

ORIGINAL

INTERVENTION



0000095331

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Arizona Corporation Commission

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AZ CORP COMMISSION  
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5 Attorney for Town of Paradise Valley

6 BEFORE THE ARIZONA CORPORATION COMMISSION

7 Commissioners:

8 Kristen K. Mayes, Chairman  
9 Paul Newman  
10 Gary Pierce  
11 Sandra D. Kennedy  
12 Bob Stump

Docket No. T-20567A-07-0662

MOTION FOR INTERVENTION BY  
TOWN OF PARADISE VALLEY

11 IN THE MATTER OF THE APPLICATION  
12 OF NEWPATH NETWORKS, LLC, FOR  
13 APPROVAL OF A CERTIFICATE OF  
14 CONVENIENCE AND NECESSITY TO  
15 PROVIDE TRANSPORT AND  
BACKHAUL TELECOMMUNICATIONS  
SERVICES

16 The Town of Paradise Valley (the "Town"), an Arizona Municipal Corporation applies  
17 to the Commission for an order pursuant to Ariz. Adm. Code § R14-3-105 allowing the Town  
18 to intervene as an interested party in the above-entitled proceedings.

19 The Town may be impacted by the issuance of a Certificate of Convenience and  
20 Necessity ("CCN") to NewPath Network, LLC ("NewPath") as the Town is charged with the  
21 maintenance and regulation of its rights-of-way. This includes a responsibility to its citizens to  
22 ensure that the Town receives fair and reasonable compensation for the use of its rights-of-  
23 way. Representatives of NewPath have represented to the Town that the issuance of a CCN  
24 may provide the legal leverage necessary for NewPath to limit the Town's ability to require  
25  
26

1 said fair and reasonable compensation (see also, letter dated March 31, 2008, from Martha  
2 Hudak, attached as Exhibit A).

3  
4 Additionally, the Town has also, for a number of years, been actively engaged in the  
5 undergrounding of all utilities. NewPath expressed interest in placing over 46 antennas within  
6 the Town's right-of-way conflicts with the Town's undergrounding requirements. The Town's  
7 long-standing policy on the undergrounding of utilities is evidenced by:

8 (1) the Town's Code provisions dating as far back as 1964 (see Town Ordinance #30 –  
9 attached as Exhibit B) that required that all new utility poles and wires be placed underground  
10 unless a special permit allowing otherwise were to be issued by the Town (see also, APS v.  
11 Town of Paradise Valley, 125 Ariz. 447, 610 P.2d 449 (1980), at page 449);

12  
13 (2) the Town's litigating with utilities that would otherwise challenge the authority of  
14 the Town to require undergrounding (see the unanimous decision of the Arizona Supreme  
15 Court in APS v. Town of Paradise Valley, supra., upholding the Town's authority to require  
16 undergrounding of utilities); and

17  
18 (3) the Town's fiscal commitment to undergrounding utilities, wherein it has spent  
19 millions of dollars over the past fifteen years to fund underground conversion districts for pre-  
20 existing above-ground utilities, including the undergrounding of every 69kv line in the Town's  
21 municipal limits. Representatives of NewPath have stated that the issuance of a CCN would  
22 allow NewPath to utilize its status as a "utility" to erect new above-ground cellular antennae in  
23 the Town's rights-of-way. The Town has a strong interest in protecting the investment it, and  
24 its residents, have made over the past five decades in keeping the Town's rights-of-ways free  
25  
26

1 of aerial obstructions. The Town desires to ensure that a CCN not be improperly issued, or  
2 that any such CCN, if issued, does not conflict with the Town's long standing policy of  
3 prohibiting the installation of new aerial utilities.  
4

5 **Contact Information**

6 Copies of all pleadings and pre-filed testimony, and all data requests or other requests  
7 for information should be directed to:

8 Andrew M. Miller, Town Attorney  
9 Town of Paradise Valley  
10 6402 E. Lincoln Drive  
11 Paradise Valley, AZ 85253  
12 Phone: (480) 348-3691  
13 Facsimile: (480) 596-3790  
14 E-mail: [amiller@paradisevalleyaz.gov](mailto:amiller@paradisevalleyaz.gov)

15 **Conclusion**

16 For the above reasons, the Town respectfully requests that the Commission issue a  
17 procedural order granting the Town's intervention in this case.

