

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Acceleration of Broadband Deployment:
Expanding the Reach and Reducing the Cost
of Broadband Deployment by Improving
Policies Regarding Public Rights of Way and
Wireless Facilities Siting

WC Docket No. 11-59

REPLY COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

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I. INTRODUCTION AND SUMMARY

The City and County of San Francisco (“City”) submits these reply comments to support the opening comments of the National League of Cities, *et. al.* (“National Associations”) and the City of New York. As noted below, the City agrees with many of the points made in those comments. In addition, the City is responding to claims contained in some of the opening comments that the City’s laws, policies, and practices have somehow hindered broadband deployment and siting of wireless facilities. As the City will show herein, these claims are untrue.

The Federal Communications Commission (“Commission”) adopted this Notice of Inquiry to obtain information concerning State and local regulation over the use of the public rights-of-way by telecommunications carriers for the installation of broadband facilities and the siting of wireless facilities on private property. The Commission is undertaking this inquiry to determine what steps, if any, the Commission could take to improve State and local policies and practices with regard to these matters.

As has been the case with other such inquiries, telecommunications carriers asking the Commission to act will discuss their experiences with local governments. They often claim that these experiences have hampered their ability to install facilities that are necessary to meet the demands of their customers in an effort to convince the Commission to take actions favorable to carriers. Because anecdotal evidence of local laws, policies or practices is often of little value, the Commission urged parties filing comments in this proceeding to name specific government entities whose laws, policies or practices they believed had hindered broadband deployment or siting wireless facilities. The City has been named as an example of a bad actor in comments filed by AT&T and NextG Networks. The facts, however, do not support their arguments that the City’s law, policies, or practices hinder deployment.

AT&T claims that the City improperly used State environmental laws to stall AT&T's deployment of the facilities necessary to bring its U-verse service to San Francisco.¹ To the contrary, the City both complied with State environmental laws and responded to public concerns over the environmental impact of AT&T's deployment of over seven hundred large utility cabinets in the public rights-of-way.

AT&T also claims that San Francisco can be a difficult place to construct a wireless facility.² AT&T's problems siting these facilities, however, have little to do with City permitting requirements. Rather, they result directly from the City's geography, a lack of appropriate buildings in certain neighborhoods, reluctant property owners, and concerned local residents.

NextG argues that San Francisco is an "extraordinarily difficult place to install wireless facilities."³ In 2007, however, the City enacted an ordinance establishing a permit for NextG's distributed antenna system ("DAS") facilities. NextG was able obtain permits for 189 DAS nodes in San Francisco in less than two years, adding to the 63 DAS nodes it had installed prior to the City enacting the ordinance. While the City recently adopted a new ordinance, the City anticipates that its new wireless permitting requirements will be no more of a hindrance to NextG's deployment than was the prior ordinance.

II. THE CITY SUPPORTS THE COMMENTS FILED BY THE NATIONAL ASSOCIATIONS AND THE CITY OF NEW YORK

The City supports the opening comments filed by the National Associations. In their comments, the National Associations show that State and local governments have a strong interest in insuring that their residents and businesses have access to broadband and wireless facilities. They also show, however, that State and local governments have a duty to protect the public rights-of-way and enforce local zoning codes. The City agrees with the National Associations that the Commission should collaborate with State and local governments to

¹ See AT&T Comments, p. 5, n.5.

² AT&T Comments, p. 11.

³ NextG Comments, pp. 7-8.

achieve the joint goal of ensuring that the United States is a technology leader while continuing to insure that State and local authority is preserved. Rather than regulating State and local practices, the Commission should work with State and local governments to achieve the shared goals of broadband deployment and access to underserved populations.

We also agree with New York City's recommendation that the Commission could play an important role in local broadband deployment by highlighting best practices and identifying and recommending policies that have successfully resulted in universal, competitive broadband. The City also believes that New York City's market based approach to pricing antenna locations could prove to be a highly efficient way to allocate limited space for these antennas on municipal assets such as street lights. The Commission, therefore, should not use this proceeding to discourage or preclude this practice.

III. ANY DELAY IN AT&T'S U-VERSE DEPLOYMENT IN SAN FRANCISCO IS OF AT&T'S OWN DOING

AT&T blames the City for its slow roll-out of its U-verse video service in San Francisco.⁴ AT&T's criticism of the City, however, is unjustified. As discussed below, the facts are that the City took its responsibilities for environmental review under State law seriously, including by addressing many concerns from local residents over the environmental impact of AT&T's proposed U-verse deployment. As a result, AT&T withdrew its initial application for environmental review, and delayed the City's ultimate approval of its application for more than two years. While the City has recently approved the U-verse deployment, the City has been sued by community groups charging the City with inappropriate application of state environmental law.

