Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Rulemaking of Fibertech Networks, LLC	RM-11303

COMMENTS OF NEXTG NETWORKS, INC.

Robert L. Delsman
NEXTG NETWORKS, INC.
2216 O'Toole Ave.
San Jose, CA, 95131
(408) 954-1580
rdelsman@nextgnetworks.net

T. Scott Thompson
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750
(202) 452-0067 (fax)
sthompson@crblaw.com

Counsel for NextG Networks, Inc.

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COMMENTS OF NEXTG NETWORKS, INC.

Pursuant to the Public Notice released December 14, 2005 in the above-referenced Docket, NextG Networks, Inc. ("NextG") submits the following comments in support of the Petition For Rulemaking ("Petition") filed by Fibertech Networks, LLC ("Fibertech"). With these comments, NextG supports Fibertech's Petition for the initiation of a rulemaking addressing rates, terms, and conditions of pole attachment, and proposes that in such rulemaking, the Commission take this opportunity to address several other issues in addition to those specifically identified by Fibertech.

I. INTRODUCTION AND SUMMARY

NextG is a provider of cutting edge telecommunications services and networks that empower wireless providers to offer new broadband services and greater capacity and coverage for existing services. In order to facilitate the deployment of NextG's network, and those like it, NextG requires access to public rights-of-way and utility poles. NextG's comments support Fibertech's Petition on the grounds that NextG too has encountered many of the same problems with obtaining just, reasonable, and timely access to utility poles as Fibertech identifies. Indeed, NextG submits that the Commission has a sufficient record to warrant the inclusion of several other additional issues in the rulemaking. Specifically, NextG submits that the Commission should also adopt rules specifically

- Stating that the Commission's pole attachment rules apply to wireless attachments;
- Stating that the Commission's attachment rental rate formula applies to wireless attachments;

- Imposing a presumption that pole top attachments of wireless devices shall be permitted; and
- Imposing a presumption that equipment boxes shall be permitted to be attached in unusable space.

NextG also generally supports the rule changes and remedies proposed in the Reply Comments of T-Mobile, which were filed in the pole attachment rulemaking docket initiated by the recent petition of the United States Telecom Association (RM-11293). As set out below, the Commission has the opportunity at this time to take concrete steps to promote the rapid deployment of both competitive wireline and wireless networks and services.

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

NextG is at the cutting-edge of the provision of telecommunications services using advanced technologies and capabilities. At the most general level, NextG provides telecommunications services to wireless providers that enable those entities to provide next-generation broadband wireless services and offer greater coverage and capacity for existing services. NextG provides its service via a network architecture that uses fiber-optic cable and small antennas mounted in the public rights-of-way (ROW), on infrastructure such as utility poles, to provide telecommunications services to wireless providers. NextG's fiber-based telecommunications service allows its wireless provider customers the ability to increase capacity and bandwidth, which furthers their ability to provide the next generation of broadband wireless services and provide capacity to serve the increasing numbers of subscribers who rely on their wireless devices for communications of all forms. NextG's telecommunications service and network are currently utilized by both Commercial Mobile Radio Service ("CMRS") providers, and increasingly, wireless Internet Service Providers ("WISPs"), such as AOL.

A. NextG's Architecture And Service – The Movement Of Wireless Equipment Onto Utility Poles

As wireless providers seek to deploy the next generation of broadband wireless services, one of the central obstacles they face is the technical limitations of traditional "high site" antenna towers and local management of their placement. Traditional towers and rooftops may be reasonable solutions for providing low capacity, wide-area coverage (assuming the sites can be built or acquired where they are needed). As demand for capacity on the network grows, however, more and more sites must be added to the network so that the frequency spectrum that a particular operator owns can be re-used more often.[1]

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

In order to offer new broadband features and greater coverage, a new paradigm of wireless network construction is not necessary. In fact, the above-mentioned engineering

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

principles to improve capacity and coverage have existed for several decades. However, in order to accomplish these objectives, NextG has invented and developed a telecommunications service offering based entirely on "low" sites located on utility poles, for the most part in public rights-of-way.