18 **RESPECTFULLY SUBMITTED** this 10<sup>th</sup> day of April, 2009.

19 **TOWN OF PARADISE VALLEY**

20  
21 By: 

22 Andrew M. Miller  
23 6401 E. Lincoln Drive  
24 Paradise Valley, AZ 85253  
(480) 348-3691  
Town Attorney

25 **ORIGINAL** and 13 copies of the foregoing filed  
26 with the Arizona Corporation Commission  
this 10th day of April, 2009

1 **COPY** of the foregoing mailed this  
2 10th day of April, 2009, to:

3 Jamie Hall  
4 NewPath Networks, LLC  
5 100 Oceangate, Suite 1400  
6 Long Beach, CA 90802

7 Stephen Garcia  
8 Director, External Affairs/Land Use  
9 NewPath Networks  
10 768 Garfield Street  
11 Seattle, WA 98109

12 Deborah Robberson  
13 3939 N. Drinkwater Boulevard  
14 Scottsdale, AZ 85251

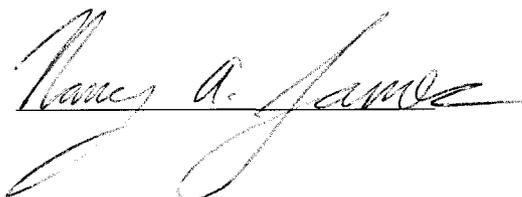
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By: 

**EXHIBIT A**

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31 March 2008

Andrew M. Miller, Esq.  
Town Attorney  
Town of Paradise Valley  
6401 East Lincoln Drive  
Paradise Valley, AZ 85253-4399

Dear Mr. Miller,

Thank you again for taking the time to meet with Stephen Garcia and me last month regarding NewPath Networks' ("NewPath") plans for facilities located in the Town of Paradise Valley. Stephen has asked me to put together a synopsis of the state of federal law as it relates to wireless communications facilities. We support your efforts to allow wireless infrastructure in the Town's rights-of-way ("ROW") without the need to obtain a discretionary permit and hope this helps move the Town toward that goal.

## **Federal Limits on Local Regulation of Wireless Communications Facilities 47.U.S.C. § 253**

Basically, the Ninth Circuit courts have identified four features of a wireless communications facilities ("WCF") ordinance that will render it preempted by federal law. These features are outlined in *NextG Networks of Cal. v. County of L.A.*, 522 F. Supp. 2d 1240, at \*22: "The common features of the preempted ordinances in these cases include: (1) a complicated application process...; (2) a public hearing on the application; (3) imposition of criminal or civil sanctions for violations; and (4) unfettered discretion to approve or deny the application, or revoke a permit once issued." If, in combination, these aspects of a local ordinance suggest to the court that a local ordinance "may" have the effect of prohibiting telecommunication services, the ordinance is struck as preempted. This analysis is repeated consistently in all of the Ninth Circuit's § 253 cases including *Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F. Supp. 2d 886, 895 (S.D. Cal. 2005) ("San Diego County I"), *affm'd*, 490 F.3d 700 (9<sup>th</sup> Cir. 2007) ("the use permit requirements allow for the exercise of unfettered discretion"); *NextG Networks of Cal., Inc. v. City of San Francisco*, Case No. C05-00658, 2006 U.S. Dist.

