

ORIGINAL

OPEN MEETING ITEM



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COMMISSIONERS  
KRISTIN K. MAYES - Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP



ARIZONA CORPORATION COMMISSION

Executive Director  
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ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

DATE: SEPTEMBER 3, 2009

DOCKET NO.: T-20597A-08-0320

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Yvette B. Kinsey. The recommendation has been filed in the form of an Opinion and Order on:

EXTENET SYSTEMS, INC.  
(CC&N)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

SEPTEMBER 11, 2009

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

SEPTEMBER 22, 2009 and SEPTEMBER 23, 2009

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission  
DOCKETED

SEP - 9 2009

DOCKETED BY 

  
ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 KRISTIN K. MAYES - Chairman  
4 GARY PIERCE  
5 PAUL NEWMAN  
6 SANDRA D. KENNEDY  
7 BOB STUMP

8 IN THE MATTER OF EXTENET SYSTEMS, INC.  
9 FOR APPROVAL OF A CERTIFICATE OF  
10 CONVENIENCE AND NECESSITY TO  
11 PROVIDE PRIVATE LINE POINT-TO-POINT  
12 FIBER TRANSPORT SERVICE FOR WIRELESS  
13 SERVICE PROVIDERS.

DOCKET NO. T-20597A-08-0320

DECISION NO. \_\_\_\_\_

14 OPINION AND ORDER

15 DATE OF HEARING: February 17, 2009  
16 July 27, 2009 (Procedural Conference)

17 PLACE OF HEARING: Phoenix, Arizona

18 ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey

19 APPEARANCES: Mr. Michael W. Patten, ROSHKA DEWULF &  
20 PATTEN, PLC, on behalf of ExteNet Systems, Inc.; and

21 Mr. Wesley C. Van Cleve, Staff Attorney, Legal  
22 Division on behalf of Utilities Division of the Arizona  
23 Corporation Commission.

24 **BY THE COMMISSION:**

25 On June 24, 2008, ExteNet Systems, Inc. ("ExteNet" or "Company"), filed with the Arizona  
26 Corporation Commission ("Commission") an application for a Certificate of Convenience and  
27 Necessity ("CC&N") to provide private line point-to-point fiber transport service for wireless  
28 providers in Arizona.

On July 22, 2008, the Commission's Utilities Division ("Staff") filed a Letter of Insufficiency  
and First Set of Data Requests.

On August 12, 2008, ExteNet filed responses to Staff's First Set of Data Requests.

On December 24, 2008, Staff filed a Staff Report in this matter recommending approval of  
ExteNet's application, subject to certain conditions.

1 On December 31, 2008, a Procedural Order was issued setting the hearing to begin on March  
2 11, 2009, and establishing other procedural deadlines.

3 On January 14, 2009, ExteNet filed a Motion to Expedite Hearing and stating Staff had no  
4 objection to an accelerated hearing date.

5 On January 16, 2009, by Procedural Order, ExteNet's Motion was granted and the hearing  
6 was reset to begin on February 17, 2009.

7 On February 3, 2009, ExteNet filed an Affidavit of Publication, stating notice of the  
8 application and hearing date had been published on January 16, 2009, in the *Arizona Republic* a  
9 newspaper of general circulation in the proposed service area.

10 On February 6, 2009, ExteNet filed a Notice of Telephonic Appearance.

11 On February 17, 2009, a full public hearing was convened before a duly authorized  
12 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Company and  
13 Staff appeared through counsel and presented evidence and testimony. No members of the public  
14 appeared to give public comment.

15 On July 13, 2009, ExteNet filed a Motion for Procedural Conference.

16 On July 20, 2009, by Procedural Order, a procedural conference was scheduled for July 27,  
17 2009.

18 On July 27, 2009, a procedural conference was held as scheduled.

19 The matter was taken under advisement after the procedural conference pending submission  
20 of a Recommended Opinion and Order to the Commission.

21 \* \* \* \* \*

22 Having considered the entire record herein and being fully advised in the premises, the  
23 Commission finds, concludes, and orders that:

24 **FINDINGS OF FACT**

25 1. ExteNet is a foreign corporation, incorporated under the laws of the State of Delaware  
26 and authorized to transact business in the Arizona.

27 2. ExteNet is a privately funded company, headquartered in Lisle, Illinois, and has two  
28

1 wholly owned subsidiaries: ExteNet (Virginia) LLC and ExteNet Systems (California) LLC.  
2 ExteNet's two subsidiaries provide services similar to the services ExteNet proposes to provide in  
3 Arizona.<sup>1</sup>

4 3. On June 24, 2008, ExteNet filed an application for a CC&N to provide private line  
5 point-to-point fiber transport service for wireless carriers. The application also seeks a determination  
6 that ExteNet's proposed services be classified as competitive.

