

1 HARRIET A. STEINER (SBN 109436)  
KIMBERLY E. HOOD (SBN 229195)  
2 McDONOUGH HOLLAND & ALLEN PC  
Attorneys at Law  
3 500 Capitol Mall, 18th Floor  
Sacramento, CA 95814  
4 Phone: 916.444.3900  
Fax: 916.444.8334  
5 hsteiner@mhalaw.com; khood@mhalaw.com  
6 Attorneys for Defendant, City of Davis

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 )  
18 )

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

**DEFENDANT'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION AND, IN  
THE ALTERNATE, REQUEST FOR  
BOND**

Date: March 8, 2010  
Time: 9:00 a.m.  
Dept: 10  
Judge: Hon. Garland E. Burrell, Jr

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1 Defendant City of Davis (City) submits the following opposition to the motion of NewPath  
2 Networks, LLC (NewPath), for a preliminary injunction, and alternatively, request for a bond .

3 **I. INTRODUCTION**

4 NewPath is seeking a mandatory preliminary injunction to authorize NewPath to continue to  
5 build out its proposed wireless system while its lawsuit proceeds. NewPath's system is currently  
6 estimated at less than 15% percent constructed and was commenced under invalidly issued permits.  
7 NewPath can not show a strong likelihood of success on the merits, nor can it show a severe  
8 hardship to warrant granting NewPath substantially all of the relief it seeks before the lawsuit is  
9 tried. Rather, granting the requested mandatory preliminary relief would be a severe hardship to the  
10 City and to its citizens and would be contrary to the public interest.

11 NewPath is asserting what is essentially a facial challenge to the City's Wireless  
12 Telecommunication Facilities Ordinance, Davis Municipal Code (DMC) §§ 40.29.0 ("Wireless  
13 Ordinance") – an ordinance that specifies the permissible locations of wireless facilities, including  
14 poles and antennas. NewPath is challenging the City's constitutional and statutory authority and  
15 ability to regulate the time, place, and manner in the location of wireless facilities in the City's rights  
16 of way. NewPath asserts that it is permitted to locate its wireless facilities anywhere it chooses  
17 within the City's rights of way without regard to the City's ordinances, rules and regulations.

18 NewPath came to the City and affirmatively argued that NewPath was exempt from the  
19 City's Wireless Ordinance and all siting limitations, notwithstanding that fact that NewPath is  
20 currently in federal district court on the same issues in *NewPath Networks, LLC v. City of Irvine*,  
21 U.S. District Court, Central District of California, Case No. SACV 06-550-JVS (ANx). (*See* City's  
22 Request for Judicial Notice ("RJN"), Exh. A.) NewPath was then issued 36 encroachment permits,  
23 including 22 for new antennas – all of which violate the City's Wireless Ordinance. Among the  
24 proposed locations of NewPath's pole antenna are greenbelts, parks, residential neighborhoods with  
25 no overhead utilities, and City property outside the right of way for which no lease was requested or  
26 approved by the City Council. When the mistake was discovered, the City Manager acted quickly to  
27 issue stop work orders and subsequently rescinded the permits. NewPath was given an opportunity  
28 to appeal the rescission to the City Council and the City Council affirmed the rescission. That is all

1 that has been determined to date. At the time the City Council affirmed the City Manager's  
2 rescission order, it specifically informed NewPath that it had the opportunity to apply for wireless  
3 facility permits under the City's Wireless Ordinance, but NewPath has not yet done so. NewPath has  
4 made no attempt to propose locations for its facilities that are permissible under the Wireless  
5 Ordinance nor has it shown that the permissible locations will not be suitable to support its proposed  
6 system. NewPath merely asserts that it is exempt from the Wireless Ordinance and from all City  
7 regulation of the location of its facilities.

8 NewPath – while claiming at its appeal hearing before the City Council that it was committed  
9 to working with the City and its residents – now seems to think such a procedure would be pointless.  
10 How NewPath has unilaterally reached a determination that working with the City would be  
11 pointless is uncertain. What is certain is that NewPath has not exhausted its administrative remedies  
12 as it has failed to even apply for permits under the City's Wireless Ordinance; and it has failed to  
13 show that it cannot comply with the City's ordinances, rules and regulations related to wireless  
14 antenna siting and use of the rights of way. This case is not ripe for adjudication because of  
15 NewPath's failure to pursue the proper Wireless Permits, and its failure to exhaust its administrative  
16 remedies under the Wireless Ordinance.

