

ALJ/TIM/sbf

PROPOSED DECISION

Agenda ID #12301 (Rev. 1)
Adjudicatory
9/19/2013 Item 7

Decision PROPOSED DECISION OF ALJ KENNEY (Mailed 8/1/13)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Edison Company, Cellco Partnership LLP d/b/a Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc. and Pacific Bell Telephone Company d/b/a AT&T California and AT&T Mobility LLC, Regarding the Utility Facilities and the Canyon Fire in Malibu of October 2007.

Investigation 09-01-018
(Filed January 29, 2009)

**DECISION CONDITIONALLY APPROVING
THE NEXTG SETTLEMENT AGREEMENT**

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Appendix A

**DECISION CONDITIONALLY APPROVING THE
NEXTG SETTLEMENT AGREEMENT**

1. Summary

This decision conditionally approves a settlement agreement between the Commission's Safety and Enforcement Division (SED) and NextG Networks of California, Inc. (NextG). The settlement resolves all issues in this proceeding regarding NextG's involvement with the Malibu Canyon Fire in October of 2007.

The Malibu Canyon Fire occurred when three utility poles broke and fell to ground. In the settlement agreement, NextG admits that one of these poles was overloaded in violation of General Order (GO) 95. NextG agrees to pay \$14.5 million, of which \$8.5 million will be a fine paid to the State of California General Fund. The remaining \$6.0 million will be used to conduct a safety audit of all of NextG's poles and pole attachments in California. NextG must complete the audit and any remedial work necessitated by the audit within three years from the date the audit starts. Any money that remains after the safety audit is complete will be paid to the State of California General Fund. Conversely, if \$6.0 million is not sufficient to complete the audit, NextG will provide additional funds to finish the audit. Importantly, the \$6.0 million provided for the safety audit will not pay for remedial work on substandard facilities found by the audit. The costs for remedial work will be in addition to the \$14.5 million that NextG is required to pay under the settlement agreement.

Our approval of the settlement is subject to the conditions in the Ordering Paragraphs of this decision. The most significant conditions are listed below:

1. NextG shall commence the safety audit within 60 days from the effective date of this decision.
2. The \$6.0 million provided for the safety audit shall pay only for material, labor, and services that are directly related to the safety audit. The \$6.0 million shall not pay for internal administrative or overhead costs incurred by NextG.
3. The safety audit shall assess whether NextG's poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm.
4. SED may specify the audit plan, methods, procedures, and other details of the safety audit. NextG shall structure the safety audit to conform to SED's specifications.
5. If the safety audit finds a pole or pole attachment that does not comply with GO 95 or other regulation, SED may seek fines and other remedies if the substandard facility is later involved in an accident or outage, regardless of whether the facility is remediated within a reasonable time.
6. SED may specify the content, format, and other details of the bi-monthly reports that NextG submits to SED pursuant to Section III.D of the Settlement Agreement. The reports submitted by NextG shall conform to SED's specifications.
7. After the final bi-monthly report is submitted, SED shall prepare a report that (a) summarizes the results of the safety audit; (b) lists and describes any significant safety issues found by the audit and what remedial actions were taken, if any; and (c) provides any recommendations or other information that SED deems appropriate. SED shall post its report online at the safety information portal on the Commission's website, with appropriate redactions, in accordance with Commission Resolution L-436.

The settlement agreement, with the conditions adopted by today's decision, will enhance public safety considerably. The safety audit will inspect nearly 60,000 utility poles for compliance with GO 95 safety factors. Substandard

poles discovered by the audit will be repaired or replaced, as necessary. The \$8.5 million fine paid by NextG will deter future violations by NextG and others.

The approved settlement agreement does not include Southern California Edison Company (SCE). This proceeding remains open to resolve allegations that SCE violated the Public Utilities Code and Commission regulations with respect to its involvement with the Malibu Canyon Fire.

2. Background

On October 21, 2007, strong Santa Ana winds swept through Malibu Canyon in Los Angeles County. Three interconnected utility poles located next to Malibu Canyon Road fell to the ground and ignited a fire. The resulting fire (the Malibu Canyon Fire) burned 3,836 acres, destroyed 14 structures and 36 vehicles, and damaged 19 other structures. The Los Angeles County Fire Department estimated the dollar loss from the fire was \$14,528,300. There were no reported injuries or fatalities.

The Commission issued Order Instituting Investigation (OII) 09-01-018 on January 29, 2009, to determine if the following Respondents violated any provisions of the California Public Utilities Code and/or Commission decisions, rules, or general orders with respect to their facilities that were involved in the ignition of the Malibu Canyon Fire:

- AT&T Mobility LLC (AT&T).¹
- NextG Networks of California, Inc. (NextG).²
- Southern California Edison Company (SCE).
- Sprint Communications Company, LP (Sprint).
- Cellco Partnership LLP, d/b/a Verizon Wireless (Verizon).

The fallen poles were jointly owned by the Respondents. Each Respondent had facilities attached to at least one of the fallen poles.

The Commission's Safety and Enforcement Division (SED), formerly known as the Consumer Protection and Safety Division (CPSD), investigated the incident and served testimony on May 3, 2010, April 29, 2011, and August 29, 2011. The Respondents served testimony, both individually and jointly, on November 18, 2010, June 29, 2011, and August 29, 2011.

There were three prehearing conferences. The first was held on May 13, 2009, the second on October 26, 2011, and the third on November 20, 2012. The assigned Commissioner issued two scoping memos. The first was issued on October 22, 2009. The second was issued on November 23, 2011.

On February 3, 2012, the following parties filed a joint motion for approval of a settlement agreement pursuant to Rule 12.1(a) of the Commission's Rules of

¹ The record does not clearly identify the AT&T entity that is the relevant Respondent. OII 09-01-018 named AT&T Communications of California, Inc., as the AT&T Respondent. The caption for this proceeding indicates the AT&T Respondent is Pacific Bell Telephone Company d/b/a AT&T California and AT&T Mobility LLC. The record of this proceeding indicates that the only AT&T entity which had facilities involved in the ignition of the Malibu Canyon Fire was AT&T Mobility LLC. This decision will hereafter treat AT&T Mobility LLC as the relevant AT&T Respondent.

² In a letter to the service list on December 5, 2012, NextG announced that it is now Crown Castle NG West, Inc. For consistency with the record of this proceeding, today's decision will use "NextG Networks of California, Inc." or NextG.

Practice and Procedure (Rule): SED, AT&T, Sprint, and Verizon. The settlement agreement was appended to the motion (the "Carrier Settlement Agreement"). NextG and SCE were not parties to the settlement. The Commission conditionally approved the Carrier Settlement Agreement in Decision (D.) 12-09-019. The approved settlement agreement resolved all issues in this proceeding with respect to AT&T, Sprint, and Verizon.

On February 21, 2013, SED and NextG filed a joint motion for approval of a settlement agreement pursuant to Rule 12.1(a). The settlement agreement was appended to the motion (the "NextG Settlement Agreement" or the "Settlement Agreement"). SCE is not party to the settlement.

NextG and SED convened a settlement conference on February 21, 2013, as required by Rule 12.1(b). On February 27, 2013, NextG and SED (hereafter, the Settling Parties) filed a motion to (1) admit into the record NextG's previously served testimony and accompanying exhibits; (2) identify previously admitted testimony and exhibits as relevant to the Commission's review of the NextG Settlement Agreement; and (3) admit into the record a new exhibit identified as CPSD-4. The motion was granted in a ruling issued by the assigned Administrative Law Judge (ALJ) on March 19, 2013.

On March 20, 2013, the assigned ALJ sent two e-mails to the service list which directed the Settling Parties to provide specified information regarding the NextG Settlement Agreement in comments submitted pursuant to Rule 12.2. The Settling Parties provided the information in comments filed on April 2, 2013. SCE also filed comments on April 2, 2013, pursuant to Rule 12.2.

On April 22, 2013, the assigned ALJ sent an e-mail to the service list that directed the Settling Parties to provide additional information on the Settlement

Agreement. The Settling Parties provided the information in comments filed on May 23, 2013. Hans Laetz, an intervenor, also filed comments on May 23, 2013.

On May 20, 2013, SCE and SED filed a joint motion for approval of a settlement agreement pursuant to Rule 12.1(a) (the "SCE Settlement Agreement"). The SCE Settlement Agreement will be addressed in a separate Commission decision.

3. Litigation Positions

SED alleged that at least one of the poles which fell and ignited the Malibu Canyon Fire was overloaded in violation of General Order (GO) 95 and California Public Utilities Code Section 451 (Pub. Util. Code § 451). SED believes the substandard pole was due, in part, to the Respondents interpreting the Southern California Joint Pole Committee (SCJPC) rules in a way that neglected compliance with GO 95. SED further alleged that each Respondent violated Pub. Util. Code § 451 and GO 95 by installing facilities in Malibu Canyon that could not withstand Santa Ana winds which are a known local condition. In addition, SED alleged that a replacement pole installed after the fire had a lower safety factor³ than required by GO 95 for new construction. Finally, SED alleged that the Respondents violated Rule 1.1 of the Commission's Rules of Practice and Procedure (Rule 1.1) by providing accident reports, data responses, and testimony that contained incorrect information.

SED recommended fines totaling \$99,232,000 for the alleged violations. The recommended fine for each Respondent is shown below:

³ The term "safety factor" is defined by Rule 44 of GO 95 as "the minimum allowable ratios of ultimate strengths of materials to the maximum working stresses."

Respondent	Proposed Fine
SCE	\$49,539,500
NextG	\$24,789,500
AT&T	\$7,759,500
Sprint	\$7,732,000
Verizon	\$9,411,500
Total Fine:	\$99,232,000

The Respondents denied all of SED's allegations. The Respondents claimed that every utility pole at issue in this proceeding complied with all applicable safety requirements. They further asserted that they did not provide incorrect information to SED or did so unintentionally.

All issues in this proceeding pertaining to AT&T, Sprint, and Verizon (together, the Carriers) were resolved by the Carrier Settlement Agreement that was conditionally approved by D.12-09-019. Briefly, the approved settlement requires the Carriers to pay \$6.9 million to the State General Fund and \$5.1 million for specified remedial safety measures, for a total of \$12 million.

4. Summary of the NextG Settlement Agreement

The NextG Settlement Agreement resolves all issues in this proceeding with respect to NextG. A copy of the Settlement Agreement is attached to today's decision as Appendix A.

The NextG Settlement Agreement contains the following admissions, acknowledgements, and concessions by NextG:

- NextG admits that it requested permission from SCE to attach fiber optic cable facilities to Pole No. 1169252E (Pole 252E) in Malibu Canyon in accordance with SCJPC procedures, and that SCE denied the request because the proposed attachment would cause Pole 252E to exceed wind-load criteria.

- NextG agrees that although SCE denied NextG's request to attach facilities to Pole 252E, NextG nonetheless attached facilities to the pole based on SCJPC Rule 18.1-D, which provides for automatic approval of proposed attachments if no protest or request for review is received within 45 days.
- NextG acknowledges that the SCJPC process cannot be used to avoid compliance with any applicable law or regulation, including GO 95. NextG admits that its communications with SCE regarding Pole 252E were inadequate.
- NextG admits that after it attached fiber optic cable facilities to Pole 252E, the pole had a lower safety factor than required by GO 95, Rules 12.2, 43.2, 44.2,⁴ and 48. NextG capitulates to SED's argument that the Respondents failed to provide safe service by overloading at least one of the subject poles in violation of Pub. Util. Code § 451 and GO 95.
- NextG admits that Santa Ana winds are a known local condition.
- NextG accepts SED's conclusion that Replacement Pole 4557608E (hereafter, Replacement Pole 608E), which SCE installed to replace the failed Pole 252E, had a lower safety factor than required by GO 95, Rules 43.2, 44.1, and 48. The NextG Settlement Agreement notes that the Carrier Settlement Agreement provides for the remediation of Replacement Pole 608E. NextG agrees to cooperate with the Carriers to bring Replacement Pole 608E into compliance with GO 95.
- NextG admits that the written testimony of William R. Schulte, dated November 18, 2010, on behalf of all Respondents, implied that all evidence had been preserved and was available for inspection. NextG admits that (1) some items attached to the failed poles were discarded, including two of NextG's cables; and (2) Schulte's testimony fell below the standards of Rule 1.1 in some respects. NextG agrees to withdraw its sponsorship of Schulte's testimony.

⁴ GO 95, Rule 44.2 is now GO 95, Rule 44.3.

The NextG Settlement Agreement requires NextG to pay \$14.5 million. From this amount, NextG will pay a fine of \$8.5 million to the State General Fund pursuant to Pub. Util. Code §§ 2107 – 2019. The remaining \$6.0 million will be paid to an escrow account to carry out the activities of the Statewide Safety Enhancement Fund (SSE Fund).

