Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks	EB Docket No. 06-119 WC Docket No. 06-63

To: The Commission

NEXTG NETWORKS, INC.
REQUEST FOR PARTIAL STAY
OF COMMISSION'S BACK UP POWER RULE

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I. INTRODUCTION AND SUMMARY

NextG Networks, Inc., on behalf of its operating subsidiaries, NextG Networks of NY, Inc., NextG Networks of California, Inc., NextG Networks Atlantic, Inc., and NextG Networks of Illinois, Inc., (collectively "NextG"), and pursuant to Section 1.43 of the Commission's rules[1] hereby submits this Request for Stay of the effectiveness of the new backup power rule for cell sites adopted in the FCC's June 8, 2007 Katrina Panel order, codified at 47 C.F.R. § 12.2 ("the Rule "), at least to the extent applicable to NextG's Distributed Antenna Systems ("DAS"), if at all. [2]

As demonstrated in this request, good cause exists for immediate Commission action to temporarily stay the backup power Rule in order to provide the Commission time to address the application of the Rule to DAS Networks without causing irreparable harm to NextG and the public during the Commission's consideration. The standard of review for stay requests requires the Commission to consider (1) the likelihood that the moving party will prevail on the merits of its case, (2) the prospect of irreparable injury to the moving party if relief is withheld, (3) the possibility of substantial harm to other parties if relief is granted, and (4) whether the grant of a stay is the public interest.[3] A stay is warranted here to provide the Commission time to address issues regarding the scope and applicability of the Rule as raised in NextG's Petition For Clarification Or In The Alternative Reconsideration ("Petition For Clarification").[4] Absent a

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[1] 47 C.F.R. § 1.43.

[2] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order, FCC 07-107, ¶ 77 (rel. June 8, 2007) (hereinafter"Order").

[3] *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (DC Cir. 1977).

[4] Pursuant to the Commission's rules this request is being filed separately from the"Petition for Clarification Or In The Alternative Reconsideration" that will also be filed by NextG. 47 C.F.R. § 1.44(e).

stay while the Commission considers the Petition For Clarification, NextG risks suffering irreparable harm. In contrast, limited if any harm would come from staying the backup power Rule to give the Commission time to evaluate and act on the Petition For Clarification. While NextG believes that the Rule does not apply to it or its DAS Networks, implementation of the Rule so as to apply to NextG on August 10, 2007 would threaten the public interest in the prompt deployment of advanced wireless services and in greater wireless coverage. Accordingly a stay is warranted and in the public interest while the Commission considers NextG's Petition For Clarification.

II. BACKGROUND

A. DAS Technology And Its Beneficial Uses

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 the next generation in wireless voice and broadband 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 lamp posts and 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. NextG's telecommunications service and network are currently utilized by both CMRS providers, and, to a lesser extent, wireless Internet Service Providers ("WISPs"). Thus, NextG's experience and the architecture and services deployed by NextG are simultaneously at both the core and the cutting edge of the wireless industry.

The architecture of NextG's DAS facilities consists of fiber optic lines leading to and connecting various equipment and antennas at remote locations called "Nodes," with a central

"hub," typically located in a building on private property. In order to construct its DAS networks, NextG must have access to poles in the public rights-of-way (utility poles, streetlight poles, or traffic signal poles. NextG installs its fiber optic lines either underground, in conduits, or aerially on poles. However, it must install its Node equipment (antennae and related equipment boxes) on poles. NextG uses either poles owned by the local utility company or poles owned by the municipality, or a combination of both. In some situations, NextG may even install its own pole in an existing utility corridor.

As wireless providers seek to deploy the next generation of wireless services, including broadband, AWS, and 700 MHz, one of the central obstacles they face is the technical and practical limitations of traditional "high site" antenna towers and local management of their placement. Traditional towers and rooftops may be good 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 spectrum frequencies that a particular operator is licenses for can be re-used more often.[5] Deployment of new sites is by no means an easy matter. Resistant local authorities and the cost and availability of locations, among other things, are significant impediments to the prompt roll out of new sites.

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

[5] 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.

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 continued deployment of wireless services.