17 NewPath's last minute "evidence" of alleged gaps in service in the wireless networks of  
18 wireless carriers who are not parties in this matter also does not provide a basis for a mandatory  
19 injunction or for this lawsuit because this issue is not also ripe for review. Those wireless carriers  
20 are fully capable of asserting their own claims, whatever they may be, in connection with any claims  
21 of coverage gaps. As it admits, NewPath is not, itself, a wireless provider; it holds no FCC licenses  
22 as a wireless telephone company. New Path cannot have a gap in coverage, much less a significant  
23 gap, since it does not and cannot provide wireless services to customers. The only issue ripe for  
24 review is whether the rescission of NewPath's permits for violating the City's Wireless Ordinance  
25 and for the other reasons set forth in the City's determination to rescind the permits was an abuse of  
26 discretion. This issue that falls squarely in favor of the City and requires rejection of NewPath's  
27 preliminary injunction motion.

28 ///

1 NewPath seeks, in this motion, to affirmatively build out its system and obtain the benefits of  
 2 its own violation of the City's regulations without having to litigate the merits of its case. Only a  
 3 small fraction of the NewPath system has been constructed, and none of it is operational. The Court  
 4 should not grant, by preliminary injunction, an order to permit NewPath to continue building in the  
 5 City in violation of City rules and to the detriment of the City's citizens.

6 Should the Court determine to issue a preliminary injunction to authorize NewPath to build,  
 7 install or operate its facilities during this litigation, the City requests that the Court require NewPath  
 8 to post bonds to secure any damages and costs to the City, as set forth below.

## 9 **II. STATEMENT OF FACTS**

### 10 **A. NewPath's Proposed DAS Project**

11 NewPath filed an application to construct a distributed antenna system ("DAS"). As stated by  
 12 NewPath, a DAS is a "dumb pipe" and NewPath intends to sell capacity in its system to its carrier  
 13 customers, typically wireless providers such as metroPCS. (Compl. at ¶¶ 1, 16, 20.) NewPath is a  
 14 "carrier's carrier" – it is not a wireless or cellular service provider. (*Id.* at ¶¶ 16, 17.) The proposed  
 15 DAS system would include 24 wireless antenna facilities (which NewPath calls "nodes"). (Comp. at  
 16 ¶ 1.) Seventeen of the antennas would be stand alone wooden or metal poles of up to 42 feet high,  
 17 while the remaining antennas would be located on existing telephone or electric poles.

18 City staff erroneously issued NewPath 36 encroachment and related building permits for the  
 19 proposed DAS project.<sup>1</sup> When NewPath came to the City, NewPath asserted that its facilities were  
 20 in the right of way and were exempt from discretionary City review. (Garcia Decl. at ¶ 3:13-15;  
 21 Sears Decl. at ¶ 17:15.) Based on NewPath's assertions and at NewPath's insistence, City staff made  
 22 an erroneous determination to process NewPath's permit requests through the City's encroachment  
 23 permit process, where they were handled by lower level administrative staff, instead of pursuant to  
 24 the City's Wireless Telecommunications Ordinance and the time, place, and manner restrictions  
 25 therein (discussed below). Unlike the Wireless Ordinance process, the City's encroachment permit  
 26 process in Chapter 32 of the DMC is a ministerial process. It does not, and did not, look at

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 28 <sup>1</sup> The Stop Work Notice lists 37 permits, but City staff later clarified that one of the permits (permit  
 #09-777002656) was not issued. (Marshall Decl. at ¶ 2.)

1 alternative acceptable locations for the wireless antennas, the least obtrusive manner to provide the  
2 antenna service, or locations that met City location requirements under the Wireless Ordinance. The  
3 encroachment permit process also did not, adequately review the aesthetics and impacts of the pole  
4 locations, and did not provide notice to, or involve, the affected property owners and the community.  
5 The encroachment permits were issued primarily in late October and early November 2009.  
6 (Marshall Decl. at ¶ 2.)

