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Arizona Corporation Commission  
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APR 20 2009

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14 Attorneys for Applicant,  
15 NEWPATH NETWORKS, LLC

13 BEFORE THE ARIZONA CORPORATION COMMISSION

14 Commissioners:  
15 Kristen K. Mayes, Chairman  
16 Paul Newman  
17 Gary Pierce  
18 Sandra D. Kennedy  
19 Bob Stump

Docket No. T-20567A-07-0662

18 IN THE MATTER OF THE  
19 APPLICATION OF NEWPATH  
20 NETWORKS, LLC, FOR APPROVAL  
21 OF A CERTIFICATE OF  
22 CONVENIENCE AND NECESSITY TO  
23 PROVIDE TRANSPORT AND  
24 BACKHAUL  
TELECOMMUNICATIONS SERVICES

**OBJECTIONS TO  
APPLICATIONS FOR  
INTERVENTION BY THE CITY  
OF SCOTTSDALE, ARIZONA,  
AND THE TOWNS OF PARADISE  
VALLEY AND CAREFREE,  
ARIZONA**

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100 Oceangate, Suite 1400  
Long Beach, CA 90802

1 Applicant NewPath Networks, LLC (“NewPath”) hereby files its Objections  
2 to Applications for Intervention filed by the City of Scottsdale (“Scottsdale” or  
3 “City”), the Town of Paradise Valley (“Paradise Valley”), and the Town of  
4 Carefree (“Carefree”) (collectively referred to as “Intervenors”) in the above-  
5 entitled proceeding before the Arizona Corporation Commission (“Commission”).  
6 NewPath’s Objections are based on several grounds.

7 **I. INTERVENORS’ APPLICATIONS SHOULD BE DENIED**  
8 **BECAUSE THEY DO NOT ADD ANY MATERIAL FACTS**  
9 **RELEVANT TO THE COMMISSION’S DETERMINATION ON**  
10 **NEWPATH’S APPLICATION.**

11 NewPath objects to the Intervenors’ applications to intervene  
12 (“Applications”) because the requests introduce no material facts that are relevant  
13 to the Commission’s determination on NewPath’s Application for a Certificate of  
14 Convenience and Necessity (“CC&N”). NewPath seeks a CC&N because,  
15 pursuant to Arizona Administrative Code, “[a]ll telecommunications companies  
16 providing intrastate telecommunications services shall obtain a [CC&N] from the  
17 Commission...” A.A.C. § R14-2-1103. The Code further states that the  
18 Commission may deny certification to any telecommunications company on five  
19 grounds:

- 20 1. The company does not provide information required by the  
21 Administrative Code;  
22 2. The company is not offering competitive services;

23  
24

- 1           3.     The company does not possess adequate financial resources to  
2           provide the proposed services;
- 3           4.     The company does not possess adequate technical competency to  
4           provide the proposed services; or
- 5           5.     The company fails to provide a performance bond, if required.

6 A.A.C § R14-2-1106.

7           Commission Staff has addressed each of these potential bases for denial.  
8 *See* Memorandum from Ernest G. Johnson, Utilities Division to Docket Control  
9 (dated October 31, 2008) re: “In the Matter of the Application of NewPath  
10 Networks, LLC...” (“Staff Report”). In the Staff Report, Staff expressed  
11 satisfaction with the completeness of NewPath’s application. *Id.* at p. 1;  
12 Transcript of Hearing before Administrative Law Judge Kinsey dated February 18,  
13 2009 (“Trans.”), page 62, lines 15-16 (hereinafter cited in the form “62:15-16”).  
14 Staff recommended that NewPath’s services be classified as competitive. *Staff*  
15 *Report* at pp. 1, 7; Trans. 63:14-19. Staff, furthermore, “believes that the Company  
16 met the technical, managerial and financial requirements as set forth by  
17 Commission rules.” *Staff Report* at p. 4; Trans. 62-63. Staff also does not believe  
18 a performance bond is required. *Staff Report* at p. 2; Trans. 63: 5-13. Moreover,  
19 Staff has concluded that NewPath’s proposed rates are just and reasonable. *Staff*  
20 *Report* at p. 3. Staff has reviewed the information provided by NewPath and  
21 determined that NewPath is in good standing in the state of Arizona and that  
22 pending legal actions have no bearing on the CC&N application. *Id.* at p. 4;  
23 Trans. 63-64. Finally, Staff testified at the public hearing held on February 18,  
24

1 2009 that NewPath was a “fit and proper entity” and that it would be in the public  
2 interest to grant NewPath’s application. Trans. 70:3-9.

3 Notably, the Intervenor’s Applications challenge none of these findings.  
4 Rather, the concerns expressed by the Applications, which are addressed in more  
5 detail below, range from a generalized concern over the scope of Intervenor’s  
6 authority in the event a CC&N is granted, including, among others, the right to  
7 require fees for the use of public rights-of-way, unspecified concerns regarding the  
8 aesthetic impact of NewPath’s proposed facilities,<sup>1</sup> and, finally, unspecified  
9 concerns over the health (which are preempted under federal law), safety and  
10 welfare interests of residents.

11 These concerns are not properly raised in this setting. Unless the  
12 Commission concludes that NewPath is not a telecommunications company as  
13 defined under state law, NewPath has an obligation to obtain a CC&N to conduct  
14 its business in the state of Arizona. A.A.C. § R14-2-1103. That obligation exists  
15 regardless of the impact that issuance of the CC&N may have on local authority.  
16 *Id.* Additionally, Scottsdale staff advised the City Council in its September 2,  
17 2008, Information Update (attached as Exhibit 1), that according to the Scottsdale  
18 Municipal Code, an application for a telecommunications license from the City  
19 must be accompanied by: “A copy of the applicant’s valid certificate of public  
20 convenience and necessity which has been issued by the Arizona Corporation  
21 Commission.” Assuming NewPath is under an obligation to obtain a CC&N, the

22 \_\_\_\_\_  
23 <sup>1</sup> To the contrary, NewPath is complying with all aesthetic regulations under applicable wireless  
24 ordinance provisions and has documented extensive meetings, hearings, and discussions  
regarding the measures it is willing to take to address reasonable concerns about the appearance  
of its proposed facilities.

1 only bases for denial of the CC&N are the five criteria outlined above. Moreover,  
2 Staff's witness, Armando Fimbres, testified on February 18, 2009 that concerns  
3 regarding both the siting of NewPath's facilities and right-of-way franchise and  
4 construction fees "would be dealt with really at the city level, not as a matter of a  
5 CC&N, understanding of course, that the CC&N is a statewide CC&N." Trans.  
6 68:10-16. Furthermore, Staff's counsel, Kevin Torrey, stated on the record that  
7 facility siting issues were "really not in the purview of the Commission to decide."  
8 Trans. 16:5-10.

9       With regard to local authority, the Arizona State Legislature has determined  
10 how and to what extent local authority over telecommunications companies is  
11 preserved. *See, e.g.*, A. R. S. §§ 9-582, 9-583. As described herein,  
12 notwithstanding the Commission's decision to grant a CC&N and the limits on the  
13 exercise of local authority over telecommunications companies by state and  
14 federal law, Intervenors are not precluded from exercising adequate control over  
15 public rights-of-way to ensure that the health, safety and welfare of their  
16 respective citizens are protected. *See* 47 U.S.C. § 253(c). NewPath recognizes  
17 that authority, with its lawful limits, and is committed to working in good faith  
18 with all communities in which it intends to do business in order to ensure that  
19 reasonable and lawful community concerns are properly addressed (*see* pp. 24-26,  
20 *infra*).