NextG has developed a telecommunications service offering based entirely on low sites. Specifically, NextG uses fiber-optic cable and small antennas mounted in the public right-of-way, on infrastructure such as lamp posts and utility poles. Using this fiber network and right-of-way infrastructure, NextG has effectively "split" a traditional cell site, keeping only the necessary pieces in the remote antenna location, and allowing the rest of the equipment to be placed in a centralized facility. NextG believes that this method of splitting and sharing is a vital and important engineering advance that economizes and maximizes use of spectrum. More efficient use of spectrum means that higher bandwidth services can be delivered, build-out of existing spectrum allocations is significantly increased for greater coverage, and wireless network capacity is increased resulting in fewer dropped calls. This is the wireless spectrum-maximizing technology of DAS facilities.

Because of the practical and technical benefits, DAS is also proving critical in the roll out of networks by new AWS entrants and could prove important to support build out of facilities after the upcoming 700 MHz auction. Difficulty obtaining sites and zoning for traditional macro cell deployments has lead some new entrants to choose DAS as the vehicle to facilitate their timely roll out in competition with existing carriers. Similarly, NextG's DAS networks could be

instrumental if the Commission adopts some of the shorter roll out requirements currently being contemplated as conditions of the upcoming 700 MHz auction.

B. How NextG's DAS Networks Are Powered

The power configuration supporting NextG's DAS facilities provides for commercial power to be delivered to Nodes in one of three ways. In the case of utility poles, NextG obtains commercial power from a secondary drop. In the case of streetlights, NextG connects power directly to the commercial power at the pole. Finally, in some cases, NextG installs a low AC voltage feed to a Node from a remote supply power distribution point, which is effective for distances up to approximately one mile.[6]

NextG's Nodes supporting wireless antennas are connected to a NextG hub from which telecommunications traffic is routed to the PSTN or out to offer nodes. The NextG hub is either powered from a carrier-customer's power plant, or NextG's installs its own commercial power service. If a Node loses power, the NextG network operations center will receive notification of the power outage and NextG will immediately contact its carrier customer and open a trouble ticket.[7] A very limited amount of back up power is currently used by NextG. Greater than 50% of NextG's Node sites do not currently have any form of battery back up. Those that do typically have a 1-hour battery back-up solution installed. At the hubs, the majority of NextG's hub racks are powered with DC power from the carrier-customer's power plant, which at a minimum has battery back up and in many cases has generator back up. In a few systems, NextG runs its hub racks from AC power, but NextG uses commercial UPC units to provide back up for the host racks.[8]

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[6] Declaration of David Cutrer at ¶ 10 (attached as Exhibit 1 hereto).

[7] Cutrer Declaration at ¶ 10.

[8] Cutrer Declaration at ¶ 10.

C. Application Of The Rule To NextG Would Thwart The Deployment Of DAS And The Technologies And Services It Supports

While the benefits of deploying DAS facilities are important to increasing the capacity, coverage, and robustness of CMRS networks, DAS Nodes on utility poles cannot accommodate eight hour backup power units for several reasons. First, the nature of DAS networks requires the deployment of many (from tens to thousands depending on the network) of Nodes. Thus, the cost of deploying eight hour backup power equipment for DAS would be significantly higher than technologies requiring fewer sites. Second, the placement of DAS Nodes on utility poles may leave inadequate ground room or structural support for backup power generators capable of providing eight hours of power. Third, many rules and restrictions imposed by cities or pole owners would make it legally impossible for NextG to place its Nodes if NextG were also required to place large power generators or batteries at every Node. NextG's DAS networks improve wireless communications partly because they are less obtrusive to neighborhoods than lattice-structure antenna towers, allowing deployment deeper into neighborhoods and urban environments. The application of an eight hour backup power rule to DAS facilities could significantly undermine, if not effectively end DAS deployments and deprive the public of micro-cell technology with the potential to greatly improve cellular capacity coverage.

As a result of the costs and practical limitations of backup power deployment on existing and new DAS facilities, the Rule, if it applies to DAS Nodes, would have a potentially significant negative impact on NextG specifically, and would have the unforeseen consequence of slowing deployment of advanced wireless services, preventing wireless services from reaching all Americans, and thus diminishing wireless E911 coverage. In light of this, NextG respectfully requests a stay of the eight hour cell site backup power rule in general, and particularly as applied to DAS networks.