The Settlement Agreement establishes the SSE Fund to pay for a third-party contractor to conduct a safety audit of every utility pole in California that NextG either owns, in whole or part, or attaches facilities to. Nearly 60,000 poles will be subject to the safety audit. The third-party contractor will complete the following tasks as part of the safety audit:

- a. Conduct a pole-load engineering analysis of each of NextG's poles and pole attachments to determine compliance with GO 95 safety factor requirements. If any pole or attachment does not comply, NextG will work with the pole owner(s) to bring the pole into compliance or replace the pole.
- b. Visually inspect poles and attachments for GO 95 compliance and maintenance issues. Compliance and maintenance issues will be documented and photographed.
- c. Confirm the height and size of NextG attachments for pole-loading calculations.
- d. Cross reference and verify the pole card to the pole and other pole owners/attachers.
- e. Request intrusive inspection records from the base pole owner and incorporate the results of the intrusive inspections into the engineering analysis.
- f. Document pole class information, confirm pole tag, and replace missing pole tags.
- g. Document the GPS location for each pole.
- h. Take a photo of each pole that clearly shows the attached facilities, and mark the date on the photo.

- i. Input all of this data into an auditable database.
- j. Communicate any problems discovered during the audit to the responsible parties.

The safety audit will begin in Malibu and Los Angeles County. NextG will provide bi-monthly status reports to SED. NextG will also maintain audit records, including pole-loading data and photographs, and provide these records to SED upon request. NextG must complete the audit and any remedial work performed in response to the audit within three years of starting the audit.

The SSE Fund will not pay for remedial work; NextG will pay for remedial work separately. Any money remaining in the SSE Fund after the safety audit is complete will be paid to the State General Fund. Conversely, if audit costs exceed the \$6.0 million used to establish the SSE Fund, NextG will provide sufficient funds to complete the audit.⁵

NextG agrees that henceforth it will not invoke SCJPC Rule 18.1-D to avoid remediation of a potential safety violation. If NextG (or one of its agents) seeks to attach to a pole and receives a safety objection within, or after, the 45-day limit specified in Section 18.1-D of the SCJPC Routine Handbook, NextG will take appropriate action to address the safety concern.

The Settlement Agreement states that NextG has implemented new protocols for in-house management of all joint-pole communications, an auditable database for all pole-loading documentation, and training for both

⁵ Although not stated in the Settlement Agreement, NextG will have direct control of the safety audit, the SSE Fund, and all associated money and activities. The \$6.0 million the Settlement Agreement provides for the SSE Fund will not be received by the Commission; NextG will retain possession of the \$6.0 million.

in-house and contract personnel on GO 95 and SCJPC policies and procedures. NextG agrees to use these protocols going forward.

NextG and SED believe the Settlement Agreement reasonably resolves the Commission's Malibu Canyon Fire investigation with respect to NextG. They aver that the settlement is reasonable in light of the record of this proceeding, consistent with the law, and in the public interest.

5. Responses to the Settlement Agreement

5.1. The Other Respondents

AT&T, Sprint, and Verizon did not express a position on the NextG Settlement Agreement. SCE has no objection to the agreement.

5.2. Hans Laetz

Hans Laetz, an intervenor who lives in the Malibu area, is concerned that utility poles in Malibu Canyon and elsewhere may not be strong enough to withstand Santa Ana windstorms, making such facilities non-compliant with Rule 31.1 of GO 95. Laetz cites the testimony from one of the Respondents' expert witnesses who asserted that Santa Ana winds reached 114 miles per hour (mph) in Malibu Canyon on October 21, 2007.

Laetz notes that the Carrier Settlement Agreement that was approved by D.12-09-019 requires the Carriers to upgrade the safety factor for utility poles in a designated part of Malibu Canyon to 4.0. The NextG Settlement Agreement requires NextG to cooperate in this endeavor. The problem, according to Laetz, is that a safety factor of 4.0 equates to a wind speed of 112 mph. Thus, the poles upgraded by the Carrier Settlement Agreement are not designed to withstand Santa Ana gusts of 114 mph that are known to occur. Laetz contends the problem is worse for utility poles in other parts of Malibu Canyon and the greater Malibu area that have a safety factor of less than 4.0.

Laetz is also concerned about potentially conflicting provisions among the settlement agreements in this proceeding regarding the upgrade and remediation of utility poles in the Malibu area. Laetz notes that the Carrier Settlement Agreement will upgrade the safety factor of utility poles in Malibu Canyon to 4.0. In contrast, the NextG Settlement Agreement requires NextG to ensure that its poles in the Malibu area comply with the minimum safety factor of 2.67 required by GO 95. The pending SCE Settlement Agreement requires SCE to ensure that its poles in the Malibu area comply with the minimum safety factor of 2.67 or a higher, but unspecified, safety factor established by SCE for poles in what SCE deems to be “high wind areas.” Further complicating this issue is Phase 3 of Rulemaking (R.) 08-11-005 where the Commission may develop standards for overhead utility facilities in high fire-threat areas such as Malibu Canyon.

Laetz opines that it would be unreasonable to have each settlement agreement utilize a different safety factor for remediating poles in the same area, and then adopting a new standard in R.08-11-005 that supersedes the fragmented standards used by the settlement agreements. Laetz urges the Commission to establish a uniform standard for remediating poles in the Malibu area that takes into account the evidence of 114 mph winds in Malibu Canyon.

6. Discussion

The ultimate issue we must decide is whether to approve the NextG Settlement Agreement. The relevant standard is provided by Rule 12.1(d) of the Commission’s Rules of Practice and Procedure, which states that the Commission will not approve a settlement agreement unless the settlement is reasonable in light of the whole record, consistent with the law, and in the public interest. In general, the Commission does not consider if a settlement reaches the optimal outcome on every issue. Rather, the Commission determines if the

settlement as a whole is reasonable. A settlement agreement should also provide sufficient information to enable the Commission to implement and enforce the terms of the settlement.

The NextG Settlement Agreement addresses matters that affect public safety. Therefore, a paramount factor in our evaluation of the Settlement Agreement is Pub. Util. Code § 451, which requires every public utility in California to "furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." The edicts of § 451 are a cornerstone of today's decision.

6.1. Reasonable in Light of the Whole Record

6.1.1. Summary of the Record

The record of this proceeding shows that three interconnected wood utility poles in Malibu Canyon fell to the ground during a Santa Ana windstorm on October 21, 2007. Pole 252E was an unguyed tangent pole. Pole 1169253E (hereafter, Pole 253E) was an inline pole with three span guys attached to Pole 2279212E (hereafter, Pole 212E). Pole 212E was a stub pole that provided structural support for Pole 253E via span guys. Pole 212E also had two down guys attached to a concrete anchor.

Poles 252E and 253E had electric facilities and communications facilities attached in the following chronological order:

- SCE - 66 kilovolt electric cables/conductors (prior to 1990).
- Verizon - communications cables/conductor (1994-1995).
- AT&T - communications cables/conductor (1995-1996).
- Edison Carrier Solution - communications cables/conductor (1996).
- Sprint - communications cables/conductor (1998).

- Sprint - antennas and related equipment (Pole 253E only, 2003).
- NextG - communications cables/conductor (2004-2005).

Pole 252E and Pole 253E each had an attached streetlight, but it is unclear when the streetlights were attached. The only attachments to Pole 212E were the span guys and down guys.

The three poles were classified as Grade A poles. GO 95 requires Grade A wood poles in Malibu Canyon to bear a horizontal wind load⁶ of eight (8) pounds per square foot (psf) multiplied by a prescribed safety factor.⁷ Newly installed Grade A wood poles in Malibu Canyon must have a safety factor of at least four (4.0), or 32 psf. The safety factor can degrade to 2.67, or 21 psf. Grade A wood poles must be remediated or replaced before the safety factor drops below 2.67.⁸

SED alleged that NextG violated Pub. Util. Code § 451, GO 95, and Rule 1.1 of the Commission's Rules of Practice and Procedure (Rule 1.1). The following table lists the alleged violations and SED's proposed fine for each violation.

⁶ The wind load on a utility pole is the force of the wind hitting the pole directly plus the force of the wind on the facilities attached to the pole (*e.g.*, cross arms and conductors). The wind load on a pole is magnified at ground level where the pole acts as lever and the ground as a fulcrum.

⁷ The GO 95 wind load standard of 8 psf applies to line elements with cylindrical surfaces. The wind load standard for line elements with flat surfaces is 13 psf.

⁸ GO 95, Rules 12.2, 31.1, 43.2, 44.1, 44.3, and 48.

Violation	Summary of Alleged Violation	Proposed Fine
<ul style="list-style-type: none"> • P.U. Code § 451 	<p>In 2003 and 2004, NextG engaged in unsafe practices when it disregarded several notices from SCE that NextG’s proposed attachments would overload several poles. Instead, NextG interpreted the SCJPC rules in a way that neglected compliance with GO 95.</p>	\$10,766,000
<ul style="list-style-type: none"> • P.U. Code § 451 • GO 95, Rules 12.2, 43.2, 44.3, and 48 	<p>In 2005, NextG attached fiber optic cable facilities to Poles 252E and 253E, which overloaded at least one of these poles. Both poles failed during a Santa Ana windstorm in October 2007, as did the support Pole 212E.</p>	\$6,538,000
<ul style="list-style-type: none"> • P.U. Code § 451 • GO 95, Rule 31.1 	<p>In 2005, NextG installed facilities that could not withstand Santa Ana windstorms that are known to occur in the area.</p>	\$6,538,000
<ul style="list-style-type: none"> • P.U. Code § 451 • GO 95, Rules 43.2, 44.1, and 48 	<p>In 2007, NextG attached facilities to Replacement Pole 608E, which did not have the minimum safety factor of 4.0 required by GO 95 for new construction.</p>	\$507,500
<ul style="list-style-type: none"> • Rule 1.1 	<p>In 2010, NextG violated Rule 1.1 by co-sponsoring testimony that falsely implied that all evidence had been preserved. In reality, some evidence had been discarded, including two of NextG’s cables.</p>	\$440,000
Total Recommended Fine		\$24,789,500
<p>Pub. Util. Code § 451 requires NextG to “furnish and maintain... service, instrumentalities, equipment, and facilities... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.”</p> <p>GO 95, Rules 12.2, 43.2, 44.2, and 48 together require the joint-use Grade A wood poles in Malibu Canyon to withstand a wind load of 8 psf multiplied by a safety factor of 4.0 for new construction, which may degrade to a safety factor no lower than of 2.67.</p> <p>GO 95, Rule 31.1 requires facilities to “be designed, constructed, and maintained for their intended use, regard being given to the conditions under which they are to be operated, to enable the furnishing of safe, proper, and adequate service.”</p> <p>Rule 1.1 requires any “person who... offers testimony at a hearing... [to] never to mislead the Commission or its staff by an artifice or false statement of fact or law.”</p>		

SED served written testimony supporting its allegations.

The Respondents denied all of SED's allegations. NextG and the other Respondents served written testimony which asserted that Pole 252E was not overloaded; that Replacement Pole 608E complied with GO 95; and that the Respondents complied with Rule 1.1. NextG further testified that it followed the SCJPC rules in a reasonable manner and complied with GO 95. For example, when NextG attached fiber optic cable facilities to Pole 253E, NextG also replaced a guy span between Poles 253E and 212E with a stronger guy cable. And while it is true that NextG was notified by SCE that NextG's proposed attachment to Pole 252E would cause the pole to have a lower safety factor than allowed by GO 95, NextG testified that SCE agreed during a "field meet" that the proposed attachment complied with GO 95.

6.1.2. Analysis

We next consider if the Settlement Agreement's resolution of the alleged violations is reasonable in light of the whole record. Our primary concern is whether the Settlement Agreement resolves the alleged violations in a way that protects public safety as required by Pub. Util. Code § 451. We find the NextG Settlement Agreement, with the conditions adopted by today's decision, achieves this objective.

6.1.2.1. Alleged Safety Violations

6.1.2.1.1. Unsafe Business Practices

SED alleged that NextG engaged in unsafe business practices, and thereby violated Pub. Util. Code § 451, when NextG disregarded several notices from SCE that denied NextG's request to attach facilities to poles in Malibu Canyon because the proposed attachments would overload several poles. NextG admits

that SCE denied NextG's proposed attachments due to pole overloading, and that Pole 252E was overloaded after NextG attached its facilities to the pole.

The Settlement Agreement contains several recitals and provisions that describe the chain of events that led to NextG's attachment of facilities that overloaded Pole 252E. Specifically, NextG used SCJPC procedures to request permission to attach facilities to Pole 252E. SCE denied the request based on SCE's determination that NextG's proposed attachment would overload the pole. NextG contested the determination. After additional communications between NextG and SCE over an 11-month period, SCE again denied the proposed attachment. NextG responded by informing SCE that it could not deny the request per Section 18.1-D of the SCJPC Routine Handbook, which provides that a proposed attachment is automatically approved if no protest or other request for review is received within 45 days.

The Settlement Agreement stipulates that the previously summarized chain of events supports "the conclusion that the SCJPC process...was not conducive to ensuring that the subject poles were GO 95 compliant." Nonetheless, NextG admits that its communications with SCE concerning Pole 252 were inadequate and apologizes for permitting this to happen.