21       NewPath further notes that the Commission has already granted a CC&N to  
22 NextG Networks of California, Inc., dba NextG Networks West ("NextG"), which  
23 expressly authorizes the provision of transport and backhaul telecommunications  
24

1 services to, among others, wireless telecommunications services providers and  
2 wireless information services providers. (NextG's CC&N is attached as Exhibit B  
3 to the Scottsdale Application.) NextG, therefore, is a direct competitor to  
4 NewPath and has its CC&N. In the event a local jurisdiction exercises its  
5 statutory authority under Arizona Revised Statutes § 9-583(B)(1) and imposes a  
6 requirement that NewPath obtain a CC&N as a condition of obtaining permits for  
7 use of the right-of-way, NextG would have an unfair competitive advantage over  
8 NewPath, even though NewPath has applied for and is equally qualified to obtain  
9 a CC&N. In fact, just last week, NewPath received authorization from Maricopa  
10 County to construct a Distributed Antenna System ("DAS"), but that County's  
11 approval was conditioned on the requirement that NewPath obtain a CC&N. (*See*  
12 *Excerpts from Maricopa County Board of Supervisors Agenda dated April, 15,*  
13 *2009 and attached as Exhibit 2.*)

14 Finally, the Commission recently recognized the importance of basing  
15 requests for intervention on relevant facts. *See In the Matter of Arizona Water*  
16 *Company, an Arizona Corporation, to Extend its Existing Certificate of Public*  
17 *Convenience and Necessity at Coolidge, Pinal County, Arizona, 2007 Ariz. PUC*  
18 *LEXIS 60, at \* 8 (Ariz. PUC 2007)* ("Staff also stated that allowing intervention  
19 by Global or Woodruff would set a regrettable precedent ...[and] is unlikely to add  
20 significant relevant facts to the proceedings.") (internal quotes omitted). Thus,  
21 for these reasons and as further detailed below, NewPath respectfully requests that  
22 the Commission deny the Applications. In the event that the Commission grants  
23 the Applications, NewPath submits the following responses to Intervenors'

24

1 arguments that NewPath should not be granted a CC&N or, in the alternative, that  
2 NewPath's CC&N should be uniquely conditioned to cede certain rights to the  
3 Intervenors.

4 **II. CITY OF SCOTTSDALE**

5 **a. BACKGROUND INFORMATION**

6 On February 29, 2008, NewPath met with Scottsdale staff to discuss  
7 deployment of its DAS network in the City's public right-of-way ("PROW").  
8 Since then NewPath has fully engaged the City, its residents and businesses, and  
9 homeowners' associations that may be impacted regarding the design of the DAS,  
10 including but not limited to the placement and design of the individual facilities  
11 (e.g., antennas, equipment enclosures, back-up power). **NewPath has conducted**  
12 **no less than 25 meetings** with Scottsdale residents, homeowners associations, and  
13 the City of Scottsdale, and has revised the construction and aesthetic design of the  
14 DAS in an effort to accommodate the concerns raised at those meetings. NewPath  
15 has also made presentations on its DAS network and design options at meetings of  
16 Scottsdale's City Council, Planning Commission and Development Review Board.  
17 Additionally, since June 2008, NewPath has had a series of meetings with City  
18 staff, as well as the Mayor and City Council members, in a cooperative effort to  
19 identify an appropriate fee structure for DAS utilization of City PROW and to  
20 ultimately result in approval of a franchise agreement authorizing NewPath to  
21 access the City's PROW.

22 //

23 //

24

1                   **b. SCOTTSDALE’S GROUNDS FOR INTERVENTION ARE**  
2                   **MERITLESS.**

3                   As described above, Scottsdale’s Application raises several concerns that  
4 are either irrelevant or meritless. First, the City’s ability to negotiate fees is not a  
5 proper basis for denying NewPath a CC&N and, moreover, concerns that NewPath  
6 would use the CC&N as a tool for forcing the City to accept unreasonable fees are  
7 baseless. Scottsdale erroneously states that NewPath has asserted that its  
8 possession of a CC&N would impact and limit the City’s ability to require  
9 compensation for the use of its PROW or to regulate the use of its PROW.  
10 NewPath’s letter regarding fees, attached as Exhibit A to the Scottsdale  
11 Application, made clear that the fees were being challenged under federal and  
12 state statutes with **no reference to NewPath’s pending CC&N**. In both written  
13 communications and public hearings before Scottsdale’s Mayor and Council,  
14 NewPath has made it clear that it has never asserted or implied that having the  
15 CC&N would affect fee negotiations. *See* Letter from Lynn Lagarde to Mayor Jim  
16 Lane (dated April 6, 2009) attached as Exhibit 3. The claims that the City raises  
17 regarding NewPath’s status as a public service corporation and the Commission’s  
18 jurisdiction over NewPath are incorrect on the law and inconsistent with the  
19 Commission’s past treatment of DAS companies.

20                   **i. Scottsdale’s Concerns about Fees Are Misplaced.**

21                   Scottsdale asserts that they may obtain fair and reasonable compensation for  
22 the use of their PROW. NewPath does not contest this statement. NewPath does,  
23 however, contend that what constitutes “fair and reasonable compensation” is the  
24

1 subject of contract negotiations between the parties and is governed by state and  
2 federal law. As the Scottsdale Application correctly states, NewPath had detailed  
3 in writing its opposition to the City's proposed fee of \$8,000 per node as  
4 unreasonable and amounting to a barrier to entry. But NewPath has always been  
5 willing to seek a fair and reasonable agreement regarding fees and has reiterated  
6 this position to Scottsdale on numerous occasions. *Id.*

7 **ii. NewPath Is a "Public Service Corporation" within the**  
8 **Jurisdiction of the Commission.**

9 Scottsdale contends that the Commission has not given adequate  
10 consideration as to whether NewPath is a public service corporation under Arizona  
11 law. NewPath strongly disagrees. Not only does the following analysis show that  
12 NewPath is a public service corporation, but the Commission has already  
13 determined that a DAS provider similar to NewPath is a public service  
14 corporation. NextG, a direct competitor of NewPath that provides  
15 telecommunications services, was granted a CC&N by the Commission in 2006  
16 (Exhibit B to Scottsdale's Application). Conclusions of Law No. 1 of the NextG  
17 CC&N expressly finds NextG to be a public service corporation within the  
18 meaning of Article 15 of the Arizona Constitution and A.R.S. §§ 40-281 and 40-  
19 282. *Id.* at p. 6.

20 There is a two-step process in determining whether or not an entity is a  
21 public service corporation. The first step is whether or not the entity fits the  
22 definition of a public service corporation under the Arizona Constitution. The  
23 second step requires an evaluation of whether the entity's business activities are of  
24

1 a public concern. *Southwest Transmission Coop., Inc. v. Ariz. Corp. Comm'n*, 213  
2 Ariz. 427, 430 (2006) (“Determining whether an entity is a public service  
3 corporation requires a two-step analysis. First, we consider whether the entity  
4 satisfies the literal and textual definition of a public service corporation under  
5 Article 15, Section 2, of the Arizona Constitution. Second, we evaluate whether  
6 the entity’s business and activity are such as to make its rates, charges, and  
7 methods of operations a matter of public concern, by considering the eight factors  
8 articulated in *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-8  
9 (1950)”) (internal quotes and citations omitted).

10 Article 15 of the Arizona Constitution defines “public service corporation”  
11 as “All corporations other than municipal engaged in ...transmitting messages or  
12 furnishing public telegraph or telephone service...” Ariz. Const. Art. XV, § 2  
13 (2008). NewPath fits the definition articulated by the Arizona Constitution in that  
14 it is in the business of transmitting messages and furnishing telephone service via  
15 its DAS. It is not necessary that NewPath provide these services directly to the  
16 public. *Serv-Yu*, 70 Ariz. at 242 (“...it is not a controlling factor that the  
17 corporation supplying service does not hold itself out to serve the public generally.  
18 It has been held that a business may be so far affected with a public interest that it  
19 is subject to regulation as to rates and charges even though the public does not  
20 have the right to demand and receive service[] ([c]iting cases)”); 213 Ariz. at  
21 431(“Because the electricity in this case will ultimately be used for light, fuel or  
22 power and Article 15, Section 2, does not expressly exclude a wholesaler that  
23 transmits electricity for that ultimate purpose, we reject SWTC’s contention that  
24

1 Article 15, Section 2, requires an immediate end use by a consumer”).

2 The second step consists of a determination that the operation of the service  
3 is a matter of “public concern” in order to identify entities “clothed with public  
4 interest and subject to regulation because they are ‘indispensable to large segments  
5 of our population.’” *Id.* at 432. Intervenor Applications and interest in  
6 NewPath’s operations expressed therein alone could be considered evidence in  
7 support of this finding. In addition, given the reliance of large segments of the  
8 population (including both residents and the business community) on  
9 telecommunications services such as mobile telephones, data transport services,  
10 dedicated fiber networks and private line services, including the total reliance  
11 upon such services by large numbers of end-users who have terminated traditional  
12 landline telephone services and use wireless exclusively, such services and the  
13 entities like NewPath providing them, have become “indispensable.”

