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7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 NEWPATH NETWORKS, LLC, A NEW)
JERSEY LIMITED LIABILITY COMPANY,)

12 Plaintiff,)

13 v.)

14)
15 THE CITY OF DAVIS, CALIFORNIA, A)
GENERAL LAW MUNICIPALITY)

16 Defendant.)
17

Case No. 2:10-CV-00236-GEB-KJM

**ANSWER TO COMPLAINT BY
DEFENDANT CITY OF DAVIS**

18
19 Defendant City of Davis ("City") hereby answers Plaintiff NewPath Networks, LLC's
20 ("NewPath") Complaint as follows:

21 **PRELIMINARY STATEMENT**

22 1. Answering paragraph 1, the City admits that it issued NewPath 36 encroachment and
23 related permits to construct a proposed "distributed antenna system" ("DAS"). The City further
24 admits that the City Manager later rescinded all of these permits and the City Council affirmed the
25 rescission of the permits on January 19, 2010. NewPath then filed this lawsuit. The City further
26 admits that 37 permits were listed in the Rescission Notice, but City staff later determined that one
27 of the permits (permit #09-777002656) was not issued. The City is further informed and believes,
28 and on that basis, admits that NewPath's DAS would be leased to wireless carrier tenants like

1 metroPCS. As to NewPath's alleged status as a "telephone corporation," the City is informed and
2 believes, and on that basis admits, that NewPath is licensed by the California Public Utilities
3 Commission ("CPUC") as a "competitive local exchange carrier" ("CLEC") and was issued a
4 Certificate of Public Convenience and Necessity ("CPCN") by the CPUC on or about November 9,
5 2004 and that the CPCN was modified on or about April 13, 2006. With respect to NewPath's
6 summary and characterization of its CPCN, Modified CPCN and CPCN application, the City alleges
7 that these documents speak for themselves and are the best evidence of their respective content, and
8 on that basis, the City denies the remaining allegations in paragraph 1. In particular, the City denies
9 that NewPath's Modified CPCN authorizes New Path to construct its DAS in locations throughout
10 the state subject only to obtaining the required environmental review under CEQA. To the contrary,
11 the City alleges that the Modified CPCN, issued by the CPUC, requires NewPath to "comply with all
12 applicable rules adopted in the Local Exchange Competition proceeding ..., as well as other
13 applicable Commission rules, decisions, [General Orders], and statutes that pertain to California
14 public utilities, subject to the exemptions granted in this decision." The City is informed and
15 believes and on that basis alleges that there is at least one proceeding at the CPUC challenging the
16 CEQA and CPUC process related to another DAS provider called NextG. Except as expressly
17 alleged, the City lacks sufficient information or belief to be able to answer the allegations in the final
18 sentence of paragraph 1, and on that basis, denies each and every allegation therein. Except as
19 specifically admitted, the City denies each and every allegation in paragraph 1.

20 2. Answering paragraph 2, the City admits that NewPath met with several City staff
21 members in approximately January or February 2009 to discuss its proposed DAS project. The City
22 further admits that NewPath affirmatively represented to City staff that it was a public utility exempt
23 from the City's Wireless Telecommunication Facilities Ordinance, Davis Municipal Code (DMC)
24 §§ 40.29.0 ("Wireless Ordinance"), and that it need only obtain ministerial permits. The City further
25 alleges that NewPath made these representations to City staff notwithstanding NewPath's knowledge
26 that it had filed a lawsuit in the Central District entitled *NewPath Networks, LLC v. City of Irvine*,
27 U.S. District Court, Central District of California, Case No. SACV 06-550-JVS (ANx) and that this
28 lawsuit involved the types of local city permits required by NewPath and whether NewPath was

