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BEFORE THE ARIZONA CORPORATION COMMISSION

Commissioners:

11 Kristen K. Mayes, Chairman
 12 Paul Newman
 13 Gary Pierce
 14 Sandra D. Kennedy
 15 Bob Stump

Docket No. T-20567A-07-0662

**BRIEF IN RESPONSE TO
 HEARING MEMORANDUMS
 SUBMITTED BY TOWNS OF
 PARADISE VALLEY, ARIZONA
 AND CAREFREE, ARIZONA**

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

24 Applicant NewPath Networks, LLC ("NewPath") hereby submits this Brief
 in Response to Hearing Memorandums ("Hearing Memorandum") submitted by
 the Towns of Paradise Valley, Arizona ("Paradise Valley") and Carefree, Arizona
 ("Carefree") (collectively "Towns").

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1 **I. THE ARIZONA CORPORATION COMMISSION HAS**
2 **JURISDICTION OVER NEWPATH’S DISTRIBUTED ANTENNA**
3 **SYSTEM.**

4 **a. NewPath is a “Public Service Corporation” as defined by Arizona**
5 **law and as such is subject to the jurisdiction of the Commission.**

6 The Towns contend that NewPath is not a public service corporation under
7 Arizona law. NewPath strongly disagrees. Not only does the following analysis
8 show that NewPath is a public service corporation, but the Commission has
9 already determined that two distributed antenna system (“DAS”) providers similar
10 to NewPath are public service corporations. NextG, a direct competitor of
11 NewPath that provides telecommunications services, was granted a CC&N by the
12 Commission in 2006. (Conclusions of Law No. 1 of the NextG CC&N expressly
13 finds NextG to be a public service corporation within the meaning of Article XV
14 of the Arizona Constitution and A.R.S. §§ 40-281 and 40-282.) ExteNet Systems,
15 Inc., another direct competitor of NewPath, was also deemed a public service
16 corporation by the Commission in an Opinion and Order issued on September 3,
17 2009. (Conclusions of Law No. 1 of the Opinion and Order in Docket No. T-
18 20597A-08-0320 expressly deems ExteNet Systems, Inc. to be a public service
19 corporation within the meaning of Article XV of the Arizona Constitution and
20 A.R.S. §§ 40-281 and 40-282.)

21 There is a two-step process in determining whether or not an entity is a
22 public service corporation. The first step is whether or not the entity fits the
23 definition of a public service corporation under the Arizona Constitution. The
24

1 second step requires an evaluation of whether the entity's business activities are of
2 a public concern. *Southwest Transmission Coop., Inc. v. Ariz. Corp. Comm'n*, 213
3 Ariz. 427, 430 (2006) ("Determining whether an entity is a public service
4 corporation requires a two-step analysis. First, we consider whether the entity
5 satisfies the literal and textual definition of a public service corporation under
6 Article 15, Section 2, of the Arizona Constitution. Second, we evaluate whether
7 the entity's business and activity are such as to make its rates, charges, and
8 methods of operations a matter of public concern, by considering the eight factors
9 articulated in *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 237-8
10 (1950)") (internal quotes and citations omitted).

11 Article XV of the Arizona Constitution defines "public service corporation"
12 as "All corporations other than municipal engaged in ...transmitting messages or
13 furnishing public telegraph or telephone service..." Ariz. Const. Art. XV, § 2
14 (2008). NewPath squarely fits the definition articulated by the Arizona
15 Constitution in that it is in the business of transmitting messages and furnishing
16 telephone service via its DAS. It is not necessary that NewPath provide these
17 services directly to the public. *Serv-Yu*, 70 Ariz. at 242 ("...it is not a controlling
18 factor that the corporation supplying service does not hold itself out to serve the
19 public generally. It has been held that a business may be so far affected with a
20 public interest that it is subject to regulation as to rates and charges even though
21 the public does not have the right to demand and receive service[] ([c]iting
22 cases)"); 213 Ariz. at 431("Because the electricity in this case will ultimately be
23 used for light, fuel or power and Article 15, Section 2, does not expressly exclude
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1 a wholesaler that transmits electricity for that ultimate purpose, we reject SWTC's
2 contention that Article 15, Section 2, requires an immediate end use by a
3 consumer"). The Towns cite to *Southwest Gas Corp. V. Arizona Corp. Comm'n*,
4 169 Ariz. 279, 285-287 (App. 1991) which it quotes in part "To be a public
5 service corporation, its business must be such as to make its rates, charges, and
6 methods of operations a matter of public concern...." What the Towns omit from
7 their citation is the next sentence which states "It must be, as the courts express it,
8 clothed with a public interest to the extent clearly contemplated by the law which
9 subjects it to governmental control." *Id* citing *Arizona Corp. Comm'n. v.*
10 *Nicholson*, 103 Ariz. 317,321 (1972). In *Southwest Gas*, the court notes that El
11 Paso's business is predominantly regulated by federal entities. ("El Paso's
12 transportation of natural gas and its sales of natural gas for resale are subject to the
13 exclusive jurisdiction of FERC under the Natural Gas Act. El Paso's sales of
14 natural gas for export to Mexico are subject to the jurisdiction of the Economic
15 Regulatory Administration under the Natural Gas Act. Only El Paso's sales of
16 natural gas for direct consumption are outside the Natural Gas Act and not directly
17 regulated under federal law." *Id* at p. 282.) In stark contrast to FERC's exclusive
18 jurisdiction of El Paso in its transportation of natural gas, NewPath is minimally
19 regulated at the federal level.

