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MEMORANDUM



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AZ CORP COMMISSION  
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TO: Docket Control

FROM: Ernest G. Johnson  
Director  
Utilities Division

DATE: October 31, 2008

RE: IN THE MATTER OF THE APPLICATION OF NEWPATH NETWORKS, LLC FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE TRANSPORT AND BACKHAUL SERVICES TO OTHER CARRIERS, INCLUDING BUT NOT LIMITED TO WIRELESS TELECOMMUNICATIONS SERVICES PROVIDERS AND POTENTIALLY TO WIRELESS INFORMATION SERVICE PROVIDERS. (DOCKET NO. T-20567A-07-0662)

Attached is the Staff Report for the above referenced Application. The Applicant is applying for approval to provide the following services:

- Private Line Telecommunications Services

Staff is recommending approval of the Application.

EGJ:AFF:red

Originator: Armando Fimbres

Attachment: Original and thirteen copies

Arizona Corporation Commission  
DOCKETED

OCT 31 2008

DOCKETED BY 

SERVICE LIST FOR: NEWPATH NETWORKS, LLC  
DOCKET NO. T-20567A-07-0662

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STAFF REPORT  
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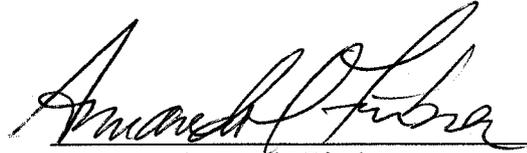
NEUPATH NETWORKS, LLC  
DOCKET NO. T-20567A-07-0662

IN THE MATTER OF THE APPLICATION OF NEUPATH NETWORKS, LLC FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE TRANSPORT AND BACKHAUL SERVICES TO OTHER CARRIERS, INCLUDING BUT NOT LIMITED TO WIRELESS TELECOMMUNICATIONS SERVICES PROVIDERS AND POTENTIALLY TO WIRELESS INFORMATION SERVICE PROVIDERS.

OCTOBER 31, 2008

## STAFF ACKNOWLEDGMENT

The Staff Report for NewPath Networks, LLC, Docket No. T-20567A-07-0662, was the responsibility of the Staff member listed below. Armando Fimbres was responsible for the review and analysis of the Application for a Certificate of Convenience and Necessity to provide transport and backhaul services to other carriers, including but not limited to wireless telecommunications services providers and potentially to wireless information service providers.

A handwritten signature in black ink, appearing to read "Armando Fimbres", written over a horizontal line.

Armando Fimbres  
Public Utilities Analyst V

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## **1. INTRODUCTION**

On November 26, 2007, NewPath Network, LLC ("NewPath" or "Applicant") filed an Application for a Certificate of Convenience and Necessity ("CC&N") to provide transport and backhaul services to other carriers, including but not limited to wireless telecommunications services providers and potentially to wireless information service providers. The Applicant also petitioned the Arizona Corporation Commission ("Commission") for a determination that its proposed services should be classified as competitive.

On August 8, 2008, Staff issued its First Set of Data Requests to NewPath. On August 13, 2008, NewPath provided information in response to Staff's First Set of Data Requests via email. On September 22, 2008, NewPath provided additional information in response to Staff's Second Set of Data Requests dated September 19, 2008. On September 30, 2008, NewPath provided additional information in response to Staff's Third Set of Data Requests dated September 23, 2008.

On October 20, 2008, NewPath submitted a letter to Staff that further clarified its customer market and need for a CC&N. On October 22, 2008 NewPath provided additional information in response to Staff's Fourth Set of Data Requests dated October 20, 2008.

Staff's review of this Application addresses the overall fitness of the Applicant to receive a CC&N. Staff's analysis also considers whether the Applicant's services should be classified as competitive and if the Applicant's initial rates are just and reasonable.

## **2. TECHNICAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES**

NewPath is a privately held, foreign, limited liability company organized under the laws of New Jersey and is headquartered in Seattle, Washington. The telecommunications experience of NewPath's top four executives exceeds a combined total of 50 years.