1 required to obtain discretionary permits, among other things. The City expressly denies that
2 NewPath's representations regarding its public utility status was correct, and instead alleges that
3 NewPath was issued ministerial encroachment permits in error because NewPath misled City staff
4 and because NewPath is subject to the City's Wireless Ordinance, including the reasonable time,
5 place and manner restrictions therein. The City further admits that City staff mistakenly issued
6 NewPath 36 encroachment and related building permits, and that those permits were issued in
7 September, October, and November 2009. The City is further informed and believes, and on that
8 basis, admits that NewPath filed a notice of proposed construction with the CPUC in November
9 2009 and that the CPUC sent NewPath a letter dated November 25, 2009, which NewPath refers to
10 as a "Notice to Proceed." With respect to NewPath's summary and characterization of the alleged
11 "NTP," the City alleges that the document attached as Exhibit 4 to the Complaint speaks for itself
12 and is the best evidence of its contents, and on that basis, the City denies each and every remaining
13 allegation in paragraph 2 regarding the content and meaning of the NTP. The City lacks sufficient
14 information and belief regarding NewPath's alleged expenses and costs and, on that basis, denies the
15 allegation in the last sentence regarding the \$1.5 million NewPath alleges it has spent. The City
16 further denies each and every remaining allegation in the last sentence of paragraph 2 – in particular
17 the City denies that NewPath's dealings with the City were in "good faith." Except as expressly
18 admitted, the City denies each and every allegation in paragraph 2.

19 3. Answering paragraph 3, the City admits that the City Manager issued a Stop Work
20 Notice on November 30, 2009. The City further admits that (1) NewPath complied with the Stop
21 Work Notice; (2) NewPath's attorney sent the letter attached as Exhibit 6 to the Complaint to the
22 City Attorney, Harriet A. Steiner; and (3) the City Manager issued a letter on December 5, 2009 to
23 NewPath rescinding all of NewPath's permits ("Rescission Letter"). With respect to NewPath's
24 remaining summary and characterization of the Rescission Letter, the City alleges that the
25 Rescission Letter speaks for itself and is the best evidence of its contents, and on that basis, the City
26 denies the remaining allegations in paragraph 3 regarding the Rescission Letter. Finally, the City
27 admits that NewPath was provided the opportunity to appeal the City Manager's decision to rescind
28 the permits pursuant to DMC 40.35 and that NewPath filed a timely appeal on December 15, 2009.

1 Except as specifically admitted, the City denies each and every remaining allegation in paragraph 3.

2 4. Answering paragraph 4, the City admits that NewPath submitted a substantial number
3 of documents to the City on January 14 and January 19, 2010. The City further admits that the City
4 Council held a duly noticed public meeting on January 19, 2010 to consider the appeal, considering
5 both written and oral testimony from staff, NewPath, and the public. Thereafter, the City Council
6 affirmed that the City Manager did not err in rescinding NewPath's permits and adopted Resolution
7 No. 10-010, Series 2010, including the Findings attached thereto. Except as specifically admitted,
8 the City denies each and every allegation in paragraph 4.

9 5. Answering paragraph 5, NewPath is primarily asserting legal conclusions as to the
10 relief it seeks in this action, and thus no response is required. If and to the extent that any response
11 is required, the City denies each and every allegation in paragraph 5.

12 6. Answering paragraph 6, the City expressly denies that NewPath is entitled to
13 expedited review under 47 U.S.C. § 332(c)(7)(B)(v) of the federal Telecommunications Act.
14 Further, the City denies each and every remaining allegation in paragraph 6.

15 **JURISDICTION, VENUE AND PARTIES**

16 7. Answering paragraph 7, the City admits that this Court has federal question
17 jurisdiction over NewPath's claims under the federal Telecommunications Act, but the City lacks
18 sufficient information and belief regarding NewPath's citizenship to determine whether diversity
19 jurisdiction exists, and on that basis denies the remaining allegations in paragraph 7 regarding
20 diversity jurisdiction. No answer is required as to the remaining allegations in paragraph 7 because
21 NewPath is merely asserting legal conclusions. To the extent an answer is required, the City denies
22 that NewPath is entitled to any relief under the statutes cited.

23 8. Answering paragraph 8, the City admits that it is a general law city located within this
24 judicial district and that the claims stated in the Complaint arose in this judicial district. Except as
25 specifically admitted, the City denies each and every allegation in paragraph 8.

26 9. Answering paragraph 9, the City admits that venue is proper in the Eastern District of
27 California.