7 **B. The City Manager's Rescission of NewPath's Permits**

8 The City Manager became aware of the DAS project in late November 2009 and promptly  
9 issued a Stop Notice Order on November 30, 2009, effective immediately, for all construction on the  
10 project. (See Exh. 3 to NewPath's Memo of P&As.) The Stop Notice Order was issued to allow the  
11 City time to investigate the application of the City's Wireless Ordinance to NewPath. The Stop  
12 Notice Order was issued just five days after the California Public Utilities Commission issued  
13 NewPath a Notice to Proceed with construction of its proposed project. (Compl. at ¶ 2, Exh. 4 –  
14 NTP letter dated 11/25/09.)

15 On December 5, 2009, the City Manager rescinded all 36 permits on the grounds that  
16 (1) NewPath did not comply with the City's Wireless Ordinance; (2) the permits for ground-based  
17 fiber and conduit relied on the location of wireless facilities that had not been approved and may not  
18 have met location requirements for wireless facilities in the City's ordinances; (3) other permits  
19 relied on access to public property that is not within public rights of way with permitted access; and  
20 (4) certain of the proposed poles and other above-ground facilities are proposed for areas of the City  
21 that do not permit above ground facilities. (See Rescission Notice: Exh. 5 to NewPath's Memo. of  
22 P&As). The Rescission Notice was further issued on the ground that there had been "no showing  
23 that the proposed locations of the wireless facilities [were] each necessary given the impacts of these  
24 facilities on the public, including both public safety and aesthetic impacts." (*Id.*) The Rescission  
25 Notice offered NewPath the opportunity to appeal the City Manager's decision to the City Council.  
26 (*Id.*) NewPath filed a timely appeal on December 15, 2009. (See Exh. 10 to NewPath's Memo. of  
27 P&As.)

28 ///

1           **C. Status of NewPath's Construction**

2           When the City Manager's order halted NewPath's construction, the construction was in its  
3 very early stages, rather than near completion, as NewPath seems to imply:

- 4           • Only four stand alone poles of the 21 new poles to be installed have been constructed.  
5           (Marshall Decl. at ¶ 5.) And one of these poles was constructed in a location that was  
6           not shown on its permit so it must be removed (*id.* at ¶ 5(a)); another pole is  
7           constructed on City property outside the right of way, yet NewPath has failed to  
8           obtain a lease from the City for this location, (*id.* at ¶¶ 5(g); 14);
- 9           • Several of the locations have preliminary work commenced but there is no pole yet  
10           constructed, (*id.* at ¶ 5);
- 11           • The remaining antenna sites have had no work done at all (*id.*); and
- 12           • Some of NewPath's proposed conduit locations rely on it obtaining leases from the  
13           City and these leases have not been granted. (*Id.* at ¶ 13).

14 In short, none of the facilities already constructed are operational, and cannot be made operational  
15 without substantial additional installation work and additional equipment installation. (Kramer Decl.  
16 at ¶ 24.)

17           **D. January 19, 2010 City Council Public Meeting on NewPath's Appeal**

18           A public meeting before the City Council was held on January 19, 2010 for NewPath's  
19 appeal. The staff presentation focused on the application of the Wireless Ordinance to NewPath  
20 facilities and the fact that the permits were issued in violation of that ordinance. In particular, staff  
21 prepared a table for the City Council that summarized the zoning for each of the proposed antenna  
22 facilities and outlines consistency with the provisions of the City's Wireless Ordinance. (Exh. 17 to  
23 NewPath's Memo. of P&As.) This table shows that all of the proposed antennas are located in or  
24 within 500 feet of residential, park, greenbelt, or corresponding planned development zones or  
25 designations, which are all prohibited under the Wireless Ordinance. (*Id.*)

26           Evidence was also presented to the City Council to support the remaining three grounds for  
27 rescission. The City did not "waive" these additional grounds as NewPath now baldly asserts. (*See*  
28 NewPath's Memo. Of P&As at p.7, n.1.) NewPath's own materials include photographs of the

1 proposed antenna sites as they now exist and as they might look with the proposed antenna. (RJN,  
2 Exh. C). These simulations show that many of the antennas would be placed in the middle of  
3 landscaped parks, greenbelts, and neighborhoods – right next to residences – in glaring contrast to  
4 the existing landscape. In addition, there was substantial public comment in opposition to  
5 NewPath's project on aesthetic grounds, including a petition against the project from 225 residents of  
6 the Village Homes neighborhood. (RJN, Exh. D; Hood Decl., Exh. A.)

