

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Implementation of Section 224 of the Act

A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket No. 09-51

**Opposition of NextG Networks, Inc.  
to Petition for Reconsideration of the  
Coalition of Concerned Utilities**

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## SUMMARY

NextG provides telecommunications services via distributed antenna system (“DAS”) networks. DAS networks play an important role in the deployment of wireless broadband services. The Commission’s *April 7 Order* represents a significant step for third party attachers and will greatly enhance the ability of wireless and wireline broadband providers to deploy services in a timely, cost-effective manner. However, a handful of pole owners, the Coalition of Concerned Utilities (the “Coalition”), have asked the Commission to undo the key provisions of the *April 7 Order*. The Coalition’s Petition for Reconsideration simply rehashes the same arguments that were previously considered, and overwhelmingly rejected, by the Commission and does not justify reconsideration of any of the Commission’s new regulations. NextG urges the Commission to deny all of the requests set forth in the Petition pursuant to Section 1.106 of the Commission’s rules.

If the Commission considers the Coalition’s Petition for Reconsideration on the merits, it still should affirm the factual and legal conclusions in the *April 7 Order*.

**Pole Top Access for Wireless Devices.** The Commission should reject the Coalition’s request to rule that unless a pole owner has previously permitted a pole top attachment it may categorically deny the attachment of wireless devices on pole tops. Access to the pole top is a matter of critical importance for wireless broadband providers. The Commission has repeatedly ruled that these types of blanket prohibitions are not permitted. NextG’s right to access a critical portion of a utility pole should not be dependent on whether the pole owner has allowed other antenna installations on the pole top or has chosen itself to deploy a wireless technology. Similarly, the Coalition’s contention that safety concerns justify barring access to poletops is unavailing. The Commission has held that a single utility cannot be the primary, final arbiter of safety standards. NextG abides by applicable safety standards such as the NESC, which (in Rule

235I) permits the placement of antennas on pole tops. The Commission should not aid the Coalition's efforts to deny pole top access by giving them unbridled discretion to restrict access to this critical pole space.

**Make-Ready Time Frames.** The Commission should reject the Coalition's request to slash the limits on the number of attachment requests subject to the make-ready timeframes. In the *April 7 Order*, the Commission correctly found that "in the absence of a timeline, pole attachments may be subject to excessive delays." Exempting large projects from the new timeframes would hinder broadband deployment.

The Petition's suggestion that the new make-ready timeframes will lead to an increase in the number of applications for pole access, and, as a result, an increase in complaints is entirely hypothetical. Six states have enacted make-ready timeframes, yet the Coalition has presented no evidence of a "flood" of complaints in those states. The option to use contractors to complete make-ready should alleviate the Coalition's assertions and make complaints unlikely.

**Non-Section 224 Attachers.** The Commission should reject the Coalition's request to exclude from the timeframes situations in which make-ready requires a "non-Section 224" attacher to move its facilities. The Commission expressly rejected such a proposal in the *April 7 Order*. Even parties that are not Section 224 attachers typically attach pursuant to a pole attachment agreement, so pole owners are not powerless to compel cooperation. Rule 1.1420(h)(2) allows a pole owner to deviate from the time limits "for good and sufficient cause," so there is no reason to create a new exemption for rare circumstances.

**Pole Replacements.** The Commission should deny the Coalition's request that the Commission specify that the timeframes do not apply to pole replacements or the installation of new poles. Neither the Commission's 2010 pole order nor the *April 7 Order* address the issue of

pole replacements, so as a preliminary matter, there is no basis for the Commission to reconsider this issue. In any event, a period of 60 days (plus 15 days) or 90 days (plus 15 days) for wireless attachments is ample time to replace a pole or install a new pole. If pole owners cannot meet these timeframes, NextG is prepared to hire contractors to perform the work in a timely manner.

**Make-Ready Time Frame Delay.** The Coalition asks the Commission to delay implementation of the timeframes by six months and slash the limits on the number of poles subject to the timeframes for another six months beyond that. This request should be denied. Pole owners have already had more than four months to prepare for the new timeframes. If pole owners cannot meet the timeframes, third party attachers will hire approved contractors to complete the work in a timely manner.

**Seasonal Storms.** The Coalition's proposal to extend the make-ready timeframes when "a company's internal staffing is not available due to a weather event" too is ambiguous and open-ended, and should be rejected. Such an exemption would give pole owners far too much discretion to stop the clock for minor, routine weather events, such as summer thunderstorms.

**Governmental Permits and Private Property Easements.** There is no reason for the Commission to create new exemption for pole projects that are "hindered" by local government permitting. Such an exemption could create a "chicken-and-egg" situation with local permitting that might require make-ready to be completed before a particular permit can be finalized.

**Preexisting Safety Violations.** The Commission should reject the Coalition's request to toll the timeframes "if existing attachments are found to be in violation of safety codes." New third party attachers should not be penalized by preexisting safety violations. Preexisting safety violations should be identified at the survey stage and should not introduce significant delay.