28 10. Answering paragraph 10, the City lacks sufficient information or belief to be able to

1 answer the allegations therein, and on that basis, denies every allegation in paragraph 10. In
2 particular, the City admits that the CPUC has licensed NewPath as a CLEC, but lacks sufficient
3 information or belief as to the accuracy of that license to be able to answer the allegations in
4 paragraph 10.

5 11. Answering paragraph 11, the City admits that NewPath was issued a Certificate of
6 Public Convenience and Necessity ("CPCN") by the CPUC on or about November 9, 2004 and that
7 the CPCN was modified on or about April 13, 2006. With respect to NewPath's summary and
8 characterization of its CPCN and Modified CPCN, the City alleges that these documents speak for
9 themselves and are the best evidence of their respective content, and on that basis, the City denies
10 the remaining allegations in paragraph 11.

11 12. The City denies each and every allegation in paragraph 12.

12 13. The City admits the allegations in paragraph 13.

13 **FACTS**

14 **NEWPATH'S COMMUNICATIONS SERVICES**

15 14. The City denies each and every allegation in paragraph 14.

16 15. Answering paragraph 15, the City is informed and believes and, on that basis, admits
17 that NewPath provides "dump pipes" for personal wireless carriers to lease, but that NewPath does
18 not directly provide telecommunication service to consumers. The City lacks sufficient information
19 and belief as to the remaining allegations in paragraph 15 and, on that basis, denies each and every
20 remaining allegation in paragraph 15.

21 16. Answering paragraph 16, the City is informed and believes and, on that basis, admits
22 the allegations in the first two sentences therein. Except as specifically admitted, the City denies
23 each and every allegation in paragraph 16.

24 17. Answering paragraph 17, the City admits that NewPath does not provide cellular
25 service directly to consumers. Except as specifically admitted, the City denies each and every
26 allegation in paragraph 17.

27 18. Answering paragraph 18, the City lacks sufficient information and belief to be able to
28 answer the allegations therein and, on that basis, denies those allegations.

1 19. Answering paragraph 19, the City lacks sufficient information and belief to be able to
2 answer the allegations therein and, on that basis, denies those allegations.

3 20. Answering paragraph 20, the City is informed and believes and, on that basis, admits
4 the allegations therein.

5 21. Answering paragraph 21, the City admits that NewPath's proposed DAS project
6 would include 24 wireless antenna facilities (which NewPath calls "nodes") as more particularly
7 described in the respective permits. Except as specifically admitted, the City denies each and every
8 allegation in paragraph 21.

9 **THE FEDERAL COMMUNICATIONS ACT**

10 22. Answering paragraph 22, no answer is required because NewPath is simply
11 summarizing the federal Telecommunications Act. To the extent an answer may be required, the
12 City asserts that the Telecommunications Act speaks for itself and, on that basis, denies the
13 allegations in paragraph 22.

14 23. Answering paragraph 23, no answer is required as NewPath is simply quoting a
15 portion of a Congressional report on the Telecommunications Act. To the extent an answer may be
16 required, the City asserts that the Congressional report speaks for itself and, on that basis, denies the
17 allegations in paragraph 22

18 24. Answering paragraph 24, no answer is required as NewPath is simply quoting a
19 section of the Telecommunications Act.

20 25. Answering paragraph 25, no answer is required as NewPath is simply quoting a
21 section of the Telecommunications Act.

22 26. Answering paragraph 26, no answer is required as NewPath is simply quoting a
23 section of the Telecommunications Act.

24 27. Answering paragraph 27, no answer is required as NewPath is simply quoting a
25 section of the Telecommunications Act.

26 28. Answering paragraph 27 [sic], no answer is required as NewPath is simply quoting a
27 section of the Telecommunications Act.

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CALIFORNIA CONSTITUTION

29. Answering paragraph 28, no answer is required as NewPath is simply quoting California Constitution, article XII, § 8 of the California Constitution.