20 The second step consists of a determination that the operation of the service
21 is a matter of "public concern" in order to identify entities "clothed with public
22 interest and subject to regulation because they are 'indispensible to large segments
23 of our population.'" 213 Ariz. at 432. As discussed more fully below, NewPath's
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1 provision of telecommunication services and transmission of telephone messages
2 is clearly contemplated by the Arizona Constitution as these services are expressly
3 mentioned and therefore is “clothed with a public interest.”

4 The Towns’ interest in this matter and in NewPath’s operations alone could
5 be considered evidence in support of this finding. In addition, given the reliance
6 of large segments of the population (including both residents and the business
7 community) on telecommunications services such as mobile telephones, data
8 transport services, dedicated fiber networks and private line services, including the
9 total reliance upon such services by large numbers of end-users who have
10 terminated traditional landline telephone services and use wireless exclusively,
11 such services and the entities like NewPath providing them, have become
12 “indispensable.” As such NewPath’s provision of telecommunication service is
13 clothed in the public interest and its rates, charges, or methods of operation are a
14 matter of public concern.

15 **i. NewPath meets the majority of *Serv-Yu* factors.**

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

- 21 1. What the corporation actually does.
- 22 2. A dedication to public use.
- 23 3. Articles of incorporation, authorization, and purposes.

24

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

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

11 The first factor is a consideration of what the company does. As previously
12 stated in this document and detailed in NewPath's pending application before the
13 Commission, NewPath provides the transport of telephone messages in the form of
14 transport and backhaul services to wireless telecommunications carriers in
15 addition to providing transmission services to other 'landline' telecommunications
16 and information companies such as AT&T, Verizon and Qwest. NewPath also
17 seeks authorization to utilize excess fiber capacity to provide specialized private
18 line services to non-carrier entities such as apartment complexes, universities, and
19 hospitals. Thus, NewPath meets this first factor. ("In supplying its transmission
20 service, SWTC delivers to its distributors the electricity on which thousand of
21 retail consumers rely. Nothing in *Serv-Yu* precludes consideration of this fact.")
22 213 Ariz. at 432

23 The second factor is a dedication of a company's private property to public
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1 use and is a question of intent. *Ariz. Corp. Comm'n v. Nicholson*, 108 Ariz. at
2 320. NewPath's role is integral to supplying telecommunication services to
3 consumers in Arizona and is the primary focus of its business. 213 Ariz. at 433
4 ("SWTC is in the business of supplying electricity to retail users, albeit through its
5 member distributors. Its role is integral in providing electricity to the public.")

6 The third factor is the authorization or purpose of the company as found in
7 the company's articles of incorporation. The Towns contend that NewPath's
8 articles of incorporation, and ultimately its purpose, is a neutral consideration. We
9 disagree. It has never been suggested by the Towns that NewPath is not
10 transmitting telephone messages for its carrier customers. NewPath's business is
11 to build DAS in communities where service for traditional cell phone service and
12 other wireless broadband products is not reliable and thus enhancing the reliability
13 of the transmission of telephone messages on behalf of their carrier customers to
14 the residents and business of those communities. *Id.* at 433. ("SWTC's stated goal
15 of providing reliable electric power to their member distributors's customers
16 suggests its purpose is to serve the public.")

17 The fourth factor concerns whether or not NewPath is "dealing with" a
18 commodity in which the public has an interest. NewPath provides
19 telecommunications service which has long been held in the public interest by the
20 Commission as evidenced by the Commission's long history of regulating
21 telephone companies. The Towns contend that since NewPath provides service
22 primarily to large wireless carriers, its service is not in the public interest. The
23 fact that NewPath does not provide telecommunication service directly to the
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1 consumer is irrelevant. *Id.* (“In transmitting electricity for *ultimate* use by
2 consumers, SWTC engages in a service ‘indispensable to large segments of our
3 population’ and is a company ‘clothed with a public interest. This is no less true
4 because SWTC is one step removed from providing electricity to the consumer
5 directly; SWTC provides and transmits a commodity in which the public has a
6 vital interest.” (Internal citations omitted)). It is certainly in the public interest for
7 residents, businesses and public safety officials to have a reliable means of
8 communication when a traditional landline telephone is unavailable.

9 The fifth factor, intent to monopolize, is not a required finding.

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

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

17 The Towns argue at this point in their analysis of the *Serv-Yu* factors, that
18 NewPath is not a common carrier. Page 11 of Hearing Memorandum. Yet, on
19 pages 5-6 of the Hearing Memorandum, the Towns quote Arizona Constitution,
20 Article XV Section 10, which provides:

21 All electric, transmission, telegraph, *telephone*, or pipeline
22 corporations, *for the transportation of* electricity, *messages*, water, oil, or
23 other property for profit, are declared to be common carriers and subject to
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1 control by law. (Emphasis added).

2 The Towns then in a footnote cite to *American Cable Tel. v. Ariz. Public*
3 *Service Co.*, 143 Ariz. 143 (App. 1983). This case is distinguishable from the
4 present case, and is clearly not applicable, for two very distinct reasons. First,
5 *American Cable* dealt with a cable television company (a company that deals with
6 providing entertainment to the public) and not a company that transmitted
7 telephone messages. Second, the Commission was not only attempting to
8 regulate a company it could not, but was attempting to regulate an agreement (pole
9 attachment license) it was not authorized to. For these reasons the court found that
10 *American Cable* was not a public service corporation. NewPath is not a cable
11 television company and is not in the business of providing entertainment to the
12 public but rather is in the business of transmitting telephone messages.

