

Decision \_\_\_\_\_

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of NewPath Networks, LLC  
(U-6928-C) for Authority to Engage in  
Ground-Disturbing Outside Plant construction  
in Compliance with Decision 06-04-030.

Application 06-12-021  
(Filed December 19, 2006)

**OPINION GRANTING NEWPATH NETWORKS, LLC  
A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

**Summary**

This decision grants the application<sup>1</sup> of NewPath Networks, LLC (NewPath) for authorization to engage in ground-breaking construction in the Caltrans right-of-way along a portion of U. S. Highway 50 in El Dorado County, in order to deploy a fiber-fed Distributed Antenna Communications System (DAS) (the Highway 50 Project).

We also find that the project, as mitigated, will not have significant adverse effects on the environment and approve the Initial Study/Mitigated Negative Declaration (ISMND) prepared by Commission staff for the project, as the Lead Agency under the California Environmental Quality Act (CEQA).

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<sup>1</sup> The application was filed on December 19, 2006. In Resolution ALJ 176-3185, dated January 11, 2007, we preliminarily categorized this application as ratesetting and preliminarily determined that a hearing is not necessary. No protests to the application were filed.

**Background**

NewPath, a New Jersey limited liability company, holds a certificate of public convenience and necessity (CPCN) authorizing the company to provide full facilities-based local exchange and interexchange services in this state.<sup>2</sup>

In D.06-04-030, we amended NewPath's original CPCN, which authorized the provision of limited facilities-based interexchange services only, to authorize the provision of full facilities-based local exchange and interexchange services. A full facilities-based CPCN is required when a telecommunications provider wishes to perform construction other than very minor activities, such as the installation of switches in existing buildings or structures.

In proceedings resulting in the adoption of D.06-04-030, NewPath stated that its facilities-based DAS projects would consist of: (a) predominantly aerial fiber optic facilities and the installation of compact "nodes" on existing utility poles, (b) a minor amount of ground-disturbance (100-200 feet) associated with connecting equipment enclosures on private property within the aerial right-of-way; and (c) aerial fiber runs of short distances, rarely exceeding 1,000 feet. All of NewPath's facilities would be located within public utility rights of way (except for ingress and egress), and the projects and facilities would be widely separated geographically. Therefore, NewPath proposed an expedited process for Commission determination of whether NewPath's facilities-based projects are exempt from review under CEQA, in order to receive Commission authorization to commence construction without unnecessary delays.

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<sup>2</sup> See D.06-04-030.

In D.06-04-030, we found that NewPath's facilities-based DAS projects were of a limited nature and would, in almost all circumstances, most likely qualify for an exemption from CEQA. We also determined that NewPath's proposed expedited process for Commission review of claimed CEQA exemptions for these projects was adequate for the Commission's purposes as a Lead Agency under CEQA, and is in the public interest. We therefore approved an expedited procedure for review of NewPath's proposed CEQA exemptions for its facilities-based projects.

Under the expedited process approved in D.06-04-030, NewPath is required to submit certain information to the Commission's Energy Division (ED) regarding its planned construction projects and the CEQA exemptions claimed to apply to these projects. ED will then review the information submitted by NewPath and determine whether the claimed CEQA exemption(s) applies. Within 21 days of NewPath's submittal of all required information, ED must either:

- Issue a Notice to Proceed with construction and file a Notice of Exemption with the State Clearinghouse, Office of Planning and Research; or
- Issue a letter of denial explaining the specific reasons that the claimed CEQA exemption(s) do not apply to the project.

If the ED determines that the proposed CEQA exemption(s) does not apply, NewPath must either redesign the project and reapply for a determination that a CEQA exemption(s) applies, or file a formal application with the Commission and undergo CEQA review for the project before commencing construction.<sup>3</sup>

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<sup>3</sup> D.06-04-030 also notes that the Commission is conducting a rulemaking proceeding regarding the application of CEQA to telecommunications entities in general. If the

*Footnote continued on next page*

**The Proposed Highway 50 Project**

In this application, Applicant seeks authorization to construct a fiber-fed DAS system along Highway 50 in El Dorado County. Before filing this application, NewPath followed the expedited procedure adopted in D.06-04-030 and attempted to obtain a determination from ED that this project is exempt from CEQA. However, ED determined that due to exceptional and unique circumstances, it was not appropriate to issue a Notice to Proceed in this instance and that a formal application and CEQA review is required in this case.