CALIFORNIA PUBLIC UTILITIES CODE

30. Answering paragraphs 29 through 39, no answer is required as NewPath is simply quoting certain sections (or portions thereof) of the California Public Utilities Code. The City alleges that section 7901.1, among other statutes, provides the City with express authority to regulate its rights of way with respect to users of the rights of way, including, but not limited to, providers such as NewPath. To the extent that NewPath is alleging that it has quoted all relevant sections (or portions thereof) of the California Public Utilities Code or that NewPath is a telephone company or a public utility, as defined under the California Public Utilities Code, the City denies such allegations.

CALIFORNIA CODE OF CIVIL PROCEDURE

31. Answering paragraph 40, NewPath is summarizing California Code of Civil Procedure section 1094.5. The City alleges that Code of Civil Procedure section 1094.5 speaks for itself as to the requirements for issuance of an administrative writ of mandamus and, on that basis, the City denies the allegations in paragraph 40.

32. Answering paragraph 41, no answer is required as NewPath is simply quoting portions of Code of Civil Procedure section 1094.5.

33. Answering paragraph 42, NewPath is summarizing California Code of Civil Procedure section 1085. The City alleges that Code of Civil Procedure section 1085 speaks for itself as to the requirements for issuance of a writ of mandamus and, on that basis, the City denies the allegations in the first sentence of paragraph 42. No answer is required as to the remaining sentences in paragraph 42 as NewPath is simply quoting Code of Civil Procedure section 1085.

DECLARATORY AND INJUNCTIVE RELIEF

34. Answering paragraph 43, the City admits that it rescinded NewPath's permits and that NewPath refutes the validity of that action. The City, however, alleges that the rescission was valid under state law and is not preempted by state or federal law. Except as specifically admitted and alleged, the City denies each and every allegation in paragraph 43.

1 35. Answering paragraph 44, the City denies each and every allegation therein.

2 **COUNT I – STATE PREEMPTION**

3 36. Answering paragraph 45, the City restates and reaffirms its answers to the allegations
4 of paragraphs 1 through 44 of the Complaint, above, as though fully set forth herein.

5 37. Answering paragraph 46, the first two sentences merely assert legal conclusions to
6 which no answer is required. As to the alleged diversity of citizenship, the City lacks sufficient
7 information and belief to be able to answer the third sentence in paragraph 46 and, on that basis,
8 denies each and every allegation therein.

9 38. Answering paragraph 47, no answer is required as NewPath is simply asserting a
10 legal conclusion. To the extent an answer may be required, the City alleges that the Legislature has
11 not preempted local time, place and manner regulations, but has instead preserved such authority,
12 including reasonable time, place and manner regulations over the siting of wireless facilities,
13 including, but not limited to, the types of wireless facilities proposed by NewPath. Except as
14 alleged, the City denies each and every allegation in paragraph 47.

15 39. Answering paragraph 48, the City denies each and every allegation therein.

16 40. Answering paragraph 49, the City admits that the CPUC has issued NewPath a
17 CPCN. Except as specifically admitted, the City denies each and every allegation in paragraph 49.

18 41. Answering paragraph 50, the City denies each and every allegation therein.

19 42. Answering paragraph 51, the City denies each and every allegation therein.¹

20 43. Answering paragraph 52, the City denies each and every allegation therein and
21 further denies that NewPath is entitled to the relief it requests in paragraph 52.

22 **COUNT II – IMPAIRMENT OF STATE FRANCHISE**

23 44. Answering paragraph 53, the City restates and reaffirms its answers to the allegations
24 of paragraphs 1 through 52 of the Complaint, above, as though fully set forth herein.

25 45. Answering paragraph 54, the first two sentences merely assert legal conclusions to
26 which no answer is required. As to the alleged diversity of citizenship, the City lacks sufficient
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28 ¹ Paragraph 51 of the Complaint appears to contain a typographical error – referencing "the City of Irvine's zoning requirements." The City assumes NewPath intended to refer to the City of Davis, and on that basis, denies the allegations therein.

1 information and belief to be able to answer the third sentence in paragraph 54 and, on that basis,
2 denies each and every allegation therein.

3 46. Answering paragraph 55, no answer is required as NewPath is simply quoting
4 California Public Utilities Code section 7901.

5 47. Answering paragraph 56, no answer is required as NewPath is simply quoting
6 portions of California Public Utilities Code section 7901.1.