13 The eighth factor is the existence of actual or potential competition with
14 other corporations whose business is clothed in the public interest. Section A-21
15 of NewPath's CC&N application states: "Applicant hereby petitions the
16 Commission to find that its service is competitive because it is a point-to-point
17 transport and backhaul private line telecommunications service leased on a long-
18 term basis, similar to the private line services offered on a competitive basis by
19 other telecommunications providers in Arizona." Moreover, Staff testified at the
20 February 18, 2009 hearing that NewPath's service is "very, very competitive."
21 Trans. 62:16-17; 63:14-23. Notably, the Commission has granted CC&Ns to
22 numerous other telecommunications companies providing private line, transport
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1 and backhaul services.¹

2 Because NewPath is in the telecommunications business and its purpose is
3 to transport voice and data transmissions, because it does indeed do that, the
4 analysis of the *Serv-Yu* factors weigh heavily in favor of finding NewPath to be a
5 public service corporation.

6 **b. The Arizona Corporation Commission has jurisdiction over**
7 **private line service providers such as NewPath and the**
8 **Commission's regulation of NewPath is not preempted by 47**
9 **U.S.C. § 332(c)(3)(A).**

10 The Town's asserts that the Commission may be preempted from regulating
11 NewPath pursuant to 47 U.S.C. § 332(c)(3)(A), which states the following:

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

16 47 U.S.C. § 332(c)(3)(A) (emphasis added). The Town's oppose NewPath's

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18 ¹ *PNG Telecommunications, Inc.*, 2008 Ariz. PUC LEXIS 215, Docket No. T-03121A,
Decision No. 70643 (issued December 17, 2008); *IPC Network Service, Inc.*, 2008 Ariz.
19 PUC LEXIS 78, Docket No. T-20457A, Decision No. 70196 (issued March 20, 2008); *GILA*
Local Exchange Carrier, 2007 Ariz. PUC LEXIS 253, Docket No. 20515A, Decision No.
20 70039 (issued December 4, 2007); *Neutral Tandem-Arizona, LLC*, 2007 Ariz. PUC LEXIS
87, Docket No. T-04298A, Decision No. 69417 (issued April 16, 2007); *360Networks*
(USA), Inc., 2007 Ariz. PUC LEXIS 34, Docket No. T-03777A, Decision No. 69240 (issued
21 January 19, 2007); *AZX Connect, LLC*, 2006 Ariz. PUC LEXIS 57, Docket No. T-04315A,
Decision No. 68666 (issued April 20, 2006); *ACC Telecommunications, LLC*, 2006 Ariz.
22 PUC LEXIS 46, Docket No. T-04282A, Decision No. 68650 (issued April 12, 2006);
Sunesys Inc., 2008 Ariz. PUC LEXIS 46, Docket No. T-20456A, Decision No. 70292 (issued
23 April 24, 2008); *Baldwin County Internet/DSSI Service, LLC*, 2008 Ariz. PUC LEXIS 190,
Docket No. T-20544A, Decision No. 70615 (issued November 19, 2008).

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1 CC&N on the grounds that there may be a “preemptive effect [of] § 332(c)(7)...on
2 the Commission’s authority to issue a CC&N to a DAS provider such as
3 NewPath.” Scottsdale App., p. 4. Contrary to the City’s position, which
4 undermines the legitimate jurisdiction of the Commission and is contrary to the
5 statutory framework regulating telecommunications services, the Commission is
6 not preempted from regulating DAS, private line services, or any other
7 competitive local exchange carrier (“CLEC”).

8 By its express terms, the preemptive effect of § 332(c)(3)(A) extends only to
9 “commercial mobile service” (“CMS”) and “private mobile service” (“PMS”).²
10 NewPath does not provide CMS or PMS. Rather, NewPath provides, among other
11 things, transport and backhaul services to wireless carriers and other entities
12 seeking private line telecommunications service. The Commission defines “private
13 line services” as follows:

14 “Private line service is a direct circuit or channel specifically dedicated to
15 the use of an end user organization for the purpose of directly connecting
16 two or more sites in a multisite enterprise. Private line service provides a
17 means by which customers may transmit and receive messages and data
18 among various customer locations over facilities operated and provided by
19 the Applicant. The Applicant is therefore engaged in providing
20 telecommunications service for hire to the public, which fits the definition
21 of a common carrier and a public service corporation.”

22 Staff Report dated April 9, 2004, *OnFiber Carrier Services, Inc*, Docket No. T-

23 ²47 U.S.C. § 332(c)(3)(A). See *Implementation of Section 3(n) and 332 of the Communications*
24 *Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, 1509ff. (1994) (“CMRS
Second Report and Order”); see also *Petition of Arizona Corporation Commission to Extend*
State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, 10
FCC Rcd. 7824, 7284 (May 19, 1995) (“established new classifications of ‘commercial’ and
‘private’ mobile radio services (‘CMRS’ and ‘PMRS,’ respectively) in order to enable similar
wireless services to be regulated symmetrically in ways that promote marketplace competition”).

1 03874A-03-0766; see Decision No. 67062 (issued June 25, 2004) (“OnFiber Staff
2 Report”).

3 In that report staff indicated that it was its belief that “the Commission has
4 jurisdiction over [such] services” *Id.*³ Similar to OnFiber, NewPath’s DAS
5 will provide specialized telecommunications services, in this case using a
6 Distributed Antenna Systems (“DAS”) to transmit messages (often for wireless
7 carriers, but not exclusively) via fiber optic cable. The DAS system that NewPath
8 builds and operates are private line services that provide “backhaul” and transport
9 services to both carriers and non-carriers. There is no uniform definition for the
10 term backhaul, but in this technological arena, it is often used to describe the use
11 of landlines, typically T-1 lines, but also fiber, for the transmission of voice and
12 data traffic between a cell site (or “node”) and a switch, i.e., between a remote site
13 and a central site. The “switch” in the case of cell sites is often the Mobile
14 Telephone Switching Office (“MTSO”), which is in turn connected to the Public
15 Switched Telephone Network (“PSTN”).