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LEXIS 36101, at \*16 (N.D. Cal. June 2, 2006) (hereinafter "NextG") ("courts...have found this sort of unfettered discretion to be especially problematic"); *Cox Communs. PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1265-66 (S.D. Cal. 2002) ("[m]ost significant is the fact that the ordinance gives the City unfettered discretion to deny a permit for unspecified reasons"); *NextG Networks of Cal. v. County of Los Angeles*, Case No. 07-2425, slip op. at p. 29 (C.D. Cal., June 22, 2007) (preempting Section 22.56 of the County's Zoning Code stating, "[t]he Court has little trouble concluding that this process is so burdensome and Byzantine as to erect a barrier to providing telecommunications services"); *GTE Mobilnet Ltd. P'ship v. City and County of San Francisco*, Case No. C05-04056, 2007 U.S. Dist. LEXIS 8801, at \*14 (N.D. Cal. Feb. 6, 2007) ("In particular, the wholly discretionary decision-making power...without any governing or limiting standards certainly may have a prohibitive effect").

The U.S. District Court for the Central District of California recently invalidated the City of Huntington Beach's WCF ordinance. *NextG Networks of Cal., Inc. v. City of Huntington Beach, California*, Case No. 07-1471, slip op. at 29 (C.D. Cal. Feb. 7, 2008) (hereinafter "Huntington Beach") ("This Court invalidated a similar CUP process in County of Los Angeles where the County attempted to shoe-horn Plaintiff into a CUP process clearly designed before the TCA was enacted")

Along those lines, I want to point you to a new decision from the Central District in which we represented NewPath it is, *NewPath Networks, LLC v. City of Irvine, California*. Case No. 06cv0550 JVS, slip op. (C.D. Cal., March 10, 2008). This new decision reiterates the holding in *NextG Networks of California, Inc. v. County of Los Angeles*, 522 F. Supp. 2d 1240 (C.D. Cal 2007) that a discretionary determination regarding "functional development design" (*County of Los Angeles*, 522 F. Supp. 2d at \*39) or "cosmetic properties of the structure" (*Irvine*, slip op. at 9) is preempted by federal law because it falls outside the proper scope of the City's right of way management authority. Irvine states specifically: "As is apparent, these provisions have more to do with regulating the *appearance* of the telecommunication facilities than regulating the public rights of way." (*Id.*, emphasis added.)

The Town should be aware that the Ninth Circuit decisions are scrutinizing discretionary aesthetic requirements. *Sprint Telephony PCS v. San Diego County* 490 F.3d 700 (9<sup>th</sup> Cir. 2007) ("Sprint II"), for example, states:

The WTO itself explicitly allows the decision maker to determine whether a facility is appropriately "camouflaged," "consistent with community character," and designed to have minimum "visual impact." We find the County's retort--that the elements of the WTO challenged by Sprint are traditional facets of zoning that are unobjectionable for the simple reason that the WTO is a zoning ordinance rather than a franchise or public right-of-way ordinance--unconvincing. Though *Auburn* discussed a franchise ordinance, our concerns in this case are largely the same. We conclude that the WTO imposes *a permitting structure and design requirements* that presents barriers to wireless telecommunications within the County, and is therefore preempted by § 253(a).

490 F.3d 700 at \*43-44 (emphasis added). The City of Huntington Beach used an incentives-

based approach to stealthing and the district court, nevertheless, found the ordinance preempted by § 253 because, among other things, it requires the applicant to “demonstrate that it complies with multiple purely aesthetic concerns, including compatibility with surrounding environment, camouflage, and consistency with surrounding structures.” *Huntington Beach*, slip op. at 23.

### **Safe Harbor Provision 47 U.S.C. § 253(c)**

Section 253(c) states that “noting in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on and nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”

The Court in *Irvine* relied on the Ninth Circuit’s finding in *City of Auburn v. Qwest Corp.*, 260 F. 3d 1160 at 1177 (9<sup>th</sup> Cir. 2001) that “right of way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way.” *Id.* *Irvine* found requirements such as “permit classifications determined by the cosmetic properties of the structure and the structure’s proximity to residential or public spaces as well as requiring “a letter of justification describing the proposed wireless communication facility, a description of the communication services, equipment, or facilities that the applicant will offer or make available to the City...” and a finding that the facility is “visually compatible with the surrounding neighborhood” to be beyond the scope of the City’s management of the ROW and “have more to do with regulating the appearance of the telecommunications facilities than regulating the public rights-of-way.” *Irvine*, slip op. at 9

According to the FCC,

the types of activities that fall within the sphere of appropriate rights-of-way management...include coordination of construction schedules, determination of insurance bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

*Auburn*, at 1177.