**Inadequate Route Design.** The Coalition’s request to restart the make-ready timeframes “beginning on the date that the attacher’s route design is corrected and resubmitted” should be rejected. This request is unclear and, in any event, Rule 1.1420(c) applies to a “complete” application. Therefore, the clock does not start running on any application that is seriously deficient until it is complete. Minor problems can be corrected by the pole owner working in cooperating with an attacher in the usual course of business.

**Financial Penalties for Safety Violations.** The Coalition’s request to permit pole owners to impose a \$200 penalty for each safety violation should be rejected. Safety violations are a contentious issue and the relationships between pole owners and attachers would be become even more acrimonious if the Commission authorized pole owners to profit from safety violations. Third party attachers already are required by most agreements to pay to correct their safety violations, so they have ample incentives to comply with the safety codes. Penalties paid to pole owner would be merely windfall profits for utilities and would do nothing to improve safety.

**Attacher Rearrangement Issues.** All of the Coalition’s requests regarding attacher rearrangement issues are unnecessary and should be rejected. Because of their considerable leverage when negotiating pole agreements, pole owners can impose such requirements on attachers when they desire. Protection from the Commission is not warranted.

**Refunds.** The Commission should reject the Coalition’s request to prohibit refunds earlier than the effective date of the *April 7 Order*. The *April 7 Order* specifically allows attachers to seek refunds back to the statute of limitations precisely in order to make previously overcharged attachers whole. Any “new liability” created by the retroactivity is entirely due to the conduct of pole owners – namely, unlawfully high rental fees.

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NextG Networks, Inc., on behalf of itself and 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”), files this Opposition in response to the Petition for Reconsideration filed by the Coalition of Concerned Utilities (“Coalition”)<sup>1</sup> on June 8, 2011 (“Petition”) in the above-captioned proceeding.<sup>2</sup>

**I. INTRODUCTION**

NextG provides telecommunications services via distributed antenna system (“DAS”) networks. As the Commission has recognized, DAS networks play an important role in the deployment of wireless broadband services and will continue to do so. In particular, DAS is critical to deploying broadband wireless services in major metropolitan areas, hard to reach

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<sup>1</sup> The “Coalition of Concerned Utilities” is comprised of Consumers Energy, Detroit Edison, FirstEnergy Corporation, Hawaiian Electric Co., NSTAR and Pepco Holdings, Inc.

<sup>2</sup> *Report and Order and Order on Reconsideration*, FCC11-50; Implementation of Section 224 of the Act (WC Docket No. 07-245); A National Broadband Plan for Our Future (GN Docket No. 09-51), April 7, 2011. The Order was published in the Federal Register on May 9, 2011, 76 Fed. Reg. 26620 (hereinafter “*April 7 Order*”).

areas and increasing network capacity. Wireless broadband deployment today does not only mean generalized coverage at an on-street level. Consumers demand access to wireless broadband in their homes, businesses, and most public facilities, and high bandwidth data uses are driving exponential demand. Thus, providing highly localized service with adequate network capacity is a critical goal for wireless broadband deployment, and it is a goal that DAS is perfectly positioned to meet. However, as detailed in the record before the Commission, NextG has encountered many impediments to timely and efficient deployment of its DAS networks on utility poles and thus to the deployment of wireless broadband services that NextG's services and networks support.

NextG appreciates the Commission's focus on the critical issue of pole attachments. The Commission's *April 7 Order* represents a significant break-through for third party attachers, particularly with respect to the persistent problem of delays in the make-ready process. NextG applauds the Commission for establishing reasonable regulations that will assist in the deployment of broadband and wireless infrastructure.

In the Petition, the Coalition asks the Commission to essentially undo the key provisions of the *April 7 Order*. The Coalition's Petition is almost entirely a re-hash of issues and arguments that were considered and rejected by the Commission. The Petition does not justify reconsideration of the issues the Coalition raises. Indeed, NextG's discussions with various pole owners around the country indicate that the vast majority of pole owners are prepared to meet and abide by the new regulations. By contrast, the Coalition is comprised of a handful of pole owners, two of which (NSTAR and Detroit Edison) will not be subject to the new rules because they own utility poles only in certified states (Massachusetts and Michigan). The Coalition's predictions about the impact of the new regulations are unrealistic and not supported by the underlying record or the facts presented in the Petition. For the reasons

detailed below, NextG urges the Commission to deny all of the requests set forth in the Petition.

## **II. THE COALITION HAS DEMONSTRATED NO VALID BASIS FOR THE COMMISSION TO RECONSIDER ANY ASPECT OF THE *APRIL 7 ORDER***

At the outset, the Petition should be rejected because it relies on the same arguments and evidence that the Coalition and other pole owners previously presented to the Commission. WC Docket No. 07-245 dates back to October 31, 2007 – nearly four years ago. The record in this proceeding contains 710 separate comments, reply comments, and *ex parte* filings. The Coalition itself has been extremely active in this proceeding, having made *31 separate filings* with the Commission. As such, the Commission had a full record upon which to act in the *April 7 Order*.