7 48. Answering paragraph 57, the City admits that the CPUC has licensed NewPath as a
8 CLEC through the issuance of the CPCN referenced above, but lacks sufficient information or belief
9 as to the accuracy of that license to be able to answer the allegations in paragraph 57 and, on that
10 basis, denies each and every allegation in paragraph 57.

11 49. Answering paragraph 58, the City lacks sufficient information and belief to be able to
12 answer the allegations therein and, on that basis, denies each and every allegation in paragraph 58.

13 50. Answering paragraph 59, the City admits that the CPUC has issued NewPath a
14 CPCN. Except as specifically admitted, the City denies each and every allegation in paragraph 59.

15 51. Answering paragraph 60, the City admits that the CPUC has issued NewPath a
16 CPCN. Except as specifically admitted, the City denies each and every allegation in paragraph 60.

17 52. Answering paragraph 61, with respect to NewPath's characterization of California
18 Public Utilities Code section 7901, the City alleges that section 7901 and the cases cited by NewPath
19 speak for themselves and, on that basis, denies each and every allegation in paragraph 61.

20 53. Answering paragraph 62, with respect to NewPath's characterization of California
21 Public Utilities Code sections 7901 and 7901.1, the City alleges that these sections speak for
22 themselves and, on that basis, the City denies each and every allegation in paragraph 62.

23 54. Answering paragraph 63, the City denies that the quoted portion of the CPUC's *Order*
24 *Instituting Rulemaking Re Competition for Local Exchange Service*, Dec. No. 97-02-051, reflects the
25 CPUC's complete rulemaking regarding local authority to regulate the time, place, and manner of the
26 right-of-ways within its jurisdiction and, further denies each and every allegation in paragraph 63.

27 55. Answering paragraph 64, the City admits that NewPath has filed a similar lawsuit in
28 the Central District of California against the City of Irvine and that the Irvine court denied

1 NewPath's motion for summary judgment motion on December 23, 2009. With respect to
2 NewPath's characterization of that order, the City alleges that the order speaks for itself and, on that
3 basis, denies each and every allegation not specifically admitted in paragraph 64.

4 56. Answering paragraph 65, the City denies each and every allegation therein.

5 57. Answering paragraph 66, the City denies each and every allegation therein.

6 58. Answering paragraph 67, the City denies each and every allegation therein and
7 further denies that NewPath is entitled to the relief it requests in paragraph 67.

8 **COUNT III – TELECOMMUNICATIONS ACT**

9 59. Answering paragraph 68, the City restates and reaffirms its answers to the allegations
10 of paragraphs 1 through 67 of the Complaint, above, as though fully set forth herein.

11 60. Answering paragraph 69, no answer is required as NewPath is simply quoting a
12 portion of 47 U.S.C. 332(c)(7)(B)(i)(II) of the Telecommunications Act.

13 61. Answering paragraph 70, the City admits that NewPath submitted a substantial
14 number of documents to the City on January 14 and January 19, 2010 for the January 19, 2010
15 public meeting on NewPath's appeal. The City admits that City staff provided a staff report to the
16 City Council and that City staff and consultants, NewPath representatives and members of the public
17 presented testimony and evidence at the public meeting. Except as specifically admitted, the City
18 denies each and every allegation in paragraph 70.

19 62. Answering paragraph 71, the City denies each and every allegation therein and
20 further denies that NewPath is entitled to the relief it requests in paragraph 71.

21 **COUNT III – TELECOMMUNICATIONS ACT**

22 63. Answering paragraph 72, the City restates and reaffirms its answers to the allegations
23 of paragraphs 1 through 71 of the Complaint, above, as though fully set forth herein.

24 64. Answering paragraph 73, no answer is required as NewPath is simply quoting a
25 portion of 47 U.S.C. 332(c)(7)(B)(iii) of the Telecommunications Act.