B. NextG's Need To Access Utility Poles

As mentioned above, NextG's service requires a contiguous grid of closely spaced "low site" antennas at a height of approximately 25-50 feet. For this reason, existing utility poles, and other structures in the rights-of-way, are necessary (from both a technical and economic perspective) for the deployment of NextG's network. However, as its comments below demonstrate, NextG has faced numerous obstacles to the placement of its facilities on utility poles[2] – most of which appear to stem from the fact that some of the facilities which NextG seeks to install are "wireless." These barriers to entry have been erected by utility pole owners in disregard of NextG's rights to access utility poles as a telecommunications provider, even if some of the equipment will be "wireless" or wireless-related. By adopting the rulemaking proposed by Fibertech, as supplemented by NextG's proposals, the Commission would have the opportunity to address these access issues and in so doing, eliminate barriers to the deployment of new telecommunications services, as well as wireless or wireless-related broadband services and facilities.

While NextG's comments focus on its own experience, it is not alone in proposing to move wireless and wireless-related networks onto utility poles. Other providers, such as Clearlinx, Dianet, and Crown Castle Solutions, compete with NextG in the distributed antenna

[2] NextG has also encountered significant barriers to deployment in public rights-of-way. NextG has provided the Commission with comments on those issues previously in Dockets GN 04-163, and GN 04-54.

system ("DAS") arena. Moreover, in order to help facilitate the deployment of next generation, broadband services, wireless carriers, like Cingular, Verizon Wireless, T-Mobile, and Sprint-Nextel, are themselves beginning to explore placement of equipment down off of traditional towers and onto utility poles, as the Reply Comments of T-Mobile in *In re Petition of the United States Telecom Association*, RM-11293 ("USTA Petition") demonstrate.

III. THE COMMISSION SHOULD GRANT FIBERTECH'S PETITION AND IN SO DOING ALSO ADDRESS OTHER ISSUES FACED BY NEW ENTRANTS SEEKING ACCESS TO UTILITY POLES

Fibertech's Petition, combined with NextG's comments, and the comments of T-Mobile and Tropos Networks[3] in support of the USTA Petition, establish that there is a need for the Commission to adopt new rules addressing the pole attachment issues faced by CLECs and wireless telecommunications providers.

A. NextG Supports The Fibertech Petition And Has Faced Many Of The Same Problems Fibertech Identifies In Support Of The Need For New Rules

NextG supports Fibertech's Petition. Fibertech's submission presents the Commission with concrete evidence of issues and problems that are faced by Fibertech and other attaching entities. NextG also has had difficulties with pole owners on issues of survey and make-ready time periods and use of utility-approved contractors to perform survey and make-ready work. For example, in one case, NextG paid the utility for make ready work on fourteen (14) sites in July 2004. However, the utility refused or failed to perform the work until six (6) months later, and then only after contact from NextG's attorney. Again, this was for only fourteen poles – not

[3] NextG notes that unlike Tropos, NextG is a provider of telecommunications services and therefore explicitly protected under Section 224. NextG has received a certificate of public convenience and necessity ("CPCN") or other applicable certification/registration to provide various telecommunications services in twenty four states.

some project involving hundreds or thousands of poles. In the meantime, the utility refused to provide NextG any clear timeline for make ready.

NextG has also encountered *significant* delays in simply getting utilities to discuss attachment. Too often, pole owners have claimed that they do not have a "wireless" attachment agreement or construction standard, and so they will not respond to NextG's request for access until the utility develops one. This usually takes several months or even years, and in more than one situation, the utility has still not provided the wireless-specific exhibits to the form agreement more than *two years* after NextG initially contacted the utilities.

The Commission should make clear that the attachment of an antenna is not the opportunity for a pole owner to invent a whole new attachment regime. Delays like those encountered by NextG, Fibertech, and others are delaying the deployment of competitive networks and services. Indeed, pole owners are potential competitors of NextG and T-Mobile and others. ILECs clearly are competing with NextG and wireless providers, and many electric utilities have started to enter the telecommunications market. As a result, these entities' behavior with respect to their poles has potentially significant anticompetitive consequences.

B. The Commission Should Address Additional Issues Unique To Wireless Pole Attachments

The Commission now has before it a record demonstrating the need for more explicit and stringent rules protecting the rights of telecommunications providers that include wireless devices in their network to just, reasonable, and nondiscriminatory pole access. As noted above, T-Mobile set forth several specific proposals in its comments in the USTA Petition docket. T-Mobile explained some of the problems and abuses that it has encountered from pole owners and how those abuses are restricting T-Mobile's deployment of new facilities for new services and

enhanced reliability and coverage of current services. NextG has encountered the same problems as T-Mobile describes and generally supports T-Mobile's proposed solutions.