The Highway 50 project will begin east of Kyburz and end west of Strawberry. NewPath states in its application that the proposed project is needed to provide added diversity within the existing telecommunications system, and would ensure that existing systems remain compatible with future technology advances in fiber optic equipment. According to the application, the proposed project would provide greater bandwidth, multiple modes of communication compatible with existing and evolving systems, more predictable delivery of bandwidth, and greater control over the ordering, provisioning, and management of this bandwidth to better meet the growing bandwidth needs of customers. Finally, the communications system would provide cellular phone coverage in an area that currently does not provide such coverage.

NewPath further states in the application that the proposed project would expand and enhance California's national and international telecommunications access and the nation's existing and future demands for telecommunications services by enabling more networks to exchange traffic across California and

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Commission modifies the above procedure in the rulemaking, NewPath must comply with the new procedure.

enhancing the reliability thereof by using high-quality, state-of-the-art fiber optic technology. The proposed project would also increase competition among existing telecommunications carriers, and promote opportunities for economic growth in California as businesses shift their focus to information services and technology.

In addition, according to the application, the Highway 50 project will significantly benefit Caltrans and California motorists, because NewPath will install 15 new lightpoles in currently unlit vehicle turnouts along Highway 50, which will increase public safety in these areas. Caltrans also plans to install video cameras on some of the lightpoles in order to monitor traffic and weather conditions on Highway 50, and will use some of NewPath's facilities to carry video signals from the cameras on the poles to a handoff at the Caltrans Kyburz Maintenance Yard, which will also promote the safety of motorists and the public.

### **Environmental Review**

The CEQA (Public Resources Code Section 21000, et seq., hereafter "CEQA"), applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereinafter, "CEQA Guidelines," Section 15002.)

Since the proposed project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (i.e., the Commission must act on the application before it for an approval of a construction project subject to Pub. Util. Code §1001), this Commission must act as either a Lead or a Responsible Agency under CEQA. The Lead Agency is the

public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)).

The Commission is the Lead Agency for this proposed project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the environmental documents and findings prepared by staff pursuant to CEQA before acting upon or approving the project (CEQA Guidelines Section 15074(b)).

NewPath's application to construct the Highway 50 project includes the Proponent's Environmental Assessment (PEA) prepared by NewPath pursuant to Rules 2.4 of the Commission Rules of Practice and Procedure (Rules). The proposed project would consist of the following four phases:

- Phase 1: Installation of 42,000 linear feet (7.96 miles) of fiber optic polyvinyl chloride (PVC) conduit, installation of 42,000 linear feet (7.96 miles) of electrical PVC conduit, and hand holes. The fiber optic PVC conduit and electrical PVC conduit would be installed in separate trenches. Installation will occur through trenching and boring.
- Phase 2: Installation of 15 fiber-fed antenna nodes with electrical meter pedestals, repeater enclosures, fiber optic splice boxes, and electrical splice boxes.
- Phase 3: Installation of a communications hub station in the parking lot of Caltrans' Kyburz Maintenance Yard.
- Phase 4: Installation and splicing of fiber optic cable and electric conductor.

Under ordinary circumstances, the project activities proposed by NewPath would generally fall within its current existing authority to install fiber optic DAS facilities and related equipment, subject to ED's finding that the project is exempt from CEQA and issuing a Notice to Proceed pursuant to the expedited process adopted in D.06-04-030. However, the environmental setting for this

proposed project caused ED, out of an abundance of caution, to reject the informal advice letter for this particular project in favor of a formal application and CEQA analysis. The proposed project lies within a California scenic highway, where utility facilities must generally be located underground. Commission staff opted to require a full CEQA analysis for the proposed project because of the need to install some of the facilities above-ground, which requires an exception to the general policy for scenic highways, and because significant work would occur within the right-of-way of a scenic highway.