III. IF THE RULE APPLIES, NEXTG WOULD BE AT SUBSTANTIAL RISK OF IMMEDIATE NON-COMPLIANCE

NextG will shortly be filing its Petition For Clarification in which it will ask the Commission to clarify that the Rule does not apply to NextG's DAS Nodes because the Nodes are not "cell sites" within the meaning of the Rule. In the alternative, NextG will ask the Commission to reconsider the Rule to the extent that it applies to DAS Nodes on the grounds that, as summarized above, application of the Rule would have unintended negative consequences for the Commission's overall public policy goals and on new entrants, like NextG. As discussed above, the requested stay is necessary to avoid significant risks and irreparable harms to NextG that will result if the Rule applies to NextG because NextG will not be able to comply initially and possibly ever.

First, absent a stay NextG will be immediately out of compliance with the Commission's Rule, as none of its Nodes currently have eight hours of backup power, and it would be impossible for NextG to deploy such backup power to its existing Nodes in time to meet the August 10, 2007 effective date of the backup power rule. A very limited amount of back up power is currently deployed by NextG.[9] Greater than 50% of NextG's Node sites do not currently have any form of battery back up.[10] Those that do typically have a 1-hour battery back-up solution installed.[11] At the hubs, the majority of NextG's hub racks are powered with DC power from the operator's power plant, which at a minimum has battery back up and in many cases has generator back up. In a few systems, NextG runs its hub racks from AC power, but NextG uses commercial UPC units to provide back up for the host racks.[12] NextG cannot under

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[9] Cutrer Declaration at ¶ 12.

[10] *Id.*

[11] *Id.*

[12] *Id.*

any circumstance have eight-hour backup power for all its Nodes before the effective date of the Rule.

Second, under threat of shut down of its business, NextG would lose the ability to keep its existing CMRS customers and attract new customers willing to use NextG's DAS network technology to expand wireless coverage.[13] The mere threat of being non-compliant with the Commission's rules, even if only for a short period while NextG's Petition for Clarification is considered, will injure NextG's customer goodwill and reputation, perhaps permanently. NextG will not be able to recover from this loss even if the backup power rule is overturned in the future. Third, should NextG attempt to invest the millions of dollars it estimates would be required to bring its Nodes into compliance,[14] it will be unable to recover that lost money if and when the Commission clarifies or reconsiders the Rule.

It would be impossible, either economically or practically (or both), for NextG to install eight hour backup power sources at every Node on its DAS networks. NextG's initial research indicates that an eight hour backup power source for its particular Nodes would weigh at least three hundred fifty pounds and would require an equipment box measuring over four and a half feet high.[15] The size and weight of these equipment cabinets would, in NextG's experience, significantly deter, if not outright prohibit, NextG's ability to deploy its DAS networks. Even if it were practically and legally feasible, the cost to NextG of physically deploying eight hour backup power sources at its DAS Nodes would be substantial, and in practical effect may render NextG's Network service less useful or unattractive to wireless carriers.[16] Furthermore, the legal costs NextG would incur battling pole owning utilities and municipalities over the installation of

[13] Declaration of Robert L. Delsman ¶ 15 (attached as Exhibit 2 hereto).
[14] Delsman Declaration at ¶ 14.
[15] Delsman Declaration at ¶ 4.
[16] Delsman Declaration at ¶ 5.

backup power facilities on or near poles (in many cases prohibited by both the NESC and local zoning ordinances) would make it infeasible for NextG to continue to do business.[17] Moreover, lack of FCC compliance may put NextG in jeopardy of breaching loan covenants.

NextG will face significant resistance from utility pole owners who will seek to prohibit the installation of equipment boxes of such size and weight.[18] For each Node on NextG's networks, it must install associated equipment. Those equipment boxes are typically very small, particularly in comparison to the battery back up cabinets. For example, in Los Angeles County, NextG is deploying equipment boxes that are approximately 24 inches tall, 6 inches wide, and 6 inches deep. Nonetheless, NextG frequently encounters resistance from utility pole owners regarding the attachment of even such small boxes.[19] Indeed, some utility companies purport to prohibit the attachment of any equipment boxes of any kind to their poles.[20] NextG can realistically expect to face significant opposition from pole owners to the attachment of back up power equipment of such size. Indeed, there may be legitimate engineering concerns regarding the attachment of equipment of such size and weight to existing poles. Many poles may be structurally incapable of accommodating such equipment, or may require costly and time consuming make-ready, at a minimum. In addition, many of NextG's Nodes are deployed on street light poles in urban locations.[21] Street light and traffic signal poles are not strong enough to hold equipment of the size and weight required to accommodate 8 hour back up power.[22]

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[17] Delsman Declaration at ¶ 14.
[18] Delsman Declaration at ¶ 11.
[19] Delsman Declaration at ¶ 6.
[20] Delsman Declaration at ¶ 6.
[21] Delsman Declaration at ¶ 12.
[22] Delsman Declaration at ¶ 12.