1. The Commission Should Adopt Rules Codifying The Rights Of Wireless Attachments

There can and should be no debate regarding the fundamental right to protection under Section 224 of the Communications Act, 47 U.S.C. § 224, of telecommunications providers using wireless technologies. The Commission reached that conclusion in *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rule and Policies Governing Pole Attachments,* Report and Order, 13 FCC Rcd 6777, 6798-99 ¶¶39-41 (1998) ("1998 Order"), and the Supreme Court of the United States explicitly confirmed that Section 224's protections extend to wireless attachments. *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 340-41 (2002). Yet, as T-Mobile explained, pole owners stubbornly fight against third party wireless attachments.[4] NextG has encountered precisely the same problem. NextG continues to face assertions by utility pole owners that while NextG's fiber attachments are protected by Section 224, any wireless devices are "unregulated" attachments on which the utility can impose whatever rates, terms, and conditions it chooses. Even though the Supreme Court has confirmed Section 224's application, these utilities point to the absence of Commission rules as somehow demonstrating that wireless equipment attachments are "unregulated" and therefore open to unfettered discretion and abuse. NextG respectfully submits that the Commission should use this opportunity to promote the deployment of the next generation of wireless networks by adopting rules explicitly recognizing and protecting wireless attachments, as set forth below and in T-Mobile's comments (the issues

[4] NextG has encountered utilities who have no problem with attaching their own wireless devices, or those of the utility's competitive-entry subsidiaries, but still baulk at NextG's attachment of wireless devices and equipment boxes.

raised in Fibertech's Petition will also aid wireless attachments). In addition, the Commission should be aware that the same dilemma faces NextG and other attaching entities at the state level, where in many cases state commissions have certified to the FCC that they have exercised reverse federal preemption under Section 224 but have failed to issue rules addressing the attachment of wireless devices and related equipment. This situation leaves the entity seeking attachment in a sort of limbo without recourse either at the state commission level or at the FCC. Therefore, in addition to providing needed relief, certainty, and stability in states within the Commission's jurisdiction, the FCC's rule could serve as a useful model for state commissions that have certified their authority under Section 224 but have thus far failed to address wireless attachments.

2. The Commission Should Adopt Rules Prohibiting Pole Owners From Charging Pole Attachment Rental Rates In Excess Of Historic Costs

An issue alluded to in T-Mobile's comments that NextG believes deserves full attention by the Commission is the rates charged by utility pole owners for wireless attachments.[5] Consistent with utilities' assertions that wireless attachments are not regulated, NextG has encountered demands for annual rental that far exceed fair and reasonable rates based on historic costs, as the Commission's rental formulas would impose. Indeed, the demands of some utilities are simply shocking. Where under the Commission's formula the maximum annual rate for one foot of space for telecommunications attachments might be approximately $10 to $15 per year, NextG has faced demands for rentals of as much as $500 *per month*, and NextG is aware of demands for annual rental for wireless attachments that are as high as $1,000 *per month*. Given that a utility's net cost per bare pole may be as low as less than $100 and generally well below

[5] T-Mobile comments at 7.

$500, it is clear that utilities seeking hundreds of dollars per month or even per year are engaged in patent monopoly pricing in violation of Section 224.[6]

Reinforcing the need for the Pole Act's rate regulation, NextG could install its own utility pole for less than paying some of the utilities' demands. However, state and local government officials generally either outright prohibit the installation of new utility poles or would vehemently oppose their installation. Accordingly, what the utilities are doing is leveraging their monopoly right to own utility poles. Section 224 was adopted precisely to prohibit such abuse.

Accordingly, NextG urges the Commission to adopt rules specifically confirming and clarifying that pole owners may not charge annual rental rates for wireless devices in excess of the maximum rate that would apply using the Commission's telecom attachment formula.

NextG notes that the Commission's telecom attachment formula, 47 C.F.R. § 1.1409(e)(2), applies to "attachments to poles by ***any telecommunications carrier***. . . ." (Emphasis added). As the Supreme Court has confirmed, the use of wireless devices as part of the provision of telecommunications services does not take the attachment out of the scope of Section 224 or the Commission's rules. *Gulf Power*, 534 U.S. at 340-41. Nonetheless, as noted above and in the comments of T-Mobile pole owners persist in asserting that the attachment of wireless devices is "not regulated," and NextG is encountering demands for rent far in excess of any application of the Commission's rules (indeed, some far in excess of the net cost of the bare pole).