⁴ See AT&T Comments, p. 5, n.5.

In 2007, the State of California assumed responsibility for issuing franchises to entities providing video services.⁵ While local governments no longer issue cable franchise, State law assigns local governments a number of important responsibilities related to the deployment of the facilities used by video service providers, such as those AT&T uses to provide its U-verse service. Those responsibilities include: (a) regulating a video franchise holder's use of the public rights-of-way;⁶ and (b) acting as the "lead agency" under the California Environmental Quality Act ("CEQA") for review of a franchise holder's construction activities.⁷

In 2007, AT&T obtained a State franchise to provide video service in San Francisco and many other parts of California. Thereafter, AT&T developed a plan to install some 850 large utility cabinets in the public rights-of-way in San Francisco in order to deploy U-verse. City law required that AT&T obtain discretionary excavation permits in order to install these facilities in the public rights-of-way.⁸ In addition, a directive from the City's Department of Public Works required AT&T to, among other things, work with the Department to determine the best location for each of those cabinets before the department would issue an excavation permit.⁹

As the "lead agency" under CEQA, the City had to consider the environmental impacts of AT&T's proposed deployment before it could issue any excavation permits.¹⁰ Sometime in the fall of 2007, AT&T submitted an application for environmental review to the San Francisco

⁵ For many years, local governments in the State of California were responsible for issuing cable television franchises. This system worked well for both local governments and cable operators. When incumbent local exchange carriers decided that they wanted to enter into the cable market their first step was to change this law. In 2006, AT&T and Verizon convinced the California legislature to preempt such local authority and establish the California Public Utilities Commission as the sole permitting authority for state video service providers. Cal. Public Util. Code § 5800, *et seq.* The franchise issued by the California Public Utilities Commission is largely ministerial and does not contain any of the detailed requirements usually found in local cable franchises.

⁶ Cal. Pub. Util. Code § 5885(a); *see* Cal. Pub. Util. Code §§ 7901, 7901.1.

⁷ Cal. Pub. Util. Code § 5820(b); *see* Cal. Pub. Res. Code 21000, *et seq.*

⁸ *See* S.F. Pub. Works Code art. 2.4.

⁹ *See* S.F. Department of Public Works Order No. 175,556.

¹⁰ Review under CEQA is required of all "discretionary projects," which includes local permits. Cal. Pub. Res. Code §§ 21065(c), 21080(a).

Planning Department. In June 2008, the Planning Department determined that the project was subject to a “categorical exemption” under CEQA.¹¹

As allowed under City law, the Planning Department’s determination was appealed to the San Francisco Board of Supervisors (“Board”). During a July 29, 2008 public hearing before the Board on the appeal, many local residents spoke about their concerns over the environmental impact of AT&T’s deployment. They asked the Board to reject the Planning Department’s determination and, instead require AT&T to prepare an environmental impact report for the project.¹² AT&T advised the Board during the hearing that it would withdraw its application.

It took AT&T more than two years to submit another application for environmental review to the Planning Department. The second application, dated September 30, 2010, contained a number of changes from the first. On February 22, 2011, the Planning Department determined that this application was categorically exempt from CEQA.

On March 24, 2011, the Planning Department’s determination was appealed to the Board by a public interest group called San Francisco Beautiful. On April 26, 2011, the Board held a public hearing on the appeal in which numerous people spoke both in favor of and against the appeal. Many opponents reiterated their requests for an environmental impact report for the project. The Board did not vote at that time.

On July 19, 2011, the Board denied the appeal leaving the Planning Department’s categorical exemption in place. The Board upheld the Planning Department’s in part because AT&T commitment to work with local residents to chose the locations for its utility cabinets.

That does not mean that AT&T is now free to fully deploy its U-Verse cabinets. On August 24, 2011, San Francisco Beautiful, along with a number of other community groups, filed

¹¹ CEQA authorizes the Secretary of the Resources Agency to establish a list of “classes of projects” that are categorically exempt from CEQA because they “have been determined not to have a significant effect on the environment.” Cal. Pub. Res. Code § 21084(a).