26 65. Answering paragraph 74, the City admits that the City Council affirmed the rescission
27 of NewPath's permits on January 19, 2010 and that the City Council adopted Resolution No. 10-010,
28 Series 2010, in writing, setting forth its action and the reasons therefore. The City further admits

1 that it sent NewPath a letter, dated January 21, 2010 with a copy of Resolution No. 10-010, Series
2 2010. With respect to NewPath's characterization of that letter (attached as Exhibit 2 to the
3 Complaint), however, the City alleges that the letter speaks for itself and, on that basis, the City
4 denies each and every allegation in paragraph 74 regarding the content of the City's January 21, 2010
5 letter to NewPath. The City further admits that NewPath submitted a substantial number of
6 documents to the City on January 14 and January 19, 2010 for the January 19, 2010 public meeting
7 on NewPath's appeal. The City admits that City staff provided a staff report to the City Council and
8 that City staff and consultants, NewPath representatives and members of the public presented
9 testimony and evidence at the public meeting. Except as specifically admitted, the City denies each
10 and every allegation in paragraph 74. In particular, and without limiting the forgoing, the City
11 denies that NewPath's effective prohibition claim is ripe for review and alleges that its rescission of
12 NewPath's permits was supported by substantial evidence.

13 66. Answering paragraph 75, the City denies each and every allegation therein and
14 further denies that NewPath is entitled to the relief it requests in paragraph 75.

15 **COUNT V- TELECOMMUNICATIONS ACT (47 U.S.C. § 253)**

16 67. Answering paragraph 76, the City restates and reaffirms its answers to the allegations
17 of paragraphs 1 through 75 of the Complaint, above, as though fully set forth herein.

18 68. Answering paragraph 77, no answer is required as NewPath is simply quoting a
19 portion of 47 U.S.C. § 253 of the Telecommunications Act.

20 69. Answering paragraph 78, the City admits that NewPath submitted a substantial
21 number of documents to the City on January 14 and January 19, 2010 for the January 19, 2010
22 public meeting on NewPath's appeal. The City admits that City staff provided a staff report to the
23 City Council and that City staff and consultants, NewPath representatives and members of the public
24 presented testimony and evidence at the public meeting. The City further admits that the City
25 Council affirmed the rescission of NewPath's permits on January 19, 2010. Except as specifically
26 admitted, the City denies each and every allegation in paragraph 78.

27 70. Answering paragraph 79, no answer is required to the first sentence which simply
28 asserts a legal conclusion. To the extent an answer may be required, the City further alleges that the

1 Ninth Circuit decision *NewPath* purports to summarize, *Qwest Communs. Inc. v. City of Berkeley*,
2 433 F.3d 1253, 1257 (9th Cir. 2006) speaks for itself and, on that basis, denies each and every
3 allegation in the first sentence of paragraph 79. The City denies each and every remaining allegation
4 in paragraph 79.

5 71. Answering paragraph 80, the City denies each and every allegation therein and
6 further denies that *NewPath* is entitled to the relief it requests in paragraph 80.

7 **COUNT VI – ADMINISTRATIVE MANDAMUS**

8 72. Answering paragraph 81, the City restates and reaffirms its answers to the allegations
9 of paragraphs 1 through 80 of the Complaint, above, as though fully set forth herein.

10 73. Answering paragraph 82, *NewPath* is summarizing California Code of Civil
11 Procedure section 1094.5. The City alleges that Code of Civil Procedure section 1094.5 speaks for
12 itself as to the requirements for issuance of an administrative writ of mandamus and, on that basis,
13 the City denies the allegations in paragraph 82.

14 74. Answering paragraph 83, no answer is required as *NewPath* is simply quoting a
15 portion of Code of Civil Procedure section 1094.5.

16 75. Answering paragraph 84, no answer is required to the first sentence as *NewPath* is
17 simply quoting a portion of Code of Civil Procedure section 1094.5. The City expressly denies each
18 and every remaining allegation in paragraph 84.

19 76. Answering paragraph 85, the City denies each and every allegation therein. Without
20 limiting the forgoing, the City alleges that *NewPath* has not applied for a CUP and that unless and
21 until *NewPath* applies for a CUP under the City's Wireless Ordinance, this matter is not ripe for
22 adjudication.

23 77. Answering paragraph 86, the City denies each and every allegation therein and
24 further denies that *NewPath* is entitled to the relief it requests in paragraph 86.