Yet, the Petition simply rehashes the same arguments that were previously considered – and overwhelmingly rejected – by the Commission. Indeed, various passages in the Petition make reference to the same arguments and evidence previously presented by the Coalition before the release of the *April 7 Order*. *See, e.g.*, Petition at 4 (“As the *Coalition* explained in its Comments, Reply Comments and *ex parte* submissions in this proceeding . . .”); Petition at 23 (“As explained in the *Coalition’s* Comments . . .”). Reconsideration should not be granted based on repetition of previously-advanced arguments. *See, e.g., Petitions for Reconsideration of the Second Report and Order; Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service, Direct Broadcast Satellite, and Multichannel Multipoint Distribution Service, Order on Reconsideration*, 14 FCC Rcd. 19924 at ¶ 7 (1999) (“we find that the parties have presented no new arguments or facts that cause us to change our prior determination. Reconsideration is warranted only if the petitioner cites material error of fact or law or presents new or previously

unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action. The Commission is not required to reconsider arguments that have already been considered. We therefore deny the petitions for reconsideration . . .”) (footnotes omitted).

To the extent that the Petition relies on a handful of new facts and evidence that were not previously presented to the Commission, the Petition should be rejected as procedurally defective because the Coalition had ample opportunity to present those facts to the Commission during the notice and comment period.<sup>3</sup> *Id.*

### **III. RESPONSE TO THE COALITION’S REQUESTS FOR MODIFICATIONS TO THE APRIL 7 ORDER**

#### **A. Pole Owners Should Not be Permitted to Prohibit Pole Top Attachments**

The Coalition asks the Commission to undo its conclusion that wireless attachers should have access to the top of the utility pole by requesting that “to the extent a utility disallows any wireless antenna of any type, including its own, to be installed on pole tops, [an electric utility] should be entitled to disallow any such proposed installation by a communications attacher.” Petition at 19. In other words, the Coalition would like the Commission to rule that unless a pole owner has previously permitted a pole top attachment it may categorically deny the attachment of wireless devices on pole tops. The Commission should reject this request.

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<sup>3</sup> See 47 C.F.R. § 1.429(b) (“A petition for reconsideration which relies on facts that have not previously been presented to the Commission will be granted only under the following circumstances: (1) The facts relied on related to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) The facts relied upon were unknown to petitioner until the last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on its required in the public interest.”).

Access to the pole top is a matter of critical importance for wireless broadband attachments. As the Commission recognized in the *April 7 Order*, “[w]ireless attachments often require placement at or near the top of the pole in order to efficiently provide [DAS] or other wireless services.” *April 7 Order* at n.226. In paragraph 77 of the *April 7 Order*, the Commission clarified that “a wireless carrier’s right to attach to pole tops is the same as it is to attach to any other part of a pole.”

The Coalition is essentially asking the Commission to give pole owners the unilateral and unbounded authority to categorically deny the attachment of wireless devices on pole tops. However, in the *April 7 Order*, the Commission reiterated that “[b]lanket prohibitions are not permitted under the Commission’s rules.” *April 7 Order* at ¶ 77. Categorical denials of access are also prohibited by Section 1.1403(b) of the Commission’s rules, which requires a denial of access to be specific and supported by relevant evidence supporting its denial.

NextG’s right to access a critical portion of a utility pole should not be dependent on whether the pole owner has allowed antenna installations on the pole top or has chosen itself to deploy a wireless technology such as SCADA (System Control and Data Acquisition) or AMR (automated meter reading) as part of its business operations. The Coalition states that “the option to attach the antenna in the communications space would still be available.” Petition at 19, n.34. However, under the Coalition’s logic – *i.e.*, a third party may attach antennas only if the pole owner allows itself or a third party to attach antennas in the same place first – wireless devices could be prohibited in the communications space as well.<sup>4</sup> Pole owners grant access to utility poles, not to a narrow, limited portion of the pole. The Coalition’s logic would allow

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<sup>4</sup> FirstEnergy admits that it is doing precisely this today, despite the Commission’s ban on categorical denials of access. *See* Petition at 19. Hawaiian Electric Company has had a blanket ban on pole top antennas. *See* Comments of ExteNet Systems, Inc., WC Docket No. 07-245, RM-11293, RM-11303, 7 (filed Mar. 7, 2008).

pole owners to deny all manner of attachments – be they new equipment, technologies, or configurations – so long as the utility had never previously allowed the specific attachment before. Section 224 requires pole owners to grant access to “telecommunications carriers,” not to specific types of attachments in specific locations on the pole.

