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BEFORE THE ARIZONA CORPORATION

IN THE MATTER OF THE APPLICATION OF )  
NEWPATH NETWORKS, LLC, FOR APPROVAL )  
OF A CERTIFICATE OF CONVENIENCE AND )  
NECESSITY TO PROVIDE TRANSPORT AND )  
BACKHAUL TELECOMMUNICATIONS SERVICES.)

DOCKET NO.  
T-20567A-07-0662

At: Phoenix, Arizona  
Date: February 18, 2009  
Filed: **MAR 04 2009**

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Arizona Corporation Commission  
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2200 North Central Avenue  
Phoenix, Arizona 85004-1481

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1 BE IT REMEMBERED that the above-entitled and  
2 numbered matter came on regularly to be heard before the  
3 Arizona Corporation Commission, in Hearing Room 1 of  
4 said Commission, 1200 West Washington Street, Phoenix,  
5 Arizona, commencing at 10:08 a.m. on the 18th of  
6 February, 2009.

7

8

BEFORE: YVETTE B. KINSEY, Administrative Law Judge

9

10 APPEARANCES:

11

For the Arizona Corporation Commission Staff:

12

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16

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COLETTE E. ROSS  
Certified Reporter  
Certificate No. 50658

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1 ALJ KINSEY: I am Administrative Law Judge  
2 Yvette Kinsey. And this is the time set for the hearing  
3 on NewPath Networks' application for a certificate of  
4 convenience and necessity to provide telecommunication  
5 services in Arizona. This is Docket T-20567A-07-0662.

6 May I have appearances for the record.

7 MR. HALL: Good morning. My name is Jamie Hall  
8 and I am outside counsel for applicant NewPath Networks.  
9 Additionally I have Stephen Garcia with me today as a  
10 witness.

11 ALJ KINSEY: Okay. Thank you.

12 And for Staff.

13 MR. TORREY: Your Honor, Kevin Torrey appearing  
14 on behalf of Commission Staff. And Staff's witness this  
15 morning will be Mr. Armando Fimbres.

16 ALJ KINSEY: Okay, thank you.

17 Are there any procedural issues that we need to  
18 cover this morning?

19 MR. HALL: I don't believe so.

20 ALJ KINSEY: Okay. And do we have any members  
21 of the public present this morning? I have a couple  
22 speaker slips here. The first one is Con A. Englemorn.

23 MR. ENGLEHORN: Englehorn.

24 ALJ KINSEY: -horn, I am sorry. And,  
25 Mr. Englehorn, if you would, come up to the mike there

1 if you want to give some comments on the application.

2 MR. ENGLEHORN: My name is Con Englehorn. I am  
3 on the board for the Happy Valley Ranch subdivision  
4 homeowners association. We have 107 residents in that  
5 subdivision NewPath is planning two towers in our  
6 subdivision.

7 ALJ KINSEY: Okay.

8 MR. ENGLEHORN: And had we been more aware of  
9 this hearing, would have had 107 people here today.  
10 Obviously we object.

11 At this point, I am neither capable -- not my,  
12 not my expertise to deal with the utility situation. We  
13 object to the, to the towers in our neighborhood. They  
14 are no, they are of no necessity to us as far as  
15 providing any service that's useful.

16 The main point, the main reason I am here is  
17 because this hearing, it was our understanding that it  
18 was scheduled, we needed to file our objections by  
19 March the 5th. So this hearing is a surprise, otherwise  
20 I would have had my tie on for it. So that's my main,  
21 that's the thrust of my being here on short notice. It  
22 was our understanding that the, we were, we had a  
23 deadline of the 5th of March. So this is a surprise and  
24 we are not able to respond other than my objection to  
25 this particular hearing.

1 ALJ KINSEY: And, Mr. Englehorn, tell me, is it  
2 just the esthetics that you are objecting to as far as  
3 towers being placed in your neighborhood or are there  
4 other concerns?

5 MR. ENGLEHORN: Esthetics is one of the main  
6 reasons. We are a dark neighborhood. We have no  
7 towers, no lights, no anything. So these particular  
8 towers are going to be quite obvious.

9 And I will say Mr. Garcia, although we are in  
10 opposition, he has been, he has been very civilized in  
11 his attempts to meet with us. So he has done that. We  
12 have some objection from some of the folks relative to  
13 health and those kinds of issues that are related to  
14 these kinds of towers.

15 ALJ KINSEY: And so the company has conducted  
16 some type of community meetings with the subdivision,  
17 the homeowners in the subdivision.

18 MR. ENGLEHORN: Yes. They scheduled -- we have  
19 had -- this scheduling has been an issue with us all  
20 along as far as not knowing when things are happening.  
21 They had a hearing that we were not aware of. But  
22 Mr. Garcia did come and talk to us. So he has been  
23 useful in that regard, not useful, he has been helpful  
24 in that regard. But we are all 100 percent opposed to  
25 that, the two towers.

1 ALJ KINSEY: And I am sorry, you said he had a  
2 hearing. I mean, what sort of hearing? Was it --

3 MR. ENGLEHORN: A public --

4 ALJ KINSEY: -- a public hearing with members of  
5 the homeowners?

6 MR. ENGLEHORN: That's correct.

7 ALJ KINSEY: And when did that take place?

8 MR. ENGLEHORN: I don't have that in front of  
9 me.

10 ALJ KINSEY: Okay. Was it in the last couple  
11 months?

12 MR. ENGLEHORN: Oh, it has been several months  
13 ago, it has been several months ago.

14 ALJ KINSEY: And was that the only meeting that  
15 you all have had to voice your concerns?

16 MR. ENGLEHORN: There have been meetings with  
17 the city. We voiced our concern with the city planning  
18 people, the staff. There have been hearings at the  
19 Scottsdale city council that we have been attending. We  
20 did not have the opportunity to talk at those hearings,  
21 but we have been trying to pay attention because this is  
22 important to us.

23 ALJ KINSEY: And, Mr. Englehorn, the meetings  
24 that were held with the City of Scottsdale, were your  
25 issues raised at that meeting and do you believe that

1 they were addressed?

2 MR. ENGLEHORN: Our issues were raised through  
3 the city council. And they, they were addressed, yes,  
4 not to our satisfaction.

5 ALJ KINSEY: Okay. Is there anything else that  
6 you would like to tell us this morning?

7 MR. ENGLEHORN: I wish my attorney was here.

8 ALJ KINSEY: All right. All right. Thank you  
9 very much.

10 MR. ENGLEHORN: Thank you.

11 ALJ KINSEY: And we have another speaker slip  
12 from Suzanne Walden-Wells.

13 MS. WALDEN-WELLS: Good morning.

14 ALJ KINSEY: Good morning. How are you?

15 MS. WALDEN-WELLS: I am well. Thank you.

16 I am here representing the DC Ranch community  
17 council and the north Scottsdale neighborhood of DC  
18 Ranch, 4400 acres, 2200 homeowners and approximately  
19 5,000 residents.

20 We have been tracking the NewPath Networks'  
21 activity very closely. And, as Mr. Englehorn expressed,  
22 we are also surprised that the hearing date was moved  
23 up. There was every intention for DC Ranch and our  
24 developer, DMB Associates, to file an intervening, file  
25 as an intervenor. But since this meeting was moved up

1 without our knowledge, we were unable to do that.

2           The concern that DC Ranch has is essentially  
3 twofold, that should the Corporation Commission grant  
4 this application, then NewPath will be free to install  
5 their infrastructure, which we understood to be  
6 essentially 24 foot tall infrastructure in the  
7 right-of-way in private streets, on private streets at  
8 DC Ranch. And also the technology that we understand  
9 NewPath to be installing will also require a great  
10 degree of proliferation of these towers, which would  
11 significantly impact the esthetics of the community,  
12 which is very much in tune with the environmental nature  
13 of the McDowell Sonoran Preserve and the community that  
14 we border.

15           ALJ KINSEY: And were you aware,  
16 Ms. Walden-Wells, that there was a procedural order that  
17 was issued regarding the change in the hearing date?

18           MS. WALDEN-WELLS: No.

19           ALJ KINSEY: And do you know whether or not your  
20 attorney was following the docket in this matter?

21           MS. WALDEN-WELLS: We have in-house counsel at  
22 DMB Associates that had been following it, happened to  
23 check on the website late yesterday to find that the  
24 hearing date had been moved to today.

25           ALJ KINSEY: Well, the procedural order was

1 issued back on December 8th of 2008.

2 MS. WALDEN-WELLS: Had no knowledge of that.

3 ALJ KINSEY: And even prior to that, let's see,  
4 Staff filed a Staff report in October of 2008. And then  
5 there was another procedural order that was issued on  
6 November 12th, 2008 that set the hearing date for  
7 March 25th.

8 MS. WALDEN-WELLS: We were aware of the  
9 March 25th date.

10 ALJ KINSEY: And then in November also, seven  
11 days later, NewPath filed a request that the  
12 March hearing date be moved forward and no one objected  
13 to the company's request. Therefore the hearing date  
14 was rescheduled.

15 When did you become aware of this application?

16 MS. WALDEN-WELLS: Oh, we have been in  
17 communication with NewPath probably since the middle  
18 summer of 2008 when they approached us regarding their  
19 plans. We had some staff meetings, meetings that  
20 involved several members of our staff, to talk about  
21 what they wanted to do and asked for our assistance in  
22 helping locate appropriate sites within the community.  
23 And as we continued to move through this process with  
24 NewPath, we started to get an understanding of how large  
25 of a scale their concept actually is and what it would

1 truly mean to the community. So we have been in  
2 conversation in one way or another with NewPath for the  
3 better part of eight months, I would say.