The option of placing these power supplies on the ground next to utility poles would face significant opposition and as a practical matter would be difficult or impossible. Local government zoning codes would be a barrier to these deployments whether on the pole or on the ground. For instance, many local government zoning ordinances allow cities to reject placement of communications equipment in rights of way for wholly subjective, discretionary, aesthetic reasons, and large backup power boxes would almost certainly be rejected.[23]

Some Cities have very specific equipment size and weight limitations that would preclude the installation of back up power equipment. For example, the City of New York has adopted regulations that permit equipment boxes that are only 13 inches by 9 inches by 4 inches. The City 's regulations will allow an equipment box with a volume of no greater than 2.8 cubic feet, with a maximum width of 18 inches only upon a demonstration of an "operational need" to the City 's satisfaction.[24] It would be impossible for NextG, or anyone, to install back up power equipment in the public rights of way within the parameters of the New York City regulations.[25]

In addition, as most batteries contain lead they may be a hazardous material under CERCLA [26] as well as raising potential violations of other environmental regulations, which would cause even greater expense to NextG. Experience indicates that the placement of large industrial boxes along roadsides would face backlash from local government and residents.

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[23] *See, e.g., Sprint Telephony PCS, L.P. v. County of San Diego* (9th Cir. 2007).

[24] *See, e.g.,* City of New York Department of Information Technology and Telecommunications, Request for Proposals For Franchises For The Installation And Use, On City-Owned Street Light Poles, Traffic Light Poles, Highway Sign Support Poles And Certain Utility Poles Located On City Streets, Of Telecommunications Equipment And Facilities, Including Base Station And Access Point Facilities, In Connection With The Provision Of Mobile Telecommunications Services, § 5(a) (released July 19, 2007).

[25] NextG has also been involved in a multi-year lawsuit with the City regarding the City's barriers to NextG 's entry in violation of Section 253 of the Communications Act.

[26] 40 C.F.R. § 302.4; Gould, *Inc. v. A & M Battery & Tire Serv.*, 232 F.3d 162, 167 (3rd Cir. 2000); *Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 411 (4th Cir. 1999).

Both New York City and San Francisco have fought NextG's efforts to deploy its current minimally invasive small antennas on utility poles, the latter complaining that NextG would "blanket the state's utility poles" with its DAS antennas[27] and the former subjecting NextG to unreasonable delay and restrictions for antenna placement.[28] The Commission did not have a record of this information to consider at the time it adopted the eight hour backup power rule for cell sites, and given the public interest harm that would result from making DAS deployment impossible, this new information must be considered now.

Finally, the cost of installing eight hour back up power would be prohibitive. NextG estimates that the costs of pedestal-mounting batteries sufficient to provide eight hour power back up would be at least $25,000 per Node.[29] Such a burden would severely disadvantage NextG and quite possibly cost it its business.[30]

IV. THE CELL SITE BACKUP POWER RULE MUST BE STAYED PENDING COMMISSION REVIEW OF THE PETITION FOR CLARIFICATION

The standard for a stay is well-established.[31] As demonstrated herein, consideration of each of the four factors supports the issuance of a stay pending the Commission's consideration of NextG 's Petition for Clarification.

A. NextG is Likely to Succeed on the Merits

NextG's Petition will demonstrate that DAS Nodes are not "cell sites" within the meaning of the Rule. DAS Nodes do not include a base station at each location, as is typically

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[27] City of San Francisco's Opening Brief at 16, *San Francisco v. NextG Networks*, Complaint 05-03-010, California Public Utility Commission (Complaint filed March 9, 2005).

[28] *See* Opening Brief of NextG Networks at 10-11, *NextG Networks v. City of New York*, US Court of Appeals for the Second Circuit, 06-5696-CV (filed March 28, 2007).