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[6] For example, looking at two recent Commission pole rate cases in which the net cost per bare pole was calculated demonstrates that $500 per month, or even per year, would recover far in excess of even the utility's investment in the bare pole. In *RCN Telecom Svc. of Philadelphia, Inc. v. PECO Energy Co.*, 17 FCC Rcd. 25,238 (Enf. Bur. 2002), the Bureau calculated PECO's net cost per bare pole to be only **$40.84**. In *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 16 FCC Rcd. 20, 238 (Cable Svc. Bur. 2001), the Bureau calculated Georgia Power's net cost per bare pole to be only **$198.72**.

Accordingly, NextG respectfully submits that the Commission should adopt rules explicitly stating that the Commission's rental rate formula applies to the attachment of wireless devices. While NextG believes it is clear that the rules already apply,[7] lack of an explicit statement in the rules is leading to conflict in the field, which in turn is delaying NextG's competitive deployment. By providing clarity on this point, the Commission can prevent unnecessary escalation of disputes over this issue to the Commission's formal process – thus providing greater certainty and speed to market for NextG and reducing the litigation burden on the Commission's resources.

3. The Commission Should Adopt Rules Establishing A Presumption Allowing Pole Top Attachments

A significant issue for wireless attachments is the opportunity for placement at the top of the pole. In the case of the wireless devices incorporated into NextG's network, there are numerous reasons supporting the placement of the antennas on top of poles. Pole top placement provides greater coverage by the simple fact that it is significantly higher, usually approximately 15 to 20 feet higher, than otherwise would be possible (which also reduces the number of antennas needed). This is an important increment for low-site wireless devices. In addition, pole top placement is more aesthetically acceptable to local government and resident concerns.

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[7] In its 1998 Report & Order adopting telecom attachment rate regulations, the Commission recognized the application of the rental formula to wireless attachments, but noted that certain presumptions, such as the presumption that an attachment occupies one foot of useable space, could be rebutted in a particular situation. *1998 Order*, 13 FCC Rcd. 6777 ¶ 42. NextG believes that the different types and sizes of wireless attachment encourage such an approach. In many instances, the wireless device may not use any more than the presumed one foot of space. Depending on the carrier and its technology choices, other attachments may use more than one foot of space. The Commission should explicitly state that the formula and its presumptions apply, but that in individual cases, actual useable space occupied and similar facts may rebut some of the presumptions. However, the fundamental formula, and its historic cost approach must apply. *See* 47 U.S.C. § 224(e) (mandating rental rates based on costs).

The Wireless Bureau has reminded pole owners that pole top attachments cannot be categorically prohibited. *Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates,* DA 04-4046 (rel. Dec. 23, 2004) ("2004 Wireless Public Notice"). Specifically, in the Public Notice, the Bureau stated:

> we take this opportunity to reiterate that the Commission declined, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, *Order on Reconsideration*, 14 FCC Rcd 18049, 18074 ¶ 72 (1999), to establish a presumption that space above what has traditionally been referred to as "communications space" on a pole may be reserved for utility use only. Thus, the only recognized limits to access for antenna placement by wireless telecommunications carriers are those contained in the statute: "where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2).

In spite of this notice, many utilities continue to resist pole top placement. The utilities prohibiting pole top placement that NextG has dealt with have not identified safety, capacity, or engineering issues as grounds for denying access to pole tops, as they could not;[8] rather, they have simply adopted a corporate policy disallowing it.

The effects of such access policies by utilities are far reaching. For example, in order to permit antenna attachment in the so-called "communications space," at least one utility has sought to require the installation of **10 foot** cross arms (five feet on each side). While antennas on top of poles are aesthetically unobtrusive, cross-arm requirements create installations that raise aesthetic objections from the public and municipal officials. So, in addition to adding

[8] NextG believes that there are no legitimate engineering or safety issues with placing antennas at the top of poles. So long as the contractors used are properly trained, which they are, the mere fact that they must be in proximity to power facilities raises no greater safety concerns than when work is done on the power company's own facilities.

unnecessary cost, the demands of utilities are making it difficult or impossible to satisfy the demands and requirements of local officials.