7 The sole issue before the City Council was whether the City Manager erred in rescinding the  
8 permits on the grounds stated in the rescission notice. After hearing substantial presentations from  
9 City staff and NewPath, and receiving public testimony, the City Council adopted Resolution  
10 No. 10-010, Series 2010, including written findings affirming that the City Manager did not err in  
11 rescinding NewPath's permits for the DAS project. (RJN, Exh. B.) The City Council further  
12 determined that its action affirming the rescission of the permits by the City Manager did not  
13 preclude NewPath from properly submitting an application for its DAS project pursuant to the City's  
14 Wireless Ordinance. (*Id.*, Finding #17.) The City Council invited NewPath to properly submit new  
15 applications under the provisions of the City's Wireless Ordinance. NewPath did not re-apply under  
16 the Wireless Ordinance, opting instead to file this lawsuit.

### 17 **III. OVERVIEW OF RELEVANT LAW**

18 There are three overarching statutory schemes at play with respect to NewPath's proposed  
19 DAS wireless facilities – the California Public Utilities Code, the City's Wireless Ordinance, and the  
20 federal Telecommunications Act. The following is a brief overview of these three statutory  
21 schemes.

#### 22 **A. State Law**

23 The California Public Utilities Commission ("CPUC") has the authority to regulate telephone  
24 companies under several sections of the California Public Utilities Code. Section 1001 requires  
25 telephone corporations<sup>2</sup> to obtain a Certificate of Public Convenience and Necessity ("CPCN") from

26 \_\_\_\_\_  
27 <sup>2</sup> A "telephone corporation" is broadly defined to "include[] every corporation or person owning,  
28 controlling, operating, or managing any telephone line for compensation within this state." Pub.  
Util. Code § 234. Telephone corporations are a "public utility" "where the service is performed for,  
or the commodity is delivered to, the public or any portion thereof." Pub. Util. Code § 216(a).

1 the CPUC "that the present or future public convenience and necessity require or will require such  
2 construction" of a line, plant, or system. In considering whether to approve a CPCN, the CPUC may  
3 grant the CPCN subject to conditions affecting such items as construction, types of equipment, and  
4 operations. Obtaining a CPCN, however, does not preclude local regulation of the time, place, and  
5 manner for locating facilities. A telephone corporation may construct facilities in the public rights of  
6 way "in such a manner and at such points as not to incommode the public use of the road or  
7 highway." Specifically, Section 7901 provides:

8 [T]elephone corporations may construct ... telephone lines along and upon  
9 any public road or highway, along or across any of the waters or lands  
10 within the State, and may erect poles, posts, piers, or abutments for  
11 supporting the insulators, wires, and other necessary fixtures of their lines,  
in such a manner and at such points as not to incommode the public use of  
the road or highway [...].

12 Section 7901.1, in turn, expressly grants municipalities "the right to exercise reasonable control as to  
13 the time, place, and manner in which roads, highways, and waterways are accessed," provided that  
14 the control, at a minimum, applies to all entities in an equivalent manner.

15 The Ninth Circuit has held that Sections 7901 and 7901.1 of the California Public Utilities  
16 Code "[do] not prohibit local governments from taking into account aesthetic considerations in  
17 deciding whether to permit the development of [wireless communications facilities] within their  
18 jurisdictions." *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 725 (9<sup>th</sup> Cir.  
19 2009). The Court also held stated that "public use" of the rights of way is not limited to travel and  
20 that the public rights of way form the "visual fabric" of neighborhoods. Thus, the mere fact that an  
21 entity is issued a CPCN does not mean that that entity is exempt from local regulation regarding the  
22 placement of its facilities in the public right of way.