To rectify SED's allegation that NextG engaged in unsafe business practices, the NextG Settlement Agreement contains several provisions to reform NextG's internal practices to ensure that NextG complies with GO 95 when installing new facilities. Specifically, NextG agrees that the SCJPC process cannot be used to avoid compliance with any applicable law or regulation, including GO 95. Henceforth, if NextG seeks to attach to a pole, and NextG receives a safety objection within, or after, the 45-day time limit specified in Section 18.1-D of the SCJPC Routine Handbook, NextG will take appropriate action to address

the safety concern. NextG has also implemented new protocols to manage joint-pole attachments, including in-house management of all joint-pole communications, an auditable database for all pole-loading documentation, and training for both in-house and contract personnel regarding GO 95 and SCJPC procedures. NextG agrees to use these protocols going forward for all of its attachments in California.

We conclude that the previously summarized provisions in the NextG Settlement Agreement, with the conditions adopted later in this decision, provide reasonable assurance that NextG will comply with Pub. Util. Code § 451 and GO 95 safety requirements going forward.

NextG's failure to heed multiple warnings from SCE about a potential safety violation, resulting in NextG's installation of facilities that did not comply with GO 95, raises the troubling possibility of widespread violations. To address this issue, the Settlement Agreement provides \$6.0 million to pay for a safety audit of all of NextG's poles and pole attachments in California. This money will be used to hire a contractor to conduct a pole-loading analysis of every pole that NextG either owns or uses. If the audit finds facilities that do not comply with GO 95, NextG will work with the pole owner(s) to bring the pole into compliance or replace the pole. The \$6.0 million will not pay for remedial work performed in response to the audit; NextG will pay for remedial work separately.

NextG must complete the audit and associated remedial work within three years of commencing the audit. Any money that remains after the audit is complete will be paid to the State General Fund. If the cost of the audit exceeds \$6 million, NextG will fund the remaining costs to complete the audit. After the audit is complete, NextG will continue to use the same audit procedures for all new pole attachments, but the \$6.0 million will not be used for this purpose.

We conclude that the safety audit, with the conditions adopted later in this decision, provides reasonable assurance that (1) all of NextG's existing utility poles and pole attachments will be audited and brought into compliance with Pub. Util. Code § 451 and GO 95, as necessary, and (2) all poles and pole attachments installed by NextG in the future will comply with § 451 and GO 95.

6.1.2.1.2. Overloaded Pole

In the Settlement Agreement, NextG admits that after it attached facilities to Pole 252E, the pole had a lower safety factor than required by GO 95. NextG capitulates to SED's argument that the Respondents, including NextG, failed to provide safe service by overloading at least one of the subject poles in violation of Pub. Util. Code § 451, and GO 95, Rules 12.2, 43.2, 44.2, and 48.

Pole 252E failed during a Santa Ana windstorm in October 2007. It is not necessary to correct this safety violation, as the failed pole was replaced.

6.1.2.1.3. Non-Compliant Replacement Pole

In the Settlement Agreement, NextG accepts SED's conclusion that Replacement Pole 608E was overloaded in violation of GO 95 because the pole – which was installed in 2007 after the Malibu Canyon Fire – did not have a safety factor of at least 4.0 at the time of the installation as required by GO 95.

To correct his violation, the NextG Settlement Agreement notes that the Carrier Settlement Agreement that was approved by D.12-09-019 provides for the remediation of Replacement Pole 608E to a safety factor of at least 4.0. The NextG Settlement Agreement requires NextG to cooperate with the Carriers regarding the remediation of Replacement Pole 608E. We find that the NextG Settlement Agreement, in conjunction with the Carrier Settlement Agreement, provides reasonable assurance that the safety violation associated with Replacement Pole 608E will be corrected.

6.1.2.1.4. Known Local Condition

The sole provision in the NextG Settlement Agreement that addresses SED's allegation that NextG installed facilities in Malibu Canyon that could not withstand Santa Ana windstorms that are known to occur in the area, resulting in a violation of Pub. Util. Code § 451 and Rule 31.1 of GO 95, is NextG's admission that Santa Ana winds are a known local condition for the canyon. There is no acknowledgement of an actual violation § 451 or Rule 31.1.

We find the lack of an admission by NextG that it failed to install facilities in Malibu Canyon that could withstand Santa Ana winds is consistent with the record. Although the three poles that are the subject of this proceeding failed during a Santa Ana windstorm on October 21, 2007, the failure may be explained by Pole 252E having a lower safety factor than required by GO 95. The failure of Pole 252E then caused a cascading failure of two interconnected poles (Poles 253E and 212E). If Pole 252E had the required safety factor, it is possible that all three poles would have survived the Santa Ana windstorm like all other poles in Malibu Canyon. Thus, the applicable violation was the failure of Pole 252E to comply with GO 95 safety factor requirements. NextG admits this violation.

6.1.2.2. Alleged Rule 1.1 Violation

SED alleged that the Respondents violated Rule 1.1 when one of their witnesses provided written testimony which implied that all physical evidence had been preserved. In reality, some evidence was discarded, including two of NextG's cables. In the Settlement Agreement, NextG admits the testimony is incorrect and acknowledges that the testimony in some respects fell below the standards for testimony set forth in Rule 1.1. NextG agrees to withdraw from sponsoring and/or supporting all of the witness's testimony in this proceeding.

We are not entirely satisfied the Settlement Agreement's somewhat equivocal resolution of the alleged Rule 1.1 violation. The witness's testimony was misleading in our judgment. We will approve the Settlement Agreement's outcome on this matter with the understanding that the provision in the Settlement Agreement that the testimony in some respects fell below the standard set forth in Rule 1.1 is an implied admission that the testimony did not comply with Rule 1.1. With this understanding, we find the Settlement Agreement's resolution of the Rule 1.1 violation, with the settlement fine discussed below, is reasonable in light of the record.

6.1.2.3. The Settlement Payment

NextG agrees to pay \$14.5 million, of which \$8.5 million will be a fine paid to the State General Fund pursuant to Pub. Util. Code §§ 2107 - 2019 for the violations described previously. The remaining \$6.0 million will be available for the safety audit described previously. Any money that remains after the safety audit is complete will go to the State General Fund. Conversely, if \$6.0 million is not enough to finish the audit, NextG will provide sufficient additional funds.

Although the settlement payment of \$14.5 million is 58% of the \$24.8 million fine recommended by SED, we conclude this is a reasonable compromise that is within the range of likely litigated outcomes for the alleged violations of § 451, GO 95, and Rule 1.1. We recognize that NextG concedes the alleged violations are largely true, which suggests that a larger settlement payment might be warranted. However, NextG's concessions were made in the context of a settlement. NextG previously denied everything it now admits. A fully litigated outcome might have produced a better or worse result for NextG than the Settlement Agreement.

6.1.3. Adopted Conditions

Rule 12.4(c) of the Commission's Rules of Practice and Procedure provides that the Commission may propose alternative terms to the parties of a settlement which are acceptable to the Commission. We conclude that in order to find the NextG Settlement Agreement is reasonable in light of the whole record, it is necessary to adopt the conditions set forth below.

6.1.3.1. Sustaining Compliance

Our finding that the Settlement Agreement is reasonable in light of the whole record is predicated, in part, on NextG's unwavering adherence to the new policies that NextG will implement under the Settlement Agreement to ensure that all poles and pole attachments installed by NextG comply with GO 95. We are concerned, however, that NextG's reinvigorated commitment to public safety may wane as the years go by.

To ensure that NextG remains focused on safety, we will approve the Settlement Agreement with the condition that NextG submits an annual Tier 1 compliance advice letter which certifies that the policies and procedures identified in the Settlement Agreement at Sections III.A.a, III.A.b, III.D, IV.4, IV.5, IV.6, and IV.7, with the conditions adopted by this decision, remain in effect. The advice letter shall be filed by December 31 of each year and signed by the highest level officer with direct responsibility for California operations.

6.1.3.2. The Safety Audit and the SSE Fund

In the Settlement Agreement, NextG capitulates to SED's argument that the Respondents, including NextG, failed to provide safe service by overloading at least one of the subject poles in violation of Pub. Util. Code § 451 and GO 95. NextG also accepts SED's conclusion that Replacement Pole 608E was overloaded in violation of GO 95. These violations posed a threat to public safety, as

demonstrated by the Malibu Canyon Fire on October 21, 2007. The safety audit that will be conducted pursuant to the NextG Settlement Agreement is a key reason we find the Settlement Agreement is reasonable in light of the record and in the public interest, as the audit provides reasonable assurance that all of NextG's poles and pole attachments comply with § 451 and GO 95.

NextG will have direct control of the safety audit and the \$6.0 million the Settlement Agreement provides for the safety audit.⁹ Our finding that the NextG Settlement Agreement is reasonable in light of the record is based, in part, on our expectation that (1) the safety audit will start soon; (2) the \$6.0 million which the Settlement Agreement provides for the safety audit will be available on a timely basis; (3) the \$6.0 million will be used only for purposes that are directly related to the safety audit; (4) the safety audit will be conducted by independent auditor with no conflicts of interest; and (5) the safety audit will be performed to SED's satisfaction. We also expect that any money which remains after the audit is complete will be paid to the State General Fund on a timely basis, and that there will adequate record keeping of the safety audit's transactions and activities to enable SED to oversee the audit.

To ensure that the NextG Settlement Agreement is consistent with our expectations, we will approve the settlement with the following conditions:

- NextG shall establish a stand-alone bank account to receive and disburse money for the safety audit. NextG shall deposit \$6.0 million into the bank account within 60 days from the effective date of this decision.

⁹ The \$6.0 million that the Settlement Agreement provides for the safety audit will not be received by the Commission. NextG will retain possession of the \$6.0 million.

- The safety audit shall commence within 60 days from the effective date of this decision.
- The \$6.0 million the Settlement Agreement provides for the safety audit shall only be used to pay for the actual costs of material, labor, and services that are (A) paid to third-party contractors to conduct the safety audit, and (B) directly related to the safety audit. The \$6.0 million shall not pay for internal overhead or administrative costs incurred by NextG.
- NextG shall retain the following for 10 years: (A) records of all safety audit transactions (*e.g.*, bank account deposits and disbursements) and supporting documents (*e.g.*, invoices, contracts, and accounting records); and (B) all safety audit documentation (*e.g.*, loading calculations, photographs, and communications with pole owners).
- The portion of the \$6.0 million that remains after the safety audit is complete, if any, shall be paid to the State of California General Fund no later than 42 months from the effective date of today's decision using the procedures set forth in the Ordering Paragraphs of this decision. NextG shall file and serve a notice of its compliance with this condition within 43 months from the effective date of this decision.
- The safety audit shall be conducted by a contractor that is independent of NextG, with no conflicts of interest.
- SED may specify the audit plan, methods, procedures, and other details of the safety audit. NextG shall structure the safety audit to conform to SED's specifications.

We note that Section III.D of the Settlement Agreement requires NextG to “continue to implement the same enhanced safety program measures for new poles it attaches to in California on a going-forward basis.” (Emphasis added.) We interpret this provision as requiring a safety audit of every pole and pole

attachment installed by NextG going forward, including new attachments to existing poles.¹⁰

6.1.3.3. Known Local Condition

The Settlement Agreement includes NextG's admission that Santa Ana winds are a known local condition for Malibu Canyon. We interpret this provision as requiring NextG's poles and pole attachments in Malibu Canyon to withstand Santa Ana windstorms pursuant to Pub. Util. Code § 451 and GO 95, Rule 31.1, which state as follows:

Pub. Util. Code § 451: Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

GO 95, Rule 31.1: Electrical supply and communication systems shall be designed, constructed, and maintained for their intended use, regard being given to the conditions under which they are to be operated, to enable the furnishing of safe, proper, and adequate service.

Pub. Util. Code § 451 and Rule 31.1 together require NextG to design, build, and maintain its poles and pole attachments to be as strong as necessary to withstand the maximum, reasonably foreseeable Santa Ana wind windstorm in Malibu Canyon. If the minimum wind-load safety factor for a particular line element specified in Rule 44 of GO 95 is not adequate to withstand the maximum, reasonably foreseeable Santa Ana windstorm, a higher safety factor must be used pursuant to Pub. Util. Code § 451 and Rule 31.1 to protect public safety.

¹⁰ Out interpretation is consistent with the *Comments of NextG Networks of California, Inc., on the Proposed Decision Conditionally approving the NextG Settlement Agreement*, dated September 4, 2013, at 2-6.

We are concerned about the ability of NextG's facilities in Malibu Canyon to withstand Santa Ana windstorms in light of the record of this proceeding that two of NextG's jointly owned poles in Malibu Canyon did not have the minimum wind-load safety factor required by GO 95 (i.e., Pole 252E and Replacement Pole 608E). The fact that NextG utilized poles that did not have the minimum safety factor raises the disconcerting possibility that NextG could have facilities in Malibu Canyon that do not possess the higher safety factor that might be necessary to withstand Santa Ana windstorms.