16 While the details of each particular deployment vary, NewPath’s transport
17 services generally involve the transport of voice and data traffic via fiber optic
18 cables between a remote “node” and customer operating equipment in a NewPath
19 “hub” location and frequently between such Hub and an MTSO. A node generally
20 consists of optical conversion equipment, electrical meters and small antennas
21 mounted to existing vertical structures (e.g. utility poles, streetlights, etc.) In some
22 cases, NewPath constructs new “stealth” vertical structures (such as faux saguaro

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24 ³ Notably, OnFiber provided neither local dial tone service nor switched services. Moreover,
OnFiber indicated that it provided services solely on an Individual Contract Basis.

1 cacti or monuments). NewPath's nodes are much smaller than a typical "cell site"
2 and are much less visually obtrusive. They also emit much lower intensity radio
3 signals. At the node, NewPath's equipment converts messages received in the
4 form of a carrier's radio frequency signal from remote devices (cell phones,
5 computers, etc.) into an optical signal which NewPath then transports to the hub.
6 This signal is then transported (in some cases by NewPath and in other cases by
7 the carrier or a third party designated by the carrier) to the MTSO, being converted
8 back from optical signals to electrical signals at the terminus of the fiber path
9 along the route. From the MTSO the signal is transmitted over the PSTN to its
10 ultimate destination. Traffic intended to be received by remote devices in the area
11 of coverage of a NewPath node follow the reverse path. Under either scenario,
12 however, NewPath provides a "private line" transport service for the wireless
13 carrier or other NewPath customer as that service has been described and defined
14 by the Commission. Consistent with the definition of "private line services"
15 quoted above, what NewPath's DAS does is to connect its carrier customer's site
16 at the PSTN end of NewPath's system to the site where the carrier's signal can be
17 received from the remote devices served by the carrier.

18 Additionally, NewPath provides "backhaul services" that are unrelated to
19 NewPath's proposed DAS system. Indeed, NewPath has already secured a
20 contract to provide backhaul services to a wireless carrier in Arizona. In this
21 scenario, NewPath would be transporting carrier traffic from an existing
22 traditional cell site to a MSTO. NewPath would deploy fiber as part of this service
23 which would replace existing T1 lines that are currently leased, usually, from the
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1 incumbent local exchange carrier. This T1 service is fairly expensive and carriers
2 need additional capacity as end users begin to subscribe to data plans taxing the
3 existing telecommunications networks. Because fiber is more efficient and cost
4 effective, NewPath fiber backhaul service represents a needed alternative to T1
5 lines for wireless carriers and provides competition to existing
6 telecommunications providers in Arizona.

7 NewPath is also seeking authorization to provide private line service to non-
8 carriers. NewPath anticipates that it will deploy over 200 miles of fiber optic
9 cable for its Scottsdale project. Due to the increased efficiency and technical
10 superiority of fiber over copper lines, NewPath will be able to offer the excess
11 capacity to companies, institutions, campus environments and other interested
12 persons seeking private line service such as hospitals, universities, apartment
13 complexes, government entities and other users. *See* Trans. 45.

14 For example, NewPath is currently planning an institutional network in
15 Colorado that will connect two government buildings. NewPath would like to
16 offer the same type of service in Arizona and seeks authorization to do so in its
17 pending Certificate of Convenience and Necessity (“CC&N”) application. These
18 services are already offered by interexchange carriers (“IXCs”) and competitive
19 local exchange carriers (“CLECs”) in Arizona.⁴ As Mr. Fimbres noted at the public
20 hearing held on February 18, 2009, this is an extremely competitive market.

21 ⁴ Staff noted in their Staff report for OnFiber Carrier Solutions Services that “Interexchange
22 carriers (“IXCs”) hold a substantial share of the private line service market. Also, a number of
23 ILECs and CLECs have been authorized to provide private line service. The Applicant will be
24 entering the market as an alternative provider of private line and, as such, the Applicant will have
to compete with several existing companies in order to obtain customers.” OnFiber Staff Report,
cited *supra*.

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As such, NewPath provides a telecommunications service and both federal courts and state regulatory bodies have routinely concluded the same.⁵ DAS providers have been issued statewide certificates throughout the country and have been authorized to provide telecommunications service.⁶ Indeed, Staff testified on February 18th as follows: "...though NewPath is a unique applicant, what they