14 The Arizona Supreme Court, set forth the *Serv-Yu* factors as a guide for the  
15 determination and it is not necessary to establish that all factors are met in order to  
16 determine that NewPath is a public service corporation. *Id.* (“*Serv-Yu* factors act  
17 as guidelines for analysis, and we are not required to find all eight factors to  
18 conclude that a company is a public service corporation.”) The eight factors are:

- 19 1. What the corporation actually does.
- 20 2. A dedication to public use.
- 21 3. Articles of incorporation, authorization, and purposes.
- 22 4. Dealing with the service of a commodity in which the public has been
- 23 generally held to have an interest.
- 24

- 1 5. Monopolizing or intending to monopolize the territory with a public
- 2 service commodity.
- 3 6. Acceptance of substantially all requests for service.
- 4 7. Service under contracts and reserving the right to discriminate is not
- 5 always controlling.
- 6 8. Actual or potential competition with other corporations whose business is
- 7 clothed with public interest.

8 *Serv-Yu*, 70 Ariz. at 237-8.

9 The first factor is a consideration of what the company does. As previously  
10 stated in this document and detailed in NewPath's pending application before the  
11 Commission, NewPath provides the transport of telephone messages in the form of  
12 transport and backhaul services to wireless telecommunications carriers in  
13 addition to providing transmission services to other 'landline' telecommunications  
14 and information companies such as AT&T, Verizon and Qwest. NewPath also  
15 seeks authorization to utilize excess fiber capacity to provide specialized private  
16 line services to non-carrier entities such as apartment complexes, universities, and  
17 hospitals.

18 The second factor is a dedication of a company's private property to public  
19 use and is not relevant.

20 The third factor is the authorization or purpose of the company as found in  
21 the company's articles of incorporation. NewPath is not a corporation and as such  
22 has no articles of incorporation, however, it has never been suggested by the  
23 intervenors that NewPath is not transmitting telephone messages for its carrier  
24

1 customers. *Id.* at 433. (“Third, neither SWTC nor the Commission argues that any  
2 provision in SWTC's articles of incorporation support their respective positions.  
3 However, SWTC's stated goal of providing reliable electric power to their member  
4 distributors' customers suggests its purpose is to serve the public.”)

5 The fourth factor concerns whether or not NewPath is “dealing with” a  
6 commodity in which the public has an interest. As discussed in section 3(i)  
7 below, NewPath provides telecommunications service which has long been held in  
8 the public interest by the Commission.

9 The fifth factor is whether or not NewPath intends to assert any monopoly  
10 rights which is not relevant.

11 The sixth factor is whether NewPath accepts substantially all requests for  
12 service. NewPath will accept substantially all requests for service from its  
13 customer carriers subject to the technical limitations of the DAS pursuant to the  
14 terms of its tariff as filed with the Commission.

15 The seventh factor addresses contractual services and NewPath does  
16 provide its services under contract as is detailed in the tariff filed with the  
17 Commission.

18 The eighth factor is the existence of actual or potential competition with  
19 other corporations whose business is clothed in the public interest. Section A-21  
20 of NewPath's CC&N application states: “Applicant hereby petitions the  
21 Commission to find that its service is competitive because it is a point-to-point  
22 transport and backhaul private line telecommunications service leased on a long-  
23 term basis, similar to the private line services offered on a competitive basis by  
24

1 other telecommunications providers in Arizona.” Moreover, Staff testified at the  
2 February 18, 2009 hearing that NewPath’s service is “very, very competitive.”  
3 Trans. 62:16-17; 63:14-23. Notably, the Commission has granted CC&Ns to  
4 numerous other telecommunications companies providing private line, transport  
5 and backhaul services.

6 Because NewPath is in the telecommunications business and its purpose is  
7 to transport voice and data transmissions, because it does indeed do that, the  
8 factors weigh heavily in favor of finding NewPath to be a public service  
9 corporation.

10 **iii. The Commission’s Regulation of NewPath Is Not**  
11 **Preempted by 47 U.S.C. § 332(c)(3)(A).**

12 Scottsdale asserts that the Commission may be preempted from regulating  
13 NewPath pursuant to 47 U.S.C. § 332(c)(3)(A), which states the following:

14 “State preemption: (A) Notwithstanding section 152(b) and 221(b) of  
15 this title, no State or local government shall have any authority to  
16 regulate the entry of or the rates charged by any **commercial mobile**  
17 **service** or any **private mobile service**, except that this paragraph  
18 shall not prohibit a State from regulating the other terms and  
19 conditions of commercial mobile service.”

20 47 U.S.C. § 332(c)(3)(A) (emphasis added). Scottsdale opposes NewPath’s CC&N  
21 on the grounds that there may be a “preemptive effect [of] § 332(c)(7)...on the  
22 Commission’s authority to issue a CC&N to a DAS provider such as NewPath.”  
23 Scottsdale App., p. 4. Contrary to the City’s position, which undermines the  
24 legitimate jurisdiction of the Commission and is contrary to the statutory  
framework regulating telecommunications services, the Commission is not

1 preempted from regulating DAS, private line services, or any other competitive  
2 local exchange carrier (“CLEC”).

3 By its express terms, the preemptive effect of § 332(c)(3)(A) extends only to  
4 “commercial mobile service” (“CMS”) and “private mobile service” (“PMS”).<sup>2</sup>  
5 NewPath does not provide CMS or PMS. Rather, NewPath provides, among other  
6 things, transport and backhaul services to wireless carriers and other entities  
7 seeking private line telecommunications service. NewPath’s DAS provides a  
8 specialized telecommunications service to wireless carriers, transmitting messages  
9 via fiber optic cable. NewPath markets excess fiber capacity to non-carriers such  
10 as hospitals, universities and apartment complexes that need to utilize a private  
11 fiber network. *See* Trans. 45. As such, NewPath provides a telecommunications  
12 service and both federal courts and state regulatory bodies have routinely  
13 concluded the same.<sup>3</sup> DAS providers have been issued statewide certificates

14 <sup>2</sup>47 U.S.C. § 332(c)(3)(A). *See Implementation of Section 3(n) and 332 of the Communications*  
15 *Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, 1509ff. (1994) (“CMRS  
16 Second Report and Order”); *see also Petition of Arizona Corporation Commission to Extend*  
17 *State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services*, 10  
FCC Rcd. 7824, 7284 (May 19, 1995) (“established new classifications of ‘commercial’ and  
‘private’ mobile radio services (‘CMRS’ and ‘PMRS,’ respectively) in order to enable similar  
wireless services to be regulated symmetrically in ways that promote marketplace competition”).

18 <sup>3</sup>*NewPath Networks, LLC Certificate of Public Convenience and Necessity in the State of Nevada*,  
19 *Docket No. 06-09005* (“The Public Utilities Commission of Nevada [] hereby grants, pursuant to  
20 the Commission’s decision on October 25, 2006, Newpath Networks, LLC the authority to  
operate as a competitive provider of telecommunications services, providing facilities based  
interexchange and facilities-based intraexchange services within the state of Nevada.”); *In the*  
21 *Matter of the Application of NewPath Networks, LLC, a New Jersey limited liability company,*  
*for a Certificate of Public Convenience and Necessity to Provide InterLATA and IntraLATA*  
22 *Telecommunications Service in California as a Facilities-based Carrier*, D. 04-11-005, 2004  
Cal. PUC LEXIS 518 (Sept. 21, 2004) (A certificate of public convenience and necessity is  
23 granted to NewPath Networks, LLC to operate as a facilities-based carrier of inter-Local Access  
and Transport Area (LATA) and, to the extent authorized by Decision 94-09-065, intra-LATA  
24 telecommunications services offered by communication common carriers in California . . .”).  
*See also, e.g., NextG Networks of N.Y., Inc. v. City of New York*, 513 F.3d 49, 50 (2d Cir. N.Y.