7 4. Staff recommends approval of ExteNet's application for a CC&N to provide private  
8 line telecommunication services in Arizona and that ExteNet's proposed services be classified as  
9 competitive.

10 5. Staff further recommends that:

- 11 a) ExteNet comply with all Commission Rules, Orders, and other  
12 requirements relevant to the provision of intrastate telecommunications  
13 services;
- 14 b) ExteNet abide by the quality service standards that were approved by the  
15 Commission for Qwest in Docket No. T-01051B-93-0183;
- 16 c) ExteNet be required to notify the Commission immediately upon changes  
17 to ExteNet's name, address or telephone number;
- 18 d) ExteNet cooperate with Commission investigations including, but not  
19 limited to customer complaints;
- 20 e) ExteNet's rates be classified as competitive; and
- 21 f) ExteNet be authorized to discount its rates and service charges to the  
22 marginal cost of providing the services.

23 6. Staff further recommends that ExteNet comply with the following condition and if  
24 ExteNet fails to comply, the CC&N should be deemed null and void, after due process.

- 25 a. ExteNet shall docket conforming tariffs for each service within its  
26 CC&N within 365 days from the date of an Order in this matter or  
27 30 days prior to providing service, whichever comes first. The  
28 tariffs submitted shall coincide with the application and shall state  
that ExteNet does not collect advances, deposits and/or  
prepayments from its customers.

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<sup>1</sup> Application at A-20.

1 **Technical/ Managerial Capabilities**

2 7. ExteNet is comprised of approximately 40 employees and four full time independent  
3 contractors. The top nine members of ExteNet's management team each have an average of 20 years  
4 experience in the telecommunications business.

5 8. ExteNet plans to employ two employees in Arizona. (Tr. at 10.)

6 9. Mr. Terry Ray, Vice President and Chief Financial Officer for ExteNet, testified that the  
7 Company has been in existence since 2002, and ExteNet deployed its first network in Michigan in late  
8 2004. (Tr. at 8.) According to the witness, ExteNet currently has 20 data networks throughout the  
9 country and the Company's primary customers are wireless service providers. (Tr. at 8.)

10 10. ExteNet proposes to provide dedicated point-to-point Private Virtual Circuit ("PVC")  
11 transport service using a Distributed Antenna System ("DAS") network. ExteNet's proposed services  
12 allow wireless service providers to bring services to hard to reach locations due the topography in  
13 certain areas. According to ExteNet's witness, ExteNet provides the vehicle or network to transmit a  
14 signal from one point to another. (Tr. at 14.) In addition, ExteNet's witness stated that in other places  
15 where the Company provides services to high-density areas, such as central business districts or large  
16 apartment complexes, wireless carriers can run into capacity issues and that is where ExteNet's  
17 services can fill a void by providing the extra capacity. (Tr. at 15.)

18 11. Although ExteNet does not plan to have a customer support center in Arizona, the  
19 proposed network will be connected to a network operations center in another location, 24 hours a  
20 day to monitor how the equipment is working. (Tr. at 18)

21 12. According to ExteNet's application, it is authorized to provide telecommunications  
22 services in 23 states. ExteNet is currently providing the services it proposes to offer in Arizona in:  
23 California, Florida, Massachusetts, Michigan, Nevada, New York, and Texas.

24 13. ExteNet has the technical and managerial capabilities to provide the services it is  
25 proposing in Arizona.

26 **Financial Capabilities**

27 14. Staff reviewed the financial information provided by the Company for the time period  
28 between September 30, 2006, and September 30, 2007, which showed ExteNet had total assets of

1 \$29,213,678, equity of \$23,535,667, and a net loss of \$4,859,741.

2 15. According to the Company's witness, ExteNet is generating a positive cash on an  
3 operating basis and if needed will rely on its existing investors or future investors to fund its  
4 operations in Arizona. (Tr. at 23.)

5 16. ExteNet submitted proposed tariffs with its application. The tariff states that ExteNet  
6 will not collect deposits or advances. ExteNet's witness testified that the Company will not collect  
7 deposits or advances from any individual residential end-users. (Tr. at 11.)

8 17. Staff recommends that ExteNet not be required to procure a performance bond or  
9 irrevocable sight draft letter of credit because the Company does not plan to collect deposits or  
10 advances from customers and ExteNet will be contracting with large wireless service providers that  
11 can use their bargaining power when negotiating contracts with ExteNet. (Tr. at 28.)

