$20/pole (Company 4)
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For Example:

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To resolve the competing requests for the 50 poles, the Zone A priority numbers are used At the start of the franchise, Company 2 bid the highest for Zone A poles and obtained a 1st priority rating Company 3 bid the next highest in Zone A and received a 2nd priority rating Company 1 received a 3rd priority rating

Since Company 2 has a higher priority rating than Company 3, the other requesting company, it retains the ability to utilize the 50 commonly requested poles for a period of one year (or an alternative period agreed upon by the franchisees and DoITT) During this period, Company 3 may seek to find an equal or lesser number of substitute poles, in this case 50 poles, which do not conflict with any other franchisee's poles or poles reserved for the City If after the one year period, Company 2 has not yet started compensating the City for the use of any or all of the 50 poles, they are offered to the other companies in Zone A They are first offered to Company 3, as it has the next highest priority rating If it does not choose to utilize this option, or subsequently does not develop the sites after one year, the poles are offered to Company 1, which has the lowest priority rating in Zone A.

If instead of Companies 2 and 3 having competing requests, it were Companies 2 and 1, then the same process would be followed The commonly requested poles would first be offered to the requesting company with the highest priority number After a one year period, they would automatically be offered to the other companies in that Zone, in priority order

Please submit your responses to these ten (10) items in writing to me by 5 00PM on May 10, 2004 Please ensure that you have addressed all 10 items If NextG does not submit a written response, the Evaluation Committee shall consider NextG's proposal withdrawn from consideration.

Sincerely,

Agostino Cangemi
Deputy Commissioner/General Counsel
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New York, NY 10007
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Cc
Fernando DeGuia, Steve Galgano, Chris Montgomery, Bruce Regal
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