4 ALJ KINSEY: But at no point you thought it  
5 necessary to go ahead and file some type of  
6 intervention?

7 MS. WALDEN-WELLS: As Mr. Englehorn expressed,  
8 we were under the impression that we had until early  
9 March to do that.

10 ALJ KINSEY: Okay. Did you have anything  
11 else --

12 MS. WALDEN-WELLS: No.

13 ALJ KINSEY: -- that you would like to make  
14 comment on this morning?

15 MS. WALDEN-WELLS: No. Thank you for your time.

16 ALJ KINSEY: All right. Thank you.

17 And I am going to let counsel for NewPath  
18 respond to the comments that were made this morning, and  
19 especially respond to the issue of intervention by these  
20 interested parties.

21 MR. HALL: Yes, Your Honor. As you indicated in  
22 your comments, NewPath did file a request for the  
23 hearing date to be moved up. And that request was  
24 filed, let's see here, on November 18th, 2008. And that  
25 request was granted and the hearing date was moved up,

1 as you are aware, to today.

2 And we have -- I am aware that NewPath has  
3 continued to work with the community in the intervening  
4 months quite intimately on the proposed project. And we  
5 are quite, I guess, surprised in a way as well that  
6 intervention would be sought at this late stage. And we  
7 feel that would be prejudicial. And we have followed  
8 the rules quite to the letter in this regard.

9 In stating that, we still continue to work, you  
10 know, want to work with the community. That is an  
11 intimate part of this process.

12 So we would maintain that we would suggest that  
13 the intervention request, late intervention request, be  
14 denied and that NewPath's hearing be allowed to continue  
15 today.

16 ALJ KINSEY: And, Mr. Hall, why do you believe  
17 the company will be prejudiced if the hearing was  
18 scheduled for a future date?

19 MR. HALL: Well, as was indicated by some of the  
20 public comments today, this process has now, the project  
21 itself has been in the planning stages for approximately  
22 12 months. There have been a number of public hearing,  
23 informal hearings, meetings with interested parties,  
24 nongovernmental entities such as the homeowners  
25 association. And NewPath has been engaged in

1 negotiations with franchise, with municipalities for  
2 franchises and has immediate customer demands. And part  
3 of the request for the earlier hearing date was so that  
4 NewPath could move forward with this project.

5 And it is for those reasons that we believe a  
6 delay will be prejudicial.

7 ALJ KINSEY: Okay. And, Staff, if you can, also  
8 respond to the comments made by the members of the  
9 public this morning regarding intervention and whether  
10 or not this hearing should be set for a future date.

11 MR. TORREY: Your Honor, from a strictly  
12 procedural standpoint, the same notice process that made  
13 the public aware of the hearing today and the previously  
14 schedule hearings was followed when the hearing dates  
15 were changed. From Staff's perspective, the adequate  
16 notice was given to the public in terms of today's  
17 hearing and the advanced dates for intervention and  
18 appearances here today. I don't believe there is a  
19 procedural impediment to proceeding today. I believe  
20 technically and procedurally to proceed today would be  
21 a -- it is permissible under the rules.

22 ALJ KINSEY: Okay. I will say that I believe  
23 that the proper notice has been given in this matter.  
24 However, once the proceedings are concluded today, I  
25 will hold the record open for a couple of weeks for the

1 members of the public to file public comment and those  
2 items will be considered during the development of a  
3 recommended opinion and order to the Commission.

4           And it is the responsibility of anyone who has  
5 an interest in a proceeding to follow the docket. And  
6 unless you are, you have filed a motion to intervene,  
7 you will not be notified. And notice is considered to  
8 be deemed sufficient regardless of whether or not the  
9 person reads the notice. And the company did file the  
10 notice that was ordered by the Commission in regards to  
11 this matter.

12           So we will go ahead with the hearing this  
13 morning. And --

14           MR. TORREY: Your Honor, if I may.

15           ALJ KINSEY: Yes.

16           MR. TORREY: If I could speak to the concerns  
17 that were raised by the two speakers this morning, just  
18 to add something. The concerns that were raised by  
19 Mr. Englehorn and Ms. Walden-Wells speak primarily to  
20 the esthetics, as you mentioned. I believe  
21 Ms. Walden-Wells' expression was that the company would  
22 be free to put up a potential proliferation of towers  
23 within their communities. And Staff certainly is  
24 sensitive to the desire of these people to have their  
25 community remain esthetically pleasing. But I will say

1 that it may be a slight misstatement to say that the  
2 company would be free to put up these towers.

3           While the Commission is not going to direct the  
4 company to put up a certain number or certain locations,  
5 certainly the City of Scottsdale will have its say over  
6 where those towers go up and what they look like. And  
7 along those lines, the two speakers do have that as a  
8 recourse to speak to the City of Scottsdale and to  
9 discuss the zoning issues that will come up regarding  
10 those towers. I believe that's probably a better forum  
11 and more likely to get appropriate action in terms of  
12 their concerns.

13           ALJ KINSEY: And, Mr. Torrey, are you aware of  
14 whether or not Staff has made that known to the members  
15 that were here today or to just members of the public in  
16 general in that subdivision?

17           MR. TORREY: Your Honor, I am informed that  
18 Staff has not spoken with the subdivision or any of the  
19 representatives from the organizations that spoke this  
20 morning. Staff has spoken to the City of Scottsdale.  
21 And City of Scottsdale was notified that they could  
22 intervene if they had any input that they would like to  
23 present. And it would appear that they have chosen not  
24 to.

25           ALJ KINSEY: And, Mr. Torrey, do you believe

1 that the issues that are raised by the homeowners and  
2 the representative from DC Ranch, that those are issues  
3 that are really not in the purview of the Commission to  
4 decide?

5 MR. TORREY: I would say that, Your Honor. I  
6 believe that the Commission would lack jurisdiction to  
7 tell the City of Scottsdale where and how many towers  
8 needed to be put up. I believe that's going to be  
9 completely within the discretion of the City of  
10 Scottsdale to enforce its own zoning ordinances.

11 ALJ KINSEY: Okay. Thank you very much.

12 And we will go ahead and go forward with the  
13 hearing this morning. And I will make some decisions  
14 after we have the transcript on this matter as to  
15 whether or not it needs to be opened up for an  
16 additional day of hearing or not once I see the  
17 comments.

18 MR. HALL: Thank you, appreciate it.

19 ALJ KINSEY: Mr. Hall, if you would like to go  
20 ahead and have your first witness sworn.

21 MR. HALL: Sure thing. Presenting Stephen  
22 Garcia with NewPath Networks.

23

24

25

1                                   STEPHEN GARCIA,  
2 a witness herein, having been first duly sworn by the  
3 Certified Reporter to speak the truth and nothing but  
4 the truth, was examined and testified as follows:

5

6                                   DIRECT EXAMINATION

7 BY MR. HALL:

8       Q.       Could you please state your name and title for  
9 the record.

10      A.       Yes.   Stephen Garcia, director of external  
11 affairs and land use for NewPath Networks.

12      Q.       Okay.   And could you explain your  
13 responsibilities at NewPath.

14      A.       Yes.   As director of external affairs my primary  
15 role is to interface with various governmental agencies,  
16 homeowners associations and other jurisdictions that  
17 have or regulate placement of our proposed  
18 infrastructure.

19      Q.       Okay.   And how long have you worked for NewPath?

20      A.       I have worked for NewPath since July of 2008.  
21 And before that I was a consultant to NewPath Networks  
22 for one year.

23      Q.       Okey doke.   And how long have you worked in the  
24 telecommunications industry?

25      A.       I have been involved in the wireless

1 telecommunications industry since 1996.

2 Q. And can you give me some insight as to what  
3 capacity or role you play in the past?

4 A. Yes. I have served as a land use consultant to  
5 wireless carriers and to other agencies that regulate  
6 and develop infrastructure for telecom companies.

7 Q. And can you explain to me the type of service  
8 that NewPath provides?

9 A. Yes. The projects proposed in Scottsdale and  
10 other parts in Arizona involve the development of a  
11 multi-tenant neutral host network. The benefits of this  
12 type of network is that it can accommodate multiple  
13 carriers with one infrastructure deployment and avoid  
14 the duplicitous types of overbuilds that carriers  
15 typically will do in addition -- or, excuse me --  
16 serving their own network needs. So this avoids the  
17 need for multiple networks to be placed in the areas we  
18 are proposing.

19 Q. Can you explain what a DAS system is?

20 A. Yes. Again, it is distributed antenna system.  
21 It is a neutral host network. It is basically the  
22 infrastructure and a fiber backbone that supports  
23 deployment of a carrier's radio frequencies through one  
24 network.

25 Q. And what type of equipment is utilized in that

1 system?

2 A. Unlike a macro facility which has large  
3 equipment based stations and antennas at each location,  
4 NewPath Networks' facilities involve fiber, a fiber  
5 backbone, repeaters at each individual node and antennas  
6 at that particular location.

7 Q. And where are these nodes typically placed?

8 A. The nodes are developed based on RF engineering  
9 and topographical needs and issues. They take the  
10 topographical information, the RF engineering needs of a  
11 particular carrier and devise and develop a network to  
12 support a company's objectives.

13 Q. And what are some of the benefits of utilizing a  
14 DAS system?

15 A. Well, in the deployment of distributed antenna  
16 systems we are seeing increased need to deploy network  
17 at the customer locations. In this particular instance  
18 we are talking about residential developments.