23 **B. Wireless Telecommunication Facilities Ordinance**

24 The City's Wireless Ordinance provides "uniform standards for the community desired  
25 design, placement, permitting, and monitoring of telecommunication facilities consistent with  
26 applicable federal requirements." DMC § 40.29.010(a). The standards in the Wireless Ordinance  
27 are "intended to address adverse visual impacts and operational effects of these facilities through  
28 appropriate design, siting, screening techniques and locational standards while providing for the

1 communication needs of residents, local businesses, and government agencies." *Id.* To that end, the  
2 Wireless Ordinance contains extensive provisions governing the placement of antenna structures and  
3 other wireless facilities. The Wireless Ordinance regulates the placement of facilities regardless of  
4 who requests the facility. It is not limited to retail "wireless providers" such as MetroPCS and  
5 AT&T Wireless. Rather the Wireless Ordinance provides for the time, place and manner of all  
6 wireless facilities within the City. The Wireless Ordinance, therefore, applies to NewPath.

7 The Wireless Ordinance contains three categories of proposed wireless facility projects –  
8 prohibited projects, exempt projects, and discretionary review projects requiring a conditional use  
9 permit. Unless listed as exempt or prohibited, "no wireless telecommunication facility shall be  
10 constructed without first undergoing the specific review process and obtaining the prescribed  
11 permit." DMC § 40.29.040(b).

12 (1) Prohibited Projects – Among the prohibited projects are telecommunication projects:

- 13 • where the combined radio frequency emissions exceeds state or federal standards
- 14 • within residential zones, or within 500 feet of residential zones (subject to certain  
15 exemptions for the setback requirement), including public rights of way
- 16 • on sites containing existing or planned public or private school facilities, or within  
17 500 feet of school facilities (subject to certain exemptions for the setback  
18 requirement)
- 19 • on existing or planned public parks and/or greenbelts.

20 DMC § 40.29.050.

21 (2) Exempt Facilities – The Wireless Ordinance exempts a number of categories of facilities,  
22 including "wireless telecommunication facilities accessory to other publicly owned or operated  
23 equipment for data acquisition such as irrigation controls, well monitoring, and traffic control  
24 signals." DMC § 40.29.060(c). The only exemption relevant to NewPath's DAS project is the  
25 exemption for "Any wireless communication facility, if and only to the extent that a permit issued by  
26 the [CPUC] or the rules and regulations of the [FCC] specifically provide that the antenna is exempt  
27 from local regulation." DMC § 40.29.060(j).

28 ///

1 (3) Facilities Allowed if Authorized Pursuant to CUP Procedures – The remainder of the  
2 Wireless Ordinance describes the location and design standards applicable to the remaining  
3 telecommunication facilities and requires that such facilities be reviewed in accordance with the  
4 CUP procedures set forth in DMC, Article 40.30, which requires (among other things), public notice  
5 and a public hearing. DMC §§ 40.29.070; 40.29.160.

6 **C. Federal Telecommunications Act**

7 President Clinton signed the Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-  
8 104, 110 Stat. 56, into law on February 8, 1996. The stated purpose of the TCA is "to promote  
9 competition and reduce regulation in order to secure lower prices and higher quality services for  
10 American telecommunications consumers and to encourage the rapid deployment of new  
11 telecommunications technologies." *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 991 (9th  
12 Cir. 2009) (quoting TCA, 110 Stat., at 56). In promoting the rapid deployment of new technologies,  
13 however, Congress also preserved "the authority of States and local government over zoning and  
14 land use matters," subject to enumerated limitations in 47 U.S.C. Section 332(c)(7) § of the TCA *Id.*  
15 at 992. Section 332(c)(7) "is actually entitled 'Preservation of local zoning authority' and states as its  
16 baseline principle that, 'except as provided in this paragraph, nothing in this chapter shall limit or  
17 affect the authority of a State or local government ... over decisions regarding the placement,  
18 construction, and modification of personal wireless service facilities.'" *MetroPCS, Inc. v. City &*  
19 *County of San Francisco*, 400 F.3d 715, 727 n.5 (9th Cir. 2005). The limitations on the City's  
20 zoning and land use authority regarding the placement, construction, and modification of personal  
21 wireless service facilities are as follows:

22 (1) No Discrimination - The City may not unreasonably discriminate among providers of  
23 functionally equivalent services. 47 U.S.C. § 332(c)(7)(B)(i)(I).