As the Lead Agency for this project, the Commission staff prepared and issued on April 17, 2007, an ISMND pursuant to CEQA.<sup>4</sup> This ISMND reviewed the potential environmental impacts of the NewPath's project over the entire range of applicable environmental resources and concluded that the proposed project will not have a significant adverse effect on the environment. The ISMND was submitted to the State Clearinghouse at the Office of Planning and Research (OPR) and circulated to the Office of Historic Preservation; the Native American Heritage Commission; the El Dorado County Planning Department; and CalTrans, among other agencies. The comment period was from April 20, 2007, through May 21, 2007. In addition, a "Notice of Intent to Adopt a Negative Declaration" was published twice during two successive weeks in the local paper of record for the project area. No comments on the ISMND were received, from either the above agencies or from members of the public.

Based upon the ISMND, the proposed Highway 50 project, including the NewPath's proposed mitigation for certain project elements, would have no

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<sup>4</sup> A copy of the ISMND is attached as Attachment A

significant impacts in the areas of: aesthetics, agricultural resources, air quality, biological resources, cultural resources, geology and soils, hazards and hazardous materials, hydrology and water quality, land use planning, mineral resources, noise, population and housing, recreation, transportation and traffic, and utilities and service systems.

The Commission's ISMND identified a number of project elements that must be addressed as Conditions of Approval. These elements and conditions are:

- **Biology** – Mitigation measure B-1 will be implemented to minimize the impacts to common wildlife (ISMND, p. B-12); Mitigation Measure B-2 will be implemented to reduce impacts to common wildlife and raptors to less-than-significant (ISMND, p. B-12). Both of these measures were subject to informal consultation with the California Department of Fish and Game, and the US Fish and Wildlife Service.
- **Cultural Resources** – Mitigation Measure C-1 will be implemented if any signs of historic, archeological, or paleontological resources are observed during excavation or ground-disturbing activities (ISMND, p. B-14).
- **Hazards** – Mitigation Measure HM-1(a – g) will be implemented to minimize the possibility of a hazardous materials spill and improper handling of hazardous materials (ISMND, p. B-19); Mitigation Measure HM-2(a – c) will be implemented to minimize risks to workers and the public associated with the use of construction equipment, risk of fire, and vehicle collisions (ISMND, p. B-19); and Mitigation measure HM-3 will be implemented to minimize disruption and/or damage to other existing utilities (ISMND, p. B-19).

The Commission has independently reviewed the application by NewPath for authority to construct the Highway 50 project, including the ISMND prepared by Commission staff. The Commission finds that the ISMND was developed in accordance with CEQA and is adequate for the Commission's decision-making purposes as a Lead Agency pursuant to CEQA.

The Commission orders the filing of a Notice of Determination with the Office of Planning and Research pursuant to Public Resources Code Section 21152 and California Code of Regulations Section 15075, and makes the following findings:

- The ISMND was developed in accordance with CEQA and is adequate for the Commission's decision-making purposes as a Lead Agency pursuant to CEQA.
- On the basis of the whole record, including ISMND, there is no substantial evidence the project will have a significant effect on the environment; and
- ISMND reflects the Commission's independent judgment and analysis.

### **Discussion**

Based on the above, we find that approval of NewPath's proposed Highway 50 project is in the public interest, because the project will expand the availability of telecommunications services in California, help ensure that existing systems remain compatible with future technological advances in fiber-optic equipment, and will improve the safety of motorists and the public on Highway 50, without causing significant adverse effects on the environment, provided that mitigation measures required in the ISMND are implemented.

We therefore grant NewPath's application for authorization to construct the Highway 50 project, as described in the application, subject to the conditions stated in the ISMND.

### **Categorization and Need for Hearings**

In Resolution ALJ 176-3185, dated January 11, 2007, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received.

Given these developments, it is not necessary to disturb the preliminary determinations made in Resolution ALJ 176-3185.

**Waiver of Comment Period**

This application is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Public Utilities Code Section 311(g)(2), the otherwise applicable 30-day period for public review and comment is waived.

**Assignment of Proceeding**

John A. Bohn is the assigned Commissioner and Myra J. Prestidge is the assigned Administrative Law Judge.