12 **Rates and Charges**

13 18. ExteNet will have to compete with various incumbent local exchange carriers  
14 ("ILECs"), competitive local exchange carriers ("CLECs") and interexchange carriers ("IXCs")  
15 currently providing the same types of telecommunications services ExteNet proposes to offer.

16 19. ExteNet's proposed rates are for competitive services. In general, rates for competitive  
17 services are not set according to the rate of return regulation.

18 20. According to the Staff Report, ExteNet will have to engage in a competitive bidding  
19 process to gain new customers, which will result in rates provided on an individual case basis  
20 ("ICB"). For those customers who do not require an ICB contract, they will be able to purchase  
21 services at the rates contained in ExteNet's proposed tariffs.

22 21. Based on the competitive environment in which ExteNet will operate, it will not be  
23 able to exert any market power and the competitive process should result in rates that are just and  
24 reasonable.

25 22. Although Staff considered ExteNet's net book value or fair value rate base of \$10,000,  
26 Staff did not give the information substantial weight in its analysis.

27 23. Pursuant to A.A.C. R-14-2-1109, ExteNet may charge rates for services that are not  
28 less than its total service long-run incremental costs of providing service.

1 24. ExteNet's proposed rates, as they appear in the proposed tariff, are just and reasonable  
2 and should be approved.

3 **Complaint History**

4 25. ExteNet certified that it has not had an application for service denied, or a CC&N  
5 revoked in any state and that none of its officers, directors or partners have been involved in any civil  
6 or criminal investigations. The Company further certified that none of its officers, directors, or  
7 partners have been convicted of any criminal acts within the last ten years.

8 26. ExteNet has not had any informal or formal complaints or civil or criminal  
9 proceedings filed against it.

10 27. ExteNet is in good standing with the Commission's Consumer Services Section and no  
11 complaints have been filed in Arizona between January 1, 2005, to July 9, 2008.

12 28. Staff's review showed no complaints have been filed against ExteNet by the Federal  
13 Communications Commission.

14 **Competitive Services Analysis**

15 29. ExteNet's proposed service is considered private line services, because it involves  
16 connecting two or more sites in a multi-site network using a direct circuit or channel specifically  
17 dedicated for the use of an end user. As with ExteNet proposed services, private lines service  
18 provides an infrastructure that customers can use to transmit and receive data.

19 30. Because IXCs, ILECs, and CLECs hold a monopoly or are authorized to provide  
20 private line services, ExteNet's entry into the market will be highly competitive. ExteNet will have  
21 no market power in those markets where alternative providers to private line telecommunications  
22 services exist.

23 31. ExteNet's proposed services in Arizona are competitive.

24 **Other Issues**

25 32. On February 18, 2009, the Commission held a hearing on the application of NewPath  
26 Networks, LLC ("NewPath").<sup>2</sup> NewPath's application request authority to provide point-to-point  
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28 <sup>2</sup> See Docket No. T-20567A-07-0662

1 telecommunications services and backhaul services through a DAS, similar to ExteNet's application  
2 in this docket. Both NewPath and ExteNet requested that their applications be expedited by the  
3 Commission because of on-going negotiations for contracts with wireless carriers. During the  
4 NewPath hearing, several members of the public appeared to give public comment, and objected to  
5 the Commission granting NewPath's application and the expedited treatment of the hearing. By  
6 Procedural Order, an additional day of hearing was scheduled on the NewPath application and the  
7 time for intervention was extended. Subsequently, the City of Scottsdale ("Scottsdale"), Town of  
8 Paradise Valley ("Paradise Valley"), and Town of Carefree ("Carefree") requested and were granted  
9 intervention in the NewPath proceeding. On the eve of the NewPath hearing, Scottsdale filed a  
10 Hearing Memorandum challenging the Commission's jurisdiction over the type of service NewPath  
11 proposes to provide in Arizona and stating federal law preempted the Commission from granting  
12 NewPath a CC&N because NewPath is essentially a wireless carrier. The scheduled hearing was  
13 vacated to give the parties time to respond to Scottsdale's Hearing Memorandum.

14 33. On June 10, 2009, Scottsdale filed a Motion to Withdraw as Party and Notice of  
15 Withdrawal of Hearing Memorandum by City of Scottsdale, Arizona, in the NewPath docket.  
16 Scottsdale's Motion stated that the city council considered and adopted two separate agreements with  
17 NewPath establishing a relationship framework on a going forward basis. On June 12, 2009, Paradise  
18 Valley and Carefree both filed Hearing Briefs raising the same issues discussed in the Scottsdale  
19 Hearing Memorandum. Subsequently, Scottsdale was granted withdrawal as a party in the NewPath  
20 Proceeding.<sup>3</sup>

21 34. On July 13, 2009, ExteNet filed a Motion for Procedural Conference, requesting to  
22 discuss the timeframe for processing the application in this matter and to discuss issues pending in the  
23 NewPath docket that could have an effect on ExteNet's application.