25 **COUNT VI – WRIT OF MANDATE**

26 78. Answering paragraph 87, the City restates and reaffirms its answers to the allegations
27 of paragraphs 1 through 86 of the Complaint, above, as though fully set forth herein.

28 79. Answering paragraph 88, *NewPath* is summarizing California Code of Civil

1 Procedure section 1085. The City alleges that Code of Civil Procedure section 1085 speaks for itself
2 as to the requirements for issuance of an administrative writ of mandamus and, on that basis, the
3 City denies the allegations in paragraph 88.

4 80. Answering paragraph 89, the City denies each and every allegation therein.

5 81. Answering paragraph 90, the City denies each and every allegation therein and
6 further denies that NewPath is entitled to the relief it requests in paragraph 90.

7 **COUNT VIII – VESTED RIGHTS & ESTOPPEL**

8 82. Answering paragraph 91, the City restates and reaffirms its answers to the allegations
9 of paragraphs 1 through 90 of the Complaint, above, as though fully set forth herein.

10 83. Answering paragraph 92, the City denies each and every allegation therein.

11 84. Answering paragraph 93, the City denies each and every allegation therein.

12 85. Answering paragraph 93 [sic], the City lacks sufficient information and belief
13 regarding NewPath's alleged expenses and costs and, on that basis, denies the allegation in the first
14 sentence regarding the \$1.5 million NewPath alleges it has spent. The City denies each and every
15 remaining allegation in paragraph 94. In particular, the City denies that NewPath's dealings with the
16 City were in "good faith" and denies that NewPath had a vested right under the invalidly issued
17 encroachment and related building permits.

18 86. Answering paragraph 94, the City denies each and every allegation therein.

19 87. Answering paragraph 95, the City denies each and every allegation therein.

20 88. Answering paragraph 96, the City denies each and every allegation therein and
21 further denies that NewPath is entitled to the relief it requests in paragraph 96.

22 **COUNT IX – SUBSTANTIVE DUE PROCESS**

23 89. Answering paragraph 97, the City restates and reaffirms its answers to the allegations
24 of paragraphs 1 through 96 of the Complaint, above, as though fully set forth herein.

25 90. Answering paragraph 98, no answer is required as NewPath is simply quoting a
26 portion of the Fourteenth Amendment of the United States Constitution.

27 91. Answering paragraph 99, the City denies each and every allegation therein.

28 92. Answering paragraph 100, the City denies each and every allegation therein.

1 93. Answering paragraph 101, the City denies each and every allegation therein and
2 further denies that NewPath is entitled to the relief it requests in paragraph 101.

3 **COUNT X – VIOLATION OF THE CIVIL RIGHTS ACT**

4 94. Answering paragraph 102, the City restates and reaffirms its answers to the
5 allegations of paragraphs 1 through 101 of the Complaint, above, as though fully set forth herein.

6 95. Answering paragraph 103, no answer is required as NewPath is simply quoting a
7 portion of 42 U.S.C. § 1983.

8 96. Answering paragraph 104, no answer is required as NewPath is simply quoting a
9 portion of the Fourteenth Amendment of the United States Constitution.

10 97. Answering paragraph 105, the City denies each and every allegation therein.

11 98. Answering paragraph 106, the City denies each and every allegation therein.

12 99. Answering paragraph 107, the City denies each and every allegation therein.

13 100. Answering paragraph 108, the City denies each and every allegation therein and
14 further denies that NewPath is entitled to the relief it requests in paragraph 108.

15
16 **AFFIRMATIVE DEFENSES**

17 As separate and distinct affirmative defenses to the Complaint and each allegation contained
18 therein, the City alleges the following defenses against NewPath:

19 **FIRST AFFIRMATIVE DEFENSE**

20 **(Failure to State Cause of Action – All Counts)**

21 The complaint and each and every purported cause of action therein fails to state facts
22 sufficient to constitute any cause of action against the City. Among other things, (1) the City's
23 Wireless Ordinance is not preempted as a matter of law by the California Constitution or NewPath's
24 CPCN; (2) NewPath's claims under the Telecommunications Act fail because NewPath is not a
25 wireless service provider, meaning it cannot establish an effective prohibition of wireless service; (3)
26 NewPath's effective prohibition claims are not ripe for review as the City has not received an
27 application from NewPath under the Wireless Ordinance; and (4) NewPath's vested rights and
28 estoppel claims fail as a matter of law because the permits were issued in violation of the Wireless