1 throughout the country and have been authorized to provide telecommunications  
2 service.<sup>4</sup> Indeed, Staff testified on February 18th as follows: "...though NewPath  
3 is a unique applicant, what they seek from the standpoint of a CC&N, certificate of  
4 convenience and necessity, there is nothing unique about that." Trans. 64:21-25.

5       Significantly, NewPath does **not** own wireless spectrum. The definitions of  
6 CMS and PMS are both spectrum-oriented. These terms are defined in § 332 (d) of  
7 the Communications Act as follows: "commercial mobile service" means any  
8 mobile service . . . that is provided for profit and makes interconnected service  
9 available (A) to the public or (B) to such classes of eligible users as to be  
10 effectively available to a substantial portion of the public, as specified by  
11 regulation of the Commission" and "private mobile service" means "any mobile  
12 service . . .that is not a commercial service or the functional equivalent of a  
13 commercial mobile service, as specified by regulation of the Commission."  
14

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15 2008) ("NextG, a wholesale provider of telecommunications services, offers other wireless  
16 carriers a method for extending wireless coverage to dead spots); *NextG Networks of Cal. v.*  
17 *County of L.A.*, 522 F. Supp. 2d 1240, 1243 (C.D. Cal. 2007) ("Plaintiff is a communications  
18 service provider and a "telephone corporation" as defined by California law. Specifically,  
19 Plaintiff holds a "Certificate of Public Convenience or Necessity" from the California Public  
20 Utilities Commission, which authorizes it to operate as a telephone corporation under California  
21 law."); *NextG Networks of Cal., Inc. v. City of San Francisco*, 2006 U.S. Dist. LEXIS 36101  
22 (N.D. Cal. June 2, 2006) ("Plaintiff NextG is a Delaware corporation with its principal place of  
23 business in Milpitas, California. On January 30, 2003, the California Public Utilities Commission  
24 ("CPUC") granted NextG's application for a certificate of public convenience and necessity  
("CPCN") to provide telecommunication services"); *NewPath Networks, LLC v. City of Irvine*,  
2008 U.S. Dist. LEXIS 72833 (C.D. Cal. 2008) ("NewPath is a competitive local exchange  
carrier which provides service to wireless communications carriers . . ."); *NextG Networks of*  
*Cal., Inc. v. City of San Francisco*, 2006 U.S. Dist. LEXIS 36101 (N.D. Cal. June 2, 2006) ("The  
City does not dispute that NextG provides wireless telecommunications services").

<sup>4</sup> NextG Networks, for example, is authorized to provide service in 33 states. See  
<http://www.nextgnetworks.net/corporate/regulatoryaffairs.html>. ExteNet Systems has been  
authorized in 23 states. See <http://www.extenetsystems.com/communities/regulatory.html>.

1 Finally, the term “mobile service” is defined in § 153(27) of the Communications  
2 Act as follows:

3  
4 “(27) Mobile service. The term ‘mobile service’ means a radio  
5 communication service carried on between mobile stations or receivers and  
6 land stations, and by mobile stations communicating among themselves, and  
7 includes (A) both one-way and two-way radio communication services, (B)  
8 a mobile service which provides a regularly interacting group of base,  
9 mobile, portable, and associated control and relay stations (whether licensed  
10 on an individual, cooperative, or multiple basis) for private one-way or two-  
11 way land mobile radio communications by eligible users over designated  
12 areas of operation, and (C) any service for which a license is required in a  
13 personal communications service established pursuant to the proceeding  
14 entitled "Amendment to the Commission's Rules to Establish New Personal  
15 Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-  
16 100), or any successor proceeding.”

17 47 U.S.C. § 153(27). The Federal Communications Commission (“FCC”) initiated  
18 a rulemaking in 1994 to further clarify the definitions of CMS and PMS. *CMRS*  
19 *Second Report and Order*, cited *supra* note 1. The FCC concluded in that  
20 rulemaking that the following services would be deemed “mobile services”: (1)  
21 public mobile services (Part 22), (2) mobile satellite services (Part 25), (3) mobile  
22 marine and aviation services (Parts 80 and 87), (4) private land mobile services  
23 (Part 90), (5) personal radio services (Part 95), and (6) all personal  
24 communications services licensed or otherwise made available under Part 24. *Id.*  
at 1509. The applicable rules adopted in this proceeding regarding commercial  
mobile service can be found at 47 C.F.R. § 20.3 and 20.7. The FCC’s rulemaking  
defined private mobile radio service as a “mobile service that is neither a  
commercial mobile radio service nor the functional equivalent of a service that

1 meets the definition of a commercial mobile service.” *Id.* at 1534. The applicable  
2 rules adopted in this proceeding regarding private mobile service can be found at  
3 47 C.F.R. § 20.3. In sum, NewPath does not provide either a CMS or a PMS as  
4 those terms have been defined under federal law. NewPath provides  
5 telecommunications services including transport and backhaul services to both  
6 carriers and non-carriers and, therefore, should be subject to the jurisdiction of the  
7 Commission.

8 **III. TOWN OF PARADISE VALLEY**

9 **a. BACKGROUND INFORMATION**

10 NewPath initially engaged Paradise Valley in early 2008 to begin  
11 discussions regarding a franchise agreement to build portions of the DAS in  
12 Paradise Valley. Since then, NewPath has participated in several meetings with  
13 both staff, the Mayor, and City Council members regarding DAS. As with  
14 Scottsdale, NewPath made changes to the design and is willing to make changes to  
15 the design and aesthetics of the DAS in Paradise Valley where feasible.

16 **b. PARADISE VALLEY’S GROUNDS FOR INTERVENTION ARE**  
17 **CONTRARY TO FEDERAL LAW**

18 NewPath objects to the Town of Paradise Valley’s Motion for Intervention,  
19 in part, on the grounds that the stated basis for intervention, specifically the  
20 Paradise Valley Utility Undergrounding Ordinance, if strictly applied to NewPath  
21 and required undergrounding of NewPath’s antennas, would constitute a  
22 prohibition in violation of 47 U.S.C. § 253. *See Sprint Telephony PCS, L.P. v.*  
23 *County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008).

24

1 Paradise Valley states in their Motion that the Town has “been actively  
2 engaged in the undergrounding of all utilities” and that “NewPath’s expressed  
3 interest in placing over 46 antennas within the Town’s right-of-way conflicts with  
4 the Town’s undergrounding requirements.” Paradise Valley cites *APS v. Town of*  
5 *Paradise Valley*, 125 Ariz. 447 (1980) for the proposition that the Town is  
6 authorized “to require undergrounding of utilities.” Paradise Valley also states that  
7 the “issuance of a CCN would allow NewPath to utilize its status as a ‘utility’ to  
8 erect new above-ground cellular antenna in the Town’s rights-of-way.” The  
9 Paradise Valley Motion concludes by urging the Commission to ensure that their  
10 actions “do[] not conflict with the Town’s long standing policy of *prohibiting* the  
11 installation of new aerial utilities” (emphasis added). It should initially be noted  
12 that NewPath has worked with the Town of Paradise Valley to ensure that  
13 proposed facilities are designed with antennas located on existing vertical  
14 structures within the PROW, when possible, so that they are “stealth” (e.g. on  
15 existing traffic signals, light poles, street signs, etc.). Moreover, NewPath has  
16 sought to work within the Town’s existing regulatory framework. *See* Trans. 28:8-  
17 11 (“it is not our intent to deploy cell sites or nodes in areas that we haven’t found  
18 a consensus on design and location.”) This concerted strategy is consistent with  
19 Staff’s testimony on February 18th. *See* Trans. 15-16. NewPath’s antennas must  
20 be elevated so that they can properly function. The Ninth Circuit Court of Appeals  
21 recently noted that an ordinance mandating undergrounding of antennas may be  
22 facially invalid under § 253(a). 543 F.3d at 580 (“If an ordinance required, for  
23 instance, that all facilities be underground and the plaintiff introduced evidence  
24

1 that, to operate, wireless facilities must be above ground, the ordinance would  
2 effectively prohibit it from providing services”). NewPath has not, in its  
3 discussions with Paradise Valley, objected to the undergrounding of those  
4 facilities that can be placed underground (*e.g.*, fiber). However, NewPath cannot  
5 underground the antennas and not render them useless. Therefore, Paradise Valley  
6 should not be able to rely on the claim of undermining one of its ordinances as a  
7 basis for intervention when that ordinance is unlawful as applicable to NewPath.