19 Carriers have a difficulty in developing their  
20 traditional models in residential settings and serve  
21 their customers with an high quality network. So this  
22 allows the carrier to extend their networks into  
23 residential areas and other hard-to-reach places with a  
24 low profile, low power output device that provides  
25 higher data speeds and better voice quality.

1 Q. And you mentioned low profile. What do you mean  
2 by that?

3 A. Typically a development of a DAS system involves  
4 the placement of antennas into our equipment on existing  
5 verticality or other public infrastructure located in  
6 the public rights of way. Unlike the carriers', our  
7 facilities are more flexible. They are designed and  
8 allow for a smaller footprint to be laced at each  
9 location.

10 Q. By verticality, what kinds of verticality are  
11 you speaking of?

12 A. In an urban environment, streetlights, traffic  
13 signals and other public infrastructure. In nonurban  
14 areas, we develop, in this particular area, both  
15 saguaros and other faux alternatives to blend in with  
16 the environment.

17 Q. Okay. And what projects does NewPath currently  
18 have in the planning stages in the State of Arizona?

19 A. We have three -- or, excuse me -- several  
20 projects proposed in the State of Arizona. The largest  
21 footprint would be Scottsdale, Arizona; Paradise Valley;  
22 Maricopa County; Carefree, Arizona. Those involve  
23 multiple node locations supporting a lead tenant, in  
24 this particular case AT&T wireless.

25 Q. And what is the process for obtaining access to

1 the right of way?

2 A. You have two steps. One would be to obtain an  
3 administrative use permit from the City of Scottsdale  
4 for use, to approve individual nodes. The second thing  
5 would be a franchise agreement with the City of  
6 Scottsdale to access their public rights of way.

7 Q. And can you explain to me the type of activities  
8 NewPath has been engaged in in the last year with the  
9 City of Scottsdale and other municipalities with regard  
10 to these proposed projects?

11 A. Yes. The initial kickoff with the City of  
12 Scottsdale began in February 2008. And that was  
13 basically an accounting, a better understanding of their  
14 process and procedures. Following that meeting we  
15 surveyed multiple locations throughout the City of  
16 Scottsdale. And based on that survey, we split  
17 applications consistent with the city's wireless  
18 communications ordinance. But since that point in time,  
19 given the inputs that we have received from Happy Valley  
20 Ranch and from DR Ranch as well as many other HOAs, we  
21 have devised alternatives that weren't on the city's  
22 approved, preapproved list but were more consistent with  
23 what the communities were asking us to do.

24 I will say that in regards to Happy Valley Ranch  
25 that we have to suspend that application until we can

1 devise an alternative structure that would be approved  
2 or supported by Happy Valley Ranch. And the same would  
3 go for DC Ranch.

4 I will give you one good example of a  
5 cooperative effort we have had with Scottsdale Ranch,  
6 which is another HOA with 3200 individual single family  
7 homes. We have been in the long process of developing  
8 locations and designs appropriate for their neighborhood  
9 that they would support. And we will do the same for  
10 DC Ranch as well as Happy Valley Ranch and many others.

11 Q. Could you explain to me what kind of public  
12 outreach or community outreach NewPath has been engaged  
13 in?

14 A. Yes. There are two steps. One is a procedural  
15 requirement by the City of Scottsdale. The second would  
16 be additional efforts that we have made as a result of  
17 the feedback we received from community members and  
18 HOAs, the first step being that before we file an  
19 application with the City of Scottsdale we are required  
20 to have an open house. At that point, we receive inputs  
21 from community members, individual residents and  
22 representatives of HOAs.

23 We take that information as well as what we  
24 receive from staff at the City of Scottsdale and devise  
25 what we believe to be the best location and design for a

1 particular location. After we file that application, it  
2 does receive, excuse me, the public does have additional  
3 opportunity to comment on those. And at that point we  
4 still make amendments to our proposed locations and  
5 designs to again achieve consensus on design location.

6 Q. And can you explain to me what backhaul services  
7 are?

8 A. Yes. Backhaul services, given our proposed  
9 200-mile network of fiber, would be an alternative for  
10 the carriers to utilize our fiber backbone as opposed to  
11 developing T-1 lines with the existing ILEC. This  
12 allows them more efficient use and a cost savings to  
13 them as well.

14 MR. HALL: I don't think I have any further  
15 questions.

16 ALJ KINSEY: Mr. Torrey, any questions for this  
17 witness?

18 MR. TORREY: I do, Your Honor.

19

20 CROSS-EXAMINATION

21 BY MR. TORREY:

22 Q. Mr. Garcia, I just want to start here with some  
23 fundamentals of the application this morning.

24 You mentioned that NewPath is going to be sort  
25 of a newcomer to the market here in Arizona, is that

1 correct?

2 A. Yes.

3 Q. And you have chosen these various locations,  
4 Scottsdale, Paradise Valley, Carefree based on customer  
5 or perceived customer need in that area, is that  
6 correct?

7 A. Yes. Let me be clear. The customer in this  
8 particular case is a carrier, a wireless carrier, in  
9 this instance AT&T. They submit an RFP to us as well as  
10 their competitors. And based on that RFP, we won that  
11 particular bid and designed the network in accordance  
12 with that particular RFP.

13 Q. And so essentially, in sort of layman's terms,  
14 AT&T needed to upgrade its service and its facilities  
15 here in Arizona and came to your company for that, is  
16 that correct?

17 A. Yes. And in an open and competitive bid  
18 process, yes.

19 Q. And your company, you won that contract because  
20 you were better able to provide those services, is that  
21 correct?

22 A. That's correct.

23 Q. Now, specifically you mentioned something that  
24 was a little too technical for me. You said that you  
25 were going to provide a backhaul of services for AT&T

1 which was to give them an alternative to use your fiber  
2 connections versus something else.

3 A. Alternative to ILECs, a carrier typically, when  
4 they deploy a new site that they call the macro sites,  
5 they have to connect to a T-1, or telephone line. So  
6 they typically go to the ILECs to obtain that. And  
7 that's how they operate their cell sites.

8 With the fiber backbone, the carrier now has an  
9 alternative or choice to choose to use our fiber  
10 backbone for their backhaul services and allow them a  
11 greater data rate or speeds that they typically can't  
12 get with a T-1 line. So there are, there are  
13 technologic advances in using fiber over T-1 in speeds,  
14 and that's what we offer to the carriers.

15 Q. You mentioned, I believe you said, 200 miles of  
16 fiber. Does that mean that NewPath is going to be  
17 bringing those facilities to Arizona and installing  
18 those or do you have those facilities in place that you  
19 are leasing from someone else?

20 A. We will be installing a majority of that. There  
21 are some areas where conduit is available. So we are  
22 able to run fiber through existing conduits and lease  
23 from that particular provider. But most of it, it will  
24 be new fiber.

25 Q. Now, in terms of physical location, these large

1 trunks of fiber that you actually have, where do those  
2 typically get placed?

3 A. They get placed within the public rights of way.

4 Q. Meaning under streets and sidewalks?

5 A. Under streets, yes.

6 Q. And when you go to place these new, this would  
7 be a 200-mile network, you are going to go to places  
8 like the City of Scottsdale and Paradise Valley and get  
9 permission from those cities to put those facilities in  
10 place, is that correct?

11 A. That's correct. We will go through a franchise  
12 and license agreement process as well as building and  
13 encroachment permits to place that fiber in accordance  
14 with the city guidelines.

15 Q. Now, once that fiber is in the ground, you  
16 mentioned something else called the nodes?

17 A. That's correct.

18 Q. Now, the fiber load is going to connect to these  
19 nodes, is that correct?

20 A. Yes.

21 Q. And what exactly is the node?

22 A. The node is the point where we transmit the  
23 wireless carrier's radio frequency to serve that  
24 particular area.

25 Q. And when you say radio frequency, is that where

1 the towers that have been discussed this morning, is  
2 that what those towers would be?

3 A. Yes. And the towers take a variety of shapes.  
4 They, again, could be to existing verticality, street  
5 lights, traffic signals. Or in the particular case of  
6 north Scottsdale where there isn't any existing vertical  
7 infrastructure, we develop various structures including  
8 saguaros, monuments and other things like that.

9 Q. And when you work out our arrangements with  
10 places like the City of Scottsdale and Carefree and  
11 those areas, are they going to direct you in terms of  
12 what facilities you need to use when you put up those  
13 nodes?

14 A. Yes. Each city currently has a wireless  
15 communications facilities ordinance. And within that  
16 body or in that ordinance there is a list of standards  
17 for the public rights of way. There are standards for  
18 traffic pole attachments. There are standards for  
19 street light attachments and standards for concealed or  
20 alternative structures that we develop in accordance  
21 with that guideline.

22 And as I mentioned, we have taken that ordinance  
23 and provided alternatives at the direction of city  
24 council as well as, again, from the input we received  
25 from many of the HOAs that we intend or propose to

1 serve.

2 Q. And so isn't it correct to say that even if you  
3 as a company have permission to operate within, say, the  
4 City of Scottsdale or if the Commission grants you your  
5 CC&N, if the City of Scottsdale tells you that you  
6 cannot put up a node in a certain area, you won't be  
7 able to do that, is that correct?