¹² An environmental impact report is required where there is “substantial evidence” that the project “may have a significant effect on the environment.” Cal. Pub. Res. Code § 21080(d). The preparation and final approval of an environmental impact report can take quite some time.

a lawsuit challenging the City's CEQA determination. They claim that the City violated CEQA by determining that the project was categorically exempt. They have asked the court to set aside the City's determination and instead require the preparation of an environmental impact report.

There is no reason for this Commission to look at the City's actions here as a call for the Commission to intercede to expedite broadband deployment. These facts show that AT&T's own inaction is the main reason it is still waiting to fully deploy U-verse in San Francisco.¹³ Each time AT&T submitted the required application for environmental review, the City acted as quickly as it could, while still complying with State and local law. This is hardly the indictment of the City's process that AT&T is trying to claim.

IV. ANY PROBLEMS AT&T MIGHT HAVE SITING WIRELESS FACILITIES IN SAN FRANCISCO HAVE NOTHING TO DO WITH THE CITY'S PERMITTING PROCESS

AT&T is one of the leading wireless carriers in San Francisco. It has installed wireless facilities at approximately 170 separate locations on private property, many of which required a discretionary permit from the City's Planning Commission.¹⁴ AT&T claims, however, that the AT&T cell sites that came on the air in 2010 took more than two and a half years "from the time AT&T initiated a search for the site to the time the site was fully acquired with all approvals obtained."¹⁵ While this statement is intended to imply that local governments are somehow part of the problem, the rest of AT&T's comments show that this is not the case in San Francisco.¹⁶

¹³ AT&T's U-verse service has been available to a limited number of customers in San Francisco for a few years now. AT&T was able to deploy some of its cabinets as a pilot project that was not subject to CEQA. In addition, AT&T has been able to serve new apartment projects in San Francisco by installing its equipment inside the building.

¹⁴ This number might not account for all of AT&T's wireless facilities in San Francisco. As discussed below, NextG and ExteNet (two DAS companies) have installed nearly two hundred DAS nodes in the public rights-of-way. The City has reason to believe that some of these are being used by AT&T. In any event, use of the public rights-of-way is certainly another option for AT&T, which it does not discuss here.

¹⁵ AT&T Comments, p. 4.

¹⁶ See AT&T Comments, pp. 11-12.

AT&T acknowledges that in San Francisco its problems begin with finding suitable locations for cell sites, which can take nine months or more. According to AT&T, in the Marina district of San Francisco AT&T was only able to identify 20 possible locations. At half of those locations, the property owners showed no interest in allowing AT&T to use their property for a wireless facility. Other locations were rejected by AT&T because they were not suitable for AT&T's coverage or capacity requirements or because the building lacked the structural integrity required for AT&T's wireless facility.¹⁷ Nowhere in this discussion is there any claim that the City's permitting process hindered or delayed AT&T's efforts to install a wireless facility in the Marina.

AT&T suggests that it proposed to place a cell tower in a park in the Marina, but the "governmental entity responsible for the park" refused to work with AT&T "after residents complained."¹⁸ It is impossible to tell from this statement what "governmental entity" AT&T is talking about. While there are parks under the jurisdiction of the City's Recreation and Park Department in the Marina district, the City is not aware of any recent efforts by AT&T to use a City park in this area to install a cell tower. The Marina district also has a number of parks that are part of the Golden Gate National Recreation Area ("GGNRA"). It is possible that AT&T is referring to the National Park Service, which is responsible for the GGNRA. Regardless of which entity AT&T is referring to, AT&T has presented no evidence whatsoever that the City's permitting process was a cause for any delay.

It appears that AT&T's problems with siting a wireless facility in the Marina district are due to reluctant property owners that may or may not be swayed by local resident concerns. Neither AT&T nor this Commission, however, can silence local residents that are concerned about the proliferation of wireless facilities in their neighborhoods – even if those concerns are

¹⁷ AT&T Comments, p. 11. AT&T admits that similar problems have arisen in "dozens" of other locations "throughout" San Francisco and "have prevented the placement of new cell site facilities." AT&T Comments, pp. 11-12, n.12.