[29] Cutrer Declaration at ¶ 15.

[30] Delsman Declaration at ¶¶ 14, 15.

[31] *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc*., 559 F.2d 841 (D.C. Cir. 1977).

part of a "cell site." In the alternative, if the Rule is deemed to apply to DAS Nodes, NextG's Petition will establish that tthe Commission should either remove or clarify the eight hour backup power rule as applied to NextG's DAS Nodes because the overwhelming public interest demands it. As discussed below, without a stay of the rule, DAS deployments would be derailed, harming communications service deployment generally, reducing E911 coverage, hurting broadband deployment, reducing wireless spectrum efficiency, damaging the homeland security goal of promoting redundant networks, and hurting deployment of services to underserved demographics. Standing alone, each of these public interest justifications for reconsideration might outweigh the benefit of having eight hours of back up power for catastrophic, one-time events. Collectively, they make the case overwhelmingly that the public interest requires that the eight hour backup power rule not apply to NextG's DAS Nodes.

Furthermore, NextG is likely to succeed on the merits of its Petition for Clarification because there was inadequate notice and because there was no public record supporting the rule. The NPRM did not give notice to interested parties and those that would be significantly affected – like NextG – that the Commission might adopt back up power requirements for each individual cell site location. Moreover, there was no notice that a backup power requirement as long as eight hours might be adopted. Had either been proposed, NextG could have provided the Commission with additional information to the effect that it now does.

Both the Katrina Panel recommendations[32] and the NPRM[33] refer generally to the Network Reliability and Interoperability Council (NRIC) best practices. However, the NRIC

[32] Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Report and Recommendations to the Federal Communications Commission*, p. 39 (June 12, 2006).

[33] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Notice of Proposed Rulemaking, FCC 06-83, ¶ 16 (rel. June 19, 2006).

best practices do not mention a specific amount of time that backup power should be provided, much less eight hours.[34] Furthermore, the NRIC standards only recommend that backup power should be available on site at "critical" locations "when appropriate," thus recognizing not every site will and should have backup power.[35] Given this lack of adequate notice that an eight hour backup rule at cell sites would be adopted, NextG is likely to prevail on the merits of its Petition for Clarification.

In addition, the record does not support the Commission's apparent conclusion that an eight hour back up power requirement at every cell site is warranted. The comments relied on by the Commission reveal that there was not a specific suggestion for an 8 hour backup power requirement at cell sites in the record. NextG can find no comment or other evidence in the record addressing or suggesting eight hours as an appropriate standard and the *Katrina Order* cites none. Indeed, NextG's initial review indicates that no party suggested the backup power requirement be implemented with such specific granularity. At most, the FCC cites the National Emergency Number Association (NENA) comments on backup power. NENA does advocate in favor of the NRIC Recommendation 7-7-5204, released in the 2005 Report.[36] However, the NRIC Recommendation is vague and meant to apply to all communications service providers, and as noted, specifically provides that backup power generators should be located on site "when

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[34] *See* Network Reliability and Interoperability Council, Focus Group 1C, *Analysis of the Effectiveness of Best Practices Aimed at E911 and Public Safety*, Final Report, p. 59 (December 2005) (Standard 7-7-5204 states "Service Providers, Network Operators and Property Managers should ensure availability of emergency / backup power (*e.g.*, batteries, generators, fuel cells) to maintain critical communications services during times of commercial power failures, including natural and manmade occurrences (*e.g.*, earthquakes, floods, fires, power brown / blackouts, terrorism). The emergency / backup power generators should be located onsite, where appropriate").

[35] *Id.*

[36] Comments of NENA, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, EB Docket 06-119, p. 6 (filed August 7, 2006).

appropriate," -- a flexible standard. There is nothing in the record addressing: the different back up power options; their costs; their size; the legal, practical or engineering limitations of different options; their availability; the regulatory limitations or their deployment; industry standards; or any other relevant issue.

The Commission's discussion of and justification for the rule in the Order is extremely limited. The Commission merely asserts that some commenters, including the NENA and St. Tammany's Parish Communications District 1, emphasized the need for carriers to have backup power.[37] Without discussion, the Commission concludes that it will require backup power in the amounts set forth in the rule. The Commission stated that its "expectation is that this requirement will not create an undue burden since several reported in their comments that they already maintain emergency back-up power."[38] However, the Commission reached this conclusion with no record regarding how many current cell sites have eight hour backup power, if any, or what cost and time would be required for companies to come into compliance with the new rule, if they can at all. NextG's has now demonstrated that, in fact, many antenna locations do not currently have eight hour back up power.