8 A. That's how it has worked so far. And, again, it  
9 is not our intent to deploy cell sites or nodes in areas  
10 that we haven't found a consensus on design and  
11 location. I think that's the reason that we haven't had  
12 a whole lot of activity with Happy Valley Ranch, because  
13 we suspended that application until we can devise better  
14 alternatives. And we will take those alternatives, once  
15 available, to Happy Valley Ranch. We will take those  
16 alternatives to DC Ranch. And we already have found  
17 alternatives for other HOAs like Scottsdale Ranch. But  
18 while we are working through that, and until we work  
19 through it, we haven't moved to an area and proposed  
20 network sites that are an objection to HOAs.

21 Q. And so this company has a history of working  
22 with types of complaints that you have heard here this  
23 morning?

24 A. Yes, because we feel it is an obligation as well  
25 as a real benefit to us. If we can gain the confidence

1 of the HOAs, going into the next HOA will be much easier  
2 once they know we are available to work with them to  
3 develop appropriate infrastructure.

4 Q. Just to clarify, this CNN application we are  
5 hearing today is not strictly for the City of  
6 Scottsdale, is that correct?

7 A. That's correct.

8 Q. And would a delay of any of the procedures in  
9 this application affect your ability to build out your  
10 network outside of the City of Scottsdale?

11 A. Yes, it would. We have seen and been asked by  
12 Paradise Valley for the status of our application. And  
13 that's held them or prevented them from negotiating a  
14 license agreement with us as well as developing  
15 alternative or design structures for their city.

16 Q. Now, you mentioned working with existing  
17 networks within certain cities, wireless networks. Is  
18 NewPath involved in some litigation over a similar issue  
19 in California?

20 A. Yes, and the City of Irvine.

21 Q. And could you please give us some background of  
22 that particular litigation?

23 A. Sure. In California, NewPath Networks is a,  
24 holds a certificate of public convenience and necessity  
25 issued by the California Public Utilities Commission.

1 With that utility status we have the right to place  
2 infrastructure within the public rights of way in  
3 California. In addition to that, there is state law  
4 that defines how and where we can place an  
5 infrastructure. In our opinion the City of Irvine is in  
6 violation of that authorization that we have issued by  
7 the PUC. And that's the reason that we have filed  
8 litigation against the City of Irvine.

9 Q. Okay. Let me make sure I am understanding  
10 correctly. Now, the California Public Utility  
11 Commission is the same commission that you are before  
12 today in Arizona, correct?

13 A. Uh-huh.

14 Q. And they have given your company, NewPath,  
15 permission statewide to operate in all public rights of  
16 way within the State of California, correct?

17 A. That's correct. We have a statewide franchise  
18 and use permit in the State of California.

19 Q. And what specifically did the City of Irvine,  
20 what action did they specifically take that you have  
21 objected to?

22 A. Well, there are two grounds. One is federal and  
23 one is state. As for the state complaints that we have,  
24 again, with our authorization we have the right to place  
25 infrastructure or attach to existing infrastructure in

1 the public rights of way, including the City of Irvine.

2 We have other cities where that same situation  
3 has come up, and we have had no difficulties in  
4 permitting to deploy our networks. City of Irvine  
5 decided that federal law applies to a public utility in  
6 California. We don't believe it does. We believe we  
7 have the rights under our statewide authorization to  
8 build that network and, again, if we have the  
9 opportunity, certainly would work with them as well.

10 Q. So your dispute with City of Irvine is  
11 essentially a jurisdiction dispute over control of your  
12 services or deployment of your network?

13 A. That's correct.

14 Q. Now, there was a mention of a second legal  
15 action that you are involved with. And I believe the  
16 opposing company is NextG Networks of California, is  
17 that correct?

18 A. That's correct.

19 Q. And can you please give us a brief summary of  
20 the basis for that litigation.

21 A. They have alleged patent infringement. However,  
22 their patent infringement case does not involve any of  
23 the Arizona proposed networks. And we have seen this  
24 action by that same company being alleged against other  
25 competitors. And we just feel so it is just an

1 anticompetitive step that they have taken to interrupt  
2 our service abilities.

3 Q. Specifically what patent is it that they have  
4 alleged that your company is infringing on?

5 A. I would have to ask Jamie Hall to respond.

6 MR. HALL: I would -- am I permitted to speak?

7 ALJ KINSEY: Mr. Torrey, do you mind holding  
8 that question? And we will get to it at the end, unless  
9 you have more questions on that line.

10 MR. TORREY: I can follow up with something more  
11 appropriate.

12 ALJ KINSEY: Okay.

13 BY MR. TORREY:

14 Q. You mentioned that you don't believe that the  
15 patent infringement suit pertains to what your  
16 operations will be here in Arizona, correct?

17 A. Uh-huh.

18 Q. Can you explain why you don't believe that that  
19 would apply?

20 A. Well, no specific allegations about the proposed  
21 projects that we have in Arizona. They are already  
22 licensed company in Arizona. And, again, we feel it is  
23 an anticompetitive step that they have taken to  
24 interrupt our, the project that we have been awarded.

25 Q. Okay. Have you had a chance to review the Staff

1 report that was provided by Staff in this matter?

2 A. Yes, I have.

3 Q. And you are familiar with Staff's  
4 recommendations, is that correct?

5 A. Yes, I am.

6 Q. And on the stand in front of you do you have a  
7 copy of an exhibit that's marked S-1 for identification  
8 purposes?

9 A. Yes, I do.

10 Q. And could you identify that for the record,  
11 please.

12 A. Yes. It is a memorandum dated October 31st,  
13 2008. And attached is the Staff report for the above  
14 referenced application. The applicant is applying for  
15 approval to provide the following services: Private  
16 line telecom services.

17 Q. And so just for your reference, I would direct  
18 you to page 6 of that application, or that Staff report.  
19 Do you see that?

20 A. I am turning to page 6. I am looking at 6.7 and  
21 item 7.

22 Q. Okay. And I just direct your attention there so  
23 you can follow along as I enumerate these.

24 Paragraph 7 of that Staff report contains  
25 Staff's recommendations in this matter and I want to

1 walk you through those. Staff had recommended in  
2 subparagraph 1 obviously that the applicant would file  
3 all Commission rules, orders and other relevant  
4 provisions. Does the company have any objection to that  
5 recommendation?

6 A. No, we don't.

7 Q. 7, paragraph 7, subsection 2 recommends that you  
8 abide by the quality of service standards that this  
9 Commission approved in that named docket. Does the  
10 company have any objection to that requirement?

11 A. No, I don't.

12 Q. Number 3 requires that the Commission be  
13 notified immediately if you change your name, address or  
14 telephone number. Does the company have any objection  
15 to that?

16 A. No, we don't.

17 Q. And recommendation number 4 would be that the  
18 applicant cooperate with the Commission, any Commission  
19 investigations. Does the company have any objection to  
20 that recommendation?

21 A. No, we don't.

22 Q. And paragraph 5, briefly, requires the company  
23 to file a tariff that reflect competitive services.  
24 Does the company have any objection to that?

25 A. No, we don't.

1 Q. And subparagraph 6 recommends that the company  
2 is authorized to charge, discount its rates and services  
3 to the marginal cost of providing those services. Does  
4 the company have any objection to that recommendation?

5 A. No, we don't.

6 Q. And as a final matter, subparagraph 1 below that  
7 requires the company to file some conforming tariffs for  
8 those matters mentioned above. Does the company have  
9 any objection to that?

10 A. No, we don't.

11 Q. Do you believe that the company has the  
12 technical capabilities to provide the services in your  
13 application?

14 A. Yes, we do.

15 Q. Do you believe that these services that you  
16 provide will be competitive in some way?

17 A. Yes.

18 Q. Can you please briefly give your reasoning  
19 behind that.

20 A. Well, again, the wireless carriers submit,  
21 request competitive bids from us as well as our  
22 competitors. And I think we have proven that we are a  
23 viable option for the carriers to select and deploy  
24 their networks throughout the State of Arizona.

25 Q. But you are aware that there are other utilities

1 that are providing similar services in Arizona?

2 A. Yes.

3 MR. TORREY: Okay. Your Honor, I have no  
4 further questions for Mr. Garcia.

5 ALJ KINSEY: And, Mr. Hall, if you would like  
6 to, go ahead and respond to that question Mr. Torrey had  
7 earlier.

8 MR. HALL: Yes. You were asking about what  
9 specific patent, or Commission counsel was asking about  
10 what specific patent was at issue. And it is 5,682,256,  
11 which expires this year on November 10th, 2009. And  
12 under the current scheduling order, NewPath does not  
13 expect the trial to actually take place until after the  
14 expiration date for that patent. And that was just the  
15 follow up I wanted to give on that specific patent at  
16 issue.

17 ALJ KINSEY: And what exactly does the patent  
18 involve?

19 MR. HALL: I think it involves, to the best of  
20 my knowledge and understanding, it involves a technology  
21 platform for operating in a DAS system, the specific  
22 technology platform. And, again, NextG has brought a  
23 similar lawsuit against a competitor and that was  
24 resolved. And so that's basically what this is about.

25 ALJ KINSEY: And do you know if the similar

1 issue was resolved in favor of NextG or was it --

2 MR. HALL: It was settled out of court.

3 ALJ KINSEY: Okay. Mr. Torrey, did you have any  
4 additional questions for this witness with that  
5 explanation?

6 MR. TORREY: I do not, Your Honor.

7 ALJ KINSEY: Okay. Thank you very much.

8

9

EXAMINATION

10 BY ALJ KINSEY:

11 Q. I do have some questions, though, Mr. Garcia.  
12 Tell me a little bit about NewPath's corporate  
13 structure. Are you a stand-alone entity or are there,  
14 is there a holding company, subsidiaries?