¹⁸ AT&T Comments, p. 11.

about radio frequency emissions. While federal law preempts local governments from denying an application for a permit to construct a wireless facility on this ground, concerned citizens have a right to voice those concerns. They can use their voices to try to stop property owners from allowing their properties to be used for wireless facilities. In addition, neither AT&T nor this Commission can require property owners to allow AT&T to use their property for wireless facilities. Property owners have the right to refuse to lease their properties – for a wireless site or for any other reason – even if those property owners are “governmental entities” that have jurisdiction over the use and enjoyment of parks.¹⁹

AT&T also claims that it could not install a new facility in the City’s Cole Valley area even though it identified nine potential sites. Once again, it appears that AT&T’s inability to use most of those locations has nothing to do with the City.²⁰ AT&T claims that two of its proposed locations “turned out to be subject to zoning requirements that would not permit the site.”²¹ This statement is vague and, from what the City can tell, it is simply untrue. The Cole Valley area is largely zoned either as residential or neighborhood commercial. The City’s Planning Code does not prohibit siting wireless facilities in these zoning districts. Instead, under the Planning Code, a wireless facility in a residential or neighborhood commercial zoning district requires a conditional use permit from the Planning Commission.²²

AT&T also claims that some sites in the Cole Valley area were rejected due to “failed environmental requirements.”²³ Once again it is difficult to discern what AT&T means by this remark. The “environmental requirements” for a cell site enforced by the City are under CEQA. The City has repeatedly found that the installation of wireless facilities on private property (even in residential zoning districts) is categorically exempt from CEQA. The City is not aware of any

¹⁹ While federal law limits the City’s regulatory authority over the siting of wireless facilities, it does not similarly limit the City’s authority to refuse to lease its property to wireless carriers. *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (local decisions that are not “regulatory” are not preempted by 47 U.S.C. § 332(c)(7).)

²⁰ AT&T Comments, p. 11, n.12.

²¹ AT&T Comments, p. 11, n.12.

²² See S.F. Planning Code §§ 209.6(c), 711.83, and 790.80.

²³ AT&T Comments, p. 11, n. 12.

other “environmental requirements” that could have derailed any proposed installation of a wireless facility by AT&T in Cole Valley.

AT&T’s comments also ignore the fact often times delays in the City’s permitting process are the result of AT&T submitting a design that the Planning Department determines is incompatible with neighborhood where AT&T seeks to construct the facility. In such a case, rather than denying the application, the Planning Department will work with AT&T to improve the design so that the Planning Commission will approve the application. This process, which usually results in City approval of a conditional use permit, can take some time.

AT&T’s efforts to portray the City’s permitting requirements as an impediment to the construction of new wireless facilities in San Francisco miss the mark entirely. AT&T’s comments about the City do not support any Commission action.

V. THE CITY HAS NOT PREVENTED NEXTG FROM SUCCESSFULLY DEPLOYING ITS DISTRIBUTED ANTENNA SYSTEM FACILITIES

NextG’s comments concern its deployment of DAS facilities in San Francisco.²⁴ Despite NextG’s efforts to claim that the City has hindered its efforts to deploy in San Francisco, the facts do not support this claim. NextG has been quite successful in this regard, having deployed nearly 200 DAS facilities.

As allowed under federal and California law, the City regulates the use of the public rights-of-way by telecommunications carriers.²⁵ All telecommunications carriers in San Francisco must have a utility conditions permit.²⁶ Any telecommunications carrier seeking to excavate must have an excavation permit.²⁷ And, since 2007, any telecommunications carrier seeking to install antennas and related equipment on utility poles must have a wireless permit.²⁸

²⁴ NextG Comments, pp. 7-8.

²⁵ See 47 U.S.C. § 253(c); Cal. Pub. Util. Code, §§ 7901, 7901.1.

²⁶ See S.F. Admin. Code § 11.9.

²⁷ See S. F. Pub. Works Code art. 2.4.

²⁸ See S.F. Admin. Code § 11.9(b) (repealed); and S. F. Pub. Works Code, art. 25 (adopted January 2011).

NextG was the first entity that approached the City about installing DAS facilities. At that time, the City did not have any permit to authorize the installation of wireless facilities in the public rights-of-way. The City had good reason to be concerned about the unregulated proliferation of these facilities, as NextG is one of many entities that construct DAS networks for wireless carriers. Wireless carriers can also install facilities like these on their own. Therefore, the City required NextG to obtain encroachment permits so that the City would have the opportunity to review and approve the size and location of each facility.