To ensure that all of NextG's poles and pole attachments in Malibu Canyon can withstand Santa Ana windstorms as required by § 451 and Rule 31.1, we will adopt the Settlement Agreement with the following conditions:

- The safety audit conducted pursuant to the NextG Settlement Agreement shall (A) determine the maximum, reasonably foreseeable Santa Ana wind load(s) in Malibu Canyon; and (B) assess whether NextG's poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm. NextG shall document, and retain as part of its audit records, the (C) specific Santa Ana wind load(s) that were used in this assessment, and (D) wind-loading calculations that were used in this assessment.
- Any substandard facility in Malibu Canyon found by the safety audit pursuant to the previous condition shall be upgraded, as necessary, to withstand the maximum, reasonably foreseeable Santa Ana windstorm. NextG shall complete any necessary upgrades within three years of commencing the audit.
- The bi-monthly status reports on the safety audit that NextG submits to SED per Section III.D of the Settlement Agreement shall identify the specific Santa Ana wind load(s) that were used by NextG to assess whether its poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm.

- The report on the safety audit that SED is required to submit to the Commission after the audit is complete¹¹ shall identify the specific Santa Ana wind load(s) that were used by NextG to assess whether all of its poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm.
- SED may direct NextG to use specific wind load(s) to assess whether poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm. NextG shall structure the safety audit to conform to SED's direction.
- For the purpose of the previous conditions, Malibu Canyon is defined as the area in the vicinity of Malibu Canyon Road between Potter Drive and Mesa Peak Tractor Way, the same area where the Carriers will upgrade the safety factor of joint-use wood poles to 4.0 pursuant to the Carrier Settlement Agreement.

6.1.3.4. Audit Reports

The Settlement Agreement requires NextG to submit bi-monthly reports to SED regarding the status of the safety audit. NextG intends to submit these reports under seal pursuant to Pub. Util. Code § 583.

The Settlement Agreement does not provide details regarding the content and format of the bi-monthly reports. Therefore, to ensure these reports provide all the information that SED may need in a format that is useful to SED, we will approve the NextG Settlement Agreement with the following condition:

- SED may specify the content, format, and other details of the bi-monthly reports that NextG submits to SED pursuant to Section III.D of the Settlement Agreement. The reports submitted by NextG shall conform to SED's specifications.

¹¹ Section 6.1.3.4 of this decision requires SED to submit a summary report on the safety audit after the audit is complete.

After the final bi-monthly report is submitted, we will require SED to prepare a report that (1) summarizes the results of the safety audit (*e.g.*, number of poles and attachments audited, the number and types of defects found, etc.); (2) provides the information specified in Section 6.1.3.3 of this decision regarding Santa Ana wind loads in Malibu Canyon; (3) lists and describes any significant safety issues found by the audit and what remedial actions were taken, if any; and (4) provides any recommendations or other information that SED deems appropriate. SED shall file and serve its report within 42 months from the effective date of this decision. SED shall also post its report online at the safety information portal on Commission's website, with appropriate redactions, in accordance with Resolution L-436, dated February 14, 2013.¹²

6.1.3.5. Overlapping Safety Factors

The safety audit and associated remedial work that will be conducted under the NextG Settlement Agreement could overlap, to some extent, with (1) the safety-factor upgrade of joint-use poles in Malibu Canyon that will occur under the Carrier Settlement Agreement approved by D.12-09-019; (2) the statistical survey and associated remedial work of joint-use poles in SCE's service territory that will occur under the Carrier Settlement Agreement; and (3) the assessment and remediation of utility poles in the Malibu area (and potentially elsewhere) under the pending SCE Settlement Agreement. We encourage the Respondents to coordinate the upgrades, surveys, assessments, and remedial work they perform under their respective settlement agreements. If these

¹² Resolution L-436 at 13 - 14.

endeavors result in situations where there are overlapping safety factors for a particular line element, the highest safety factor shall apply.¹³

6.1.3.6. Cost Recovery

The NextG Settlement Agreement does not address whether or how NextG will recover the costs it incurs to comply with the Settlement Agreement. This is to be expected; NextG has deregulated rates and can set rates without the Commission's approval. However, to ensure there is no misunderstanding by NextG's customers, we will approve the Settlement Agreement with the condition that if NextG places a charge on its customer bills to recover settlement-related costs, NextG must not state or imply that the charge is approved by the Commission.

We realize that the conditions adopted by this decision may increase costs for NextG. Although there is no estimate of the potentially higher costs, we conclude that the higher costs, if any, are necessary to comply with Pub. Util. Code § 451 and GO 95, and will be more than offset by the public-safety benefits from the reduced risk of fires that these conditions will bring about.

¹³ For example, the safety audit that NextG will conduct per its Settlement Agreement might find a Grade A wood pole with a lower safety factor than required by GO 95. NextG is required by its Settlement Agreement (and GO 95) to increase the safety factor of this pole to at least 2.67 in conjunction with the other pole owner(s). However, if this pole is in a "high-wind area" designated by SCE, the pole would be upgraded to higher safety factor under the pending SCE Settlement Agreement. If the SCE Settlement Agreement is approved, the higher safety factor would apply and be implemented by SCE under the terms of the SCE Settlement Agreement (and not by NextG under its Settlement Agreement).

6.1.4. Issues Raised by Hans Laetz

Laetz opines that it would be unreasonable to inspect, remediate, and upgrade utility poles in this proceeding, and then retrofit these same poles at a later time to comply with new safety requirements that may be adopted in R.08-11-005. We respectfully disagree. We believe it would be imprudent and contrary to Pub. Util. Code § 451 to wait for the development, adoption, and implementation of new safety standards in R.08-11-005 instead of taking corrective actions immediately to address the safety hazards identified in the instant proceeding.¹⁴

Laetz is also concerned about the adequacy of safety factors for utility poles in Malibu Canyon and nearby areas in light of the Respondents' testimony that Santa Ana winds reached 114 mph in Malibu Canyon on October 21, 2007. Laetz notes that the Carrier Settlement Agreement will upgrade the safety factor for joint-use wood poles in Malibu Canyon to 4.0, which corresponds to a wind speed of 112 mph. The minimum safety factor for other joint-use wood poles in the Malibu area is 2.67 pursuant to GO 95, which corresponds to a wind speed of 91 mph. Laetz urges the Commission to adopt safety standards that reflect the possibility of Santa Ana winds reaching 114 mph.

We agree that utility poles must be designed, built, and maintained to withstand known local conditions such as Santa Ana windstorms pursuant to Pub. Util. Code § 451 and Rule 31.1 of GO 95. We would not hesitate to order utilities to upgrade their poles (or take other appropriate action) to withstand

¹⁴ It is speculative at this time regarding what new safety standards will be adopted in R.08-11-005 or when they will be implemented. Today's decision does not prejudge any issue in R.08-11-005.

Santa Ana winds of 114 mph in Malibu Canyon and nearby areas if there were an adequate record in this proceeding to justify such action.

We note that the scope of this proceeding is limited to investigating whether there were any violations with respect to the Respondents' facilities that were involved in the Malibu Canyon Fire and taking appropriate remedial actions, including the imposition of fines, based on that investigation. After carefully reviewing the record of this proceeding, we do not find a sufficient factual basis to require utility poles in Malibu Canyon (or elsewhere) to withstand wind speeds of 114 mph. Although the Respondents testified that Santa Ana winds reached 114 mph at the incident site in Malibu Canyon at the time the three poles failed,¹⁵ Laetz overlooks contradictory testimony from SED, which asserts that SCE's claim of 114 mph winds was based on a flawed computer model.¹⁶ SED used its own computer model to estimate the maximum wind gust was 44 mph at the incident site when the three poles failed.¹⁷ The results of SED's computer model appear to be consistent with reports from firefighters who were traveling on Malibu Canyon Road at the time of the incident and arrived at the incident site two to three minutes after the poles failed. These firefighters estimated the wind speed at approximately 50 mph.¹⁸ The evidence at the site may support an inference that winds did not reach

¹⁵ Exhibit Respondents-1 at 3.

¹⁶ Exhibit CPSD-2, Chapter 9; and Exhibit CPSD-3, Chapter 10.

¹⁷ Exhibit CPSD-1, Chapter 7.

¹⁸ Exhibit CPSD-1, Attachment 1.

114 mph, as it seems likely that more than three poles would have failed if winds in the area had reached 114 mph.¹⁹

We appreciate and share Laetz's concerns about the safety factor for utility poles in Malibu Canyon. These concerns are largely addressed by the Carrier Settlement Agreement and SCE's internal practices. Under the Carrier Settlement Agreement approved by D.12-09-019, the Carriers will upgrade the safety factor for joint-use wood poles in Malibu Canyon to 4.0, which equates to a wind speed of 112 mph. SCE's internal practices require a minimum safety factor of 4.0 be maintained for joint-use wood poles in Malibu Canyon.²⁰ We note that there is no evidence in this proceeding, or in any other proceeding to our knowledge, where a utility pole with a safety factor of 4.0 has experienced a wind-caused failure in Malibu Canyon.

Laetz's concerns will be further addressed in R.08-11-005 where we intend to develop fire-threat maps that accurately locate areas in California where there is an elevated risk of power-line fires igniting and spreading rapidly. These fire-threat maps will incorporate parameters that contribute to the ignition and spread of power-line fires, including Santa Ana windstorms. Following the adoption of fire-threat maps, we will consider new rules to reduce the risk of catastrophic power-line fires occurring. The new rules may include, for example,

¹⁹ In sum, the record can be characterized as follows: The Respondents asserted that the failure of three poles in Malibu Canyon was caused by a force of nature beyond their control (i.e., wind gusts of 114 mph). SED claimed that at least one of the failed poles was overload in violation of GO 95, which may explain why the three interconnected poles failed at a wind speed of 44 mph. NextG admits that Pole 252E was overloaded. SCE also admits that Pole 252E was overloaded in the pending SCE Settlement Agreement.

²⁰ SCE-SED Joint Response dated July 3, 2013, at 5 - 6.

higher safety factors, undergrounding facilities, and other measures. We emphasize that today's decision does not prejudge any matters in R.08-11-005.

6.2. Consistent with the Law

We find the NextG Settlement Agreement is consistent with the law, including the California Public Utilities Code and the Commission's decisions, rules, and General Orders. However, there are several legal issues regarding the Settlement Agreement that we address below.

6.2.1. Violations Discovered by the Safety Audit

The safety audit of NextG's facilities that will be conducted pursuant to the Settlement Agreement may find facilities that do not comply with GO 95. In their joint comments filed on April 2, 2013, NextG and SED aver that SED will not seek fines against NextG based solely on the audit, provided that non-compliance is remediated within a reasonable period of time. However, SED retains its statutory authority to seek fines and other remedies for any facilities that endanger public safety or are linked to accidents and/or reliability issues. For example, if the audit finds a facility that does not comply with GO 95, SED may seek fines if that facility is later involved in an accident, regardless of whether the facility is brought into compliance within a reasonable time.

We find this understanding between NextG and SED to be reasonable and consistent with the law, as SED has discretion to pursue or refrain from an enforcement action based on the facts of each situation. We will formalize this understanding by adopting the following condition for our approval of the NextG Settlement Agreement:

- If the safety audit conducted pursuant to Section III.D of the Settlement Agreement discovers a facility that does not comply with a statute or regulation subject to the Commission's jurisdiction, SED (or its successor) may seek

finest and/or other remedies if that facility is later involved in an accident, outage, or other incident affecting public safety, regardless of whether the facility is brought into compliance within a reasonable time.

6.2.2. Compliance with GO 95

The Settlement Agreement requires NextG to conduct a safety audit of all of its poles and pole attachments and to remediate substandard facilities found by the audit. In carrying out these activities, NextG must comply with GO 95. Among other things, if the safety audit finds substandard poles, NextG must notify the owner(s) of the poles pursuant to Rule 18-B of GO 95. The substandard poles must then be repaired or replaced in accordance with the priority levels and deadlines in Rule 18-A(2). New or reconstructed poles must be marked in conformance with Rule 51.6-A (high-voltage marking), Rule 56.9 (guy marker), Rule 86.9 (guy marker), Rule 91.5 (ownership), and Rule 94.5 (antennas). NextG must retain records of all inspections and remedial work conducted pursuant to the safety audit for at least 10 years per Rule 18-A(1)(b).

6.2.3. Conformance with Fine Criteria

NextG accepts SED's position that NextG did not comply with Pub. Util. Code § 451, GO 95, and Rule 1.1.²¹ The Settlement Agreement stipulates that NextG will pay a penalty of \$8.5 million to the State General Fund to resolve these violations. SED and NextG agree that the penalty is a fine under Pub. Util. Code §§ 2107 - 2109.²² These laws state, in relevant part, as follows:

²¹ Previously in this decision, we approve the NextG Settlement Agreement with the understanding that the settlement includes an implied admission by NextG that a witness's testimony did not comply with Rule 1.1.