NewPath proposes to offer facilities-based, dedicated point-to-point circuits on a Distributed Antenna System ("DAS") network. NewPath currently operates a DAS in the City of Glendale using leased fiber lines from SRP. The system provides wireless coverage in the vicinity of Westgate Center, University of Phoenix Stadium, and Coyotes Stadium. NewPath's customers are currently wireless carriers, not end-users. NewPath does not offer services to consumers.

NewPath currently does not have employees located in Arizona; however, several employees are anticipated in the 4<sup>th</sup> quarter of 2008.

In addition to providing services in Glendale, AZ using leased fiber lines, NewPath currently provides transport and backhaul services in Oregon, Nevada, California, Minnesota, Louisiana, Washington, and Colorado. The Applicant also plans to begin providing similar services in Missouri and New Mexico by mid-2009 and will be filing an application in Georgia

before the end of 2008. NewPath also indicated that it does not have applications pending in any states, nor has it been denied approval in any states.

Based on the above information, Staff believes NewPath possesses the technical capabilities to provide the services it is requesting the authority to provide.

### **3. FINANCIAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES**

On July 16, 2008, the Applicant provided unaudited consolidated financial statements for 2006, 2007, and the five months ending May 31, 2008. These financial statements list Total Assets of \$8,206,114; Total Equity of (\$1,200,844); and Earnings Before Income Tax of (\$1,668,302) for end of year 2007. The May 31, 2008 information indicates that Total Equity has shifted to a positive figure of several million dollars. The Applicant did not provide notes related to the financial statements.

Sheet 19, section 5 of the Applicant's proposed Tariff states that advance payments may be collected. Sheet 20, Section 6.2 of the Applicant's proposed Tariff states that deposits may be collected.

In response to Staff's First Set of Data Requests, NewPath filed replacement pages for sheets 24 and 25 to delete a reference to "special promotions" and incorporate the revised policy into the tariff.

NewPath's current customer market consists primarily of large, sophisticated wireless carriers. However, NewPath intends to provide service to other telecommunications service providers and large business entities upon request. NewPath will not provide service to small business or residential customers. Due to the nature of NewPath's current and future customer market, Staff does not believe a performance bond or Irrevocable Sight draft Letter of Credit ("ISLC") is necessary for the transport and backhaul services that NewPath proposes to offer in Arizona.

### **4. ESTABLISHING RATES AND CHARGES**

The Applicant would be providing service in areas where an incumbent local exchange carrier ("ILEC"), along with various competitive local exchange carriers ("CLECs") and interexchange carriers ("IXCs"), is providing telephone service. Therefore, the Applicant would have to compete with those providers in order to obtain subscribers to its services. The Applicant would be a new entrant and would face competition from both an incumbent provider and other competitive providers in offering service to its potential customers. Therefore, the Applicant would generally not be able to exert market power. Thus, the competitive process should result in rates that are just and reasonable.

In general, rates for competitive services are not set according to rate of return regulation. NewPath indicated that, as of December 31, 2007, its net book value or fair value rate base was

\$423,669. The rate to be ultimately charged by the Company will be heavily influenced by the market. While Staff considered the fair value rate base information submitted by the Company, it did not accord that information substantial weight in its analysis.

The rates proposed by this filing are for competitive services. NewPath will not provide service to residential end users. NewPath provides unswitched private line services, and also proposes to offer customized private line services to meet the individual needs of carriers and large business entities in Arizona. NewPath's customers are currently large, sophisticated wireless carriers who typically negotiate contract rates through a competitive process with the ultimate rates provided on an individual case basis ("ICB") by NewPath. However, NewPath states it is also planning to use excess fiber capacity to provide end user telecommunications services to non-carrier business customers such as apartment complexes, office buildings, and other businesses.<sup>1</sup> NewPath customers who do not need individualized offerings and do not require an ICB contract to meet their needs will be able to purchase services at the rates contained in NewPath's proposed tariff.

Staff has reviewed the proposed rates to be charged by the Applicant. NewPath's rates are for highly competitive services and the services are targeted for sophisticated carriers and communications companies. These carriers and companies have ample resources and bargaining power to protect their business interests while negotiating for the best market prices for services. The proposed tariff rates are similar to those charged by NewPath in other states and are similar to the tariffed rates of other providers of point to point services in Arizona. The rate charged for a service may not be less than the Company's total service long-run incremental cost of providing the service pursuant to A.A.C. R14-2-1109. Therefore, Staff believes that NewPath's proposed rates are just and reasonable.