NextG sued the City claiming that federal law preempts the City's encroachment permit requirement. The district court found for NextG, holding that "the City's requirement that NextG obtain a major encroachment permit 'may prohibit or have the effect of prohibiting' NextG from providing telecommunications services." *NextG Networks of California, Inc. v. City of San Francisco*, 2006 WL 1529990, at *5 (N.D. Cal. 2006) (quoting 47 U.S.C. 253 (a)). In making this determination, the district court had to apply controlling law. At that time, as the district court noted, controlling authority had restricted local authority to regulate the use of the public rights-of-way by telecommunications carriers:

Under clearly established Ninth Circuit law, section 253(a) effects an extremely broad preemption of state and local regulation of telecommunications services: "[w]e have interpreted this preemptive language to be clear and 'virtually absolute' in restricting municipalities to a 'very limited and proscribed role in the regulation of telecommunications.'" *Qwest Commc'ns v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006) (quoting *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001).

NextG Networks, 2006 WL 1529990, at *4.

The district court subsequently entered a judgment in favor of NextG in which the court required the City to issue NextG a utility conditions permit. NextG then installed 63 DAS nodes in San Francisco without any other permits. These DAS facilities look nothing like the

photograph of the Huntington Beach node that NextG attached as Exhibit A to its comments. They are significantly larger and more obtrusive.²⁹

In 2007, a City ordinance established a separate wireless facility site permit for NextG's DAS facilities and similar facilities.³⁰ The purpose of this ordinance was to give the City some control over the location and look of these facilities in a manner that was consistent with controlling authority and the district court's *NextG* decision. The ordinance also enabled the City to ensure that NextG has complied with this Commission's regulations for human exposure to radio frequency emissions.

NextG then filed another lawsuit against the City in which NextG claimed that § 253 preempted the City's newly enacted requirements for wireless permits. The district court found that the City's ordinance was distinguishable in many respects from the types of local ordinances that other courts, following *City of Auburn*, had found were preempted:

First, telecommunications providers are not subject to any civil or criminal penalties for failure to comply with the regulations. Second, no public hearings are required for the initial application process.

Third, the application process is relatively basic, streamlined, and inexpensive. The information required for the application is limited to the information necessary to identify the proposed locations of the wireless facilities; information related to whether or not the applicant has permission to use a particular utility pole; a certification that the applicant has obtained approvals required under the California Environmental Quality Act; and a certification that radio frequency emissions are within FCC limits.

NextG Networks of California, Inc. v. City and County of San Francisco, 2008 WL 2563213, at *8 (N.D. Cal. 2008). Nonetheless, the district court found that under *City of Auburn* certain aspects of the City's permitting requirement were preempted. *Id.* at *10.

Shortly after the district court issued this opinion, and before the City had a chance to amend the ordinance, the Ninth Circuit sitting *en banc* expressly overruled *City of Auburn*. In

²⁹ A photograph of one of the facilities that NextG installed in San Francisco during this period is attached as Exhibit A hereto.

³⁰ See S.F. Admin. Code § 11.9(b) (repealed).

Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571, 577-78 (9th Cir. 2007), the Ninth Circuit held:

Section 253(a) provides that “[n]o State or local statute or regulation ... may prohibit or have the effect of prohibiting ... provi[sion of] ... telecommunications service.” In context, it is clear that Congress’ use of the word “may” works in tandem with the negative modifier “[n]o” to convey the meaning that “state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.” Our previous interpretation of the word “may” as meaning “might possibly” is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that “a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.”

After the Ninth Circuit’s *Sprint Telephony* decision the district court granted the City’s motion for reconsideration of that court’s determination that § 253 preempted the City’s wireless permit. In an order dated September 24, 2009, the court stated that under *Sprint Telephony* the City’s requirements for wireless permits are not preempted “on their face.”

Despite NextG’s lawsuit claiming federal preemption, the City’s application of that ordinance to the deployment of wireless facilities did not prove to be a prohibition of any kind. In fact, the City’s wireless permit requirement worked remarkably well for NextG and other telecommunications carriers. Between 2008 and 2010, the Department of Public Works issued NextG permits to construct 189 DAS nodes in the public rights-of-way.³¹ During this same time period, the Department of Public Works issued 59 wireless permits to ExteNet Systems, Inc. (another DAS provider), and 67 wireless permits to T-Mobile.³² Again, NextG’s DAS facilities look nothing like the photograph of the Huntington Beach node that NextG attached as Exhibit A to its comments. They are significantly larger and more obtrusive.³³

³¹ NextG claims that it only installed 123 DAS nodes, despite obtaining 189 permits.

³² A map showing the location of all of the City’s permitted wireless facilities is attached hereto as Exhibit B.