Finally, the Coalition asserts that the issue of “safety, reliability and generally applicable engineering” is “reserved solely for electric utilities.” Petition at 19. This statement is contrary to a series of orders issued by the Commission holding that a single utility cannot be the primary, final arbiter of safety standards.<sup>5</sup> Accepting the Coalition’s argument also would effectively immunize pole owners from any review of a denial. If a pole owner could simply invoke “safety” and thereby deny access without the Commission retaining authority to evaluate the validity of that denial, it would create a loophole that would eviscerate the statutory right of access. Ultimately, safety, reliability and generally applicable engineering standards are issues that affect all users of a pole, whether they provide communications or electric services. NextG abides by the National Electrical Safety Code (“NESC”), the National Electric Code (“NEC”), and other generally applicable engineering standards, and it is within those bodies that the engineering issues relating to attaching any kind of equipment or circuit to a pole are discussed and resolved by experts with full access to all technical information necessary to develop engineering standards that take into account all relevant safety and reliability issues. Indeed, NESC Rule 235I expressly permits the placement of antennas on

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<sup>5</sup> See, e.g., *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd. 11599 at ¶ 11 (Cable Services Bur. 1999) (“The utility may rely on the NESC to provide standards for safety, reliability, and generally applicable engineering standards, but the utility is not the final arbiter of such issues and its conclusions are not presumed reasonable.”); *Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 at ¶ 1158 (1998) (the Commission rejected the electric utility claims that they could unilaterally establish safety and engineering standards, stating: “we reject the contention of some utilities that they are the primary arbiters of . . . concerns [about capacity, safety, reliability or engineering] or that their determinations should be presumed reasonable.”).

pole tops, subject to appropriate clearances and other safety precautions, thereby demonstrating the arbitrary and unreasonable nature of the Coalition's request.

The reality is that some pole owners have fought against the attachment of wireless devices since 1996 with no valid safety or reliability issues asserted, much less proved. NextG has been denied access to install wireless antennas and equipment on utility owned poles. Utility prohibitions against pole top antenna attachments combined with existing prohibitions against or limiting communications space antenna attachments can prohibit and have effectively prohibited broadband deployment. NextG expects this resistance may continue, but the Commission should not aid the pole owners' efforts to deny pole top access by giving them unbridled discretion to restrict access to this critical pole space.

**B. The Number of Poles Subject to the Make-Ready Timeframes is Reasonable**

The Coalition asks the Commission to decrease the lower limit on the number of attachment requests subject to the make-ready timeframes from 300 to 100 poles, to reduce the upper limit from 3,000 to 500 poles, and to make the limits apply to all attaching entities combined per month. Petition at 6. The Commission should reject this request.

The make-ready timeline is perhaps the most significant benefit that will be realized as a result of the *April 7 Order*, because it mandates timeframes for the completion of the various steps in the make-ready process, thereby providing attachers with assurance that they will be able to meet broadband deployment schedules. *See April 7 Order* at ¶¶ 21–73; 47 C.F.R. § 1.1420. The Commission carefully evaluated the record evidence and found that “in the absence of a timeline, pole attachments may be subject to excessive delays.” *April 7 Order* at ¶ 21. In NextG's experience, the Commission's finding was correct. The new make-ready

timeframes set forth in Rule 1.1420 are both reasonable and necessary for the prompt deployment of broadband infrastructure.

The Commission has properly recognized that time to market is critical for the deployment of broadband infrastructure.<sup>6</sup> In NextG’s experience, time to market and therefore timely make-ready have been critical for NextG’s large-scale DAS network projects in Boston, Los Angeles, New York City, Philadelphia and San Diego. Exempting large projects, such as those, from the new timeframes would hinder broadband deployment, and potentially subject projects to multiple, conflicting timeframes.

The arguments presented by the Coalition for its request are unconvincing and are merely a repeat of the reasons why it was imperative for the Commission to impose make-ready timeframes in the first place. A new broadband deployment that involved the installation of new fiber (with all the benefits and new jobs that entails) would be lengthened by several years under the Coalition’s proposals regarding the make-ready timelines. The reality is that the long timeframes the Coalition requests for the utility are unnecessary, as shown by many utilities across the United States, which have effectively managed to meet similar timeframes to those described in the *April 7 Order*.

The Petition imagines unrealistic and implausible scenarios that will almost certainly never occur. For example, the Coalition states that “multiple attachers could bombard a single utility with multiple 3,000 pole requests every month.” Petition at 6. Yet, the Coalition provides no actual examples of attachers “bombarding” a utility with applications for attachment under the existing rules or in states that already have imposed similar guidelines.

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<sup>6</sup> See *April 7 Order* at ¶ 21 (“Adopting a specific timeline will also generate jobs and help to move large broadband projects forward more expeditiously . . .”);

The Petition’s suggestion that the new make-ready timeframes will somehow lead to an increase in the number of applications for pole access is entirely hypothetical.<sup>7</sup> An increase in applications, if any, will be driven by the necessity to improve broadband deployment in the United States – which is the Commission’s goal – and the implementation of clearer timeframes only serves to focus all parties on working collaboratively to improve the processes surrounding such deployments. While the Coalition describes the make-ready timeframes as a “significant, new burden for electric utilities,”<sup>8</sup> in reality, Rule 1.1420 simply requires pole owners to process applications and perform make-ready work in a timely manner.

The Coalition argues that “[u]tilities do not have unlimited resources sitting idle while waiting for the next pole attachment application to arrive.” Petition at 6. This statement illustrates the cavalier, ambivalent attitude that some pole owners possess with respect to the completion of make-ready work – an attitude that has made Rule 1.1420 all too necessary. Given that third party attachers pay all make-ready costs caused by the attachment, pole owners have no justification for being understaffed with personnel to support third party attachment requests. Moreover, if a utility does not choose to add staff to manage pole attachment matters, pole owners can and have hired (or can allow attachers to hire) qualified contractors to complete surveys or make-ready work as needed for large orders or during unusually busy periods, the costs of which would be borne entirely by the requesting third party attacher(s).