²² Joint Comments filed by NextG and SED on April 2, 2013, at 2 - 3.

§ 2107: Any public utility that violates or fails to comply... with any... order, decision, decree, rule, direction, demand, or requirement of the commission... is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense.²³

§ 2108: Every violation... by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

§ 2109: In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility.

We concur that NextG should pay a fine for its admitted violations. As the Commission has held previously, the primary purpose of fines is to deter future violations.²⁴ Therefore, to deter future violations by NextG and others, it is necessary to fine NextG for the violations that are the subject of this proceeding.

To determine if the settlement fine of \$8.5 million is reasonable, we will rely on the following criteria adopted by the Commission in D.98-12-075:

- (1) physical harm;
- (2) economic harm;
- (3) harm to the regulatory process;
- (4) the number and scope of violations;
- (5) the utility's actions to prevent a violation;
- (6) the utility's actions to detect a violation;
- (7) the utility's actions to disclose and rectify a violation;
- (8) the need for deterrence;
- (9) constitutional limit on excessive fines;
- (10) the degree of wrongdoing;
- (11) the public interest; and
- (12) consistency

²³ During the time period relevant to the alleged violations, the maximum penalty per offense was \$20,000.

²⁴ D.01-08-058 at 80, and D.04-09-062 at 62.

with precedent.²⁵ As we consider each criterion below, it is important to keep in mind that the NextG Settlement Agreement is one of three settlements in this proceeding that together will result, if all are approved, in an overall settled amount of \$63.5 million (\$35.4 million to the State General Fund and \$28.1 million for remedial measures), of which NextG's share is \$14.5 million (\$8.5 million fine to the State General Fund and \$6 million for the safety audit).

6.2.3.1. Physical Harm

The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following. The physical harm in this case was caused by the Malibu Canyon Fire, which burned 3,836 acres, destroyed 14 structures and 36 vehicles, and damaged 19 other structures. There were no reported injuries or fatalities from the fire. There was no physical harm from NextG's failure to comply with Rule 1.1.

We find that the NextG settlement fine of \$8.5 million, when combined with all the payments to the State General Fund in this proceeding which total \$35.4 million (assuming the SCE Settlement Agreement is approved), is proportionate to the significant physical harm caused by the Malibu Canyon Fire.

6.2.3.2. Economic Harm

The severity of a violation increases with (1) the level of costs imposed on the victims of the violation, and (2) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

²⁵ D.98-12-075, 84 CPUC 2d at 188-190.

The Settling Parties aver that everyone who suffered economic harm appears to have been compensated. Specifically, the five Respondents in this proceeding have signed a settlement agreement with Cal Fire that requires the Respondents to pay \$4 million to Cal Fire for fire suppression costs associated with the Malibu Canyon Fire. The Respondents have also reached confidential settlements with the victims of the Malibu Canyon Fire. NextG believes everyone who suffered significant economic harm from the fire has sought redress through the courts or other process. All proceedings outside of the Commission stemming from the fire have, to NextG's knowledge, been settled. NextG opines that all victims have been made whole through their respective settlements, as the plaintiffs have dropped their claims against the Respondents.

The Settling Parties state the unlawful economic benefits gained by NextG were minimal. NextG believes the economic benefit was limited to the avoided costs of a new utility pole to replace the overloaded Pole 252E. NextG estimates the cost of the new pole at \$3,225.

Based on the previously summarized representations of the Settling Parties, we find the economic harm from the Malibu Canyon Fire has been largely mitigated by the Respondents. There was no significant economic harm from NextG's failure to comply with Rule 1.1. Accordingly, we conclude that the settlement fine of \$8.5 million equals or exceeds any remaining uncompensated economic harm caused by NextG's violations.

6.2.3.3. Harm to the Regulatory Process

A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements. NextG harmed the regulatory process when it co-sponsored written testimony which implied that all physical evidence had been preserved at

an SCE warehouse. In fact, certain physical evidence had been discarded, including two of NextG's cables. In mitigation, NextG promptly advised SED, in response to an SED data request, that two NextG cables had been discarded.

In our judgment, the testimony at issue was misleading and did not comply with Rule 1.1. We view the lack of compliance as a serious offense. The submittal of misleading testimony causes substantial harm to the regulatory process, which cannot function effectively unless participants act with integrity at all times. Accordingly, this criterion weighs in favor of a significant fine.

6.2.3.4. The Number and Scope of Violations

A single violation is less severe than multiple offenses. A widespread violation that affects many people is worse than one that is limited in scope.

NextG admits several violations. We judge the violations to be widespread based on the fact that the Malibu Canyon Fire destroyed 14 structures and 36 vehicles, and damaged 19 other structures. Consequently, this criterion weighs in favor of a significant fine.

6.2.3.5. Actions to Prevent a Violation

Utilities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. A utility's past record of compliance may be considered in assessing a fine. Today's decision is the first time that NextG has been found to have violated applicable laws and regulations.²⁶ Accordingly, this criterion weighs in favor of a moderate fine.

²⁶ D.09-02-015 adopted a settlement agreement between NextG and CPSD in which NextG agreed to pay \$200,000 to the State General Fund to resolve an alleged violation of Rule 1.1. D.09-02-015 did not find, and NextG did not admit, any violations.

6.2.3.6. Actions to Detect a Violation

Utilities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level of management's involvement in, or tolerance of, the offense will be considered in determining the amount of a fine.

There is nothing in the record of this proceeding that indicates NextG's safety-related violations were condoned by NextG's management. We surmise from the record that NextG's failure to comply with Rule 1.1 was driven by the misplaced zeal of those directly involved, and was not condoned by NextG's management. Accordingly, this criterion weighs in favor of a moderate fine.

6.2.3.7. Actions to Disclose and Rectify a Violation

Utilities are expected to promptly bring a violation to the Commission's attention. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing a fine.

NextG did little to disclose the violations at issue in this proceeding. To the contrary, NextG denied all the violations prior to the Settlement Agreement. On the other hand, the inclusion of NextG's admissions in the Settlement Agreement, instead of litigating all issues to conclusion, shows a belated willingness to disclose.

All of the violations alleged by SED are rectified by the Settlement Agreement. The safety audit that NextG will conduct of all of its existing poles and pole attachments, and all future installations, provides a high degree of assurance that safety violations will henceforth be detected and rectified.

We find that NextG's decisive action to rectify its violations offsets its failure over several years to disclose or admit the violations. We conclude that, on balance, this criterion weighs in favor of a moderate fine.

6.2.3.8. Need for Deterrence

Fines should be set at a level that deters future violations. Effective deterrence requires the size of a fine reflect the financial resources of the utility.

At the time of the Malibu Canyon Fire and during the period encompassing NextG's violations, NextG was owned by NextG Networks, Inc. (NNI).²⁷ NextG disclosed its financial resources by submitting (1) NNI's audited financial statements for 2007 and 2011 (most recent), and (2) NextG's verified financial statements for 2007 and 2011 (most recent). NextG does not have audited financial statements for itself. NNI's and NextG's financial statements are confidential and were filed under seal.

Based on our review of the confidential financial statements, we find the settlement fine of \$8.5 million is material in relation to the financial resources of NextG and NNI, and thus provides deterrence against future violations.

6.2.3.9. Constitutional Limits on Excessive Fines

The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources. NextG, by reaching a settlement with SED, has implicitly agreed that the settlement fine of \$8.5 million is not excessive.

6.2.3.10. The Degree of Wrongdoing

The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.

²⁷ NNI was acquired by Crown Castle International Corp. on April 10, 2012, nearly 4.5 years after the Malibu Canyon Fire ignited on October 21, 2007.

The relevant facts applicable to this criterion were addressed previously in today's decision. In general, we find the settlement fine of \$8.5 million is consistent with the degree of wrongdoing.

6.2.3.11. The Public Interest

The public interest is always considered in determining the size of a fine. Here, we accord great weight to SED's judgment that the settlement fine of \$8.5 million is in the public interest. SED is the public's representative in Commission enforcement proceedings and has extensive experience with both litigated outcomes and negotiated settlements. SED is intimately familiar with the facts and circumstances of this case, as well as the strengths and weaknesses of its own position and NextG's. Moreover, it would undermine SED's ability to negotiate fines if the counterparty lacked confidence in the Commission's willingness to approve the negotiated fine. This situation would virtually guarantee that every enforcement proceeding would be fully litigated, resulting in an inefficient use of scarce public resources.

For the preceding reasons, we hesitate to second guess a fine negotiated by SED without good cause. We see no good cause here.

6.2.3.12. Consistency with Commission Precedent

Any decision that levies a fine should address previous Commission decisions that involve reasonably comparable factual circumstances and explain any substantial differences in outcome. For the reasons explained below, we find the settlement fine of \$8.5 million is consistent with Commission decisions that imposed fines for (1) safety violations that resulted in deaths, injuries, and/or property damage, and (2) violations of Rule 1.1.

6.2.3.12.1. Precedent Regarding Safety Violations

In D.12-09-019, which was issued earlier in this proceeding, the Commission approved the Carrier Settlement Agreement that required AT&T, Sprint, and Verizon to pay \$6.9 million to the State General Fund, divided equally among them (i.e., \$2.3 million each). It is reasonable for NextG to pay more than each of the Carriers (\$8.5 million vs. \$2.3 million) because SED recommended a larger fine for NextG.²⁸

D.11-11-001 levied a fine of \$38 million on Pacific Gas and Electric Company (PG&E) for several violations related to a natural gas explosion in Rancho Cordova that killed one person, injured several more people, destroyed one house, and damaged another. Although the Malibu Canyon Fire caused far more property damage than the Rancho Cordova gas explosion, a larger fine was appropriate in the Rancho Cordova case due to the fatality and injuries.

D.10-04-047 approved a settlement agreement between SED and the two respondents in that proceeding, San Diego Gas & Electric Company (SDG&E) and Cox Communications (Cox), regarding alleged violations pertaining to the respondents' involvement with the Witch, Rice, and Guejito Fires that ignited on October 21, 2007, during a Santa Ana windstorm. Those fires were far larger and vastly more destructive than the Malibu Canyon Fire. The settlement agreement approved by D.10-04-047 required SDG&E to pay \$14.35 million to the State General Fund and up to \$400,000 for reimbursement of SED's cost. Cox paid \$2 million to the State General Fund.

²⁸ SED recommended a fine of \$24,789,500 for NextG, \$7,759,500 for AT&T, \$7,732,000 for Sprint, and \$9,411,500 for Verizon.

Compared to D.10-04-047, the current proceeding may result in the five Respondents (AT&T, NextG, SCE, Sprint, and Verizon) paying \$35.4 million to the State General Fund, assuming all the settlement agreements are approved. A larger payment is appropriate in the current proceeding relative to D.10-04-047 because it has taken much longer for the Respondents in the current proceeding to reach a settlement with SED, thereby reducing one of the key benefits of a settlement (i.e., avoiding the time and expense of litigation). Moreover, unlike the current proceeding, the settlement agreement approved by D.10-04-047 did not include admissions of safety violations.²⁹ The absence of admitted safety violations further explains the lower payments to the State General Fund approved by D.10-04-047 compared to the current proceeding.³⁰

D.06-02-003 approved a settlement agreement regarding a fire at PG&E's Mission Substation in 2003. In that settlement, PG&E agreed to pay \$500,000 to the State General Fund,³¹ but the settlement also included the parties' stipulation that PG&E did not commit any violations.³² In contrast, today's decision approves a settlement agreement wherein NextG admits multiple violations. Consequently, it is appropriate for today's decision to approve a much larger payment to the State General Fund compared to D.06-02-003.

²⁹ SDG&E admitted that it failed to provide the Commission with a 20-day follow-up letter required by the Accident Reporting Requirements for the Witch, Rice, and Guejito Fires.

³⁰ The NextG Settlement Agreement and the SCE Settlement Agreement include admissions of safety-related violations. The Carrier Settlement Agreement approved by D.12-09-019 does not include admissions of safety violations.

³¹ The settlement agreement approved by D.06-02-003 also required PG&E to pay \$6.0 million for specified improvements to PG&E's electric system.

³² D.06-02-003, Appendix A, at 3, Paragraph 1.

Lastly, D.04-04-065 concerned a Commission investigation of SCE's electric line construction, operation, and maintenance practices during 1998 through 2000. D.04-04-065 ordered SCE to pay a fine of \$656,000 for 86 violations, including 30 violations involving fatalities, personal injuries, and/or property damage. The fine of \$8.5 million approved by today's decision is much larger compared to D.04-04-065 primarily because today's decision reflects SED's recommendation to levy fines based on continuing violations pursuant to Pub. Util. Code § 2108, which allows each day to count as a new violation. In contrast, D.04-04-065 did not count each day as a new violation because the period of noncompliance could not be determined.³³

6.2.3.12.2. Precedent Regarding Rule 1.1 Violations

Commission decisions adopting fines for violations of Rule 1.1 are similar in that such precedent necessarily involves instances where a party was not truthful in its dealings with the Commission. Examples of recent decisions where the Commission has approved a fine for violations of Rule 1.1 include D.11-04-009 (fine of \$12,000), D.11-03-030 (fine of \$195,000), D.10-12-011 (fine of \$5,000), and D.10-06-033 (fine of \$11,000).