⁵*NewPath Networks, LLC Certificate of Public Convenience and Necessity in the State of Nevada, Docket No. 06-09005* ("The Public Utilities Commission of Nevada [] hereby grants, pursuant to the Commission's decision on October 25, 2006, NewPath Networks, LLC the authority to operate as a competitive provider of telecommunications services, providing facilities based interexchange and facilities-based intraexchange services within the state of Nevada."); *In the Matter of the Application of NewPath Networks, LLC, a New Jersey limited liability company, for a Certificate of Public Convenience and Necessity to Provide InterLATA and IntraLATA Telecommunications Service in California as a Facilities-based Carrier*, D. 04-11-005, 2004 Cal. PUC LEXIS 518 (Sept. 21, 2004) (A certificate of public convenience and necessity is granted to NewPath Networks, LLC to operate as a facilities-based carrier of inter-Local Access and Transport Area (LATA) and, to the extent authorized by Decision 94-09-065, intra-LATA telecommunications services offered by communication common carriers in California . . ."). See also, e.g., *NextG Networks of N.Y., Inc. v. City of New York*, 513 F.3d 49, 50 (2d Cir. N.Y. 2008) ("NextG, a wholesale provider of telecommunications services, offers other wireless carriers a method for extending wireless coverage to dead spots"); *NextG Networks of Cal. v. County of L.A.*, 522 F. Supp. 2d 1240, 1243 (C.D. Cal. 2007) ("Plaintiff is a communications service provider and a "telephone corporation" as defined by California law. Specifically, Plaintiff holds a "Certificate of Public Convenience or Necessity" from the California Public Utilities Commission, which authorizes it to operate as a telephone corporation under California law."); *NextG Networks of Cal., Inc. v. City of San Francisco*, 2006 U.S. Dist. LEXIS 36101 (N.D. Cal. June 2, 2006) ("Plaintiff NextG is a Delaware corporation with its principal place of business in Milpitas, California. On January 30, 2003, the California Public Utilities Commission ("CPUC") granted NextG's application for a certificate of public convenience and necessity ("CPCN") to provide telecommunication services"); *NewPath Networks, LLC v. City of Irvine*, 2008 U.S. Dist. LEXIS 72833 (C.D. Cal. 2008) ("NewPath is a competitive local exchange carrier which provides service to wireless communications carriers . . ."); *NextG Networks of Cal., Inc. v. City of San Francisco*, 2006 U.S. Dist. LEXIS 36101 (N.D. Cal. June 2, 2006) ("The City does not dispute that NextG provides wireless telecommunications services").

⁶ NextG Networks, for example, is authorized to provide service in 33 states. See <http://www.nextgnetworks.net/corporate/regulatoryaffairs.html>. ExteNet Systems has been authorized in 23 states. See <http://www.extenetsystems.com/communities/regulatory.html>.

1 seek from the standpoint of a CC&N, certificate of convenience and necessity,
2 there is nothing unique about that.” Trans. 64:21-25.

3 In considering whether or not the Commission may be preempted from
4 regulating NewPath or any other DAS provider, as contended by the Towns, it is
5 important to note that DAS served merely as a transport mechanism for services
6 provided by wireless carriers or other NewPath customers.⁷ While NewPath
7 employs the use of antennas as a specialized means of providing its private line
8 service, NewPath has no control over its customer’s communications signals
9 between the end user and the antenna. All aspects of the wireless transmissions
10 sent or received through those antennas are controlled by NewPath’s wireless
11 carrier customers, including the frequency, the power, the technology used for
12 encoding signals and the content and timing of the signals. NewPath therefore
13 does not provide a “mobile service” as that term is defined under 47 U.S.C. §
14 153(27) of the Communications Act (see below). NewPath’s system merely
15 transmits the messages it receives (at either the MTSO, hub or node) to a
16 destination defined by NewPath’s customer. In essence, NewPath’s facilities act
17 as a “dumb pipe.”

18 Significantly, NewPath does **not** own wireless spectrum. The definitions of
19 CMS and PMS are both spectrum-oriented. These terms are defined in § 332 (d) of
20 the Communications Act as follows: “commercial mobile service” means any
21 mobile service . . . that is provided for profit and makes interconnected service
22 available (A) to the public or (B) to such classes of eligible users as to be

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24 ⁷ Indeed, NewPath is not required to register with the Communications Commission (“FCC”) or
maintain any FCC licenses to provide its specialized telecommunications service.

1 effectively available to a substantial portion of the public, as specified by
2 regulation of the Commission” and “private mobile service” means “any mobile
3 service . . .that is not a commercial service or the functional equivalent of a
4 commercial mobile service, as specified by regulation of the Commission.”
5 Finally, the term “mobile service” is defined in § 153(27) of the Communications
6 Act as follows:

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

21 47 U.S.C. § 153(27). As outlined in the above technical description of NewPath’s
22 proposed private line services, NewPath does **not** provide a “*radio* communication
23 service carried on between mobile stations or receivers and land stations.”

24 NewPath’s DAS system merely transports a customer’s message along a defined
route. While NewPath’s “dumb pipe” incorporates the use antennas, NewPath does
not own spectrum and NewPath’s customers continue to controls all aspect of the
system between the “mobile station” and the “land station.” While the FCC may
have concluded that “all mobile services are within the ambit of § 332, the fact of

1 the matter is that NewPath simply does not (and cannot) provide mobile services.
2 See *In the Matter of Implementation of Section 3(N) and 332 of the*
3 *Communications Act, Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 1411
4 (March 7, 1994)(hereinafter “the CMRS Order”), p. 10, ¶ 34. However, NewPath,
5 therefore, is not providing a “mobile service.” Further, the fact that the FCC is
6 seeking to require DAS providers to provide backup battery power is irrelevant to
7 the jurisdictional question currently before the Commission. The FCC’s so-called
8 “Backup Power Rule” is unconcerned with precise regulatory classifications and is
9 platform agnostic. *In the Matter of Recommendations of the Independent Panel*
10 *Reviewing the Impact of Hurricane Katrina on Communications Networks*, 2007
11 WL 2903938, 14, 22 F.C.C.R. 18013, 18030, 22 FCC Rcd. 18013-18031, 22 FCC
12 Rcd. 18013. For example, the rule also purports to include Local Exchange
13 Carriers, who certainly cannot be characterized as wireless carriers. The reference
14 to the FCC’s “Backup Power Rule” is a red herring with no bearing on the
15 question at hand.