B. NextG Will Suffer Irreparable Harm Absent A Stay

In resolving whether to grant a petition to stay an order, the Commission considers the four prong test as established by the U.S. Court of Appeals for the District of Columbia.[39] Of all

[37] Order at ¶ 76.

[38] Order at ¶ 78.

[39] *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958) Specifically, the Commission will grant a stay where the movant proves that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) no substantial harm to other interested parties will result; and (4) a grant of the stay is in the public interest.

the factors considered, irreparable harm has been viewed as the most important.[40] Irreparable injury exists where monetary damages are difficult to calculate or inadequate to compensate the moving party.[41] Moreover, the potential loss of customers or goodwill is sufficient to constitute irreparable injury.[42] While economic loss, by itself, does not satisfy the requirement of irreparable harm,[43] courts agree that the danger of unrecoverable economic loss qualifies as irreparable injury.[44]

In this case, NextG will suffer immediate financial losses that cannot be recovered, loss of customers and goodwill, and irreparable and unrecoverable economic loss without a stay.[45] As explained at Section III above, due to the impossibility of timely compliance if the Rule

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[40] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) ("Wisconsin Gas").

[41] *See id.* (citing *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973); *see also Blackwelder Furn. Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 197 (4th Cir. 1977).

[42] *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable*, 22 F.3d 546, 552 (4th Cir. 1994) (stating that "when the failure to grant preliminary relief creates the *possibility* of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied.") (emphasis added); *see also Merrill-Lynch, Pearce, Fenner and Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985); *see also Iowa Utilities Board v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996).

[43] *See Wisconsin Gas*, 758 F.2d at 674.

[44] *See Iowa Utilities Board v. FCC*, 109 F.3d at 426 (citing *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994); *Airlines Reporting Co. v. Barry*, 825 F.2d 1220, 1227 (8th Cir. 1987)); *see also Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 467 (6th Cir. 1980). We recognize that in limited cases, the Commission has refused to recognize the loss of customers and loss of goodwill as sufficient to demonstrate irreparable injury. However, these cases may be distinguished from the one presently before the Commission. In one instance, the FCC refused to recognize loss of customer goodwill as rising to the level of irreparable injury. *In re Cablevision Systems Corp., Time Warner New York City Cable Group Petitions for Stay Pending Reconsideration*, 11 FCC Rcd 12669, Memorandum Opinion and Order (1996) (*Cablevision – Time Warner*). The dispute at issue involved cable operators seeking to stay the effects of orders from the Cable Services Bureau. The Bureau decision declined to delete specific communities within the cable systems' areas from must carry service requirements. This Order is distinguishable from the present case. In *Cablevision – Time Warner*, the Commission denied the petitions for stay because it had already considered and rejected the cable operators' claims in the underlying order. *See id.* at para. 11

[45] Delsman Declaration at ¶¶ 14, 15.

applies to DAS Nodes, there is significant uncertainty about NextG's immediate compliance. That uncertainty will cause harm to NextG and its customer goodwill.

NextG has a "once in a lifetime" opportunity to build out AWS networks that are at substantial risk of loss as a result of the uncertainty caused by the Rule. Absent a stay, there is a significant risk that AWS carriers may decide that because of the Rule they cannot use DAS Nodes. As a result, the carriers may decide to use macro sites and completely forswear DAS as a means of providing primary coverage. Once those carriers move forward with a macro build out, the opportunity for NextG to deploy the same coverage would be lost forever. Time to market is critical, and these decisions are being made at a rapid pace. Uncertainty even for a short period of time while the Commission clarifies the scope of the Rule as applied to DAS will cause NextG irreparable harm in lost opportunities.