15 A. We have a board of directors. And in addition  
16 to the board of directors, there are private equity  
17 investors. So it is through the combination of private  
18 equity and the boards of directors. NewPath makes  
19 decisions in the best interest of those investors as  
20 well as the board's objectives.

21 Q. Are there any affiliates or subsidiaries that  
22 are involved?

23 A. Don't know exactly what you mean by affiliates.  
24 Other companies that we have acquired?

25 Q. Uh-huh.

1 A. The other companies we have acquired, Insight  
2 Solutions.

3 Q. And what type of company is that?

4 A. Similar to what NewPath is, it is a distributed  
5 antenna system developer.

6 Q. And do they do business in Arizona?

7 A. No.

8 Q. Go ahead.

9 A. No, they don't.

10 Q. Okay. And are there any plans for them to do  
11 business here in Arizona?

12 A. No.

13 Q. In the Staff report that you just referred to,  
14 Staff was provided some numbers regarding financial  
15 information on NewPath. And will NewPath be relying on  
16 its own finances to do business here in Arizona?

17 A. It would be relying on a combination of its own  
18 finances as well as a new venture capitalist.

19 Q. Okay. And regarding your service, you described  
20 it when Mr. Hall asked you some questions, but give me  
21 an example of how the service actually works for one of  
22 your current customers in layman terms.

23 A. Okay. I will just use one network that we just  
24 spent some time at yesterday. That's in the City of San  
25 Francisco. That particular instance we have two

1 residential areas being served by NewPath Networks. The  
2 lead tenant for NewPath Networks in that case was Metro  
3 PCS. Again through an open and competitive bid process,  
4 we were awarded a contract to develop wireless network,  
5 DAS systems in two neighborhoods, McClaren Park as well  
6 as Lake Merced.

7 Q. I am sorry, Claren Park?

8 A. McClaren Park and Lake Merced.

9 Q. Okay.

10 A. McClaren Park facilities -- or, excuse me -- the  
11 McClaren Park network consists of joint use poles. In  
12 California there is a member organization known as  
13 Northern California Joint Pole Organization. As a  
14 member, NewPath Networks is allowed to attach wireless  
15 antennas as well as repeaters to that infrastructure.

16 And that network was just turned up yesterday  
17 and now serves Metro PCS. We connect to their existing  
18 base station, or what we call the hub. And we transmit  
19 that radio signal via fiber optic links to the nodes in  
20 those neighborhoods. And it is because we have the  
21 ability to remotely transmit the frequencies from far  
22 distances we are able to have, again, a low profile  
23 infrastructure deployment but still meet the needs of  
24 that carrier as well as the carrier's customers.

25 Q. And does the service in some way -- what is it

1 you are giving the communities that they normally  
2 wouldn't be able to get with just a regular wireless  
3 carrier?

4 A. Ultimately when the network is complete in any  
5 of these locations, you have a multi-tenant host, which  
6 current individual carriers cannot provide. So by  
7 allowing a developer of DAS systems, you will eventually  
8 give the customers, the end customers in the residential  
9 neighborhoods, the choice of the wireless carrier that  
10 they want. And that would be probably price driven or  
11 service driven.

12 But right now currently what happens is that end  
13 users end up selecting a carrier based on who serves  
14 that neighborhood. And so, again, that denies them the  
15 right of choice as well as price. But by having a  
16 platform that's a neutral host, any carrier can serve  
17 those customers evenly and not be at a disadvantage.

18 Q. And so the areas that you are serving, are they  
19 hard to serve areas because of just where they are  
20 located, topography, that sort of thing?

21 A. Yes. Again, the difference between DAS and the  
22 macro wireless carrier is the footprint that's required  
23 to deploy a network site. So the typical wireless  
24 carrier would deploy a macro facility. And the macro  
25 facility includes or typically includes a shelter that's

1 12 by 24 feet, 12 feet wide, 24 feet long. That would  
2 be the ideal situation for a carrier to provide future  
3 growth capabilities as well as adjust to network needs.

4 As you can imagine, a 12-by-24 infrastructure  
5 footprint is difficult to place in public rights of way  
6 or difficult to place in residential neighborhoods. And  
7 as long as the carriers are still remotely transmitting  
8 to these remote neighborhoods, the service level is  
9 always going to be an issue, especially when one of the  
10 biggest drivers for a carrier is data. And providing  
11 multiple broadband capability to residential  
12 neighborhoods to their customers, they can't possibly do  
13 that at the quality they want from those remote  
14 locations.

15 Q. And you talked about earlier transport and  
16 backhaul services. Describe for me again what those two  
17 are.

18 A. Yes. The backhaul services for a carrier  
19 typically involve, once the site is developed, meaning  
20 that they develop their tower or they develop their  
21 rooftop facility, they have to connect to their existing  
22 network operation center. In order for them to do that  
23 they need to connect to a T-1, or telephone line. And  
24 one of the biggest challenges they have is the cost of  
25 that T-1 line and their rate of service they get from

1 that T-1 line.

2 Telephone lines are typically fiber -- or,  
3 excuse me -- copper based. Fiber optic lines that we  
4 provide superior advantage over copper T-1 lines. And  
5 that's, again, given the network drivers for the carrier  
6 are data, high speed data, the T-1 lines typically can't  
7 provide a competitive rate of service that fiber does.  
8 And that's the reason that carriers now look to fiber  
9 backbones as a solution to meeting the speeds and data  
10 service they need to provide for their network sites.

11 Q. Okay. And transport, is that something  
12 different?

13 A. No. It is really --

14 Q. Just the process?

15 A. Yes.

16 Q. Okay. And if customers in Arizona have  
17 problems, how does the company foresee those problems  
18 being handled?

19 A. Well, if you are talking about NewPath's  
20 customers, it is the wireless carriers. The wireless  
21 carriers are intimately involved with NewPath Networks  
22 and the construction, excuse me, the permit,  
23 construction, maintenance and operation base. So there  
24 is an ongoing relationship. From the day that we start  
25 the proposed project until the day it is constructed

1 there is, again, an ongoing relationship beyond that.  
2 There is the maintenance requirement. We have  
3 contractual obligations we have to meet and maintenance.  
4 And per that agreement we have to maintain and operate  
5 that network as if it was their own network.

6 Q. And so once NewPath does its whole setup and the  
7 wireless carrier is able to provide service to  
8 residents, then residents would go to the wireless  
9 carrier if there are any service outages or anything  
10 like that, is that correct?

11 A. Yes. It is typically caught before they would  
12 call to the carrier. We have a network operation center  
13 as well as the carrier does that are notified  
14 immediately upon network service issues. So those are  
15 known 24/7 and, if it comes up, then we have a response  
16 team as well as they.

17 Q. Okay. And where is your response team located?

18 A. We have a network operation center in Arizona as  
19 well as California so we are able on monitor all our  
20 sites from various locations. Again, a NOC, network  
21 operation center, doesn't have to be inside, it can be  
22 outside.

23 Q. How has your response time been with NOCs that  
24 are out of state?

25 A. We are notified immediately of any interruptions

1 in service. And, again, per our agreement with the  
2 carriers, we have a very high standard, our quality  
3 standard, to maintain in order to maintain the contracts  
4 that we have until future contracts. It is very  
5 important for us to do that and we have proven that we  
6 can do that and the reason we were awarded other  
7 contracts.

8 Q. Okay. In the Staff report that we talked about  
9 earlier, on page, on page 3, Staff mentions that NewPath  
10 is planning to use the excess fiber capacity, which I am  
11 assuming is part of that backhaul that you talked about,  
12 to provide end user telecommunication services to  
13 apartment complexes, office buildings and other  
14 businesses.

15 And then in your application at A-15 -- do you  
16 have that in front of you? You probably don't. Let me  
17 just tell you what it says here. It says that you will  
18 only provide service to other carriers and not  
19 individuals or small businesses.

20 Can you reconcile what is in the Staff report  
21 with what you reported in your application in this  
22 matter?

23 A. I think when the application was filed it was  
24 the assumption of our outside counsel that we wouldn't  
25 do that. But as we continued to deploy networks in

1 other states, we find that there is various institutions  
2 that want the or are interested in the excess capacity.  
3 And in some states we have dealt with cities that would  
4 like to use excess capacity to deploy various  
5 transportation control management programs or other  
6 things that serve the cities.

7 We have also just recently had a DAS forum in  
8 Scottsdale, Arizona last month and there are many  
9 institutions like universities that are interested in  
10 utilizing that fiber for their needs and for extending  
11 or providing better network service on their campuses.

12 Q. And would the service be provided to those  
13 entities the same way that you just described earlier?

14 A. Yes. There would be a similar deployment model  
15 for private institutions, meaning campuses and/or larger  
16 campuses, company environments.

17 Q. And would they involve wireless carriers or  
18 would you be making contracts with the university maybe  
19 to use their own telecommunication system? I guess I  
20 don't understand if they are the same or if they are  
21 different.

22 A. Well, there are cities that have their own 700  
23 megawatt spectrum or public safety spectrum. And that's  
24 something that could be transported over our networks.

25 Q. Okay. So in those instances, if there is a

1 service outage to, say, a university or some apartment  
2 complex, there is no middle person there? It would just  
3 be you dealing, the company, with those entities, is  
4 that correct?

5 A. Yes.

6 Q. Do you believe that the company should provide  
7 some type of protection in the form of a performance  
8 bond for those entities?