## **5. REVIEW OF COMPLAINT INFORMATION**

The Applicant has neither had an Application for service denied nor revoked in any state. In section (A-11) of its application, NewPath states that "neither applicant nor any officer, director, partner or manager of the Applicant has been or is currently involved in any formal or informal complaint proceeding pending." NewPath supplemented its response to (A-11) on August 15, 2008 by explaining that subsequent to the filing of NewPath's CC&N application in Arizona, NewPath was granted an injunction<sup>2</sup> against the City of Irvine permanently enjoining the enforcement of the City's Wireless Ordinance pursuant to Section 253 of the Telecom Act of 1996. As a result of this litigation, an Irvine resident wrote the California Public Utilities

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<sup>1</sup> NewPath letter to Staff, dated 10/17/08

<sup>2</sup> The case number for the original case filed by NewPath Networks, LLC against the City of Irvine and the City Council of Irvine, CA in the United States District Court for the Central District of California is SACV06-550-JVS(RNBx). The Judgment and Permanent Injunction is dated April 4, 2008. Both NewPath and the City of Irvine have filed appeals in this case with the United States Court of Appeals for the Ninth Circuit. The case number for the NewPath appeal is 08-56010 and the case number for the City of Irvine appeal is 08-5575. A subsequent case (SACV08-651 CJC(ANx)) has been filed by NewPath against the City and City Council of Irvine, CA in the US District Court for the Central District of California with different claims.

Commission ("CPUC") and objected to the CPUC's grant of a Notice of Exemption for NewPath's Irvine project. NewPath states that the objection had no merit and that the CPUC staff refused to process or otherwise take any action on the request. On September 30, 2008, NewPath also provided explanatory details regarding a patent infringement lawsuit<sup>3</sup> filed by NextG Networks of California, Inc.<sup>4</sup> ("NextG") on March 21, 2008, four months after NewPath filed its application Arizona. NextG has not accused any of NewPath's existing or planned installations in Arizona of infringement in the lawsuit but it is possible that NextG may raise such allegations. Under the current scheduling order entered by the Court, which does not set a trial date, it is unlikely any trial will occur before November 2009. The civil lawsuit involves issues between key competitors and Staff has no reason to believe that the matter has any bearing on this CC&N application.

Staff sought information from five Public Utility Commissions<sup>5</sup> in which NewPath is currently operating and found no discrepancies with the complaint information provided by NewPath. No complaint information filed against NewPath was found on the Federal Communications Commission ("FCC") website.

The Applicant also indicated in section (A-12) of its application that none of its officers, directors, partners, or managers have been or are currently involved in any criminal investigations within the last ten (10) years. The Corporations Section of the Arizona Commission has indicated that NewPath is in good standing and the Consumer Services Section reports no complaints have been filed in Arizona.

On October 7, 2008, Staff met with representatives of the City of Scottsdale to discuss some of their concerns with the NewPath application and also try to understand the Commission processes. Below are the concerns raised by the City of Scottsdale:

1. The type of service proposed/provided by the company.
2. The type of equipment and structure the company is proposing.
3. The financial risks should NewPath abandon its network, either fully or in part.
4. The rights of way, franchise and/or construction fees.

On October 20, 2008, Staff had a conference call with NewPath to address the issues raised by the City of Scottsdale. Based on the discussion, Staff issued its Fourth Set of Data Requests to Newpath.

Based on the response provided by NewPath, Staff believes that the Company met the technical, managerial, and financial requirements as set forth by Commission rules.

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<sup>3</sup> U.S. District Court, Northern District California, Judge Vaughn Walker, Case # 3:2008cv01565, filed March 21, 2008.

<sup>4</sup> NextG was granted a CC&N by the Arizona Corporation Commission on August 29, 2006 in Decision 68915.

<sup>5</sup> California, Washington, Oregon, Nevada, Colorado.

In addition, Staff believes that the City of Scottsdale can and has the ability to intervene in this case and present their issues to the Commission for the record.