### **Fees for Use of the Public Rights of Way**

There is general agreement among courts that municipalities<sup>1</sup> can charge reasonable cost-based permit fees for use of the ROW by telecommunication providers. The question remains whether or not municipalities can assess “rent,” *i.e.*, recurring non-cost-based fees, for use of the public rights-of-way. Under § 253, municipalities can assess fees for use of the ROW so long as they are “fair and reasonable” and are assessed in a “competitively neutral and

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<sup>1</sup> The term “municipalities” is used herein generically to refer to any city or county.

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nondiscriminatory” manner. 47 U.S.C. § 253(c).<sup>2</sup> Federal courts are split on the question of whether or not this language precludes recurring fees or limits fees to cost-based fees. The Sixth Circuit held § 253 authorizes municipalities to charge rent and developed a reasonableness test based on several factors. *TCG Detroit v City of Dearborn*, 206 F. 3d 618, 625 (6<sup>th</sup> Cir. 2000) (“...only the totality of the circumstances could illuminate whether a fee is fair and reasonable”). The Tenth Circuit follows a strict interpretation of the Sixth Circuit test to determine if such fees are fair and reasonable, including: (1) the extent of the use contemplated, (2) the amount other telecommunications providers would be willing to pay, and (3) the impact on the profitability of the business. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272-73 (10<sup>th</sup> Cir. 2004) (fair market based rates are invalid because they do not take into account “the limited use contemplated”). Unlike the Sixth Circuit, the Tenth Circuit invalidated the rates.

In *City of Auburn v. Qwest*, 260 F.3d 1160, 1176 (9<sup>th</sup> Cir. 2001), the Ninth Circuit alluded to a cost-based fees interpretation of § 253: “Some non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right-of-way, as required under the Telecom Act.” But when the issue arose more directly in Oregon where Qwest challenged a 7% franchise fee, the court deferred to an Oregon state court interpretation that revenue-based fees were permissible under both Oregon law and § 253. Facing the same question in California, the Court moved closer to the Sixth Circuit, declining to read the language in *Auburn* as requiring all fees to be cost-based and requiring instead a case-by-case analysis. Like the Tenth Circuit, the Court used its approach to invalidate fee provisions in a proposed ordinance. *Qwest Communs., Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9<sup>th</sup> Cir. 2006) (“we decline to read *Auburn* to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of the particular regulation at issue”).

The most recent federal case to face the legality of ROW fees is in the Eighth Circuit. *Level 3 Communications, Inc. v. City of St. Louis, Missouri, et al.*, 477 F. 3d 528 (8<sup>th</sup> Cir. 2007). In this case, the City of St. Louis attempted to charge Level 3 Communications an annual linear-foot-based licensing fee for use of the ROW. The district court ruled that in order to be fair and reasonable, the fees must be related to actual costs incurred by the City for use of the ROW. The Eighth Circuit overturned the district court, but on the novel grounds that Level 3 was under an obligation to show effective prohibition under §253(a) before it challenged the fees. Because Level 3 failed to meet that burden, the Eighth Circuit overturned the district court ruling and therefore left unanswered the question of whether the only fees permitted under § 253(c) were cost-based fees.

The bottom line is that fees charged by municipalities for use of the ROW by telecommunication providers must be “fair and reasonable” and “assessed in a competitively neutral and non-discriminatory basis.”