8 With regard to fees, Paradise Valley incorrectly states that NewPath  
9 represented that the issuance of a CC&N “may provide the legal leverage  
10 necessary for NewPath to limit the Town’s ability to require said fair and  
11 reasonable compensation.” Whether or not NewPath obtains a CC&N, under both  
12 state and federal law, fees charged by Paradise Valley must be “fair and  
13 reasonable.” 47 U.S.C. § 253(c). NewPath is willing to negotiate these fees and  
14 would do so even if it does not need CC&N to operate in the state of Arizona. But  
15 NewPath’s willingness to negotiate fees is not a concession under either federal or  
16 state law. Accordingly, the issue of fee negotiations is not a proper basis for  
17 Commission determination on the CC&N.

18 **IV. TOWN OF CAREFREE**

19 **a. Background Information**

20 NewPath has recently engaged Carefree in discussions regarding a franchise  
21 agreement to utilize Carefree’s PROW for the DAS.

22 **b. The Carefree Application Does Not State a Basis for Denying**  
23 **NewPath’s CC&N.**

24

1 Carefree’s application to intervene fails to state with any specificity, the  
2 basis for the application and how the granting of a Certificate of Convenience and  
3 Necessity (“CC&N”) to NewPath “directly and substantially” affects the Town in  
4 contravention of Section R14-3-105(A) of the Arizona Administrative Code.  
5 Additionally, this lack of specificity does not allow the Commission the ability to  
6 determine, pursuant to A.A.C. § R14-3-105(B), if the Town’s intervention will  
7 “unduly broaden” the issues presented by NewPath’s application. Therefore, this  
8 Application should be denied.

9 V. **NEWPATH IS QUALIFIED TO PROVIDE**  
10 **TELECOMMUNICATIONS SERVICE IN THE STATE OF**  
11 **ARIZONA AND THE GRANT OF ITS CC&N IS IN THE**  
12 **PUBLIC INTEREST**

13 a. **NewPath Is Entitled to Competitively Neutral Treatment in**  
14 **the Commission’s Consideration of Its CC&N Application**

15 Section 253, cited *supra*, protects telecommunications companies like  
16 NewPath that seek to provide telecommunications services from being prohibited  
17 from doing so. 47 U.S.C. § 253(a). That restriction is qualified in that it does not  
18 prevent states from, *inter alia*, imposing requirements, such as a CC&N, that are  
19 designed to protect the public safety and welfare. 47 U.S.C § 253(b). However,  
20 the exercise of that authority must be done on a “competitively neutral basis.” *Id.*;  
21 *see Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004); *In re Federal-State*  
22 *Joint Board on Universal Service*, 15 FCC Rcd. 15175, ¶ 18 (2000) (“While state  
23 commissions clearly have the authority to deny requests for ETC designation  
24

1 without running afoul of section 253, the denials must be based on the application  
2 of competitively neutral criteria that are not so onerous as to effectively preclude a  
3 prospective entrant from providing service”).

4 The past decisions of the Commission clearly demonstrate that the  
5 Commission is willing to grant CC&Ns to entities proposing the same types of  
6 services as those proposed by NewPath. The Commission has issued CC&Ns to  
7 over 60 Competitive Local Exchange Carriers (“CLECs”).<sup>5</sup> The Commission has  
8 routinely exercised regulatory authority over “carrier’s carriers,” private line  
9 service providers, and data transport service providers. Indeed, a review of the  
10 Commission’s Regulated Utility List reveals that the Commission has asserted  
11 jurisdiction and regulated numerous providers offering these services.<sup>6</sup>

12 Companies providing similar services, such as Sunesys, Inc. (“Sunesys”) and  
13 Baldwin County Internet/DSSI Service, LLC (“BCI”) have been granted CC&Ns  
14 from the Commission. *See Sunesys Inc.*, 2008 Ariz. PUC LEXIS 46, Docket No.  
15 T-20456A, Decision No. 70292 (issued April 24, 2008); *Baldwin County*  
16 *Internet/DSSI Service, LLC*, 2008 Ariz. PUC LEXIS 190, Docket No. T-20544A,

17  
18 <sup>5</sup> See Regulated Utility List available at [www.cc.state.az.us/divisions/  
19 utilities/UTILITYLIST.asp](http://www.cc.state.az.us/divisions/utilities/UTILITYLIST.asp)

20 <sup>6</sup> See, e.g., *PNG Telecommunications, Inc.*, 2008 Ariz. PUC LEXIS 215, Docket No. T-03121A,  
21 Decision No. 70643 (issued December 17, 2008); *IPC Network Service, Inc.*, 2008 Ariz. PUC  
22 LEXIS 78, Docket No. T-20457A, Decision No. 70196 (issued March 20, 2008); *GILA Local*  
23 *Exchange Carrier*, 2007 Ariz. PUC LEXIS 253, Docket No. 20515A, Decision No. 70039  
24 (issued December 4, 2007); *Neutral Tandem-Arizona, LLC*, 2007 Ariz. PUC LEXIS 87, Docket  
No. T-04298A, Decision No. 69417 (issued April 16, 2007); 360Networks (USA), Inc., 2007  
Ariz. PUC LEXIS 34, Docket No. T-03777A, Decision No. 69240 (issued January 19, 2007);  
*AZX Connect, LLC*, 2006 Ariz. PUC LEXIS 57, Docket No. T-04315A, Decision No. 68666  
(issued April 20, 2006); *ACC Telecommunications, LLC*, 2006 Ariz. PUC LEXIS 46, Docket No.  
T-04282A, Decision No. 68650 (issued April 12, 2006).

1 Decision No. 70615 (issued November 19, 2008). BCI, for example, provides  
2 telecommunications transport services to both carrier customers (such as CLECs,  
3 ILECs and wireless carriers) and non-carrier customers (such as cable television  
4 operators and data communication companies). *See* Staff Report dated September  
5 5, 2008. BCI transports, among other things video, internet/data and VoIP  
6 communications services. *Id.* BCI also back-hauls data traffic to local central  
7 offices for entry to the public switched telephone network. *Id.* BCI maintained that  
8 it needed a CC&N because (1) it was crossing a PROW and (2) it was providing  
9 service to “non-carrier” customers.

10 In Decision No. 70615, the Commission concluded, as a matter of law, that  
11 BCI was a public service corporation within the meaning of Article 15 of the  
12 Arizona Constitution and A.R.S. §§ 40-281 and 40-282. *See* BCI CC&N.  
13 NewPath’s services are functionally equivalent to services provided by BCI.  
14 Indeed, NewPath is seeking authorization to provide private line and backhaul  
15 service to both carrier and non-carrier customers.

16 As stated above, the Commission awarded a CC&N to NewPath’s  
17 competitor, NextG. As a result, NextG has successfully negotiated franchises with  
18 localities in Arizona and has offered its DAS service to its customer carriers.  
19 Moreover, the Commission is currently reviewing CC&N applications for the  
20 following DAS providers: (1) ATC Outdoor DAS, LLC (Docket Number T-  
21 20595A) and (2) ExteNet Systems, Inc. (Docket Number T-20597A). Denial of  
22 NewPath’s CC&N would likely violate § 253 in that it would not be competitively  
23 neutral given the Commission’s longstanding jurisdiction over  
24

1 telecommunications providers offering similar services. Intervenors' Applications  
2 do not present the Commission with any basis for any disparate treatment of  
3 NewPath that is not competitively neutral.