## **6. COMPETITIVE SERVICES ANALYSIS FOR PRIVATE LINE SERVICES**

### *6.1 Private Line Services*

Private line service is a direct circuit or channel specifically dedicated to the use of an end user organization for the purpose of directly connecting two or more sites in a multi-site enterprise. Private line service provides a means by which customers may transmit and receive messages and data among various customer locations over facilities operated and provided by the Applicant. The Applicant is therefore engaged in providing telecommunications service for hire to the public, which fits the definition of a common carrier and a public service corporation. Staff believes the Commission has jurisdiction over the services to be provided by NewPath. Staff also believes a hearing is necessary.

### *6.2 Description of Requested Services*

NewPath proposes to provide private line service. Private line service is a direct circuit or channel specifically dedicated to the use of an end user organization for the purpose of directly connecting two or more sites in a multi-site enterprise.

### *6.3 A Description of the General Economic Conditions That Exist That Make the Relevant Market For the Service One That is Competitive.*

IXCs hold a substantial share of the private line service market. Also, ILECs and a number of CLECs have been authorized to provide private line service. The Applicant will be entering the market as an alternative provider of private line service and, as such, the Applicant will have to compete with several existing companies in order to obtain customers.

### *6.4 The Number of Alternative Providers of the Service.*

IXCs are providers of private line service in the State of Arizona. ILECs and a number of CLECs also provide private line service.

### *6.5 The Estimated Market Share Held by Each Alternative Provider of the Service.*

IXCs and ILECs hold a substantial share of the private line market. CLECs likely have a smaller share of the private line market.

### *6.6 The Names and Addresses of Any Alternative Providers of the Service That Are Also Affiliates of the Telecommunications Applicant, as Defined in A.A.C. R14-2-801.*

None.

6.7 *The Ability of Alternative Providers to Make Functionally Equivalent or Substitute Services Readily Available at Competitive Rates, Terms, and Conditions.*

IXCs and ILECs have the ability to offer the same services that the Applicant has requested in their respective service territories. Similarly, many of the CLECs offer substantially similar services.

**7. RECOMMENDATIONS**

Staff recommends that Applicant's Application for a CC&N to provide intrastate telecommunications services, as listed in this Report, be granted. In addition, Staff further recommends:

1. That the Applicant complies with all Commission Rules, Orders and other requirements relevant to the provision of intrastate telecommunications services;
2. That the Applicant abides by the quality of service standards that were approved by the Commission for Qwest in Docket No. T-01051B-93-0183;
3. That the Applicant be required to notify the Commission immediately upon changes to the Applicant's name, address, or telephone number;
4. That the Applicant cooperate with Commission investigations including, but not limited to, customer complaints;
5. The rates proposed by this filing are for competitive services. In general, rates for competitive services are not set according to rate of return regulation. Staff obtained information from NewPath indicating that as of December 31, 2007 its net book value or fair value rate base was \$8,206,114. Staff has reviewed the rates to be charged by the Applicant and believes they are just and reasonable as they are comparable to other wholesale transport providers offering service in Arizona and comparable to the rates the Applicant charges in other jurisdictions. The rate to be ultimately charged by the Company will be heavily influenced by the market. Therefore, while Staff considered the fair value rate base information submitted by the Company, the fair value information provided was not given substantial weight in this analysis;
6. That the Commission authorizes the Applicant to discount its rates and service charges to the marginal cost of providing the services.

Staff further recommends that the Applicant be ordered to comply with the following. If it does not do so, the Applicant's CC&N shall be null and void after due process.

1. The Applicant shall docket conforming tariffs for each service within its CC&N

within 365 days from the date of an Order in this matter or 30 days prior to providing service, whichever comes first. The tariffs submitted shall coincide with the Application.

**8. RECOMMENDATION ON THE APPLICANT'S PETITION TO HAVE ITS PROPOSED SERVICES CLASSIFIED AS COMPETITIVE**

Staff believes that the Applicant's proposed services should be classified as competitive. There are alternatives to the Applicant's services. The Applicant will have to convince customers to purchase its services, and the Applicant has no ability to adversely affect the local exchange or interexchange service markets. Therefore, the Applicant currently has no market power in the local exchange or interexchange service markets where alternative providers of telecommunications services exist. Staff therefore recommends that the Applicant's proposed services be classified as competitive.