9 A. Well, the only -- yes, we don't have any problem  
10 providing performance bonds. In fact, we do that just  
11 because of the legacy issue that came up many years ago  
12 with a company called Metro Comp that developed and  
13 deployed infrastructure. And eventually that company  
14 went bankrupt. And there was no performance clause or  
15 bonds or escrow accounts that allowed the cities to  
16 remove those facilities in their infrastructure. And as  
17 a result of that situation, all carriers, DAS companies  
18 are being required to provide bonds.

19 Q. And are those bonds required as a part of your  
20 CC&Ns or are they required as a part of, say,  
21 construction related bonds with the city? How are those  
22 done in other jurisdictions?

23 A. In all cases, based on my experience, it has  
24 been through the organizations at the local and state  
25 levels.

1 Q. And is that the company's plan here in Arizona  
2 to do, or have those bonds in place with the cities and  
3 other entities?

4 A. Yes. We would have a performance clause in our  
5 contract or franchise agreement with each of the cities.

6 Q. Okay. And have any of those franchise  
7 agreements been executed at this point? Are they  
8 complete?

9 A. No, they are not complete.

10 Q. Okay. So in no instance do you believe that the  
11 company will have direct contact with any residential or  
12 individual customers?

13 A. That's correct. And I guess indirectly we would  
14 have contact with those people that live in a  
15 neighborhood that were deploying networks. So there are  
16 two different things. We would have direct contacts  
17 with homeowners associations and individual residents  
18 that may be affected by our proposed locations.

19 Q. Okay. And I believe you have already described  
20 what type of equipment and structure the company will be  
21 placing in these various communities, which will be the  
22 nodes and any other, and whatever type construction you  
23 need for the fiber optics, is that correct?

24 A. Yes.

25 Q. Okay. Any plans for employees in Arizona?

1           A.       Yes. I think the biggest factor leading up to  
2 that has been our contract with Scottsdale and other  
3 cities. But we know and anticipate a large contract,  
4 RFP to go out in the City of Scottsdale and surrounding  
5 areas for support of our proposed construction.

6           So we have, as you may be aware, several hundred  
7 nodes for land for this area that require multiple  
8 contract companies to deploy that network. And given  
9 the time delay that we have in the overall process, we  
10 will need more companies in order to keep up with the  
11 anticipated start-up dates. So...

12          Q.       Okay. And does the company's service differ in  
13 other jurisdictions or are you basically doing the same  
14 thing in other states that you are going to be doing  
15 here in Arizona?

16          A.       Yes, it is very similar.

17          Q.       Okay. The public, some of the public comment  
18 this morning were safety concerns regarding, they  
19 describe them as antennas but I think you would call  
20 them nodes. Has the company addressed that at all?

21          A.       Yes. We have had a very large effort as a  
22 result of the customers' -- excuse me -- homeowners'  
23 feedback about what they call RF health and safety  
24 emissions.

25                 As you know from the law, perhaps, local

1 jurisdictions are involved in deciding whether a node  
2 gets placed or not based on RF health and safety.  
3 However, it has always been our practice to meet with  
4 communities and individual homeowners concerned about RF  
5 health and safety. We go through a variety of reporting  
6 techniques.

7           What we do in Scottsdale, Arizona, in addition  
8 to what is required by the city, is we provide an  
9 ambient level test that just shows measurement of RF  
10 levels in a neighborhood. And then we do a predictive  
11 study which shows what the ambient level plus our  
12 prediction study will amount to. And then we do  
13 proposed construction installation reports that show  
14 what the standard is, what the ambient level is, and how  
15 we can comply with that standard that's defined by the  
16 FCC.

17           So we are not relying on the federal preemption  
18 to ignore that issue. We want the customers or the  
19 neighborhoods to be comfortable with how we can comply  
20 with our RF health and safety issues.

21       Q.     You described earlier the two processes that you  
22 go through in order to be able to construct your fiber  
23 optic lines. Can you explain those to me once more.

24       A.     Sure. Most of the cities in the Maricopa County  
25 area subscribe to the Maricopa County Association of

1 Governments' standard for deploying fiber. There are  
2 specific standards that they have agreed universally are  
3 important to them in deploying fiber.

4 We have gone to each city and provided  
5 information about our proposed deployment standard,  
6 which varies a little from what the Maricopa County  
7 Association of Governments has adopted. But we are in  
8 active negotiations to show the benefits of the  
9 alternative method that we are proposing. And the  
10 primary benefit is that it is a low impact to  
11 neighborhoods. And so we are working through the  
12 technical issues with public works departments to take  
13 advantage of that when it makes sense to them. And then  
14 we would go through and follow their traditional methods  
15 that they have already adopted when that does not make  
16 sense.

17 Q. All right. Your application also says that you  
18 plan to collect deposits and advances. What will those  
19 deposits and advances be for?

20 A. You are referring to?

21 Q. I believe it is at, I believe it was also at --  
22 it was contained at your tariff at sheet 20.

23 MR. TORREY: Your Honor, I believe it is in A-15  
24 of the application, as well.

25 ALJ KINSEY: A-15, okay.

1 THE WITNESS: I am not sure --

2 BY ALJ KINSEY:

3 Q. It just says NewPath's deposit policy found at  
4 sheet 20 of its tariff provides that at such time as the  
5 provision of service to the customer is terminated, the  
6 company will return the deposit within 30 days after  
7 discontinuance of service or after 12 months of service,  
8 whichever comes first. So who would those advances and  
9 deposits be from?

10 A. I am not sure if it is talking about the  
11 wireless carrier customers.

12 Q. Is that something that you do in other  
13 jurisdictions? Do you require deposits or advances of  
14 some sort?

15 A. I am not too familiar with that. I would say I  
16 am not aware of that situation in others.

17 Q. Okay. And I believe you talked a little bit  
18 earlier about the complaint with the City of Irvine.  
19 And did the complaint allege that -- did they basically  
20 just not want you to use the right of ways in order to  
21 construct your fiber optic lines?

22 A. Again, their interpretation of state law is  
23 inconsistent with what we believe the CPU is authorized  
24 to do. So basically they don't -- they believe they  
25 have control or discretion to decide where, what and how

1 those facilities are placed. And, again, that's  
2 inconsistent with what we believe the state has already  
3 authorized us to do.

4 And while we disagree on that point, we  
5 certainly, as we do here in Scottsdale, propose to work  
6 with the community to design the best and appropriate  
7 network. But we don't want it to be understood that we  
8 don't plan to do it. We certainly have the  
9 authorization to do that and we will find an appropriate  
10 design solution for each area.

11 Q. Okay. And did the company do something  
12 different here in Arizona that maybe it didn't do in  
13 California as more of a proactive approach to dealing  
14 with the cities and the subdivisions that it plans to  
15 install its fiber optics line or provide service?

16 A. Yes. I think that's a good question. City of  
17 Irvine does not have the open house process. And I  
18 think that's where we gained the opportunity to get more  
19 feedback from the community and HOAs about specific  
20 preferences for location and/or design, whereas in the  
21 City of Irvine, it doesn't have that same arrangement.  
22 And I think that's where we benefit from that, the city  
23 of Scottsdale's process versus what typically is  
24 required in the City of Irvine.

25 Q. Okay. And why does the company believe that the

1 lawsuit filed by NextG will not have an effect on the  
2 proceedings here in Arizona?

3 A. We think it is a frivolous allegation. And,  
4 again, they have done this to our competitors. And  
5 those competitors are still deploying networks. And we  
6 believe the same situation will occur or be in favor of  
7 NewPath Networks.

8 Q. You talked about basically the agreement that  
9 you have been able to reach with Scottsdale Ranch.  
10 Where is the process now with Happy Valley and DC Ranch?

11 A. With Happy Valley Ranch, we had two locations  
12 proposed. We suspended those applications due to the  
13 inputs we have received from Happy Valley Ranch. And  
14 that was received verbally by telephone, e-mail, and  
15 then an open house we had with Happy Valley Ranch.

16 It was clear that the majority at Happy Valley  
17 Ranch did not want those specific locations or designs.  
18 We would like to go back to Happy Valley Ranch with some  
19 alternatives once we are clear what those will be and  
20 submit those to them for consideration. We believe we  
21 will be able to find an alternative that will be  
22 agreeable to them because we found that to be true with  
23 Scottsdale Ranch and some other HOAs that we are working  
24 with. That remains to be seen. But we are in no hurry  
25 to deploy network in that area because of those

1 objections. We want to find a reasonable solution.  
2 Again, we think we have been successful in other areas;  
3 we think we can do the same with them.

4 Q. Where are you now with DC Ranch?

5 A. DC Ranch we are very much in the beginning stage  
6 of that. DC Ranch, or at least DMB, one of their  
7 holding companies or subsidiaries is Larsen. Larsen  
8 manufactures stealth products for wireless communication  
9 facilities. And we feel that, in a tri-level effort  
10 between DMB, Larsen and ourselves, that we can find,  
11 develop appropriate infrastructure for the DC Ranch  
12 area. That remains to be seen what that will look like,  
13 but we certainly believe, because Larsen exists within  
14 their company organization, that we can find a solution  
15 because that's what they do for other carriers.

16 Q. And how much, how much will communities be  
17 inconvenienced by the installation of your fiber optics  
18 line?

19 A. We believe that the alternative method proposed  
20 by NewPath Networks will mitigate the typical impacts  
21 that are associated with fiber deployment. We are able  
22 to provide -- that alternative, we believe, will save a  
23 significant amount of time as well as fewer disruptions  
24 to those neighborhoods. At the very least we asked the  
25 City of Scottsdale to consider at least allowing us to

1 use this alternative in those local areas, streets that  
2 are, have, that are in close proximity to single family  
3 homes. If they prefer the traditional method, we  
4 believe that we can probably do that in the more major  
5 urban arterial, excuse me, arterial streets and  
6 thoroughfares where whatever method is deployed wouldn't  
7 matter as much. So at the very least we are asking them  
8 to consider this alternative in residential areas.