³³ Photographs of typical permitted NextG facilities are attached hereto as Exhibit C. A drawing of a proposed NextG facility in San Francisco is attached as Exhibit D. The drawing does not include the separate power supply cabinet that NextG intends to install on another utility pole across the street from this one.

Earlier this year, the City adopted a new ordinance that revised its wireless permitting requirements.³⁴ The major change from the prior permitting requirements is that there are now three different tiers for wireless facilities based entirely on the size of the antennas and other equipment used. One of the purposes of the tier program is to provide an incentive for applicants for wireless permits to install the smallest facilities possible by requiring limited review for the lowest tier. In this manner, NextG and the other applicants for wireless permits can control the process from the outset by designing a facility that satisfies the criteria for the smallest tier.

The lowest facilities (Tier I) are permitted with minimal application review by: (i) the Department of Public Works to determine whether the size of the equipment satisfies the Tier I requirements; and (ii) the Department of Public Health to determine whether the facility complies with Commission regulations concerning human exposure to radio frequency emissions. Tier I permit applications, therefore, can be approved very quickly. NextG has submitted a number of applications for Tier I permits.

Applications to install slightly larger facilities (Tier II) are also reviewed by the Department of Public Works and Department of Public Health for the reasons set forth above. These applications could also be reviewed by the Planning Department or the Recreation and Park Department depending on the proposed location for the facility.³⁵ For this reason, the time to process many Tier II applications will be longer than for a Tier I application, but still should be completed relatively quickly.

Any facility that is larger than the size prescribed for Tiers I or II is a Tier III facility (there are no size limitations for a Tier II facility). In addition to reviews similar to those described above for a Tier II facility, persons living and working in the vicinity have the right to protest the City's issuance of a Tier III permit. If a protest is filed, the City will hold a public

³⁴ S. F. Pub. Works Code, art. 25.

³⁵ The Planning Department will only review any application for a Tier II facility if the proposed location is in a residential or neighborhood commercial zoning district, a historic district, in front of a historic or architecturally significant building, or on a scenic or view street as designated in the City's General Plan. The Recreation and Park Department will only review the application if the proposed location is near a City park or open space.

hearing. For this reason, it will take longer to process an application for a Tier III permit. Because the City is just starting to process these applications, it is not clear at this point how long the whole process will take. The City does not believe, however, that it will take more than six months as NextG suggests in its comments.³⁶

NextG has once again sued the City to challenge this ordinance.³⁷ T-Mobile and ExteNet have joined NextG in this lawsuit. This time there is no claim of federal preemption. Instead, the plaintiffs claim that California law preempts the City's new ordinance. The City believes that its ordinance is not preempted, and intends to vigorously defend the lawsuit.

NextG also argues that in the new ordinance the City "purports to terminate" the 63 DAS nodes that NextG installed in the public rights-of-way before the City had a wireless permit requirement.³⁸ This is an exaggeration of what the City's new law ordinance. In fact, the ordinance merely requires that NextG obtain wireless permits for facilities that were never reviewed by any City department. Ultimately, the City might issue NextG 63 new permits once they go through the new permitting process.³⁹ NextG will only have to remove those facilities if the City ultimately denies its application for a wireless permit at a particular site.⁴⁰

³⁶ NextG has informed the City that it believes under this Commission's shot-clock decision the City must process these applications in 90 days. *See In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994 (2009)*. While the City does not agree with NextG in this regard for a number of reasons, if NextG is correct it can certainly seek relief from a court if the City's review process is not completed within 90 days.

³⁷ NextG's multiple lawsuits against the City are not an anomaly. A Westlaw search of reported decisions shows that NextG has been quite willing to sue local governments. *See NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49 (2d Cir. 2008); *NextG Networks of California, Inc. v. City of Huntington Beach*, 294 Fed. Appx. 303 (9th Cir. 2008); *NextG Networks of Cal., Inc. v. County of Los Angeles*, 522 F. Supp. 2d 1240 (W.D. Cal. 2007); *NextG Networks of California, Inc. v. City of Newport Beach, CA*, 2011 WL 717388 (C.D. Cal. 2011);

³⁸ NextG Comments, p. 7.

³⁹ A court recently denied NextG's motion for preliminary injunction that would have prohibited the City from enforcing this aspect of the City's new ordinance.

⁴⁰ Even NextG would seem to agree it could not maintain these facilities forever without a wireless permit. NextG has argued in court that its DAS facilities have a "useful life of 15-20 years." After that, NextG presumably would file need a permit to install a different facility at any of these locations.