### **Fees for the Use of Municipally Owned Facilities in the Public Rights-of-Way**

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<sup>2</sup> The section states in full: “Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”

Unlike the law on fees for use of the ROW, the law on rates for attachment to municipally owned utility facilities in the ROW is not well developed. On the other hand, attachments to investor-owned utilities are heavily regulated. In 1978, the federal government amended the Communications Act of 1934 by passing the Pole Attachment Act (47 U.S.C. § 224 *et seq.*) ("PAA"). The purpose of the PAA was to ensure that rates, terms and conditions of access to utility facilities were "just and reasonable." Section 224(b)(1). The Federal Communications Commission was charged with regulating the charges for pole attachments and the FCC developed a formula for rates based on the incremental cost of adding a facility to the utility's pole based derived, in part, from a calculation of the usable space of the pole.<sup>3</sup> In 1996, through the TCA, Congress added a nondiscriminatory access provision requiring utilities to permit access to poles at the FCC's established rates and further ordered the FCC to establish a uniform rate formula for the attachment of telecommunications facilities. The mandatory access provision was challenged and ultimately upheld in *Gulf Power v. United States*, 187 F.3d 1324, 1331 (11<sup>th</sup> Cir. 1999) (finding it a lawful taking that was justly compensated by FCC's rates but declining to rule on the lawfulness of rates as unripe). In a parallel challenge, the U.S. Supreme Court upheld the FCC's application of its rate formulas to attachments carrying Internet services and to attachments of wireless carriers. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.* (2002) 534 U.S. 327, 340-41 ("A provider of wireless telecommunications service is a 'provider of telecommunications service,' so its attachment is a 'pole attachment'").

Unfortunately, the PAA excluded municipally owned utilities from the definition of "utility," thereby exempting these poles from the FCC's pole attachment rates.<sup>4</sup> Moreover, recently, the U.S. Supreme Court has ruled that § 253 does not preempt a state law prohibiting municipal telecommunications companies because Congress did not intend the term "entity" in § 253(a) to apply to municipal utilities. *Nixon v. Missouri Mun. League* (2004) 541 U.S. 125, 138 ("In sum, § 253 would not work like a normal preemptive statute if it applied to a governmental unit. It would often accomplish nothing, it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of a national consistency"). Although that case supported a state prohibition on municipal entrants into the telecommunications business, it arguably would protect municipal utilities from a § 253 "effective prohibition" claim based on charging unreasonable fees in the absence of state law to that effect.

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<sup>3</sup> The FCC rates do not apply in states that have certified to the FCC that they have elected to exercise their own authority over pole attachment rates and can demonstrate that election by adopting their own governing regulation. Sec. 224(c). California, for instance, has certified to the FCC that it governs pole attachment rates. See California Public Utilities Commission, Decision No. 98-10-058, cited *infra*.

<sup>4</sup> Section 224(a)(1,3): "As used in this section: (1) The term 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State... (3) The term 'State' means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof" (emphasis added).

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### Fiber-Optic Based DAS and Emerging Wireless Services

Finally, I wanted to provide you with some information about the infrastructure NewPath is proposing to build in the Town.

NewPath's Distributed Antenna System ("DAS") serves as the deployment platform that supports high speed voice, data, video, and Internet access services as well as coverage and capacity benefits to multiple wireless providers and public agencies via a single fiber-optic backbone. With fiber-optic cable, the DAS eliminates the need for a series of independent wireless telecommunication carrier cell sites, equipment, and power/telephone infrastructure. Because fiber-optic cable is technology neutral, DAS can accommodate all major wireless standards and protocols for any national or regional wireless telecommunications provider that requires service within the project area. Additionally, the unlimited bandwidth inherent with fiber-optic based DAS allows local, state and federal agencies to consider extending reliable wireless telecommunications to public safety and administrative field personnel.

For example, an increasing number of law enforcement, emergency response service, and state and federal highway organizations are extending geospatial technology to the field via wireless networks for highway data collection and management purposes. These in-field applications need the support of a robust telecommunications infrastructure, like that offered by NewPath's fiber-optic based DAS. With a fiber-optic based DAS infrastructure private industry and public agencies will have the option of adopting some of the emerging wireless systems that the United States Department of Transportation recommends as part of their Advanced Rural Transportation Systems (ARTS). As you may be aware, ARTS was implemented to promote the application of Intelligent Transportation Systems (ITS) in rural areas like in order to address rural accident fatality rates. According to FHWA Highway Statistics, 1998, Rural versus Urban Highway Statistics 68.4% of all crash fatalities occur on rural highways. Even though Paradise Valley is by no means rural, it may still benefit from ITS or similar technology and services. The following list includes some of the primary ITS available today:

- ***Vehicle-to-Vehicle wireless communications*** that support vehicle collision avoidance, Automatic Crash Notification ("ACN"), passing safety, and warnings about slow-moving or stopped vehicles.
- ***Roadside-to-vehicle broadcast communications*** warn drivers about safety hazards, work zones, detours, and weather conditions to name a few.
- ***Mobile wide-area wireless communications*** offer in-vehicle information systems, in-vehicle mayday function, interactive route guidance, en route warning systems, fleet dispatching and routing, onboard information recording and reporting, electronic payment systems, onboard safety monitoring, an emergency notification.
- ***Fixed wide-area wireless communications*** permit remote roadside data collection and monitoring, roadside information displays, emergency fixed roadside terminal

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notification, traveler and service information access, transit demand management and interagency coordination.

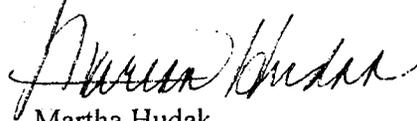
- *Short-range wireless communications* support intersection collision-avoidance coordination, automated vehicle identification, commercial vehicle operations (e.g., electronic clearance, roadside safety inspection, weigh in motion, and automated vehicle identification), and priority signal control for transit vehicles and emergency vehicles.

The advantage that NewPath and its customers gain by installing fiber-optic cable with unlimited bandwidth reduced network deployment cost, network flexibility, and network control/scalability (i.e., level of service). In addition to the benefits that fiber-optics adds to network deployment, fiber is immune to electrical interference and because it is made of glass it will not corrode, it is not affected by chemicals, it is not affected by indoor or outdoor environmental conditions, it does not pose a fire hazard, and it costs much less to maintain.

I hope this has been of assistance and guidance to you regarding what the Town can and cannot require of wireless provider. Please do not hesitate to contact either Stephen or myself if you need any further information. We look forward to working with you and the Town to bring NewPath's DAS and all of its benefits as we've discussed and as shown here.

Thanking you, I remain

Sincerely,



Martha Hudak  
Attorney for  
NewPath Networks, LLC

cc: Mr. Michael Kavanagh  
Mr. Stephen Garcia

**EXHIBIT B**

ORDINANCE NO. 30

AN ORDINANCE AMENDING THE ZONING ORDINANCE OF THE TOWN OF PARADISE VALLEY BY AMENDING THE CAPTION TO ARTICLE VIII THEREOF; BY ADDING SECTIONS 850, 851, 852 AND 853 THERETO, TO PROVIDE FOR REGULATION OF ERECTION OF NEW UTILITY POLES AND WIRES, TO DEFINE UTILITY POLES AND WIRES, EXISTING UTILITY POLES AND WIRES, AND NEW UTILITY POLES AND WIRES, TO PROHIBIT ERECTION OF NEW UTILITY POLES AND WIRES WITHOUT A SPECIAL PERMIT THEREFOR, TO PRESCRIBE PROCEDURES FOR PROCESSING SUCH PERMITS AND TO ESTABLISH STANDARDS FOR THE ISSUANCE OF SAME; AND BY AMENDING SECTION 1402 THEREOF.

BE IT ORDAINED by the Mayor and Common Council of the Town of Paradise Valley, Arizona, as follows:

Section 1. That the caption to Article VIII of the Zoning Ordinance of the Town of Paradise Valley is hereby amended to read:

"Parking and Loading Regulations;  
Regulation of Erection of Utility  
Poles and Wires."

Section 2. That Article VIII of the Zoning Ordinance of the Town of Paradise Valley, Arizona, is hereby amended by adding Sections 850, 851, 852 and 853 to-wit:

SECTION 850. Definitions. As used within this Article: "utility poles and wires" shall mean poles, structures, wires, cable, conduit, transformers and related facilities used in or as a part of the transportation or distribution of electricity or power or in the transmission of telephone, telegraph, radio or television communications; "existing utility poles and wires" shall mean such utility poles and wires as are in place and in operation as of the effective date of this ordinance; and "new utility poles and wires" shall mean such utility poles and wires as are not existing utility poles and wires but shall not include such utility poles and wires as in the future may constitute mere and strict replacements for, or repairs to, existing utility poles

and wires nor the addition to existing utility poles of new wires or equipment installed in order to increase the service capabilities of existing utility poles and wires.