1 Ordinance.

2 **SECOND AFFIRMATIVE DEFENSE**

3 **(Failure to Exhaust – All Counts)**

4 NewPath failed to exhaust its administrative remedies, and therefore this Court lacks
5 jurisdiction over the Complaint. In particular, the City found that:

6 Rescission of the improperly issued encroachment and related building permits at
7 issue does not mean NewPath is effectively prohibited from utilizing its CPCN to
8 access the public rights of way. Rescission of the permits simply means NewPath
9 must apply for permits pursuant to the City's Wireless Ordinance. If NewPath shows
10 that particular proposed sites prohibited under the Wireless Ordinance are necessary
11 to eliminate significant gaps in coverage, *i.e.*, there are no reasonable alternative
locations permissible under the Wireless Ordinance, then NewPath may seek an
exemption from the Wireless Ordinance that is consistent with the City's aesthetic and
safety concerns, including consideration of collocation on existing poles or light
stanchions.

12 City of Davis Resolution No. 10-010, Series 2010: Attachment A, Finding #17. NewPath, however,
13 has not yet submitted an application pursuant to the City's Wireless Ordinance.

14 **THIRD AFFIRMATIVE DEFENSE**

15 **(Ripeness – All Counts)**

16 The alleged adverse decision on which the Complaint is founded has not yet been made and
17 may never be made since NewPath has not yet submitted an application pursuant to the City's
18 Wireless Ordinance. Unless and until the City receives an application from NewPath that is
19 considered pursuant to the City's Wireless Ordinance, NewPath's effective prohibition claims are not
20 ripe for review and Counts III through X should be abated.

21 **FOURTH AFFIRMATIVE DEFENSE**

22 **(Lawful Conduct – All Counts)**

23 The Complaint and each and every Count therein are barred, in whole or in part, because the
24 City proceeded in the manner required by law and has not committed a prejudicial abuse of
25 discretion. In particular, the City's Wireless Ordinance is valid and the City's rescission of
26 NewPath's permits was supported by substantial evidence.

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FIFTH AFFIRMATIVE DEFENSE

(Estoppel – All Counts)

By its conduct and omissions, NewPath is equitably estopped to assert any claims against the City. NewPath, among other things, misled City staff, convincing them that NewPath was exempt from the Wireless Ordinance simply because of its status as a public utility.

SIXTH AFFIRMATIVE DEFENSE

(Unclean Hands – All Counts)

As a result of its acts, omissions, misconduct, and concealment in the matters relevant to this litigation, NewPath has unclean hands and is therefore barred from asserting any claim against the City. NewPath, among other things, misled City staff, convincing them that NewPath was exempt from the Wireless Ordinance simply because of its status as a public utility.

SEVENTH AFFIRMATIVE DEFENSE

(Ineligible for Attorneys' Fees – All Causes of Action)

NewPath cannot fulfill the requirements for an award of attorneys' fees under any doctrine allowing attorneys' fees and it is not eligible for such an award.

EIGHTH AFFIRMATIVE DEFENSE

(Additional Defenses)

The City presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, defenses. The City reserves the right to assert additional defenses in the event any discovery in this action indicates they would be appropriate.

WHEREFORE, the City prays for judgment as follows:

1. That NewPath take nothing by way of this litigation;
2. That the petitions for writ of administrative and ordinary mandate be denied;
3. That no injunction be issued;
4. For costs of suit incurred herein;
5. For attorneys' fees incurred herein, to the extent permitted by law, and any and all costs associated with preparation of the administrative record; and

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6. For such other and further relief as this Court deems proper.

DATED: February 24, 2010

McDONOUGH HOLLAND & ALLEN PC
Attorneys at Law

By: /s/ Harriet A. Steiner
 HARRIET A. STEINER

Attorneys for Defendant City of Davis