4       **b. NewPath Has Acted in Good Faith with Local Authorities and**  
5       **Will Continue To Do So.**

6       NewPath has demonstrated its good faith and cooperative intentions by  
7 compliance with Scottsdale's wireless ordinance in the preparation and processing  
8 of its DAS applications, engaging in extensive community outreach with  
9 potentially affected neighbors, modifying its applications in response to  
10 neighborhood concerns, meeting with City staff and decisionmakers to explain  
11 DAS and the need for an appropriate fee structure, attending and making  
12 presentations at all Scottsdale City Council, Planning Commission and  
13 Development Review Board hearings as asked by staff to do, and diligently  
14 pursuing a fair and reasonable fee structure in numerous meetings and  
15 communications with City officials. NewPath has shared with Scottsdale its  
16 existing contracts with other jurisdictions which show a range of fee structures and  
17 has proposed similar fee structures for Scottsdale. NewPath will continue to  
18 follow Scottsdale's wireless ordinance regulations and work in good faith toward a  
19 fair and reasonable fee structure for DAS irrespective of obtaining a CC&N.

20       NewPath has also met with Paradise Valley officials and has requested the  
21 opportunity to present information about DAS and its potential design solutions in  
22 a hearing before the Mayor and Town Council in order to be able to address any  
23 questions or concerns they may have and demonstrate NewPath's intent to be  
24

1 responsive to resident concerns. NewPath intends to continue working with  
2 Paradise Valley in a manner respectful of the aesthetic concerns of its citizens.  
3 NewPath intends to engage in constructive dialogue intended to reach mutually  
4 satisfactory resolution of concerns with Carefree in the same manner as it has with  
5 Scottsdale and Paradise Valley. Intervenors do not present a basis for any  
6 determination that a NewPath CC&N is not in the public interest and should not  
7 be granted.

8 VI. CONCLUSION

9 In conclusion, NewPath respectfully opposes Intervenors' Applications by  
10 Scottsdale, Paradise Valley and Carefree and requests the Commission concur  
11 with the Staff findings and recommendation of approval of NewPath's CC&N,  
12 find that NewPath meets all of the statutory criteria for a CC&N and expeditiously  
13 grant such CC&N.

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Respectfully Submitted,

Dated: April 17, 2009

CHANNEL LAW GROUP, LLP

By: Jamie T. Hall/SMH  
Jamie T. Hall  
Attorney for Applicant  
NewPath Networks, LLC

1 Original and thirteen copies filed this 20<sup>th</sup> day of April, 2009 with:

2

ARIZONA CORPORATION COMMISSION

3

Docket Control

4

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Phoenix, AZ 85007

5

A COPY of the foregoing filed this 20th day of April, 2009 with:

6

The Honorable Yvette B. Kinsey

Administrative Law Judge

7

Hearing Division

8

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# Exhibit 1

~~September 2, 2008~~  
Information Update  
NewPath Networks – Wireless Project

The purpose of this document is to update you on the proposed wireless communications facility (WCF) installations throughout the City by NewPath Networks (NPN). The City currently has ~~136~~ pre-applications and 30 Development Review Board (DRB) applications for WCF's in the areas north and south of Shea Blvd (Scottsdale Ranch), Cactus Road, Thompson Peak Parkway, the communities of DC Ranch, Grayhawk, Happy Valley Ranch, Pinnacle Peak Estates and Pima Acres.

*(NOTE: NPN's unique business model and proposal assumes that NPN qualifies for certain regulatory treatment. This paper's use of regulatory labels and categories is intended only to generally explain NPN's proposal and does not commit the City to agreement with NPN's claimed regulatory positions.)*

### PROJECT SCOPE

NPN's project is a commercial venture that will offer wireless companies (AT&T, Cricket, Sprint, T-Mobile and Verizon) the ability to lease space at a WCF site to provide service to their customers. While it is possible that wireless companies will utilize this technology in locations where they do not have coverage or are in need of additional capacity, AT&T is currently NPN's only "tenant" with a contract to lease WCF sites in Scottsdale.

There are two primary components of the wireless distributed antenna systems (DAS) network: 1) the above ground antenna systems and related ground equipment cabinet, and 2) the below ground fiber-optic network for transporting the cell phone calls from each DAS site to a wireless company's call switching location. The proposed DAS network will include 287 DAS antenna sites (262 in City ROW; 25 on private property) and the installation of 100-150 miles of fiber optic cables beneath City streets or otherwise underground.

#### Antenna Sites

WCF sites consist of three elements, the pole or vertical asset, the antennas, and the ground equipment. In the case of NPN, their proposal is for up to six panel antennas (each antenna is approximately 4' H x 10" W x 4" D) to be mounted on a vertical asset.

The vertical assets that NPN intends to use include existing streetlights and traffic signal poles, and new faux (stealth) cactus. Of the 136 pre-applications, the breakdown is as follows:

- Streetlight poles – 52
- Traffic signal poles – 25
- Faux cacti – 59

Each site will have a ground equipment cabinet that is approximately (52" H x 37" W x 48" D) and each cabinet will be screened from view towards the roadway by either a decorative metal screen, vegetation, and faux or real boulders. In addition, there will be an electrical meter pedestal with dimensions of approximately 16" H x 17" W x 48" D that will be adjacent to the ground equipment cabinet.

Attached to this document are copies of photo simulations for the three vertical asset types that were included in the neighborhood notices that were mailed by NPN.

## **PROJECT SCOPE (Continued)**

### *Fiber-optic Cable Network*

In order to transport the wireless calls and data from the DAS site to the wireless company, NPN will be sending the information over a fiber-optic network that they plan to install as part of this system. The NPN proposal involves the installation of 150-200 miles of conduit and fiber-optic cable in City ROW and utility easements.

## **ZONING APPROVAL PROCESS FOR DAS LOCATIONS**

According to the City's wireless ordinance, WCF installations located within the City's ROW require approval through either a staff approval or DRB processes. At this point, due to the proximity of their sites being within 150 feet of residentially zoned, single-family property, it appears that 98% of the pre-applications will require DRB approval. (NOTE: On July 24, 2008, NPN made a presentation about their DAS sites and gave an overview of their network at the DRB study session.)

### *City Authority*

The City's zoning ordinance section pertaining to WCF sites was amended in 2003 to promote the utilization of locations with existing vertical assets (streetlights, traffic signal poles, ball field light poles, etc.) to minimize the need to install new monopoles throughout the City. The City has permitted 41 WCF sites to be operated in the ROW; this has been an effective option to reducing the number of new monopoles for WCF sites in the City.

~~Under the ordinance, any proposed WCF site – whether on private property or on City property – that is within 150 feet of a single-family residential property is subject to the DRB approval process. The DRB may require modifications to the aesthetics of the WCF and may recommend that the applicant move a site to an alternate location to minimize visual impact.~~

Upon receiving DRB approval, the applicant submits detailed construction plans for review and approval by the City then "pulls" permits prior to starting work in the site. For WCF sites in the ROW, the applicant must also meet all requirements for a Permission for Private Improvement in the ROW (PIR) encroachment permit, including payment of fees.

The City Council takes action only on Type 4 WCF applications (e.g., monopoles, WCF in flagpoles, WCF that exceed the underlying maximum height in a zoning district, etc.) that require a conditional use permit, or a lease or a license for the WCF on City property. At this time, NPN's proposal does not include any sites that requires a conditional use permit or involves a lease or a license on City property.

### *Neighborhood Notification*

The WCF application process requires applicants to send letters to property owners within 750 feet of the proposed wireless site. The notification letter NPN sent to property owners included the site location, a photo simulation of the pole or faux cactus, antenna and ground fixtures, along with information about open houses that NPN had planned for residents to see the "master plan" for their area and to discuss issues and concerns with NPN representatives.