16 The Federal Communications Commission (“FCC”) initiated a rulemaking
17 in 1994 to further clarify the definitions of CMS and PMS. *CMRS Second Report*
18 *and Order*, cited *supra* note 1. The FCC concluded in that rulemaking that the
19 following services would be deemed “mobile services”: (1) public mobile services
20 (Part 22), (2) mobile satellite services (Part 25), (3) mobile marine and aviation
21 services (Parts 80 and 87), (4) private land mobile services (Part 90), (5) personal
22 radio services (Part 95), and (6) all personal communications services licensed or
23 otherwise made available under Part 24. *Id.* at 1509. The applicable rules adopted
24

1 in this proceeding regarding commercial mobile service can be found at 47 C.F.R.
2 § 20.3 and 20.7. The FCC’s rulemaking defined private mobile radio service as a
3 “mobile service that is neither a commercial mobile radio service nor the
4 functional equivalent of a service that meets the definition of a commercial mobile
5 service.” *Id.* at 1534. The applicable rules adopted in this proceeding regarding
6 private mobile service can be found at 47 C.F.R. § 20.3.

7 In sum, NewPath does not provide either a CMS or a PMS as those terms
8 have been defined under federal law. NewPath provides telecommunications
9 services including transport and backhaul services to both carriers and non-carriers
10 and, therefore, should be subject to the jurisdiction of the Commission.
11

12 **c. NewPath is qualified to provide telecommunication service in the**
13 **State of Arizona and the grant of its CC&N is in the public interest.**

14 Section 253, cited *supra*, protects telecommunications companies like
15 NewPath that seek to provide telecommunications services from being prohibited
16 from doing so. 47 U.S.C. § 253(a). That restriction is qualified in that it does not
17 prevent states from, *inter alia*, imposing requirements, such as a CC&N, that are
18 designed to protect the public safety and welfare. 47 U.S.C § 253(b). However,
19 the exercise of that authority must be done on a “competitively neutral basis.” *Id.*;
20 *see Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004); *In re Federal-State*
21 *Joint Board on Universal Service*, 15 FCC Rcd. 15175, ¶ 18 (2000) (“While state
22 commissions clearly have the authority to deny requests for ETC designation
23 without running afoul of section 253, the denials must be based on the application
24

1 of competitively neutral criteria that are not so onerous as to effectively preclude a
2 prospective entrant from providing service”).

3 The past decisions of the Commission clearly demonstrate that the
4 Commission is willing to grant CC&Ns to entities proposing the same types of
5 services as those proposed by NewPath. The Commission has issued CC&Ns to
6 over 60 Competitive Local Exchange Carriers (“CLECs”),⁸ including “carrier’s
7 carriers,” private line service providers, and data transport service providers.⁹
8 Indeed, existing IXC’s and Regional Bell Operating Companies (“RBOCs”) such
9 as Qwest provide private line service as part of the existing suite of
10 telecommunications services offered in Arizona. In 2004, the Commission
11 determined that they had jurisdiction over “purely” private line service providers
12 when it granted a CC&N to OnFiber Carrier Service, Inc. Decision No. 67062,
13 cited *supra*. Notably, OnFiber provided neither local dial tone service nor
14 switched services. Moreover, OnFiber sought authorization to provide services
15 solely on an Individual Contract Basis.

16 The Commission has subsequently issued CC&Ns to a number of private
17

18 ⁸ See Regulated Utility List available at [www.cc.state.az.us/divisions/
19 utilities/UTILITYLIST.asp](http://www.cc.state.az.us/divisions/utilities/UTILITYLIST.asp)

20 ⁹ See, e.g., *PNG Telecommunications, Inc.*, 2008 Ariz. PUC LEXIS 215, Docket No. T-03121A,
21 Decision No. 70643 (issued December 17, 2008); *IPC Network Service, Inc.*, 2008 Ariz. PUC
22 LEXIS 78, Docket No. T-20457A, Decision No. 70196 (issued March 20, 2008); *GILA Local
23 Exchange Carrier*, 2007 Ariz. PUC LEXIS 253, Docket No. 20515A, Decision No. 70039
24 (issued December 4, 2007); *Neutral Tandem-Arizona, LLC*, 2007 Ariz. PUC LEXIS 87, Docket
No. T-04298A, Decision No. 69417 (issued April 16, 2007); *360Networks (USA), Inc.*, 2007
Ariz. PUC LEXIS 34, Docket No. T-03777A, Decision No. 69240 (issued January 19, 2007);
AZX Connect, LLC, 2006 Ariz. PUC LEXIS 57, Docket No. T-04315A, Decision No. 68666
(issued April 20, 2006); *ACC Telecommunications, LLC*, 2006 Ariz. PUC LEXIS 46, Docket No.
T-04282A, Decision No. 68650 (issued April 12, 2006).

1 line service providers. Companies such as Sunesys, Inc. (“Sunesys”) and Baldwin
2 County Internet/DSSI Service, LLC (“BCI”) have been granted CC&Ns from the
3 Commission. *See Sunesys Inc.*, 2008 Ariz. PUC LEXIS 46, Docket No. T-
4 20456A, Decision No. 70292 (issued April 24, 2008); *Baldwin County*
5 *Internet/DSSI Service, LLC*, 2008 Ariz. PUC LEXIS 190, Docket No. T-20544A,
6 Decision No. 70615 (issued November 19, 2008). BCI, for example, provides
7 telecommunications transport services to both carrier customers (such as CLECs,
8 ILECs and wireless carriers) and non-carrier customers (such as cable television
9 operators and data communication companies). *See* Staff Report dated September
10 5, 2008. BCI transports, among other things video, internet/data and VoIP
11 communications services. *Id.* BCI also back-hauls data traffic to local central
12 offices for entry to the public switched telephone network. *Id.* BCI maintained that
13 it needed a CC&N because (1) it was crossing a PROW and (2) it was providing
14 service to “non-carrier” customers.