Even if compliance were economically possible the legal obstacle of local zoning and pole use restrictions would be substantial, and if compliance could be achieved it would be at such a great cost that NextG's business model would likely be ruined and the company would likely cease to exist.[46] For all these reasons, NextG has made a "clear showing" that it will suffer irreparable injury.[47]

C. A Stay of the Rule As Applied to NextG Will Not Harm Other Parties

A stay of the eight hour backup power rules as applied to NextG or DAS Nodes generally will not harm other parties. First, the import of the rule is to protect wireless network users from outages during catastrophes. But the inability of NextG to deploy eight hour power backups on its Nodes means that any application of the rule to NextG will only force it to scale back its

[46] See Section III, *supra*.

[47] *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) ("Multi-Channel TV") (citing *Direx Israel Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)).

business or shut down completely.[48] Thus, the effect of the Rule would be to *diminish* coverage both during catastrophes and on a daily basis. Accordingly the grant of a stay in this situation is completely warranted.

As explained above, the cost for NextG to comply with the rule requiring eight hours of backup power could significantly undermine NextG's ability to continue doing business. In fact, the primary risk of harm to the public is if the Commission does not promptly grant this request for stay, because application of the backup power Rule to NextG will expose the company to additional legal liability and may force the removal or shut down of numerous newly out-of-compliance DAS antenna facilities, reducing wireless coverage and network capacity and therefore the ability of consumers to obtain coverage in the time of an emergency when local power is otherwise not lost.

D. The Public Interest Requires a Stay

The public interest overwhelmingly favors a stay of the Rule pending consideration of NextG's Petition for Clarification. Without a stay, as explained above, NextG's DAS deployment will be thwarted, perhaps permanently. The result will be reductions in wireless network capacity and coverage, including new entrant deployment of AWS spectrum, which will in turn hurt communications service deployment generally, slow deployment to underserved areas, will slow wireless broadband deployment, will reduce the efficient use of wireless spectrum, and will reduce the robustness of the redundant wireless communications networks.

First, it is the Commission's policy to encourage the deployment of advanced technologies, a doctrine which the Commission cites regularly.[49] DAS is one such new

[48] Delsman Declaration at ¶ 14.

[49] *In the Matter of CommNet Communications Network, Inc. Request for Waiver and for Reinstatement of the 900 MHz Specialized Mobile Radio Service T Block License for MTA007,*

communications technology which both increases and improves communications services to the public and thereby serves the public interest. As demonstrated above, application of the Rule would be devastating to DAS generally, and to NextG specifically. If applied to DAS Nodes and unchanged, the Rule could thwart the deployment of a nascent industry altogether.

Second, the public interest requires the promotion of wireless communications technologies which make better use of the finite resource of radio spectrum, a goal served by DAS. The Communications Act specifically directs the Commission to "encourage the larger and more effective use of radio in the public interest,"[50] and as described above, DAS facilities allow carriers to expand wireless network capacity and coverage by more efficiently using their existing licenses without requiring new spectrum, serving this important goal. Encouragement of DAS facilities will promote effective and efficient use of the radio spectrum, the most finite resource in the Commission's care which the public interest demands be used well and effectively.[51] By using lower power antennas on utility poles, DAS presents an excellent

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Dallas-Fort Worth, KNNX959, Order, DA 07-2032, ¶ 13 (rel. May 9, 2007) (purpose of spectrum auction rules is "the rapid deployment of new technologies and services to the public"); *Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion & Order, 21 FCC Rcd 13201, ¶ 3 (rel. November 01, 2006) (purpose of OTARD rules is "encouraging the rapid deployment of new technologies"); *E911 Requirements For IP-Enabled Service Providers*, First Report and Order and NPRM, 20 FCC Rcd 10245, Separate Statement of Commission Jonathan S. Adelstein (rel. June 03, 2005) ("Somewhere between one and two million Americans currently use some form of VoIP services. These services promise a new era of consumer choice, and we must continue to promote the deployment of new technologies.").

[50] 47 U.S.C. § 303(g).

[51] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and FNPRM, 18 FCC Rcd 20604, ¶ 2 (rel. October 6, 2003) ("Facilitating the development of these secondary markets enhances and complements several of the Commission's major policy initiatives and public interest objectives, including our efforts to encourage the development of broadband services for all Americans… and enable development of additional and innovative services in rural areas."); *Id.*, Joint Statement of Chairman Michael K. Powell and Commissioner Kevin J. Martin. ("By increasing spectrum access, this item will advance a number of the Commission's key policy goals. Access to

solution for expanding coverage into residential areas that have traditionally eschewed deployment of macro site facilities.