## ZONING APPROVAL PROCESS FOR DAS LOCATIONS (CONTINUED)

### *Open Houses*

To date, NPN has held four open house events for impacted residents. Here is a list of dates and locations:

<u>Dates</u>	<u>Location</u>
June 20 & 21	Hampton Inn, 10101 N. Scottsdale Rd
July 11 & 12	Hilton Garden Inn, 8550 E. Princess Dr
July 25 & 26	Hilton Garden Inn, 8550 E. Princess Dr
August 8 & 9	Wyndham Hotel 14255 N. 87th Street
August 23 & 24	Hilton Garden Inn, 8550 E. Princess Dr

### *Development Approval Process*

The development approval process for WCF is either through a staff approval or DRB process based on its proximity to single-family zoned properties. The planning staff reviews the applications, recommends and approves the location, and design of WCF sites not within 150 feet of residential property. Upon receiving development approval from staff or the DRB, NPN would be required to submit detailed engineering drawings and plans for review and approval by the Planning Department.

### *Permit Process*

Once approved in the development review process, the DAS sites may be located in the City's ROW as provided under the staff issued encroachment permit, "Permission for Private Improvements in the ROW" which is also referred to as a "PIR." The ability to have City staff issue a PIR for WCF sites in the ROW is provided in S.R.C. Chapter 47, Article III, Division 2, Sections 47-98.

The PIR process has been the common practice in the City since about 1999; currently, there are 41 WCF sites on streetlights, signal poles and faux cacti in the ROW throughout the City that have obtained a PIR. The annual fee for a WCF in the ROW (see S.R.C., Sections 47-107) is \$8,475 with a one-time, start-up fee of \$1,455 that is required when the applicant picks-up permits to construct the WCF site.

In order to consolidate the number of PIR applications, the City will incorporate the essential elements from the PIR into the yet to be applied for telecommunications license that NPN must obtain before commencing any construction activity in the City's ROW and utility easements.

### **WCF IN ROW FEE PROPOSAL**

In a meeting with John Little on June 11, 2008, NPN presented a proposal that included two options for a reduced fee for their sites in the ROW. The first option is a fee payment based on a percentage of annual revenue generated per site; the amounts proposed ranged from \$45-\$225 per DAS site per year. The second option is for the City to reduce the annual ROW fee (\$8,475 for FY 08/09) amount by a factor of nine, so that each site would have a fee that is one-ninth (1/9) of the annual ROW fee or \$942 annually per site.

## **TELECOMMUNICATIONS LICENSE**

Prior to commencing any work on the fiber-optic network, NPN is aware that they must apply for and receive City Council approval for a telecommunications license to work in the streets, utility easements and ROW (S.R.C. Chapter 47, Article VI, Sections 47-163). At this time, NPN has not requested from the City the application form for a telecommunications license.

According to S.R.C., Section 47-164(b)(2), an application for a telecommunications license must be accompanied by, "A copy of the applicant's valid certificate of public convenience and necessity which has been issued by the Arizona Corporation Commission." As of this date, NPN's request for a certificate of convenience and necessity (CC&N) is on the Commission's November 12, 2008 agenda.

## **RELATED ISSUES**

The NPN proposal to install the WCF network raises a number of questions about how their network will affect the City and its residents.

### *Technology*

The foundation technology behind the distributed antenna system (DAS) network is bi-directional amplification (BDA) antenna systems. For more than 20 years, BDA systems installed in large commercial buildings and in underground parking structures have improved the radio signal strength and coverage for cell phone services and public safety radio communications. Although the technology behind DAS networks have been operating for some time, the deployment of the BDA architecture for wireless carriers to cover a large geographic area is relatively new to the industry.

### *Economic Development*

In general, cell phone coverage throughout Scottsdale is good to very good for most of the wireless carriers. The northern areas of the City appear to have more coverage "holes" due to more limited WCF sites. NPN represents that its DAS system will improve the coverage and download speeds for cell phone and wireless data customers of AT&T Wireless. To our knowledge, the four other wireless carriers (Cricket, Sprint, T-Mobile and Verizon) have not entered into a contract with NPN.

The link between the incremental improvement in cell phone coverage and economic vitality is unclear. According to the Economic Vitality Department, companies and businesses have not indicated that cell phone coverage was a market differentiator they considered in their decision to relocate or to stay in Scottsdale.

### *Future Impact*

NPN's proposal to install 287 WCF sites will make Scottsdale the largest deployment of its kind in the nation. (NOTE: Information provided by NPN indicates that they have deployed the DAS network in nine (9) geographic locations with the largest being 22 DAS sites in Fairfax County, Virginia.)

As stated earlier, AT&T is NPN's only contracted wireless carrier; the City cannot require the remaining wireless carriers to enter into contracts to use NPN's network. In light of this, the City anticipates that the wireless carriers will seek to install new WCF sites to provide services to their customers. In addition, given that NPN's network is designed as a supplement to a carrier's existing wireless sites, it is unlikely that their proposed network will result in the removal of any WCF sites that is currently on the air.

## **SUMMARY**

The NPN proposal to install 287 DAS sites throughout the City is both monumental and challenging on several fronts, including:

- The number of applications to be processed through the Planning & Development Department
- The number of DRB cases that must be developed and presented
- The relatively short timeframe that the activity is taking place (125 pre-apps in two months)
- The reaction to the proposed sites from residents and neighborhood associations

~~Should NPN seek a telecommunications license, the license would be considered by the City Council at a public meeting. Any reduction or modification to the existing fee schedule would require City Council action.~~

## **TIMELINE**

**February 29, 2008** – During the initial meeting with City staff, NPN presented their proposal to install 250+ DAS sites throughout the City with 85% of the sites installed on streetlights, traffic signal poles and in stealth cacti within the City's rights-of-way (ROW). The proposal includes the installation of 120-150 miles of fiber optic cable in the ROW to connect the DAS sites to one of several hub locations in the City.

**April (various dates) 2008** – NPN held meetings separately with City Council members, Mayor Manross and John Little. The focus of the meetings was two-fold: 1) to provide an overview of the company and their proposal, and 2) to seek consideration on reducing the annual ROW fee for a cell site in the ROW.

**May 30, 2008** – NPN met with City staff to review the first batch of 15 pre-applications of DAS wireless sites submitted for development approval. Over the course of the next five weeks, NPN submitted an additional 110 pre-applications for the DAS sites. The City has received 125 pre-applications; the last group of applications was received the first week in August.

**June 11, 2008** – In a meeting with John Little and City staff, NPN presented their proposals for reducing the annual (per site) ROW fee for a (WCF).

**August 19, 2008** – NPN representatives met with John Little, and staff from the City Attorney's Office and staff from Information Systems to discuss the City's position on NPN's request for the City to reduce the ROW fees for the DAS sites.

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# Exhibit 2



"The mission of Maricopa County is to provide regional leadership and fiscally responsible, necessary public services to its residents so they can enjoy living in healthy and safe communities"

**Board Members**  
Max Wilson, District 4, Chairman  
Fulton Brock, District 1  
Don Stapley, District 2  
Andrew Kunasek, District 3  
Mary Rose Wilcox, District 5

**County Manager**  
David Smith

**Clerk of the Board**  
Fran McCarroll

**Meeting Location**  
Supervisors' Auditorium  
205 W. Jefferson  
Phoenix, AZ 85003

# FORMAL MEETING AGENDA

## BOARD OF SUPERVISORS Maricopa County, Arizona

(and the Boards of Directors of the Flood Control District, Library District,  
Stadium District, Improvement Districts and/or Board of Deposit)

**Wednesday, April 15, 2009  
9:00 AM**

Agendas are available at least 24 hours prior to each meeting in the Office of the Clerk of the Board, 301 West Jefferson, Tenth Floor, Phoenix, Arizona, Monday through Friday between the hours of 8:00 a.m. and 5:00 p.m. and on the internet at [http://www.maricopa.gov/Clk\\_board/Agendas.aspx](http://www.maricopa.gov/Clk_board/Agendas.aspx). One or more Board members may attend telephonically. Board members attending telephonically will be announced at the meeting. The Board may vote to recess into an executive session for the purpose of obtaining legal advice from the Board's attorney on any matter listed on the agenda pursuant to A.R.S. §38-431.03(A)(3). Accommodations for individuals with disabilities, including alternative format materials, sign language interpretation, and assistive listening devices are available upon 72 hours' advance notice through the Office of the Clerk of the Board, 301 West Jefferson Avenue, Tenth Floor, Phoenix, Arizona 85003, (602) 506-3766, Fax (602) 506-6402, TDD (602) 506-2348. To the extent possible, additional reasonable accommodations will be made available within the time constraints of the request.