9 ALJ KINSEY: I think that was all the questions  
10 I had.

11 Mr. Hall, did you have any redirect?

12 MR. HALL: Yes. I have a few follow-up  
13 questions.

14

15 REDIRECT EXAMINATION

16 BY MR. HALL:

17 Q. A couple of questions about that, the Irvine  
18 matter, just to provide some clarification.

19 Is there something unique about California state  
20 law with regard to telephone companies and their ability  
21 to access the right of way that might be different than  
22 from here in Arizona?

23 A. Yes. The CPC, this issue with NewPath Networks  
24 is a statewide franchise and statewide use agreement.  
25 So that is a difference in what we have here in Arizona.

1 Q. Okay. And, also, are you aware of Irvine's  
2 record with regard to approving applicants in the  
3 proposed area and can you give me some background to  
4 frame this issue?

5 A. Yes. The City of Irvine, in particular this  
6 neighborhood known as Turtlerock, has been known since  
7 my beginning in the industry in 1996 to be opposing all  
8 forms of infrastructure for wireless carriers. So we  
9 have gone and seen and I personally have permitted or  
10 proposed to permit infrastructure in open spaces. And  
11 what we are finding is that whichever alternative we go  
12 to, if it is a public right of way, they redirect you  
13 to the open space; if you are in the open space, they  
14 redirect you to the public right of way. So this is  
15 this endless cycle of redesigning the network to meet  
16 the particular needs of the council at that time. And  
17 it seems as though we have gone the circle and cycle  
18 many, many times. Again, since 1996, this has been an  
19 issue for all the carriers before DAS was an option.

20 Q. And are you aware or can you explain the basis  
21 for NewPath's federal law claims against the city?

22 A. It is a prohibition claim. Right now, because  
23 of the summary I just gave you, they are prohibiting  
24 NewPath Networks and they are also prohibiting other  
25 carriers providing service in that neighborhood.

1 Q. Is it fair to say that NewPath's litigation was  
2 a last resort?

3 A. Yes, absolutely. Again, we felt that the public  
4 right of way infrastructure was the best means to deploy  
5 wireless services in that neighborhood. But we have no  
6 alternative at this point.

7 Q. One other point of clarification. You had  
8 mentioned several times the term neutral host system  
9 and the ability for multiple carriers to be able to use  
10 NewPath's system. Can you explain in more detail  
11 specifically how many carriers can utilize a DAS system  
12 at the same time?

13 A. Well, typically you don't want to see more than  
14 four or five because that's all that are licensed in  
15 each state. But the fiber network has very robust  
16 capacity available for all wireless carriers as well as  
17 other utility companies that may want to utilize fiber  
18 networks, so, for example, WiMAX or WiFi, optic or other  
19 trunk services could be carried over that same network.

20 Q. So is it fair to say that multiple carriers can  
21 utilize the same system without overbuilding?

22 A. Yes, that's correct.

23 Q. And how much smaller is a NewPath antenna  
24 compared to traditional panel antennas, just to get an  
25 idea?

1           A.       The transmitting antennas are essentially the  
2 same in size.   What you have are engineering minimum  
3 requirements.   Because we serve multiple carriers, each  
4 panel antenna is designed to serve multiple carriers,  
5 meaning multiple bands of service.   So you have minimum  
6 space requirements on each panel antenna to provide that  
7 service so that the antenna would be the same but the  
8 footprint of the equipment and related infrastructure is  
9 much smaller.

10           MR. HALL:   Okay.   And I don't believe I have any  
11 further questions at this time.

12           ALJ KINSEY:   Okay.   Thank you, Mr. Garcia.   We  
13 appreciate your testimony.

14           THE WITNESS:   Thank you.

15           ALJ KINSEY:   Why don't we take about a  
16 ten-minute break and give our court reporter a short  
17 reprieve and come back at 20 until 12:00 by that clock.  
18 They are both wrong, different.   So I have 25 after.   So  
19 we will go with this one and say 20 till 12:00.   Okay,  
20 20 till 12:00.   Thank you.

21           (A recess ensued from 11:28 a.m. to 11:40 a.m.)

22           ALJ KINSEY:   Okay.   We will go back on the  
23 record.   And we will start with Staff.   If you would  
24 like to go ahead and call your first witness.

25           MR. TORREY:   Thank you, Your Honor.   Your Honor,

1 Staff calls Mr. Armando Fimbres.

2 (Whereupon Armando Fimbres was duly sworn by the  
3 Certified Reporter.)

4 THE WITNESS: Your Honor, is it okay if I keep  
5 my sweater on? It is terribly cold in here.

6 ALJ KINSEY: Yes, please do. I agree.

7

8

DIRECT EXAMINATION

9 BY MR. TORREY:

10 Q. Mr. Fimbres, can you state your full name and  
11 business address for the record, please.

12 A. Armando Fimbres, 1200 West Washington, Phoenix.

13 Q. And you are employed by the Corporation  
14 Commission, is that correct?

15 A. That is correct.

16 Q. And how long have you been with the Corporation  
17 Commission?

18 A. Since April 2005.

19 Q. And can you briefly summarize your experience in  
20 the telecommunications industry.

21 A. 29 years with the, what I would describe as, the  
22 Bell system or companies derived from the Bell system,  
23 some of it in central office engineering, the majority  
24 of it, the large majority of it in corporate functions,  
25 corporate analysis, competitive analysis, those sorts of

1 things.

2 Q. Is that similar to the duties you perform here  
3 at the Corporation Commission?

4 A. My duties here are analytic. They take on the  
5 form of analyzing various applications and then also  
6 providing support on various topics such as perhaps  
7 papers on VOIP and that kind of thing.

8 Q. In conjunction with the application of NewPath  
9 Networks that we are hearing testimony on this morning,  
10 did you conduct an analysis of that application?

11 A. I am sorry. You are asking if I conducted an  
12 analysis on --

13 Q. Did you --

14 A. -- NewPath's application?

15 Q. Did you conduct an analysis for the NewPath  
16 application?

17 A. Yes.

18 Q. And did you prepare a written report of your  
19 findings?

20 A. Yes, I did.

21 Q. On the stand in front of you, can you find an  
22 exhibit that has been marked S-1 for identification  
23 purposes?

24 A. Yes.

25 Q. And can you identify that exhibit for the

1 record, please.

2 A. It is marked Exhibit S-1, October 31st, 2008,  
3 from Ernest G. Johnson, Director of Utilities Division,  
4 to Docket Control.

5 Q. Is that the Staff report you prepared?

6 A. Yes, it was.

7 Q. Was it prepared either directly by you or under  
8 your direct supervision?

9 A. That is correct.

10 Q. And if I were to ask you a series of questions  
11 this morning designed to elicit the information that is  
12 contained in that Staff report, would your answers be  
13 the same or substantially similar to the way the  
14 information appears in the Staff report?

15 A. That's correct. I am not aware of any need for  
16 changes.

17 Q. That -- you just stole my next question. So you  
18 don't need to -- is there anything you feel needs to be  
19 changed or modified or clarified here on the stand  
20 today?

21 A. I do not.

22 Q. Okay. Just a couple of brief questions. Do you  
23 believe that this company, based upon its application  
24 and upon the testimony of Mr. Garcia this morning, do  
25 you believe the company has the technical capability to

1 provide the services that they have applied for?

2 A. Yes, I do.

3 Q. And in terms of the company's financial  
4 wherewithal, do you believe the company is financially  
5 capable of providing those services?

6 A. Yes.

7 Q. Earlier this morning, there was a discussion  
8 just briefly regarding a bond requirement. In the Staff  
9 report, you didn't recommend the company be required to  
10 file a bond, is that correct?

11 A. That is correct.

12 Q. And can you explain briefly what your reasoning  
13 behind that was?

14 A. Yes. Typically on private line CC&Ns, Staff  
15 does not recommend an application. Our thinking is  
16 this, the private line business is, first, very, very  
17 competitive and particularly at the high end where this  
18 is. By that I mean not small business. So, I mean, our  
19 belief or what has been the policy is that there really  
20 is no remedy that is needed there so that I am just  
21 following the policy that we have had in place.

22 Q. There was some mention of the use of the excess  
23 fiber capacity to connect to other customers, for  
24 example, apartment complexes and other businesses.  
25 There were a few questions regarding the need for a

1 performance bond in that area. Do you recall that?

2 A. Yes, I do recall that.

3 Q. And what is Staff's position regarding a  
4 performance bond in those situations?

5 A. Well, again, those are big, big customers, large  
6 business. And I am not aware of any private lines CC&N  
7 where Staff has ever taken a position to require a bond  
8 on large businesses or where there are large businesses  
9 being served.

10 Q. And in this matter, does any of the discussions  
11 this morning change your opinion regarding the need for  
12 a performance bond?

13 A. No, it does not.

14 Q. Now, the company had requested that these  
15 services be classified as competitive. Do you recall  
16 that?

17 A. Yes.

18 Q. And what was Staff's recommendation?

19 A. I think they are very competitive, yes.

20 Q. And you believe that the business environment  
21 for these services is going to be a competitive  
22 environment?