The Coalition makes a series of hyperbolic, gloom-and-doom predictions about the impact of the new make-ready timeframes. For instance, the Coalition contends that the new

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<sup>7</sup> See, e.g., Petition at 5 (“A 9,000-pole request over three months would double NSTAR’s workload for an entire year.”); Petition at 11 (“No one can predict with certainty the amount of work that will be requested or the real world experiences ahead.”)

<sup>8</sup> Petition at 3.

timeframes are: “unworkable,”<sup>9</sup> will create an “inevitable flood of pole attachment access complaints,”<sup>10</sup> will permit attachers to “bombard” pole owners with applications,<sup>11</sup> and (again for emphasis) will result in a “flood of FCC complaints.”<sup>12</sup> However, six other states have found it necessary to enact similar – or in some cases more stringent – make-ready timeframes: Connecticut, New Hampshire, New York, Oregon, Utah and Vermont. The Coalition has presented no evidence that any of its dire predictions have come to pass in any of these states.

The Coalition contends that some state commissions have established “more reasonable make-ready deadlines” than the Commission. Petition at 7, n. 12. In fact, the Commission’s make-ready timeframes are squarely in the middle of those of the various state commissions. The Connecticut Department of Utility Control (which the Coalition omits from footnote 12 of the Petition), requires the completion of the make-ready process within *90 days* for most projects,<sup>13</sup> as opposed to the Commission’s interval of 133 days (or 148 days with the additional 15-day “grace period” set forth in Section 1.1420(i)). Similarly, the New York Public Service Commission requires the make-ready process to be complete within an interval of *118 days* – a period two weeks shorter than the Commission’s timeframes.<sup>14</sup> It was well-reasoned that the Commission enacted intervals of national scope that fall within the range of intervals set by state commissions spread across the nation.

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<sup>9</sup> Petition at 4.

<sup>10</sup> Petition at 4.

<sup>11</sup> Petition at 6.

<sup>12</sup> Petition at 6.

<sup>13</sup> See *DPUC Review of the State’s Public Service Company Utility Pole Make-Ready Procedures – Phase I*, Docket No. 07-02-13, Ct. Dept. of Public Utility Control, 2008 Conn. PUC LEXIS 90 at \*\*48-54 (2008). The survey must be completed within 45 days and make-ready must be performed within 45 days. *Id.*

<sup>14</sup> *Case 03-M-0432 – Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, 2004 N.Y. PUC LEXIS 306 (2004). The New York PSC’s timeframes call for the following: survey – 45 days, estimate – 14 days, attacher acceptance – 14 days and performance of make-ready – 45 days for a total of 118 days.

Contrary to the Coalition’s arguments, Rule 1.1420 is neither “unworkable” nor “far from manageable.” Petition at 4-5. The Commission has already created effective safeguards that bolster the reasonableness of the make-ready timeframes. First, the Commission has added thirty days to the interval for the completion of make-ready for wireless attachments. 47 C.F.R. § 1.1420(e)(2). Subpart (i) of Rule 1.1420 establishes an additional 15-day window within which pole owners may assert a right to complete make-ready. This 15-day “grace period” effectively extends the interval for the completion of make-ready to 75 days for most wireline orders (or 105 days most wireless orders). Utilities may also aggregate into one order all requests from a single entity within a 30-day period. 47 C.F.R. § 1.1420(g). Thus, it is clear that Rule 1.1420 already gives pole owners a considerable degree of flexibility to manage the make-ready workload.

Finally, the use of utility-authorized contractors to complete a survey or make-ready work will prevent the Coalition’s dire prediction of a “flood” of complaints to the Commission because this is already the standard remedy for many utilities when there are delays. *April 7 Order* at ¶ 49; 47 C.F.R. § 1.1420(i). As the Commission noted in the *April 7 Order*, “[t]he transfer of control to the new attacher, including the ability to hire contractors, is the key to the effectiveness of the timeline.” *April 7 Order* at ¶ 50. NextG agrees. Third party attachers have no incentive to file a complaint when they can avail themselves of an effective self-help remedy. This remedy minimizes the need for complaints.

**C. The Commission Should Not Exclude Poles Requiring the Rearrangement of Non-Section 224 Attachers from the Deadlines**

The Coalition asks the Commission to modify Rule 1.1420 to exclude from the make-ready timeframes any situations in which make-ready work requires any attacher that is not a cable television system or telecommunications service provider to move its facilities. Petition

at 8. There is no justification for a new, categorical exception from the make-ready rules simply because a pole includes attachments by entities that are not protected by Section 224 (what the Coalition calls “non-Section 224 attachers”). This argument is simply another attempt by the Coalition to riddle Rule 1.1420 with exceptions so as to render it essentially meaningless and it should be rejected by the Commission.