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

21 As stated above, the Commission awarded a CC&N to NewPath’s
22 competitor, NextG. As a result, NextG has successfully negotiated franchises with
23 localities in Arizona and has offered its DAS service to its customer carriers.

24

1 Moreover, the Commission is currently reviewing CC&N applications for the
2 following DAS providers: (1) ATC Outdoor DAS, LLC (Docket Number T-
3 20595A) and (2) ExteNet Systems, Inc. (Docket Number T-20597A). In fact, a
4 Recommended Order and Opinion (“ROO”) was recently issued for ExteNet, a
5 competitor to NewPath offering the same type of telecommunications service
6 (DAS), concluding that “ExteNet Systems, Inc., is a public service corporation
7 within the meaning of Article XV of the Arizona Constitution and A.R.S. 540-281
8 and 40-282” and “[t]he Commission has jurisdiction over ExteNet Systems, Inc.,
9 and the subject matter of this application.”¹⁰ ExteNet ROO issued September 3,
10 2009 at p. 8.

11 The Commission’s assertion of jurisdiction over private line service
12 providers that provide DAS is consistent with sister state utility commissions.
13 While NewPath’s precise regulatory classification has varied from state-to-state
14 depending on the applicable statutory regime in place, NewPath and its
15 subsidiaries have sought and obtained authorization to provide
16 telecommunications services from no less than 16 statewide agencies with
17 regulatory authority over telecommunications providers and public utilities. *See*
18 chart outlining certificates/registrations for NewPath and its subsidiary (InSite
19 Solutions, LLC) attached as Exhibit 1. Further, NewPath’s competitor NextG
20 Networks, has obtained statewide authority to operate in no less than 33 states and
21 another DAS company, ExteNet, has obtained authorization in no less than 23

22 _____
23 ¹⁰ Unlike ExteNet, NewPath’s business plan is not limited to providing private line service to
24 campus environments (i.e., universities, resorts, state buildings, hospitals) and as such is not
requesting that its CC&N be limited in this manner. Regardless of location, the Commission
retains jurisdiction over private line services.

1 states.¹¹ All together, 33 of the 50 states have asserted jurisdiction over DAS as a
2 telecommunications service to date and to NewPath's knowledge, no statewide
3 regulatory agency has held that it was preempted under federal law from
4 regulating DAS.

5 In addition to the companies listed above, private line services are currently
6 being offered by IXC's, ILEC's and CLEC's in Arizona who connect traditional cell
7 sites to MTSOs and the PSTN. Like NewPath, these telecommunications
8 providers are transmitting the messages of wireless carriers. However, neither the
9 FCC nor any state commission has held that carriage of this mobile traffic
10 transforms the carriers into providers of a "mobile service." As previously
11 explained, the term "mobile service," which is defined under 47 U.S.C. § 153(27)
12 of the federal Communications Act, is reserved for companies that offer
13 Commercial Mobile Radio Service ("CMRS") or Private Mobile Radio Service
14 ("PMRS"), services that NewPath cannot be authorized by the FCC to provide
15 because it does **not** own spectrum. Like these landline companies, NewPath is a
16 transport conduit for this traffic.

17 In sum, NewPath provides private line services, a telecommunications
18 service that the Commission has jurisdiction over as evidenced by the multitude of
19 companies, including traditional landline companies, offering transport services
20 for wireless carriers in Arizona pursuant to a validly issued CC&N by the
21 Commission. Moreover, denial NewPath's CC&N would likely violate § 253 in
22

23 ¹¹ For a list of states where these two companies have received authorization, you may go to
24 www.nextgnetworks.net/corporate/regulatoryaffairs.html and
www.extenetsystems.com/communities/regulatory.html.

1 that it would not be competitively neutral given the Commission's longstanding
2 jurisdiction over telecommunications providers offering similar services. The
3 Town's do not present the Commission with any basis for any disparate treatment
4 of NewPath that is not competitively neutral.

5
6 **II. THE COMMISSION'S REGULATORY AUTHORITY IS REAL**
7 **AND NOT ILLUSORY**

8
9 As previously noted, the Commission has concluded, as a matter of law, that
10 it has jurisdiction over "purely" private line services. Decision No. 67062 (issued
11 June 25, 2004); Staff Report dated April 9, 2004, *OnFiber Carrier Services, Inc.*,
12 Docket No. T-03874A-03-0766. Indeed, OnFiber was granted a CC&N despite the
13 fact that it did not provide dial tone services or switched services and was offering
14 service on an Individual Contract Basis. Further, the fact that the Commission may
15 not have a precise regulatory definition for "transport or backhaul services" is
16 irrelevant. These malleable terms are covered under the broader category of
17 "private line services," a telecommunications service that the Commission
18 undoubtedly has jurisdiction over. While NewPath certainly competes with other
19 CLECs offering private line service, it does not offer the same range of services
20 (for example, dial tone service) that other CLECs may offer. As such, NewPath
21 and other private line service providers, is not required to comply with certain
22 regulations applicable to other CLECs (such as contributing to the Universal
23 Service Fund). This fact, however, does not mean that NewPath is not devoid of
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1 actual regulation by the Commission.

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**III. THE TOWN OF PARADISE VALLEY’S UNDERGROUNDING
REQUIREMENT IS PREEMPTED BY FEDERAL LAW AS
APPLICABLE TO NEWPATH’S DAS.**

The Paradise Valley Utility Undergrounding Ordinance, if strictly applied to NewPath and required undergrounding of all of NewPath’s equipment, including antennas, would constitute a prohibition in violation of 47 U.S.C. § 253. *See Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008).