See the Clerk and fill out a speaker's form if you would like to address the Board regarding any matter on the agenda.

**d. TEMPORARY EXTENSION OF PREMISES/PATIO FOR GAVILAN PEAK SPORTS BAR & GRILL**

Pursuant to A.R.S. §4-207.01, approve an application filed by Michael R. Thomas for a Temporary Extension of Premises/Patio of a Series 06 Liquor License for Gavilan Peak Sports Bar & Grill at 46639 N. Black Canyon Highway, New River, AZ 85087 from 6:00 a.m. to 7:00 p.m. for the following dates: (Supervisory District 3) (C-06-09-375-L-00)

- April 18, 19, 25 & 26;
- May 2, 3, 9, 10, 16, 17, 23, 24, 25 & 30;
- June 13, 14, 20 & 21

**e. SPECIAL EVENT FOR SPEEDWORLD R/C FLYERS**

Pursuant to A.R.S. §4-203.02, approve a Special Event Liquor License Application filed by Randell Dauer for the Speedworld R/C Flyers at 19421 W. Jomax Road, Wittmann, AZ 85361 to be held on May 1, 2 and 3, 2009 from 12:00pm to 1:00am. (Supervisory District 4) (C-06-09-376-L-00)

**Planning and Development recommends denial. Zoning violation has been opened for unpermitted construction and encroachment outside of the special use permit boundary. Applicant was advised of requirement for an up major amendment on May 16, 2007 and has yet to submit application.**

**6. PUBLIC SERVICE FRANCHISE - NEWPATH NETWORKS**

Pursuant to A.R.S. §40-283, convene the scheduled public hearing to solicit comments and consider the application by Newpath Networks, for a public service franchise for a residential wireless communications system. The hearing will consider whether the applicant is able to adequately maintain facilities in county rights-of-way. Pending approval by the Board of Supervisors, the franchise will be granted upon the express condition that the Certificate of Convenience and Necessity be procured from the Corporation Commission of the State of Arizona within six months of approval by the Board of Supervisors and that no facilities will be installed prior to the granting of the Certificate of Convenience and Necessity. Upon approval, authorize the Chairman to sign the Franchise Resolution. (C-06-09-330-L-00)

**Public Works**

**7. ROAD FILE DECLARATIONS**

Approve, by resolution, petitions to open and declare the following roads into the county highway system. This action will serve as notice of the Board of Supervisors' acceptance of all U.S. Patent easements, reservations, rights-of-way or properties along the alignments into the Maricopa County highway system and will also authorize the maintenance and acquisition of the necessary rights-of-way through donation, purchase, or condemnation.

**a. ROAD FILE 5808**

Road File No. 5808 - General Vicinity: Pinnacle Peak Road and El Mirage Road. This action is in accordance with A.R.S. Titles 28- 6701, 6705(A) and 11-806.01(M). Supervisor District No. 4 (C-91-09-131-M-00)

**Channel Law Group, LLP**  
100 OceanGate, Suite 1400  
Long Beach, CA 90802

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# Exhibit 3

**EARL, CURLEY & LAGARDE, P.C.**  
ATTORNEYS AT LAW

Telephone (602) 265-0094  
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3101 North Central Avenue  
Suite 1000  
Phoenix, Arizona 85012

April 6, 2009

**VIA EMAIL / HAND DELIVERY**

Mayor Jim Lane  
City Council Members  
City of Scottsdale  
3939 Drinkwater Boulevard  
Scottsdale, AZ 85251

Re: NewPath Networks

Dear Mayor Lane and City Council Members:

NewPath Networks, LLC (NewPath) has been trying for over a year to negotiate fair and reasonable right-of-way fees for its DAS network based upon the City's continuing assurances that the opportunity for such negotiations would be afforded NewPath by the City. On June 11, 2008, at the City's direction, NewPath submitted an initial fee proposal to begin negotiations, long before NewPath would have had its CC&N. NewPath is thus extremely disappointed to have its position on fees totally misrepresented in the City Council Report on Item 6 on the Consent Agenda for your Tuesday, April 7, 2009. Never in any written or verbal communication has NewPath ever asserted or implied that NewPath having the CC&N would affect its fee negotiations.

If the City had acted months ago, instead of delaying and ultimately now refusing to engage in negotiations, a mutually beneficial fee agreement could be in place well before NewPath would receive its CC&N. Establishing an appropriate DAS fee structure for NewPath would set a precedent for fair fees and strengthen the City's position in applying its fees to all DAS providers.

NewPath remains willing to begin those negotiations and is confident that with good faith and an open exchange of information by the City, the desired mutually advantageous fee structure could be established within 30 days. As NewPath has advised the City, federal law establishes NewPath's rights to fair, reasonable, non-discriminatory and competitively neutral fees, whether or not a CC&N is issued. We are therefore renewing our request that the Council direct staff to enter into meaningful negotiations with NewPath.

If instead the City decides to intervene to try to prevent the issuance of NewPath's CC&N, NewPath could only interpret that as a hostile action on the part of the City signaling that the City is refusing to establish fair fees and is instead trying to keep NewPath out of Scottsdale and to prevent NewPath from offering the enhanced services of its DAS network to the community.

Mayor Jim Lane and City Council Members  
Page Two  
April 6, 2009

NewPath's CC&N has already received an ACC Staff recommendation for approval, with Staff confirming on the record of the initial Administrative Law Judge hearing that NewPath meets all statutory criteria. A DAS competitor of NewPath has already received and is providing telecommunications services statewide under its CC&N, which is highly unlikely to be revoked by the ACC, as Staff suggests. The ACC is responsible for implementing a state statutory system intended to assure the provision of services like this to the public on a fair, reasonable, nondiscriminatory and competitively neutral basis. NewPath also needs a CC&N to provide its full range of telecommunication services statewide. As long as NewPath meets the statutory criteria for a CC&N, Scottsdale has no grounds to advocate denial of the CC&N by the ACC, despite Staff's attempt to tell the Council otherwise.

NewPath has demonstrated by its extensive efforts with neighborhoods and City Staff that NewPath both respects Scottsdale's wireless ordinance regulations and is responsive to resident concerns. NewPath spent nine months working closely with Scottsdale Ranch and, after communicating the facts about its network to concerned citizens and modifying its system design, has been able to achieve HOA approval of its 16 node system within that community. NewPath is establishing the best precedent for how DAS should be introduced into the community. NewPath has not tried to force a particular fee structure on the City, as others are apparently now trying to do, but has maintained a courteous, respectful and cooperative approach with the City and has waited patiently for meaningful fee negotiations based upon ongoing City representations that NewPath would have the opportunity for such negotiations.

We respectfully ask the City Council not to oppose the issuance of NewPath's CC&N, which action would only unfairly favor NewPath's competitors, one of which already has a CC&N and others of which will soon have CC&N's. NewPath has proven it operates as a good corporate citizen and should not be penalized for its cooperative approach and patience.

We further respectfully ask that the Council instead direct Staff to immediately engage in the fee negotiations NewPath has been diligently pursuing in good faith for over a year. That is the approach that is in the mutual best interests of both the City and NewPath.

Very truly yours,

  
Lynne A. Lagarde

LAL/mr

cc: John Little  
David Ellison  
Deborah Robberson  
David Richert  
Mike Kavanagh  
Stephen Garcia  
Mark Kelso  
Chuck Rohe