**Findings of Fact**

1. Notice of the application was published in the Commission Daily Calendar on January 12, 2007. No protests have been filed.
2. NewPath holds a CPCN authorizing the provision of full facilities-based telecommunications services in this state.
3. Under D.06-04-030, NewPath is required to apply for Commission authorization to perform full facilities-based construction projects and to undergo CEQA review if, based on information submitted by NewPath, ED finds that the proposed project is not exempt from CEQA and therefore is unable to issue a Notice to Proceed with construction.
4. NewPath is applying for authorization to construct a fiber-fed DAS system along Highway 50 between Kyburz and Strawberry in El Dorado County (the Highway 50 Project).
5. Pursuant to the expedited procedure adopted in D.06-04-030, NewPath previously applied to ED for a determination that the Highway 50 project is exempt from CEQA and for authorization to proceed with construction, but ED did not issue a Notice to Proceed based on its determination that that a formal application and CEQA review should be required in this case.

6. ED determined that the Highway 50 project should undergo CEQA review because the project will be constructed in a right-of-way adjacent to a scenic highway, and certain project facilities will be constructed above-ground when, as a general policy, utility facilities along scenic highways must be located underground.

7. The Commission is the lead agency for the Highway 50 project under CEQA.

8. Commission staff prepared and issued an ISMND pursuant to CEQA on April 20, 2007.

9. The ISMND prepared by the Commission analyzed the potential environmental impacts of the Highway 50 project over the entire range of applicable environmental resources and concluded that the project would not have a significant adverse effect on the environment.

10. Commission staff filed the ISMND with the State Clearinghouse Office of Planning and Research on April 17, 2007, in order to circulate the ISMND for formal comment for 30 days from April 20, 2007 through May 31, 2007. No comments were received.

11. The Commission's ISMND identified a number of project elements that are required to be addressed by NewPath as Conditions of Approval. These elements were associated with avoiding impacts in the areas of Biology, Cultural Resources, and Hazards.

12. The Mitigation Measures outlined in the Commission's ISMND to address impacts in Biology (ISMND, p. B-12), Cultural Resources (ISMND, p. B-14), and Hazards (ISMND, p. B-19) are required mitigation and will be made Conditions of Approval for the Highway 50 project.

13. The Commission has independently considered the ISMND for NewPath's Highway 50 project in its decision-making process in accordance with the CEQA Guidelines Section 15096(f).

14. On the basis of the whole record, including the ISMND, the Commission finds that there is no substantial evidence the project will have a significant effect on the environment.

15. The Highway 50 project will increase the availability of telecommunications services in this state and will help ensure that existing systems remain compatible with future technological advances in fiber-optic equipment.

16. The Highway 50 project will also increase the safety of motorists and the public on Highway 50.

**Conclusions of Law**

1. The application is uncontested, and a public hearing is not necessary.
2. It is not necessary to disturb the preliminary determinations made in Resolution ALJ 176-3185 regarding the category of this proceeding and the need for a hearing.
3. The ISMND developed by Commission staff was prepared pursuant to CEQA and is adequate for the Commission's decision-making purposes.
4. Granting NewPath's application to construct the Highway 50 project, as described in the application and subject to the mitigation measures required by the ISMND, is in the public interest.
5. In order to expedite construction of the Highway 50 project, our approval of this application should be made effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. The application of NewPath Networks, LLC (NewPath) for authorization to construct a fiber-fed Distributed Antenna Communications System (DAS) along Highway 50 between Kyburz and Strawberry in El Dorado County (the Highway 50 Project), as described in the application, is granted, subject to the conditions below.
2. The Initial Study/Mitigated Negative Declaration (ISMND) prepared by Commission staff for the Highway 50 project is adopted.
3. Commission staff shall file a Notice of Determination for the ISMND with the State Office of Planning and Research within the time required by law.
4. The Mitigation Measures outlined in the Commission's ISMND on pages B-12, B-14, and B-19 are required as Conditions of Approval for the Highway 50 Project. NewPath must comply with these mitigation measures in its construction of the Highway 50 project.
5. NewPath's authorization to construct the Highway 50 project shall expire if not exercised within two years, unless this time is previously extended at least 30 days in advance by the Commission's Energy Division.
6. Our authorization for NewPath to construct the Highway 50 project may be revoked or modified, after giving notice to NewPath, if the public convenience, necessity, or health and safety so require.
7. Application 06-12-021 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.