24 35. On July 27, 2009, a procedural conference was held to discuss the issues raised in  
25 ExteNet's motion. ExteNet and Staff appeared through counsel. Counsel for the Company explained  
26 that ExteNet has been negotiating with Arizona Public Service ("APS") for use of APS' poles to run  
27

28 <sup>3</sup> Procedurally, the NewPath hearing has not been reset.

1 fiber lines for its proposed services; however, the negotiations with APS cannot be finalized until  
2 ExteNet has obtained a CC&N from the Commission. ExteNet's counsel stated that ExteNet's  
3 business plan is somewhat different from NewPath's in that ExteNet is focused on bringing wireless  
4 coverage to campus environments (i.e., universities, resorts, state buildings, hospitals). (Tr. at 5, 15)  
5 ExteNet's counsel explained that as a part of its proposed services, ExteNet will be able to take a  
6 wireless handoff from a wireless provider and turn it into optical data that will run on a fiber network,  
7 but the fact that ExteNet can accommodate the wireless handoff does not convert ExteNet into a  
8 wireless carrier. (Tr. at 12) ExteNet's counsel further stated that no requests for intervention have  
9 been filed in this proceeding and ExteNet believes the Commission has jurisdiction over the services  
10 ExteNet proposes to provide in Arizona. Counsel for Staff stated that Staff has reviewed the issues  
11 raised in the NewPath docket, no requests for intervention have been made and no jurisdictional  
12 issues have been raised in this docket and it is Staff's position that the Commission has jurisdiction  
13 over ExteNet and its proposed services and the CC&N should be granted. (Tr. at 8).

14 36. Staff's recommendations are reasonable and should be adopted.

15 **CONCLUSIONS OF LAW**

16 1. ExteNet Systems, Inc., is a public service corporation within the meaning of Article  
17 XV of the Arizona Constitution and A.R.S. §40-281 and 40-282.

18 2. The Commission has jurisdiction over ExteNet Systems, Inc., and the subject matter of  
19 this application.

20 3. Notice of the application was given in accordance with the law.

21 4. A.R.S §§ 40-282 allows a telecommunications company to file an application for a  
22 CC&N to provide competitive telecommunications services.

23 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised  
24 Statutes, it is in the public interest for ExteNet Systems, Inc., to provide the telecommunications  
25 services set forth in its application.

26 6. ExteNet System, Inc., is a fit and proper entity to receive a CC&N authorizing it to  
27 provide competitive private line telecommunications services in Arizona, subject to Staff's  
28

1 recommendations set forth herein.

2 7. The telecommunications services that ExteNet Systems, Inc., intends to provide are  
3 competitive within Arizona.

4 8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules,  
5 it is just and reasonable and in the public interest for ExteNet Systems, Inc., to establish rates and  
6 charges that are not less than ExteNet System Inc.'s total service long-run incremental costs of  
7 providing the competitive services approved herein.

8 9. Staff recommendations are reasonable and should be adopted.

9 **ORDER**

10 IT IS THEREFORE ORDERED that the application of ExteNet Systems, Inc., for a  
11 Certificate of Convenience and Necessity to provide competitive private line telecommunications  
12 services within the State of Arizona, is hereby granted subject to Staff's conditions in Findings of  
13 Fact Nos. 5 and 6.

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1 IT IS FURTHER ORDERED that if ExteNet Systems, Inc., fails to comply with the  
2 conditions stated in Findings of Fact Nos. 5 and 6, the Certificate of Convenience and Necessity  
3 granted herein shall be considered null and void after due process.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.  
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8 CHAIRMAN

COMMISSIONER

9  
10 COMMISSIONER

COMMISSIONER

COMMISSIONER

11  
12 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,  
13 Executive Director of the Arizona Corporation Commission,  
14 have hereunto set my hand and caused the official seal of the  
Commission to be affixed at the Capitol, in the City of Phoenix,  
this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

15  
16 \_\_\_\_\_  
17 ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

18  
19 DISSENT \_\_\_\_\_  
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21 DISSENT \_\_\_\_\_  
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1 SERVICE LIST FOR: EXTENET SYSTEMS, INC.

2 DOCKET NO.: T-20597A-08-0320

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