Based on the refusal of utilities to heed the Commission's Public Notice and holding in its 1999 Order, NextG respectfully submits that the Commission should adopt a specific, explicit rule establishing a presumption that pole top attachments for wireless devices are allowed. To rebut the presumption, a pole owner should be required to obtain an order from the Commission based on conclusive evidence of insufficient capacity or safety, reliability, and generally applicable engineering purposes that cannot be remedied through make ready, pole expansion or change out at the attaching party's expense, or other engineering solutions that are acceptable under generally applicable engineering or safety standards. The rule should state that the internal policy of a utility cannot be the basis for denying a pole top attachment.

4. The Commission Should Adopt Rules Permitting Installation Of Equipment In Unusable Space

Another example of utility abuse concerns attachment of equipment to poles. More than one utility has refused to allow NextG to attach its fairly small equipment boxes to the side of poles. There is no safety or engineering basis for the refusal. Indeed, the refusal persists despite the fact that the utility has installed similar equipment of its own on the poles – including wireless equipment for use in remote meter reading. (Needless to say, the utility's own wireless antennas are not being installed on cross arms). In addition, it has been standard industry practice to attach equipment to poles, particularly in the unusable space. ILECs and cable operators historically have attached equipment boxes of various size and purpose. Verizon, notably, has recently attached equipment boxes – that are substantially larger than anything NextG proposes – to utility poles as part of its fiber optic build out.

The Commission has recognized that it is standard industry practice to attach such equipment boxes, and that equipment located in unusable space is excluded from the one foot allocation. *See, e.g., Texas Cablevision Co., et al. v. Southwestern Elec. Power Co.*, 1985 FCC LEXIS 3818, ¶ 6 (1985)("[I]n adopting a standard one foot for space deemed occupied by the cable itself, the Commission not only included that space occupied by the cable itself, but also the space **associated with any equipment normally required** by the presence of the cable television attachment. . . . Moreover, to the extent that this ancillary equipment may occupy the 18-28 feet designated as "ground clearance," which by definition is excluded from the usable space, it is deemed to be omitted from any measurements" (emphasis added)); 2004 Wireless Public Notice (stating that "[i]n *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rule and Policies Governing Pole Attachments,* Report and Order, 13 FCC Rcd 6777, 6798-99 ¶¶39-41 (1998), the Commission determined that wireless telecommunications providers are entitled to the benefits and protections of section 224 for the attachment to utility poles of antennas or antenna clusters **and associated equipment.**" (emphasis added)); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 ¶ 1123 (1996) ("Pursuant to section 224(f)(1), a utility must grant telecommunications carriers and cable operators nondiscriminatory access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility. This directive seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable **equipment** by those seeking to compete in those fields." (emphasis added)(internal footnotes excluded)).

NextG respectfully submits, therefore, that the Commission should adopt a specific rule establishing a presumption that equipment related to telecommunications attachments is allowed on utility poles. To rebut the presumption, a pole owner should be required to obtain an order from the Commission based on conclusive evidence of insufficient capacity, or safety, reliability, and generally applicable engineering purposes that cannot be remedied through engineering solutions that are acceptable under generally applicable engineering or safety standards. The rule should provide that the internal policy of a utility cannot be the basis for denying equipment attachment.

IV. CONCLUSION

Based on the foregoing comments, as well as other comments submitted in this docket and the parallel USTA Petition docket, the record before the Commission "discloses sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding." 47 C.F.R. § 1.407. Accordingly, NextG respectfully submits that the Commission should initiate a rulemaking addressing the issues raised by Fibertech's Petition, by T-Mobile's comments, and by NextG's comments above. NextG suggests that the timing is right for such an action by the Commission to bring about the most benefit for consumers, providers, and the public. NextG suggests that the Commission address in this rulemaking, the issues raised by Fibertech, NextG, and T-Mobile, but that the discreet legal issue of ILEC rights raised in USTA's Petition should remain separate.

Respectfully Submitted,

T. Scott Thompson
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750
(202) 452-0067 (fax)
sthompson@crblaw.com

Counsel for NextG Networks, Inc.

Robert L. Delsman
NEXTG NETWORKS, INC.
2216 O'Toole Ave.
San Jose, CA, 95131
(408) 954-1580
rdelsman@nextgnetworks.net

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