The Commission considered – and expressly rejected – such a proposal in paragraph 94 of the *April 7 Order*, stating: “we disagree with certain commenters that the statute precludes the Commission from regulating because . . . the presence of non-regulated attachment[s] (such as a municipality’s traffic light) on poles somehow places these poles outside of the Commission’s authority.”

The Coalition complains that the “conduct of these other [third party] attachers is far beyond the pole owner’s control” (Petition at 7) and “[p]ole owners are powerless to compel cooperation by existing attacher.” Petition at 7, n.13. These statements are inaccurate and unsupported. Typically, even those parties that are not “Section 224 attachers” attach pursuant to a pole attachment agreement because pole owners do not simply allow any entity to attach to their poles without one. To the extent that the Coalition has direct experience otherwise, it should have provided the Commission with examples during the comment phase of this proceeding. The fact that it did not suggests that this argument is yet another purely hypothetical outcome unsupported by facts.

In NextG’s experience, pole attachment agreements include provisions that require coordination and cooperation with the pole owner and among third party attachers. Accordingly, pole owners are not “powerless” over the parties attached to the poles. NextG, like the Commission, is skeptical that pole owners have no contractual ability to move – or

require third party attachers to move – facilities attached to their poles. As the Commission found, “[a] joint use contract gives the parties to the contract some degree of control over the pole . . .” *April 7 Order* at ¶ 94.

In any event, Rule 1.1420(h)(2) already allows a pole owner to deviate from the time limits “for good and sufficient cause that renders it infeasible for the utility to complete make-ready work within the prescribed time frame.” There is no justification for creating an entirely new exemption to encompass the rare situation in which a pole owner truly is unable to move existing third party facilities due solely to those entities’ hypothetical intransigence.

**D. The Commission Should Not Exempt Pole Replacements and the Installation of New Poles from the Deadlines**

In a further attempt to chip away at the make-ready timeframes, the Coalition asks the Commission to specify that “the make-ready deadlines do not apply to pole replacements or to the installation of new poles necessary to accommodate additional attachments.” *Petition* at 9. The Commission should deny this request.

The Commission ruled in the “Order on Reconsideration” portion of the *April 7 Order* that the issue of pole replacements is “beyond the scope of the *2010 Order*.” *April 7 Order* at ¶ 226. The Commission further stated “that the Commission made no findings in [the *2010 Order*] relative to pole replacement” and “the *2010 Order* provides no basis upon which to reconsider (or clarify) a utility’s obligation to preform pole change-outs, and there is no record foundation for making the clarification sought by the Cable Providers.” *April 7 Order* at ¶ 226. Because the *April 7 Order* also provides no basis upon which to reconsider pole replacements, the Commission should reject the Coalition’s request to “confirm” that the make-ready timeframes do not apply to pole replacements.

NextG's projects, like all networks, may require some pole replacements and/or installation of new poles. Exempting pole replacements and installation of new poles from the new timeframes would both hinder and reduce broadband deployment. There is no reasoned justification for the Commission to exempt pole replacements from the make-ready timeframes. The Coalition has presented no evidence that pole owners cannot meet the existing timeframes for a pole replacement. A period of 60 days plus a 15-day grace period – or 90 days plus a 15-day grace period for wireless attachments – is more than sufficient time to perform a pole replacement or install a new pole. If pole owners cannot (or will not) meet these timeframes, NextG and other third party attachers are prepared to hire utility approved contractors to perform the work in a timely manner.

The Connecticut DPUC did not exempt pole replacements from its make-ready timeframes in its 2008 order establishing make-ready timeframes. Instead, the DPUC merely extended the time period for make-ready work involving pole replacements from the usual interval of 45 days to 70 days.<sup>15</sup> The FCC's window for the completion of make-ready is 75 days for wireline attachments (including the 15-day grace period) or 105 days for wireless attachments (including the 15-day grace period), so the Commission's interval is even longer than the DPUC's extended interval that applies for make-ready involving pole replacements.

**E. The Commission Should Not Delay the Implementation of the Make-Ready Timeframes.**

The Coalition next requests that the Commission delay the implementation of the make-ready timeframes by six months and decrease the upper and lower limits on the number

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<sup>15</sup> *DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I*, Decision in Docket No. 07-02-13, Ct. Dept. of Public Utility Control, 2008 Conn. PUC LEXIS 90 at \*51 (2008).

of poles subject to the timeframes for another six months beyond that. Petition at 11. This request, if granted, would allow pole owners *another year* to delay the make-ready process.

As the Commission has repeatedly recognized, long and unpredictable make-ready timeframes are a major barrier to the acceleration of broadband build-out. As detailed in NextG's Further Comments in this proceeding, NextG and other DAS providers have experienced these barriers first hand.<sup>16</sup> The Coalition's proposal to postpone the new make-ready timeframes for six months and then to gradually phase them in runs counter to the intent of the *April 7 Order* to accelerate broadband deployment.

Pole owners have already had more than four months to prepare for the new timeframes. The Coalition states: "No one can predict with certainty the amount of work that will be requested or the real world experiences ahead." Petition at 11. This is all the more reason that a six month delay in implementing reasonable make-ready timeframes and procedures is unnecessary. The only practical difference is that under the new rules, if pole owners continue with interminable make-ready delays, third party attachers have the right to hire utility approved contractors to complete the work in a timely manner.