Third, DAS deployments facilitate the reach of wireless broadband into more homes, offices, and apartment buildings throughout the country. Indeed, by using lower power antennas on utility poles, DAS presents an excellent solution for expanding coverage into residential areas that have traditionally been difficult to reach. This Commission has noted on multiple occasions that broadband deployment is one of the highest public interest goals at present.[52]

Fourth, deployment of services to underserved populations is another long-standing public interest goal of the Commission which would be thwarted by application of any burdensome backup power rule which would put DAS deployments at risk.[53] In this regard,

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spectrum is critical to development of a wireless broadband platform… And facilitating the ability to lease or transfer spectrum will expand spectrum access for innovators and entrepreneurs, increasing the number and variety of wireless applications available to consumers. Additionally, this item offers the promise of greater wireless deployment in rural America.")

[52] *See The FCC's Front Man Talks*, BusinessWeek, October 31, 2005 ("The Commission's top priority is broadband deployment and to make sure other new technologies are deployed as quickly as possible."), available online at http://www.businessweek.com/magazine/content/05_44/b3957112.htm; Remarks of FCC Chairman Kevin J. Martin, Georgetown University McDonough School of Business's Center for Business and Public Policy, November 30, 2006 ("During my tenure as Chairman, the Commission has worked hard to create a regulatory environment that promotes broadband deployment. We have removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks, and we worked to create a regulatory level playing-field among broadband platforms.") available online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268774A1.pdf.

[53] *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, Report and Order and FNPRM, FCC 04-166, ¶ 1 (rel. September 27, 2004) ("Over the past decade, most Americans have enjoyed dynamic growth in the variety and quality of wireless service offerings available to them, as well as increased choice among facilities-based telecommunications service providers. The Commission is committed to ensuring that this success is enjoyed by all Americans in all areas of the country"). *Id.*, Statement of Commissioner Michael J. Copps ("Anyone who lives in rural America knows first hand that rural consumers have fewer choices of carriers, more holes in their coverage, and that there are still areas of our country that have no service at all.")

NextG is providing service to CMRS provide MetroPCS enabling them to build out their network completely and serve more underserved populations.

Fifth, wireless broadband deployment creates redundancy of communications networks, which serves an important homeland security function in an age where having multiple lines of communications available in the event of man-made disasters is paramount.[54] DAS deployments facilitate the expansion of wireless broadband services. In the same way they increase coverage and capacity of wireless phone networks, the added capacity of DAS networks allow greater bandwidth to be devoted to additional applications, including broadband services.

Sixth and finally, greater coverage for wireless means more availability of wireless E911 emergency service to more people on a regular basis, a recognized goal of the Commission.[55] By expanding coverage and capacity, deploying wireless by new entrants, and pushing deeper into neighborhoods and previously hard to serve areas, DAS can help provide greater E911 coverage on a daily basis, but not if it is thwarted by unrealistic and unattainable back up power requirements.

All of these Commission public interest goals served by NextG's DAS technology will be imminently threatened absent a stay. To preserve the viability of DAS networks, the public

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[54] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless* Networks, Declaratory Ruling, FCC 07-30, ¶ 27 (rel. March 23, 2007) ("Additionally, we believe that wireless broadband Internet access service can provide an important homeland security function by creating redundancy in our nation's communications infrastructure.").

[55] *See, e.g., Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Further FNPRM, 71 FR 48506, ¶ 100 (rel. August 10, 2006) ("Wireless E911 is a vital step toward applying wireless technology to improving public safety. For many Americans, the ability to call for help in an emergency is the principal reason they own a wireless phone. A significant percentage of all 911 calls nationwide are made from wireless phones, and this percentage is growing… Wireless E911 provides a critical safety-of-life feature, and it should be deployed as quickly and ubiquitously as possible.").

interest overwhelming favors a stay to give the Commission time to address the application of the backup power rule to DAS networks.

V. CONCLUSION

NextG has satisfied the required showing that a stay of the eight hour back up power rule, at least as applied to DAS networks is warranted. For all of the foregoing reasons, NextG respectfully requests that the Commission stay the eight hour backup power rule, 47 C.F.R. § 12.2, at a minimum to the extent it applies, if at all, to DAS networks, pending action on NextG's Petition for Clarification.

Respectfully submitted,

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