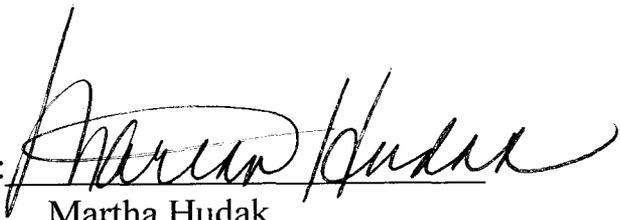
Paradise Valley states in their Hearing Memorandum that the Town is “actively managing its rights-of-way so as to remove aerial facilities...actively engaged in undergrounding of all utilities to enhance the aesthetic appeal of the Town” and that “NewPath’s expressed interest in placing over 48 antennas within the Town’s right-of-way conflicts with the Town’s safety and aesthetic concerns and could negate the many years of hard work that have kept intact utility undergrounding requirements.” Paradise Valley cites *APS v. Town of Paradise Valley*, 125 Ariz. 447 (1980) for the proposition that the Town is authorized “to require undergrounding of utilities.” Paradise Valley also states that the “issuance of a CCN would allow NewPath to utilize its status as a ‘utility’ to erect new above-ground cellular antenna in the Town’s rights-of-way.” Paradise Valley continues by urging the Commission to ensure that their actions “do[] not conflict

1 with the Town's long standing policy of *prohibiting* the installation of new aerial
2 utilities" (emphasis added). It should initially be noted that NewPath has worked,
3 and continues to work, with the Towns and their residents to ensure that proposed
4 facilities are designed with antennas located on existing vertical structures within
5 the PROW, when possible, so that they are "stealth" (e.g. on existing traffic
6 signals, light poles, street signs, etc.). This commitment to work with the
7 municipality and its residents is most clearly demonstrated by the City of
8 Scottsdale's withdrawal of its intervention in this matter due to resolution of
9 concerns articulated by both the City and its residents. Most significantly, as a
10 result of extensive public outreach efforts, NewPath recently has been granted a
11 letter of authorization to proceed with construction by the Grayhawk Community
12 Association in Scottsdale, one of the most vocal opponents of NewPath's CC&N
13 application at the public hearings held by the Commission in February and April
14 of this year. Moreover, NewPath has sought to work within each of the Town's
15 existing regulatory frameworks. *See* Trans. 28:8-11 ("it is not our intent to deploy
16 cell sites or nodes in areas that we haven't found a consensus on design and
17 location.") This concerted strategy is consistent with Staff's testimony on February
18 18th. *See* Trans. 15-16. NewPath's antennas must be elevated so that they can
19 properly function. Paradise Valley correctly points out that the District Court
20 decision in *Sprint v. County of San Diego* was overturned by the Ninth Circuit
21 Court of Appeals. *Sprint Telephony v. County of San Diego* 543 F.3d 572 (2008).
22 However, there is a significant omission in Paradise Valley's analysis of that case
23 that is directly on point -- that is the Ninth Circuit's noting that an ordinance
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Dated: September 14, 2009

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Exhibit 1

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<u>STATE</u>	<u>NEWPATH ENTITY HOLDING CERTIFICATE/REGISTRATION</u>	<u>TYPE OF CERTIFICATE/REGISTRATION</u>
California	NewPath Networks, LLC	Certificate of Public Convenience and Necessity in Order to Provide Full Facilities-Based Competitive Local Exchange, Access and Non-Dominant Interexchange Services
Florida	InSite Solutions, LLC	Registered as Intrastate Interexchange Telecommunications Company
Georgia	NewPath Networks, LLC	Certificate of Authority to Construct or Operate a Telephone Line, Plant or System
Iowa	InSite Solutions, LLC	Registered as an Intrastate Interexchange Telecommunications Company
Maryland	InSite Solutions, LLC	authority to provide non-switched facilities-based interexchange telecommunications services
Minnesota	NewPath Networks, LLC	Certificate of Authority to Provide Local Niche Services
Missouri	NewPath Networks, LLC	Certificate of Authority to Provide Interexchange and Non-switched Local Telecommunications Services
Nevada	NewPath Networks, LLC	Authority to operate as a competitive provider of telecommunications services, providing facilities-based interexchange and facilities-based intraexchange services
New Jersey	InSite Fiber of New Jersey, LLC	Certificate of Public Convenience and Necessity to provide non-switched facilities-based interexchange and dedicated access intrastate

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		telecommunications services
New Mexico	NewPath Networks, LLC	Certificate of Registration to provide competitive local exchange telecommunications services
New York	InSite Solutions, LLC	Certificate of Public Convenience and Necessity to operate as a facilities-based provider and reseller of telephone service without authority to provide local exchange service
North Carolina	InSite Solutions, LLC	Certificate to provide intrastate interexchange telephone service
Oregon	NewPath Networks, LLC	Application for a Certificate of Authority to Provide Telecommunications Service in Oregon and Classification as a Competitive Provider
Pennsylvania	InSite Solutions, LLC	Certificate of Public Convenience for telecommunications services as a Competitive Access Provider
Texas	NewPath Networks, LLC dba N Path Networks LLC	Registration as an Interexchange Carrier
Virginia	InSite Fiber of Virginia, Inc.	Interexchange and Dedicated Access Service

1 Original and thirteen copies filed this 14th day of September, 2009 with:

2

ARIZONA CORPORATION COMMISSION

3

Docket Control

1200 West Washington Street

4

Phoenix, AZ 85007

5 A COPY of the foregoing mailed this 14th day of September, 2009 with:

6

The Honorable Yvette B. Kinsey

Administrative Law Judge

7

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