**F. The Commission Should Maintain the Current Definition of Events That "Stop The Clock".**

The Coalition asks the Commission to permit pole owners to "stop the clock" on the make-ready timeframes for a variety of reasons including seasonal storms, governmental permits, private property easements, preexisting safety violations, and inadequate route design. Petition at 11–15. Again, the Coalition is attempting to tack on exceptions to the rule to effectively render meaningless the make-ready timeframes. The Commission should reject each of the Coalition's requests because it already allows the pole owner to deviate from the

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<sup>16</sup> *Implementation of Section 224 of the Act*, W.C. Docket 07-245, Further Notice of Proposed Rule Making, Comments of NextG Networks, Inc. at 15-17 (filed Aug. 16, 2010).

timelines “for good and sufficient cause,” which should cover all the scenarios contemplated in the Petition as long as the pole owner notifies the requesting attacher, provides “the reason for and date and duration of the deviation,” and does not cause delay “longer than necessary.” 47 C.F.R. § 1.420(h)(2).

**Seasonal Storms.** The Coalition’s proposal to extend the make-ready timeframes when “a company’s internal staffing is not available due to a weather event” (Petition at 13) too is ambiguous and open-ended. Such an exemption would give pole owners far too much discretion to stop the clock for minor, routine weather events, such as summer thunder storms. Pole owners should not be permitted to stop the clock any time it rains or snows.

The existing exemption “for good and sufficient cause that renders it infeasible for the utility to completely the make-ready work within the prescribed time frame” (47 C.F.R. § 1.1420(h)(2)) covers those instances where unpredicted and severe storms, hurricanes and other catastrophes validly would make it difficult to complete make-ready.

**Governmental Permits and Private Property Easements.** The Coalition asks the Commission to stop the make-ready time frame clock for “pole attachment projects that are hindered by the local government permit process.” Petition at 13. There is no reason to have pole attachments wait for all other permits. Indeed, this could create a “chicken-and-egg” scenario in situations where local permitting might require make-ready to be completed before a particular permit can be finalized.

Some of the examples cited by the Coalition, such as parking permits, are routine and do not add a significant amount of time to the make-ready process, and private property rights are rarely needed for new attachments. The existing exemption “for good and sufficient cause that renders it infeasible for the utility to completely the make-ready work within the

prescribed time frame” (47 C.F.R. § 1.1420(h)(2)) already encompasses the rare government permit and private property easement that introduces real and significant delay. Another new exemption is not warranted.

**Preexisting Safety Violations.** The Coalition next asks the Commission to toll the make-ready timeframes “if existing attachments are found to be in violation of safety codes.” Petition at 14. This request should be rejected for several reasons. As a matter of fundamental fairness, new third party attachers should not be penalized by preexisting safety violations.

Preexisting safety violations can and should be identified early in the process, at the survey stage. However, there is no reason why preexisting violations should introduce significant delay. Nor should new attachers be financially penalized by being required to pay to fix preexisting attachments. These costs should be borne by the party (or parties) that caused the violation. Preexisting safety violations can and should be fixed by the pole owner during the make-ready work process. And because pole attachment agreements typically require safety violations to be corrected at the attacher’s expense, pole owners recover their costs to fix these violations.

**Inadequate Route Design.** Finally, the Coalition asks the Commission to restart the make-ready timeframes “beginning on the date that the attacher’s route design is corrected and resubmitted.” Petition at 15. The Coalition’s request on this point is not entirely clear. The Petition talks about “route design,” which presumably refers to the route of the provider’s network, but the specific examples cited in the paragraph do not appear to concern “route design.” Rather, the Coalition’s examples appear to be the types of issues that typically might be found in a survey (otherwise, what are they surveying?). Moreover, it would not be

reasonable to allow a pole owner to stop the make-ready clock on all attachments if there were a change in one or even several poles that are part of an overall “route.”

The 45-day time frame set forth in Rule 1.1420(c) applies to a “complete” application, *i.e.*, one that “provides the utility with the information necessary under its procedures to begin the survey of poles.” *April 7 Order* at ¶ 25. Therefore, the clock does not start running on any application that is seriously deficient. Minor problems with an application should not be yet another reason for pole owners to delay. The issues identified by the Coalition on this point are the reason for surveys and make-ready, not a reason to stop it. These issues can be corrected by the pole owner working in cooperating with an attacher in the usual course of business. The Commission should reject the request to add specified ways to stop the make-ready timeframes because that is already covered by Rule 1.1420(h)(2).

**G. The Commission Should Not Permit Pole Owners to Impose Significant Financial Penalties for Safety Violations**

The Coalition has asked the Commission to rule that pole owners may impose penalties for safety violations in the amount of \$200 per violation. *Petition* at 15. This request suggests that the Coalition members may be more concerned with money than with safety. It appears that the Coalition members would like to turn safety violations into a profit center to be exploited. The Commission should reject this request out of hand.