SECTION 851. Regulation of Erection of New Utility Poles and Wires; Prohibition of Erection of New Utility Poles and Wires without a Special Permit; Exception. From and after the effective date of this Ordinance, no person shall erect within the Town boundaries and above the surface of the ground any new utility poles and wires except after securing a special permit therefor from the Town Council, provided, however, this section shall not be applicable (a) to new utility poles and wires erected for temporary use for periods not in excess of four (4) months for purely temporary purposes such as for providing temporary building construction power or for emergency power or telephone service or for the furnishing of power to temporary outdoor activities; (b) nor to the erection above the ground and flush to the ground of transformers, pull boxes, service terminals, pedestal type telephone terminals, telephone splice closures, or other similar on-the-ground facilities normally used with and as a part of an underground distribution system, all of same to be of a size, type, and design approved by the Town Engineer; (c) nor to the erection above the ground and flush to the ground of wires encased in concrete or in conduit where installed as a part of an underground distribution system where underground wire installation at the point of installation is not feasible due to special features of the terrain.

SECTION 852. Procedure for Securing a Special Permit for Erection of New Utility Poles and Wires. Any person seeking a special permit for erection of any new utility poles and wires within the Town boundaries and above the surface of the ground shall first make application therefor to the Town Council, which said application shall be processed in the manner prescribed by Article XI of this Ordinance dealing with special use permits.

SECTION 853. Prescribing Standards for Issu-  
ance of Permits for Erection of New Utility Poles and Wires. A  
special permit for erection of new utility poles and wires will be  
granted only in the event the applicant makes an affirmative  
showing that the public's general health, safety and welfare will  
not be impaired or endangered or jeopardized by the erection of  
same as proposed. In deciding such matter, the following factors  
shall be considered: the location and heights of such poles and  
wires and their relation to present or potential future roads;  
the crossing of such lines over much traveled highways or streets;  
the proximity of such lines to schools, churches or other places  
where people congregate; the probability of extensive flying in  
the area where such poles and wires are proposed to be located  
and the proximity to existing or proposed airfields; fire or  
other accident hazards from the presence of such poles and wires  
and the effect, if any, of same upon the effectiveness of fire  
fighting equipment; the aesthetics involved; the availability of  
suitable rights-of-way for the installation; the future conditions  
that may be reasonably anticipated in the area in view of a normal  
course of development; the type of terrain; the practicality and  
feasibility of underground installation of such poles and wires  
with due regard for the comparative costs between underground and  
overground installations (provided, however, that a mere showing  
that an underground installation shall cost more than an over-  
ground installation shall not in itself necessarily require issuance  
of a permit); and in the event such poles and wires are for the  
sole purpose of carrying electricity or power or transmitting  
telephone, telegraph, radio or television communications through  
or beyond the town's boundaries, or from one major facility to an-  
other, the practicability and feasibility of alternative or other  
routes.

Section 3. That paragraph 1 of Section 1402 of the Zoning Ordinance of the Town of Paradise Valley, Arizona is hereby amended to read:

"1. An application for a permit shall be submitted in such form as the Chief Building Inspector may prescribe but such form shall bear on its face the legend: "All new utility poles and wires are governed by the terms of Section 850, 851, 852 and 853 of ~~this~~ ordinance, which require that unless special permit therfor is secured, all new utility poles and wires must be installed underground." All building permits that are issued shall bear the same legend."

PASSED AND ADOPTED by the Mayor and Common Council of the Town of Paradise Valley, Arizona, this 14th day of July, 1964.

APPROVED this 14th day of July, 1964.

  
MAYOR

ATTEST:

  
TOWN CLERK