In the case before us, SED and NextG have agreed to a settlement fine of \$8.5 million, but the NextG Settlement Agreement does not specify how much of the \$8.5 million is attributable to NextG's lack of compliance with Rule 1.1. This is consistent with Commission precedent where the Commission has adopted a single fine for multiple violations, with no disaggregation of the fine among the violations. For example, D.08-09-038 levied a fine of \$30 million for violations of

³³ D.04-04-065 at 5, 39, 40, 44, and 55-56.

several statutes, Commission decisions, and Rule 1.1, with no disaggregation of the fine among the violations.

6.2.3.13. Conclusion

Based on the facts of this case and the criteria established by D.98-12-075, we conclude that the NextG settlement fine of \$8.5 million is significant, reasonable, and consistent with Commission precedent. We will approve the fine in order to deter future violations by NextG and others. We emphasize that the fine we approve today reflects the unique facts before us in this proceeding. We may adopt larger or smaller fines in other proceedings if the facts so warrant.

6.3. In the Public Interest

The Commission has long favored the settlement of disputes. This policy supports many worthwhile goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce unacceptable results.³⁴ The NextG Settlement Agreement achieves these goals.

The NextG Settlement Agreement, with the conditions adopted by today's decision, provides substantial public benefits. Among other things, the Settlement Agreement rectifies extant safety violations with respect to NextG; requires NextG to audit all of its poles and pole attachments in California to find and remediate other safety violations that may exist; and requires NextG to audit all new installations in the future. NextG also agrees to reform its internal practices to prevent safety violations from occurring again. The significant fine that NextG must pay under the Settlement Agreement provides a strong

³⁴ See, for example, D.13-05-020 at 22, 24-25; D.10-12-051 at 9; and D.10-12-035 at 56.

deterrent to future violations by NextG and others. The total settlement payment of \$14.5 million is within a range that fairly reflects the facts of this case.

We conclude for the preceding reasons that the public interest is better served by approving the NextG Settlement Agreement, with the conditions adopted by today's decision, than continuing with litigation.

7. Need for a Hearing on the Settlement Agreement

Rule 12.2 of the Commission's Rules of Practice and Procedure allows parties to request a hearing on a settlement agreement. Rule 12.3 provides that the Commission may decline to set a hearing if there are no material contested issues of fact. No party requested a hearing on the NextG Settlement Agreement, and there are no material contested issues of fact regarding the settlement. Accordingly, there is no need for a hearing on the NextG Settlement Agreement.

8. Comments on the Proposed Decision

The Proposed Decision was mailed to the parties pursuant to Pub. Util. Code § 311, and comments were allowed in accordance with Rule 14.3 of the Commission's Rules of Practice and Procedure. Timely comments were filed by (1) Laetz; (2) NextG; (3) SCE; (4) the Carrier Respondents AT&T, Sprint, and Verizon; and (5) the Amici Curiae consisting of AT&T Mobility, Verizon California Inc., T-Mobile West LLC d/b/a/ T-Mobile, CTIA-The Wireless Association, Comcast Phone of California, LLC, Sunesys LLC, the California Cable and Telecommunications Association, and SDG&E.³⁵ Timely reply comments were filed by Laetz, SCE, and SED.

³⁵ The Amici Curiae were authorized to file comments on the Proposed Decision in a ruling issued by the assigned Administrative Law Judge dated September 5, 2013.

In response to the comments and reply comments on the Proposed Decision, we have removed the condition in the Proposed Decision that every pole and pole attachment that NextG installs henceforth in California shall undergo a safety audit within 30 days of the installation. NextG's opening comments on the Proposed Decision, and SED's reply comments, convince us that NextG is obligated by the Settlement Agreement to perform a safety audit of every pole and pole attachment installed by NextG going forward. Our final decision memorializes this interpretation of the Settlement Agreement.

We decline to adopt the recommendation by the Amici Curiae, the Carrier Respondents, and SCE to significantly modify the provisions in the Proposed Decision that interpret Pub. Util. Code § 451 and Rule 31.1 as together requiring NextG to design, build, and maintain its poles and pole attachments in Malibu Canyon to be as strong as necessary to withstand the maximum, reasonably foreseeable Santa Ana windstorm. These commenters would prefer that the final decision interpret § 451 and Rule 31.1 as directing NextG to "take into account Santa Ana wind conditions in Malibu Canyon." We believe our interpretation of § 451 and Rule 31.1 is legally sound, in the public interest, and relevant to our final decision on the NextG Settlement Agreement.

We also decline to adopt the recommendation by the Amici Curiae, the Carrier Respondents, and SCE to significantly modify the provisions in the Proposed Decision that state (1) GO 95 requires Grade A wood poles to "bear" or "withstand" a wind load of 8 psf "multiplied by" a safety factor of 4.0 for new construction; and (2) that a safety factor of 4.0 "corresponds" to a wind speed of 112 mph and a safety factor of 2.67 "corresponds" to a wind speed of 91 mph. These commenters contend that the previously cited provisions in the Proposed Decision incorporate an interpretation of GO 95 that is the subject of intense

debate in Phase 3 of R.08-11-005. They are concerned that the Proposed Decision may inadvertently prejudge issues that will be decided in R.08-11-005.

Once again, we believe our interpretation of GO 95 is legally sound, technically correct, in the public interest, and relevant to our final decision on the NextG Settlement Agreement. Moreover, our holdings in this decision have no effect on R.08-11-005. Pursuant to Rule 12.5 of the Commission's Rules of Practice and Procedure, this decision does not constitute approval of, or precedent regarding, any principle or issue in R.08-11-005 or other proceedings.

9. Assignment of the Proceeding

Carla J. Peterman is the assigned Commissioner for this proceeding. ALJ Timothy Kenney is the presiding officer for this proceeding.

Findings of Fact

1. The Malibu Canyon Fire occurred on October 21, 2007, when three interconnected utility poles located next to Malibu Canyon Road in Los Angeles County fell to the ground during a Santa Ana windstorm. The Malibu Canyon Fire burned 3,836 acres, destroyed 14 structures and 36 vehicles, and damaged 19 other structures. There were no reported injuries or fatalities.

2. Following an investigation, SED served written testimony that alleged:

- i. NextG violated Pub. Util. Code § 451 when it disregarded several notices from SCE that NextG's proposed attachment of fiber optic cable facilities would overload several poles in Malibu Canyon.
- ii. NextG violated § 451 and GO 95 when it attached fiber optic cable facilities to Poles 252E and 253E and thereby overloaded at least one of these poles.
- iii. NextG violated § 451 and GO 95 when it installed facilities in Malibu Canyon that could not withstand Santa Ana windstorms, a known local condition for that area.

- iv. NextG violated § 451 and GO 95 when it attached facilities to Replacement Pole 608E, which had lower safety factor than required by GO 95 for new construction.
- v. NextG violated Rule 1.1 when it co-sponsored written testimony which falsely implied that all physical evidence had been preserved.

3. In the Settlement Agreement, NextG admits, acknowledges, and/or concedes the following:

- i. SCE denied NextG's request to install fiber optic cable facilities on Pole 252E based on SCE's determination that the installation would overload the pole.
- ii. NextG contested SCE's determination that the proposed installation would overload Pole 252E. Ultimately, NextG made a unilateral decision to attach fiber optic cable facilities to Pole 252E based on NextG's interpretation of SCJPC Rule 18.1-D, which provides for automatic approval or proposed attachments if no protest or request for review is received within 45 days.
- iii. After NextG attached its fiber optic cable facilities to Pole 252E, the pole had a lower safety factor than required by GO 95. The overloaded pole was not remediated prior to the Malibu Canyon Fire on October 21, 2007.
- iv. Replacement Pole 608E was overloaded in violation of GO 95.
- v. Santa Ana winds are a known local condition in Malibu Canyon.
- vi. The prepared written testimony of William R. Schulte, dated November 18, 2010, implied that all evidence had been preserved at an SCE warehouse. The testimony does not state that some items originally attached to the failed poles, including two NextG cables, had not been preserved.
- vii. The testimony of William R. Schulte is incorrect and, in some respects, is below the standards for testimony in Rule 1.1.

4. NextG capitulates to SED's argument that the Respondents, including NextG, failed to provide safe service by overloading at least one of the subject poles in violation of Pub. Util. Code § 451 and GO 95.

5. The NextG Settlement Agreement, with the conditions adopted by today's decision, (i) rectifies all extant safety violations, and (ii) provides reasonable assurance that all of NextG's existing poles and pole attachments in California, and poles and pole attachments installed by NextG henceforth in California, comply with Pub. Util. Code § 451 and GO 95.

6. The combined settlement payments of \$14.5 million are within the range of likely litigated outcomes for the alleged violations of § 451, GO 95, and Rule 1.1.

7. The settlement agreements in this proceeding may result in the application of two different safety factors for a particular line element, although this should be relatively rare.

8. The conditions adopted by today's decision may impose higher costs on NextG. These higher costs, if any, are a necessary to comply with Pub. Util. Code § 451 and GO 95, and are more than offset by the public-safety benefits from the reduced risk of fires these conditions will bring about.

9. There are no material contested issues of fact regarding the NextG Settlement Agreement.

10. The \$6.0 million that the Settlement Agreement provides for the safety audit will not be received by the Commission; NextG will retain possession of the \$6.0 million. NextG will have direct control of the safety audit and all associated money and activities.

Conclusions of Law

1. Rule 12.1(d) of the Commission's Rules of Practice and Procedure provides that the Commission will not approve a settlement unless the settlement is reasonable in light of the whole record, consistent with the law, and in the public interest. Rule 12.4(c) provides that the Commission may propose alternative terms to a settlement that are acceptable to the Commission.

2. The NextG Settlement Agreement should be approved with the conditions listed in the following order to (i) ensure that key provisions in the Settlement Agreement are implemented within a reasonable period of time; (ii) clarify the intent of several provisions; and (iii) ensure that the Settlement Agreement protects public safety as mandated by Pub. Util. Code § 451.

3. Section III.D of the NextG Settlement Agreement should be interpreted as requiring NextG to conduct a safety audit, as described in Items a - j of Section III.D of the Settlement Agreement, of every pole and pole attachment installed by NextG going forward.

4. The NextG Settlement Agreement, with the conditions set forth in the following order, is reasonable in light of the whole record, consistent with the law, and in the public interest. Absent these conditions, the NextG Settlement Agreement does not satisfy Rule 12.1(d).

5. The Settling Parties' motion for approval of the NextG Settlement Agreement should be granted pursuant to Article 12 of the Commission's Rules of Practice and Procedure, subject to the conditions in the following order.

6. If there is a conflict between or among the settlement agreements in this proceeding regarding the applicable safety factor for a particular line element, the highest safety factor should apply.

7. There is no need for a hearing on the NextG Settlement Agreement.

8. This decision does not constitute approval of, or precedent regarding, any principle or issue in R.08-11-005 or other proceedings pursuant to Rule 12.5 of the Commission's Rules of Practice and Procedure.

9. The following order should be effective immediately so that the benefits of the NextG Settlement Agreement may be obtained expeditiously.

O R D E R

IT IS ORDERED that:

1. The attached settlement agreement (Settlement Agreement) between NextG Networks of California, Inc. (NextG) and the Commission's Safety and Enforcement Division (SED) is approved, subject to the following conditions:

- i. NextG shall file annually a Tier 1 compliance advice letter which certifies that the policies and procedures identified in the Settlement Agreement at Sections III.A.a, III.A.b, III.D, IV.4, IV.5, IV.6, and IV.7, with the conditions adopted by this order, remain in effect. The advice letter shall be filed by December 31 of each year and signed by the highest level officer with direct responsibility for California operations.
- ii. NextG shall establish a stand-alone bank account to receive and disburse money for the safety audit in Section III.D of the Settlement Agreement (safety audit). NextG shall deposit \$6.0 million into the bank account within 60 days from the effective date of this order.
- iii. The safety audit shall commence within 60 days from the effective date of this order.

- iv. The \$6.0 million the Settlement Agreement provides for the safety audit shall only be used to pay for the actual costs of material, labor, and services that are (A) paid to third-party contractors to conduct the safety audit, and (B) directly related to the safety audit. The \$6.0 million shall not pay for internal overhead or administrative costs incurred by NextG.
- v. NextG shall retain the following for 10 years: (A) records of all safety audit transactions (e.g., bank account deposits and disbursements) and supporting documents (e.g., invoices, contracts, and accounting records); and (B) safety audit documentation (e.g., loading calculations, photographs, and communications with pole owners).
- vi. The portion of the \$6.0 million that remains after the safety audit is complete, if any, shall be paid to the State of California General Fund within 42 months from the effective date of this order. NextG shall pay the money in accordance with the procedures in Ordering Paragraph 5. NextG shall file and serve a notice of its compliance with this condition within 43 months from the effective date of this order.
- vii. The safety audit shall be conducted by a contractor that is independent of NextG, with no conflicts of interest.
- viii. SED may specify the audit plan, methods, procedures, and other details of the safety audit. NextG shall structure the audit to conform to SED's specifications.
- ix. The safety audit shall (A) determine the maximum, reasonably foreseeable Santa Ana wind load(s) in Malibu Canyon; and (B) assess whether NextG's poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm. NextG shall document, and retain as part of its audit records, the (C) specific Santa Ana wind load(s) that were used in this assessment, and (D) wind-loading calculations that were used in this assessment.