Safety violations already are a very contentious issue because it is often difficult to determine which party (or parties) caused a particular safety violation. NextG believes that relationships between pole owners and attachers would be become even more acrimonious if the Commission authorizes pole owners to profit from safety violations. Indeed, pole owners would be likely to hire consultants or contractors to act as bounty hunters to seek out minor safety violations. Third party attachers now pay to correct their own safety violations, so they

have ample incentives to comply with safety codes. Penalties paid to pole owner would simply be windfall profits for utilities and do nothing to improve the overall safety and reliability of pole infrastructure. Finally, the Coalition insinuates that many “CLECs and emerging telecommunications providers do not even have established safety programs or qualified engineering and safety departments.” Petition at 16, n.27. The Coalition’s assertion merely attempts to paint new entrants in an unjustified and unfairly negative light. This issue, to the extent that it is true, can be dealt with in other ways.<sup>17</sup>

**H. The Commission Should Reject All of the Coalition’s Requests Regarding Attacher Rearrangement Issues**

In Section IV(B) of the Petition, the Coalition asks the Commission to enact a series of new regulations regarding attacher rearrangement. Specifically, the Coalition asks the Commission to: (1) require attacher participation in the National Joint Use Notification System (“NJUNS”), the Spatially-Enabled Permitting and Notification System (“SPANS”) or some other electronic attachment notification system (Petition at 19-20); (2) “specify that pole owners are entitled to be reimbursed by the new attacher for moving existing attachments if the existing attachers do not move their attachments in a timely manner” (Petition at 20); and (3) “rule that pole owners cannot be held liable for damages, including consequential damages, resulting from the mandatory rearrangements or relocations required by the new rules.” Petition at 21. All of these requests are unnecessary and should be rejected.

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<sup>17</sup> NextG takes safety issues very seriously and employs both a full time Compliance Manager and a Safety Manager who are responsible for overseeing construction and safety code compliance of its facilities attached to utility poles. NextG’s Compliance Manager is responsible for development and compliance of construction standards with the latest versions of the NESC, the NEC, and General Order 95 (which applies in California). NextG’s Safety Manager is responsible for development, implementation and training of safety polices required by federal and state OSHA rules and regulations for its employees.

NextG has no objection to participating in NJUNS or other electronic attachment notification systems and routinely agrees to do so in its pole attachment agreements. However, because of their monopoly control over poles and considerable leverage when negotiating pole agreements, pole owners are perfectly capable of imposing and regularly impose such requirements on attachers when they so desire. Protection from the Commission in the form of federal regulations is not warranted.

The Coalition's request pertaining to damages (Petition at 21) should also be rejected because a pole owner should not be excluded from liability for harm caused by its own negligence. NextG must regularly remind utilities that the Enforcement Bureau has found that a nonreciprocal indemnification clause in a pole agreement is unjust and unreasonable.<sup>18</sup> Pole owners simply do not need the Commission's assistance when negotiating pole agreements.

**I. The Commission Should Maintain Rule 1.1410(c) to Permit Refunds as Far Back the Applicable Statute of Limitations**

Finally, the Coalition asks the Commission to prohibit refunds earlier than the effective date of the *April 7 Order* because the Coalition contends that allowing recovery to extend as far back in time as the applicable statute of limitations re-writes the Commission's rules and imposes new liability for pole owners after the fact. Petition at 23. This request, which on some level fundamentally reveals an admission of long-standing overcharges by pole owners, should be rejected.

Under the Commission's prior regulations, pole owners had little or no incentive not to overcharge attachers. As the Commission explained in the *April 7 Order*, this change is needed because the prior rule failed to make overcharged attachers whole and was inconsistent

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<sup>18</sup> *Cable Television Ass'n of Ga. v. Georgia Power Co.*, Order, 18 FCC Rcd. 16333 at 16334 (Enf. Bur. 2003).

with the way claims for monetary recovery are generally treated under the law. *April 7 Order* at ¶ 110.

Any “new liability” created by the new rule is entirely due to the conduct of pole owners – namely, charging unlawfully high rental fees. NextG has been the victim of these gross overcharges. A number of pole owners have adopted the position that wireless attachments were not subject to Section 224 and refused to allow antenna attachments unless the attacher paid monopoly rents for the privilege. As a result, NextG has been forced to pay annual rates of \$1,200 or more per pole for small antenna attachments on distribution poles – radically in excess of any lawful fee under the Commission’s Rules.

The Commission has made it clear that if attachers bring a complaint for unlawful rates, they are entitled to refunds extending back to the statute of limitations from the time a complaint is filed, even if the refund extends back before the effective date of the *April 7 Order*: June, 8, 2011. *April 7 Order* at ¶ 112. Reconsideration of this holding would only serve to immunize past unlawful over-charges.

#### **IV. CONCLUSION**

For the reasons discussed above, NextG urges the Commission to deny all of the various requests set forth in the Petition.

Respectfully submitted,

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August 10, 2011

Attorneys for NextG Networks, Inc.

## CERTIFICATE OF SERVICE

I, T. Scott Thompson, do hereby certify that on this 10th day of August 2011, I have caused a copy of the foregoing to be served via first-class United States Mail, postage pre-paid, and via email upon the following:

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