23 A. Yes, it is a very competitive environment.

24 Q. There was some brief discussion this morning  
25 regarding the legal actions that have been filed in

1 California. Is there anything about those legal actions  
2 now that you heard some explanation from the company  
3 that gives Staff concern regarding this application?

4 A. No, no.

5 If it is helpful, Your Honor, I could -- when  
6 NextG came through with their application -- please tell  
7 me if it is inappropriate I raise it -- NextG had an  
8 action with San Francisco. It is not unusual, I think,  
9 given the nature of the big business, competitive  
10 environment.

11 Q. I briefly discussed with the company the  
12 recommendations that Staff had made and went down the  
13 list of Staff's recommendations. Do you continue to  
14 stand by those recommendations as they appear in the  
15 Staff report?

16 A. Yes.

17 Q. Is there anything else about the Staff report  
18 that you feel needs to be explained or clarified here on  
19 the stand today?

20 A. Well, it might be helpful to explain that,  
21 though NewPath is a unique applicant, what they seek  
22 from the standpoint of CC&N, certificate of convenience  
23 and necessity, there is nothing unique about that.

24 Your Honor heard a case yesterday, it is exactly  
25 the same type of technology, NextG, same technology.

1 There was an application filed just a few days ago, same  
2 type. So from the standpoint that we see it, the Staff,  
3 of the CC&N, no.

4 MR. TORREY: Your Honor, Staff moves to admit  
5 Exhibit S-1.

6 ALJ KINSEY: Mr. Hall, any objection to S-1?

7 MR. HALL: Could you repeat again what S-1 is?

8 ALJ KINSEY: It is the Staff report that has  
9 been submitted in this application.

10 MR. HALL: No, no objections.

11 ALJ KINSEY: Okay. S-1 is admitted.

12 (Exhibit No. S-1 was admitted into evidence.)

13 MR. TORREY: And, Your Honor, I have no further  
14 questions for Mr. Fimbres at this time.

15 ALJ KINSEY: Thank you, Mr. Torrey.

16 Mr. Hall, any questions for this witness?

17 MR. HALL: I don't believe I have any questions  
18 at this time.

19 ALJ KINSEY: Okay. Mr. Fimbres, just give me  
20 one second here.

21

22 EXAMINATION

23 BY ALJ KINSEY:

24 Q. You talked earlier about Staff's policy  
25 regarding posting a bond for private line services and

1 that it has basically been the Commission's policy not  
2 to require a bond in those matters. However, this  
3 applicant does state that it will collect deposits and  
4 advances. And how does Staff reconcile the fact that  
5 they are going to collect deposits and advances with the  
6 Commission's policy that we usually require a bond in  
7 those instances.

8 A. Well, their tariff says it is from their  
9 customers. And that's what I think Staff would focus  
10 on. Their customers are very large businesses, very  
11 large carriers. If you look at from the standpoint of  
12 sort of the way marketing works and business works, I  
13 would -- well, it would be possible to say that the  
14 customers have more control than the provider.

15 Q. Okay.

16 A. And so what I think I said earlier is that we  
17 don't feel that there is a remedy needed here. It is  
18 such a competitive business. And for that, for that  
19 reason, we just thought, I think, have not required a  
20 bond.

21 Q. And you believe that the issue that we try to  
22 control basically with the posting of a bond will be  
23 done anyway with the way the company, the applicant and  
24 its clients will do their contracts, is that --

25 A. What I heard them say, they would have

1 contracts. And they do have an ICB provision in their  
2 tariff. And so it sounds like bonds would be in place  
3 contractually anyway.

4 Q. Okay. You have also -- I believe you were here  
5 this morning when the witness testified about the  
6 situation with the City of Irvine. Does Staff have any  
7 concerns with what has transpired with the City of  
8 Irvine?

9 A. From what we know, we do not have any concerns.  
10 It didn't strike me as perfectly unique. I did mention  
11 that one of their competitors had a very similar  
12 situation with, I want to say, the City of San  
13 Francisco. San Francisco, maybe it is the county. I am  
14 not entirely sure.

15 What I might add additionally, based on what  
16 NewPath told us, is I think they did receive an  
17 injunction against Irvine. So the case is proceeding  
18 and thus far that's what we know about it.

19 Q. Okay. And in Staff's review of that situation,  
20 it didn't raise any concerns with Staff as far as the  
21 Commission granting a CC&N to the applicant?

22 A. No.

23 Q. Okay. Staff had some discussions with the City  
24 of Scottsdale regarding the city's concern with this  
25 applicant. And Staff listed in the Staff report four

1 issues regarding the city's concerns. Walk me through  
2 the analysis for each of those issues that Staff went  
3 through.

4 A. Is Your Honor referring to the issues on page 4,  
5 I believe?

6 Q. That's correct, page 4.

7 A. Staff issued a data request which we reference  
8 in the Staff report. NewPath answered them, we believe,  
9 appropriately. Based on those answers, we really didn't  
10 have any issues. I think, as counsel indicated earlier,  
11 we met with City of Scottsdale and listened to their  
12 concerns, but it certainly was our opinion that those  
13 concerns would be dealt with really at the city level,  
14 not as a matter of a CC&N, understanding, of course,  
15 that the CC&N is a statewide CC&N. And so I mean it  
16 goes beyond the City of Scottsdale.

17 Q. Sure. The one that raised a little bit of  
18 concern with me was number 3. Does Staff think that  
19 there are any risks if NewPath abandons its network.

20 A. Certainly there would be risks if the City of  
21 Scottsdale, or whoever the jurisdiction, not just to  
22 focus on the City of Scottsdale because these issues  
23 could pertain to any city, but those cities surely would  
24 have dealt with them appropriately, you know, whether  
25 they would choose a bond with an applicant like NewPath

1 or whether they would have exit mechanisms. In fact,  
2 when NewPath responded, they were perfectly aware of  
3 those discussions, I think.

4 Q. Okay.

5 A. So...

6 Q. You listened to, I believe you listened to  
7 Mr. Garcia's testimony regarding the apartment complexes  
8 and the office buildings and other businesses or end  
9 users that they were going to try to provide service  
10 for. Did the testimony give Staff any concerns with  
11 whether those customers would need protection in the  
12 form of a performance bond?

13 A. No, no additional concerns. It is pretty clear  
14 to us, I have heard nothing to change that, that they  
15 are serving large businesses, whether those large  
16 businesses would be called carriers or a campus of some  
17 sort.

18 ALJ KINSEY: Okay. I believe that was all the  
19 questions that I had.

20 Any redirect, Mr. Torrey?

21 MR. TORREY: Your Honor, just a couple questions  
22 I probably should have asked at the beginning.

23

24

25

## 1 REDIRECT EXAMINATION

2 BY MR. TORREY:

3 Q. Mr. Fimbres, do you believe it would be in the  
4 public interest to grant this application?

5 A. Yes, I do.

6 Q. And do you believe NewPath Networks is a fit and  
7 proper entity based upon their application and their  
8 data responses and the testimony that you heard today?

9 A. Yes, I do.

10 MR. TORREY: And nothing further, Your Honor.

11 ALJ KINSEY: Okay. Thank you, Mr. Fimbres. I  
12 just have a question before we go on to our closing  
13 comments for counsel for Staff.

14 I will forego it. That's okay.

15 And, Mr. Hall, do you have any closing comments  
16 that you would like to make today?17 MR. HALL: I would just like to reiterate our  
18 appreciation for Staff's efforts in review of this  
19 application -- it has been a long process, and I want to  
20 thank you for your time and effort, Mr. Fimbres -- and  
21 reiterate that we fully support Staff's recommended  
22 approval of this application and that, should Your Honor  
23 decide to allow additional parties to file comments,  
24 NewPath would request that we be given an opportunity to  
25 respond to any issues that are raised.

1           And as a final note, I would like to mention  
2           again, maybe reiterate, that NewPath has been working on  
3           this Arizona project for approximately a year now. And  
4           things have come to a point where we need to move  
5           forward. And in order to finalize certain franchises  
6           with jurisdictions, we need to obtain a CC&N and we  
7           would request that Your Honor's ROO be finalized in  
8           short order so that we can get approval. And I  
9           appreciate your efforts to do that. Thank you.

10           ALJ KINSEY: You are welcome.

11           Okay. Mr. Torrey.

12           MR. TORREY: Your Honor, as Staff had stated,  
13           Staff does support this application. And as the company  
14           had stated on the stand, if they are able to implement  
15           this kind of a network, it does go a long way to giving  
16           consumers a little bit of choice in the telecom market.  
17           And based on that, I do believe it is an appropriate  
18           application for approval.

19           ALJ KINSEY: Okay. Is there anything further?

20           MR. HALL: No, Your Honor.

21           ALJ KINSEY: I will issue a procedural order  
22           discussing whether or not additional comments will be  
23           allowed in this matter. And I will do that in short  
24           order.

25           MR. HALL: Thank you.

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ALJ KINSEY: All right. Thank you.

MR. TORREY: Thank you, Your Honor.

(The hearing concluded at 11:58 a.m.)

1 STATE OF ARIZONA )  
 ) ss.  
 2 COUNTY OF MARICOPA )

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I, COLETTE E. ROSS, Certified Reporter No.  
 50658 for the State of Arizona, do hereby certify that  
 the foregoing printed pages constitute a full, true and  
 accurate transcript of the proceedings had in the  
 foregoing matter, all done to the best of my skill and  
 ability.

WITNESS my hand this 2nd day of March, 2009.




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COLETTE E. ROSS  
 Certified Reporter  
 Certificate No. 50658