- x. Any substandard facilities in Malibu Canyon found by the safety audit pursuant to the previous condition shall be upgraded, as necessary, to withstand the maximum, reasonably foreseeable Santa Ana windstorm. NextG shall complete any necessary upgrades within three years of commencing the audit.
- xi. The bi-monthly status reports on the safety audit that NextG submits to SED per Section III.D of the Settlement Agreement shall identify the specific Santa Ana wind load(s) that were used by NextG to assess whether its poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm.
- xii. SED may direct NextG to use specific wind load(s) to assess whether NextG's poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm. NextG shall structure the safety audit to conform to SED's direction.
- xiii. SED may specify the content, format, and other details of the bi-monthly reports that NextG submits to SED per Section III.D of the Settlement Agreement. The reports submitted by NextG shall conform to SED's specifications.
- xiv. After the final bi-monthly report is submitted by NextG, SED shall prepare a report that (A) summarizes the results of the safety audit; (B) identifies the specific Santa Ana wind load(s) that were used by NextG to assess whether its poles and pole attachments in Malibu Canyon can withstand the maximum, reasonably foreseeable Santa Ana windstorm; (C) lists and describes any significant safety issues found by the audit and what remedial actions were taken, if any; and (D) provides any recommendations or other information that SED deems appropriate. SED shall file and serve its report within 42 months from the effective date of this order. SED shall post its report online at the safety information portal on the Commission's website,

with appropriate redactions, in accordance with Commission Resolution L-436.

- xv. If the safety audit discovers a facility that does not comply with a statute or regulation subject to the Commission's jurisdiction, SED (or its successor) may seek fines and/or other remedies if that facility is later involved in an accident, outage, or other incident affecting public safety, regardless of whether the facility is brought into compliance within a reasonable time.
- xvi. If NextG places a charge on its customer bills to recover settlement-related costs, NextG shall not state or imply that the charge is approved by the Commission.
- xvii. For the purpose of the previous conditions, Malibu Canyon is defined as the area in the vicinity of Malibu Canyon Road between Potter Drive and Mesa Peak Tractor Way.

2. If there is a conflict between or among the settlement agreements in this proceeding regarding the applicable safety factor for a particular line element, the highest safety factor shall apply.

3. The joint motion of NextG Networks of California, Inc., and the Safety and Enforcement Division for approval of the attached Settlement Agreement is granted, subject to the conditions in the previous Ordering Paragraphs.

4. NextG Networks of California, Inc. and the Commission's Safety and Enforcement Division shall file and serve a notice within five business days from the effective date of this order that states whether they accept the conditions in the previous Ordering Paragraphs.

5. If the conditions listed in Ordering Paragraph 1 are accepted, NextG Networks of California, Inc. (NextG) shall pay a fine of \$8.5 million to the State of California General Fund within 60 days from the effective date of this order. Payment shall be made by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. NextG shall write on the face of the check or money order "For deposit to the State of California General Fund per Decision XX-YY-ZZZ" with "Decision XX-YY-ZZZ" being the Commission-designated number for today's decision.

6. All money received by the Commission's Fiscal Office pursuant to Ordering Paragraphs 1.vi and 5 shall be deposited or transferred to the State of California General Fund as soon as practical.

7. This proceeding remains open to address and resolve pending allegations against Southern California Edison Company.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A: Settlement Agreement

Note: The attached Settlement Agreement has non-substantive pagination and formatting changes that are not reflected in the copies of the Settlement Agreement that were filed and served.

Note: The signatures of the Settling Parties are not included on the signature pages of the attached Settlement Agreement. The signatures are included in the Settlement Agreement that was filed at the Commission's Docket Office, copies of which were served on the parties.

**MALIBU CANYON FIRE OII SETTLEMENT AGREEMENT BETWEEN
THE CONSUMER PROTECTION AND SAFETY DIVISION OF THE
CALIFORNIA PUBLIC UTILITIES COMMISSION AND NEXTG
NETWORKS OF CALIFORNIA, INC.**

I. PARTIES

The parties to this Settlement Agreement (“Agreement”) are the Consumer Protection and Safety Division of the California Public Utilities Commission (“CPSD”)¹ and NextG Networks of California, Inc. (“NextG”)² (hereinafter collectively referred to as the “Settling Parties”). Southern California Edison Company (“SCE”), AT&T California and AT&T Mobility LLC (“AT&T”), Cellco Partnership LLP, D/B/A/ Verizon Wireless (“Verizon Wireless”), and Sprint Telephony PSC, L.P. (“Sprint”) who have also been named respondents in this proceeding, are not parties to this Settlement Agreement.³

The CPSD is a Division of the California Public Utilities Commission (“Commission”) charged with enforcing compliance with the Public Utilities Code and other relevant utility laws, the Commission’s rules, regulations, orders and decisions. CPSD is also responsible for investigations of utility incidents, including fires, and assisting the Commission in promoting public safety.

¹ CPSD is now known as the Safety and Enforcement Division (“SED”). For ease of reference, CPSD continues to be referred to as “Consumer Protection and Safety Division” or “CPSD” for the purposes of this Settlement Agreement.

² Pursuant to December 5, 2012 letter to service list, counsel for NextG informed the Commission and parties that NextG is now known as Crown Castle NG West, Inc. For ease of reference, NextG continues to be referred to as “NextG Networks of California, Inc.” or “NextG” for the remainder of this proceeding.

³ Verizon Wireless, AT&T, Sprint and the CPSD have entered in a settlement agreement (the Carrier Settlement) that was approved by the Commission in D.12-09-019 (issued on September 20, 2012).

NextG is a public utility, as defined by the California Public Utilities Code, with telecommunications facilities located in southern California.

II. RECITALS

A. This matter arises from a fire that ignited on October 21, 2007. CPSD has reported that on October 21, 2007, three wooden utility poles (Poles 1169252E, 1169253E and 2279212E) (each a “Pole”) located on Malibu Canyon Road broke and fell to the ground. According to a report by the Los Angeles County Fire Department, the resulting fire (the “Malibu Canyon Fire”) burned 3,836 acres, destroyed 14 structures and 36 vehicles and damaged 19 other structures. The power lines on the poles that fell were owned and operated by SCE. The telecommunications facilities that were on the poles were installed by SCE, AT&T, Verizon Wireless, Sprint and NextG. The poles were jointly owned by SCE, AT&T, Verizon Wireless, Sprint and NextG although evidence has been presented that Sprint sold all of its ownership interests in certain subject facilities to NextG, subject to a leaseback agreement.

B. On October 21, 2008, CPSD issued its Incident Investigation Report, which included allegations of pole overloading violations.

C. On January 29, 2009, the Commission instituted Investigation No. 09-01-018 (“I. 09-01-018” or “this proceeding”) to formally investigate this matter. SCE, NextG, AT&T, Sprint and Verizon Wireless were named as Respondents in I. 09-01-018.

D. The parties served the following testimony: (1) CPSD served its direct testimony on May 3, 2010; (2) Respondents served direct testimony of November 18, 2010; (3) CPSD served rebuttal testimony on April 29, 2011; (4) Respondents served surrebuttal testimony on June 29, 2011; and (5) on August 29, 2011 CPSD served reply testimony and on the same date AT&T and

Verizon Wireless jointly, as well as Sprint individually, served surrebuttal testimony.

E. The general chronological order of attachment for the Poles is as follows:

- a. SCE Cables/Conductors (Prior to 1990)
- b. Verizon Wireless Cables/Conductor (1994-1995)
- c. AT&T Cables/Conductor (1995-1996)
- d. Edison Carrier Solution Cables/Conductor (November 1996)
- e. Sprint Cables/Conductor (1998)
- f. Sprint Antennas and related equipment (Pole 1169253E only, 2003)
- g. NextG Cables/Conductor (2004-2005)

F. On October 21, 2011, CPSD filed a Prehearing Conference Statement in ("Prehearing Report") this proceeding identifying potential violations by NextG and the other Respondents. Specifically, the Prehearing Report alleged violations of Public Utilities Code section 451, General Order ("GO") 95, Rules 12.2, 43.2, 44.2 and 48, by overloading at least one of the Poles. The Prehearing Report alleged violations of Public Utilities Code section 451 for unsafe and unreasonable business practices demonstrated by poor communication amongst the Respondents in the Southern California Joint Pole Committee (SCJPC) process for pole attachments, that contributed to overloading Pole 1169252E. The Prehearing Report alleged violations of Public Utilities Code section 451, GO 95, and Rule 31.1, in that the Respondents failed to consider known local conditions in Malibu Canyon, such as wind speeds. The Prehearing Report also alleged violations of Public Utilities Code section 451, GO 95, and Rules 43.2, 44.1 and 48, because the replacement pole for Pole 1169252E was not constructed in

compliance with the safety factor for new construction wood poles. The Prehearing Report further alleged a violation of Rule 1.1 for NextG and the other Respondents concerning the November 18, 2010 testimony of William Schulte pertaining to the preservation of evidence at an SCE warehouse.

G. This Agreement is entered into for purposes of compromise. In order to minimize the time, expense and uncertainty of further litigation, the Settling Parties agree to the following terms and conditions as a complete and final resolution of all claims against and all issues regarding NextG under the evidence presented in this proceeding. NextG has no claims against or issues regarding CPSD.

III. AGREEMENT

A. NextG's Admissions Regarding the Ignition of the Malibu Canyon Fire

a. Subject Pole 1169252E was Overloaded in Violation of General Order 95

After NextG's fiber optic attachments were made in 2003-2004 and at the time of ignition of the Malibu Canyon Fire on October 21, 2007, the loading on subject pole 1169252E did not meet the safety factor required by GO 95, Rules 12.2, 43.2, 44.2,⁴ and 48, regardless of whether or not termite damage is considered.⁵ Such condition was not remedied by any Respondent between the time that NextG made its attachments in 2003-2004 and the ignition of the

⁴ GO 95, Rule 44.2 is now GO 95, Rule 44.3.

⁵ CPSD, in the course of its investigation, determined that pole 1169252E suffered from termite damage at the ground line sometime prior to its failure at the time of the Malibu Canyon Fire ignition on October 21, 2007. NextG was not the base pole owner of pole 1169252E and therefore, per the SCJPC rules in effect at the time, was not responsible for intrusive testing of the pole. The language in this footnote does not interpret, expand or limit GO 95 or GO 165 requirements on any party.

Malibu Canyon Fire on October 21, 2007. Thus, subject pole 1169252E did not comply with GO 95's required safety factor prior to its failure at the time of the Malibu Canyon Fire ignition. A central argument in CPSD's case in this proceeding is that the Respondents failed to provide safe service by overloading at least one of the subject poles in violation of Public Utilities Code section 451, and GO 95, Rules 12.2, 43.2, 44.2, and 48. NextG capitulates to CPSD's central argument.

NextG asserts that it contracted with a third-party engineering firm (Engineering Contractor) to conduct the engineering and pole loading analysis necessary to determine that NextG's fiber optic cable would not cause Pole 1169252E to be overloaded and that the attachment of the fiber optic cable would comply with the safety factor contained in GO 95. NextG's Engineering Contractor was also responsible for managing documentation associated with the installation of those fiber optic cables. A separate NextG contractor (Construction Contractor) was contractually obligated to install NextG's fiber optic cable on Pole 1169252E in conformance with GO 95. Subject pole 1169252E was overloaded notwithstanding the contractual obligations of the Engineering Contractor and Construction Contractor to NextG.

However, NextG agrees with CPSD that Public Utilities Code section 2109 states:

In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment shall in every case be the act, omission, or failure of such public utility.

NextG concedes that CPSD may seek to prosecute utilities, such as NextG, for the acts, omissions, and failures of utility contractors per Public Utilities Code

section 2109. NextG agrees that moving forward it will seek to ensure that its contractors perform pole loading and construction work in compliance with GO 95 and Public Utilities Code section 451.

b. Communication Failures between Respondents in the Southern California Joint Pole Committee Process Facilitated the Overloading of Subject Pole 1169252E

NextG admits that SCE employee, Richard Cromer, clearly identified subject pole 1169252E as being overloaded by writing “Request denied due to overload ... Poles in Red overloaded” and circling subject pole 1169252E (in red ink) on an SCJPC form that was distributed in August 2003.

NextG admits that on September 26, 2003, SCE confirmed the denial of NextG’s proposed installation (including subject pole 1169252E, among others) on a Form 7, and wrote that it “exceeds wind load criteria.”

NextG admits that on October 22, 2003, Lupe Hernandez, an employee of the Engineering Contractor, wrote a letter to the “Joint Pole Desk” in response to SCE’s denial of NextG’s proposed construction, which stated: “Per a field meet with Casey Doherty, NextG Networks representative, and Jim Austin, Edison Planner these JPAs are being returned for approval. The wind loading criteria is adequate.” Further, NextG admits that Lupe Hernandez crossed out the text quoted above on the Form 7 and replied “Wind loading adequate per field meet between NG [NextG] and Jim Austin.”

At his deposition, taken by CPSD on December 29, 2009, NextG admits that Mr. Jim Austin testified that he never held a “field meet” with Casey Doherty, another employee of the Engineering Contractor, regarding the subject poles.

NextG admits that on May 7, 2004, Casey Doherty emailed June Santiago of SCE regarding the NextG installation (including subject pole 1169252E). In the email, Casey Doherty stated: “I understand from what you said there were

internal problems at SCE ... Richard Kromer [sic] ... was given size of cable, weight per foot and diameter on August 13, 2003. I believe all windloading has been completed and I disagree with what you said that windloading of poles should be put on the JPA.”

NextG agrees that on May 10, 2004, June Santiago of SCE emailed Casey Doherty. In the email June Santiago stated: “since SCE did the wind loading of the poles [including subject pole 1169252E] as you mentioned in your email, as long as the poles pass the WL safety factor. I will contact Richard Kromer [sic] and the rest of the team to verify wind loading results.”

NextG agrees that at his deposition, taken by CPSD on March 4, 2010, June Santiago admitted that he did not know who Richard Cromer was, did not remember contacting Richard Cromer, did not remember contacting “the rest of the team,” and did not verify windloading results.

NextG agrees that on July 8, 2004, SCE’s representative sent a Form 7 to Casey Doherty which stated: “Your request to attach to Edison based poles as indicated in the above referenced JPA is denied.”

NextG admits that Lupe Hernandez responded by writing the following on the July 8, 2004 Form 7: “Cannot deny JPA. Per section 18.1-D JPA is already automatically approved. Work started per approval. JPA sent to Edison a year ago!”

The above facts, including communications failures relating to the loading of Subject Pole 1169252E, support the conclusion that the SCJPC process regarding the subject construction was not conducive to ensuring that the subject poles were GO 95 compliant.

NextG admits that SCJPC Rule 18.1-D provides for “automatic approval” of a joint pole authorization form if no protest or request for review is received

within 45 days. NextG agrees, however, that no provision of the SCJPC process, including SCJPC Rule 18.1-D, should be used to avoid compliance with any applicable law or regulation, including GO 95. NextG agrees that it will not invoke Rule 18.1-D to avoid remediation of a potential safety violation. NextG also agrees that if it (or its agent) seeks to attach to a pole and it receives a safety objection within, or after, the 45-day time limit specified in Section 18.1-D of the SCJPC Routine Handbook, it will take appropriate action to address the safety concern.

c. Known Local Conditions

NextG admits that Santa Ana winds are a known local condition for Malibu Canyon.

B. Replacement Pole 608 was Overloaded in Violation of GO 95

NextG accepts CPSD's conclusion that Replacement Pole 608 was overloaded in violation of GO 95. Pursuant to GO 95, Rules 43.2, 44.1, and 48, new joint use poles must be built to a safety factor of at least 4.0. NextG agrees with CPSD that Replacement Pole 608 was a new pole at the time of its installation (after the Malibu Canyon Fire) and was not built to a safety factor of 4.0. CPSD's approved settlement agreement with AT&T, Verizon Wireless and Sprint provides for the remediation of Replacement Pole 608. Therefore, although this term does not specifically require NextG to remediate Replacement Pole 608, NextG agrees to cooperate with the Settling Parties regarding all steps necessary to bring Replacement Pole 608 into compliance with GO 95.

C. Rule 1.1 Admission

NextG admits that the November 18, 2010 testimony of William R. Schulte, on behalf of all named Respondents, implied that all evidence had been "preserved at an SCE warehouse." NextG admits that the testimony of William R. Schulte does not state that some items originally attached to the failed poles,

including two NextG cables, had not been preserved and were not available for inspection by CPSD at the SCE warehouse. More specifically, the following evidence had been discarded, or was not otherwise available for inspection at the SCE warehouse: 1) an Edison Carrier Solutions Cable, 2) two NextG cables, 3) an AT&T cable, and 4) an Edison KPF Switch. NextG admits that Mr. Schulte's testimony is incorrect and agrees to withdraw from sponsoring and/or supporting all of William R. Schulte's testimony in this proceeding. Furthermore, in retrospect, NextG acknowledges that such testimony in some respects fell below the Commission's standards for testimony set forth in the Rules of Practice and Procedure.⁶

D. NextG Agrees to Pay \$14.5 Million to the State General Fund and a Statewide Safety Enhancement Program

NextG shall pay a total of \$14.5 Million of which an \$8.5 Million penalty will be paid to the State of California General Fund and \$6 Million will be paid into a statewide safety enhancement fund as described in more detail below. Payment to both funds shall be made within 60 days of the issuance of a final decision by the Commission approving the Settlement Agreement. Concurrent with its remittal, NextG shall provide a photocopy of the checks to CPSD.

Payment to the California General Fund shall be made by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within the timeframe directed above. NextG must write on the face of the check or money order "For deposit to the General Fund per Decision XX-XX-XXX."

⁶ See, e.g., Rule 1.1.

Payment to a statewide safety enhancement fund shall be made into an escrow account established for the purpose of developing a statewide enhanced safety program for NextG's communications facilities. As part of that program, NextG agrees to hire a third-party contractor to audit all of NextG's poles and pole attachments in the State of California. Such audit will encompass every pole that NextG either has an ownership interest in or has attached to, which as of the date of this Agreement includes nearly 60,000 poles in the State of California. NextG shall complete the audit and any remedial work necessitated by the audit findings within three years of commencing the audit. The audit will begin with NextG's facilities in Malibu and Los Angeles County. The statewide safety enhancement fund shall be used to conduct the audit. No portion of the statewide safety enhancement fund shall be used to pay for remedial work and/or repairs performed in response to the audit or for any work done by NextG prior to the signing of this Settlement Agreement. If any funds remain after the safety enhancement program has been completed, the remaining funds will be paid to the California General Fund. In the event the program cost exceeds the \$6 Million used to establish the fund, NextG will fund the remaining costs to complete the audit and implementation of the enhanced safety program. NextG agrees to provide bi-monthly reports to CPSD providing status of the enhanced safety program implementation and accounting records pertaining to the statewide safety enhancement fund. Audit records, including pole loading data and photographs, shall be maintained and provided to CPSD upon request.

Upon completion of the audit and implementation of an enhanced safety program, NextG agrees to continue to implement the same enhanced safety program measures for new poles it attaches to in California on a going-forward basis, and will not utilize the statewide safety enhancement fund for that

purpose. Upon review of NextG's attachments, NextG's third-party contractor will complete the following:

- a. Conduct a new pole load engineering analysis for each of NextG's pole/attachment(s) to ensure compliance with GO 95 requirements regarding minimum safety factor. To the extent that any pole or attachment is not compliant, NextG, if it shares joint ownership of the pole, will work with all pole owners to bring the pole into compliance or replace the pole if it cannot be brought up to the minimum safety factor.
- b. Visually inspect pole and attachments for GO 95 compliance and maintenance issues. Compliance and maintenance issues will be documented in writing and photographed.
- c. Confirm height and size of NextG attachments for pole loading calculations.
- d. Cross reference and verify pole card to pole and other pole owners/attachers.
- e. Request intrusive inspection records from the base pole owner and incorporate the results of those intrusive inspections into engineering analysis.
- f. Document pole class information, confirm pole tag or place pole tag (where not otherwise needed).
- g. Collect and document GPS latitude and longitude location for each pole.
- h. Take photo of pole that clearly shows attached facilities and mark date on photo.
- i. Input all of this data into an auditable database.
- j. Communicate any problems discovered during the audit to the responsible parties.

E. Cooperation Regarding Implementation of \$12 Million Settlement with AT&T, Sprint and Verizon Wireless

NextG agrees that it will cooperate regarding the implementation of the \$12 Million Carrier Settlement, in this proceeding (I.09-01-018). NextG agrees that it will not hinder any construction or pole loading study and will promptly provide any information sought (in relation to the Carrier Settlement) by any Settling Party.

IV. OTHER MATTERS

1. SCE, AT&T Wireless, Verizon and Sprint have not been privy to these settlement discussions, are not Settling Parties, and have not provided any compensation or consideration towards the settlement payments. The Settling Parties agree that the settlement discussions between the parties that resulted in this Agreement are and shall remain at all times confidential. NextG agrees not to provide any materials or information from these confidential settlement discussions to the remaining Respondent in this proceeding regardless of the terms of the Joint Defense Agreement. This Agreement is expressly limited to this proceeding and does not prohibit NextG from exercising its rights under the Joint Defense Agreement in any civil litigation related to the Malibu Canyon Fire.

2. In the event that this Agreement is approved by the Commission but a hearing is nonetheless conducted in this proceeding, NextG agrees not to object to CPSD calling any witness that provided testimony sponsored by NextG.

3. In the event that this Agreement is approved by the Commission but a hearing is nonetheless conducted in this proceeding, NextG agrees to waive cross-examination of all of CPSD's witnesses in this proceeding: Raymond Fugere, Kan Wai-Tong, Pejman Moshfegh, as well as the SIG witnesses.

4. NextG has implemented new protocols for managing joint pole communications, including in-house management of all joint pole

communications, new policies and procedures to manage an auditable database for all pole loading documentation, and training for both in-house and contract personnel pertaining to GO 95 and SCJPC policies and procedures. NextG agrees to continue these protocols going forward with respect to all of its attachments in California.

5. NextG acknowledges that no provision of the SCJPC process, including SCJPC Routine Handbook Section 18.1-D, can be used to avoid complying with any applicable law or regulation, including GO 95.

6. NextG acknowledges and understands its obligation to ensure that it communicates clearly and effectively with the owners of a utility pole prior to attaching its communications facilities to such poles. NextG admits that its efforts in communicating with SCE concerning Pole 1169252E were inadequate and apologizes for permitting this to happen. NextG has modified its processes and procedures in an attempt to prevent future communication breakdowns.

7. NextG agrees that, if it seeks to attach to a pole governed by the SCJPC and receives a safety objection within, or after, the 45-day time limit specified in Section 18.1-D of the SCJPC Routine Handbook, NextG will take appropriate action to address the safety concern.

8. NextG has not served testimony contesting Mr. Fugere's methodology for computing the s.f. under GO 95 and agrees that the methodology is correct.

9. NextG enters into this Agreement without prejudice to its rights or positions or any claims that may have been asserted or may yet be asserted in any civil litigation related to the Malibu Canyon Fire.

10. The Settling Parties agree that the evidence submitted by CPSD that Pole 1169252E was overloaded at the time it failed on October 21, 2007 is meritorious.

11. The Settling Parties agree to seek expeditious approval of this Agreement and to use their reasonable best efforts to secure Commission approval of it, including written filings, appearances, and other means as may be needed to obtain expeditiously the necessary approval. The Settling Parties agree to actively and mutually defend this Agreement if its adoption is opposed by any other party in proceedings before the Commission.

12. If the Commission has not issued a decision approving this Agreement prior to the commencement of the evidentiary hearing for the remaining Respondent, NextG or CPSD may withdraw from this Agreement.

13. The Settling Parties have bargained in good faith to achieve this Agreement. The Settling Parties intend the Agreement to be interpreted as a unified, interrelated agreement. Both of the Settling Parties have contributed to the preparation of this Agreement. Accordingly, the Settling Parties agree that no provision of this Agreement shall be construed against any party because that party or its counsel drafted the provision.

14. The rights conferred and obligations imposed on any party by this Agreement shall inure to the benefit of or be binding on that party's successors in interest or assignees as if such successor or assignee was itself a party to this Agreement.

15. Should any dispute arise between the Settling Parties regarding the manner in which this Agreement or any term shall be implemented, the Settling Parties agree to work in good faith to resolve such difference in a manner consistent with both the express language and the intent of the Settling Parties in entering into this Agreement. If such dispute cannot be resolved through good faith negotiation between the Settling Parties, the dispute shall be submitted to the Commission for resolution through alternative dispute resolution and if it

cannot be resolved to the mutual satisfaction of the Settling Parties through alternative dispute resolution, then through administrative adjudication before the Commission.

16. This Agreement may be executed in counterparts.

IN WITNESS WHEREOF, the Settling Parties hereto have duly executed this Settlement Agreement.

Dated: _____

Crown Castle NG West Inc. (f/k/a
NextG Networks of California, Inc.)

By: _____

Dated: _____

Safety and Enforcement Division
(f/k/a Consumer Protection and
Safety Division)

By: _____

(END OF APPENDIX A)