24 (2) Effective Prohibition – The City may not prohibit or have the effect of prohibiting the  
25 provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). "[A] locality can run afoul  
26 of the TCA's 'effective prohibition' clause if it prevents a wireless provider from closing a  
27 'significant gap' in service coverage." *MetroPCS*, 400 F.3d at 731. The "effective prohibition"  
28 inquiry "involves a two-pronged analysis requiring (1) the showing of a 'significant gap' in service

1 coverage and (2) some inquiry into the feasibility of alternative facilities or site locations." *Id.*

2 (3) Reasonable Time – The City must act on any request for authorization to place,  
3 construct, or modify personal wireless service facilities within a "reasonable period of time after the  
4 request is duly filed ... taking into account the nature and scope of such request." 47 U.S.C. §  
5 332(c)(7)(B)(ii).

6 (4) Denial Must be In Writing – Any decision to deny a request to place, construct, or  
7 modify personal wireless service facilities shall be in writing and supported by substantial evidence  
8 contained in a written record. 47 U.S.C. § 332(c)(7)(B)(iii).

9 (5) Preemption of Environmental Effects – The City may not "regulate the placement,  
10 construction, and modification of personal wireless service facilities on the basis of the  
11 environmental effects of radio frequency emissions to the extent that such facilities comply with the  
12 Commission's [Federal Communications Commission, or FCC] regulations concerning such  
13 emissions." 47 U.S.C. § 332(c)(7)(B)(iv).

14 **IV. NEWPATH FAILS THE STANDARD FOR ISSUANCE OF A PRELIMINARY**  
15 **INJUNCTION**

16 A preliminary injunction represents the exercise of a very far reaching power never to be  
17 indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141, 143  
18 (9th Cir.1964). As explained in *Save Our Sonoran, Inc. v. Flowers*, 408 F. 3d 1113 (9th Cir. 2004):

19 "[t]he standard for granting a preliminary injunction balances the  
20 plaintiff's likelihood of success against the relative hardship to the parties."  
21 We have described two sets of criteria for preliminary injunctive relief.  
22 Under the "traditional" criteria, a plaintiff must show "(1) a strong  
23 likelihood of success on the merits, (2) the possibility of irreparable injury  
24 to plaintiff if preliminary relief is not granted, (3) a balance of hardships  
25 favoring the plaintiff, and (4) advancement of the public interest (in  
26 certain cases)." Alternatively, a court may grant the injunction if the  
27 plaintiff "demonstrates either a combination of probable success on the  
28 merits and the possibility of irreparable injury or that serious questions are  
raised and the balance of hardships tips sharply in his favor."

25 *Id.* at 1120 (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir.  
26 2003), and *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)). Where a  
27 party demonstrates that a public interest is involved, a "district court must also examine whether the  
28 public interest favors the plaintiff." *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir.

1 1992). "These two formulations represent two points on a sliding scale in which the required degree  
2 of irreparable harm increases as the probability of success decreases. They are not separate tests but  
3 rather outer reaches of a single continuum." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th  
4 Cir. 2004) (quoting *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir.1998)).

5 As the following discussion will show, NewPath has not established a likelihood of success  
6 on the merits. The balance of hardships if an injunction were issued tips strongly in favor of the  
7 City, and issuance of a mandatory injunction would directly harm the public interest.

8 **A. There is Only a Weak Likelihood of Success on the Merits**

9 City actions are presumed valid. California Civil Code § 3548 declares the presumption:  
10 "The law has been obeyed." *See, e.g., Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1011 (9th Cir.  
11 1997), cert. denied, 522 U.S. 1098 (1998). There is a "strong presumption of constitutionality that  
12 applies to legislative enactments," requiring a plaintiff to "allege some sort of improper purpose or  
13 insufficient justification in order to state a colorable federal claim for relief." *First English*  
14 *Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 327 (1987). The  
15 burden lies with the party challenging an ordinance to demonstrate any alleged constitutional  
16 violations. *See, e.g., New Orleans Public Service v. City of New Orleans*, 281 U.S. 682, 686 (1930)  
17 ("The ordinance is presumed to be valid"); *City of Anchorage v. Richardson Vista Corp.*, 242 F.2d  
18 276, 285 (9th Cir. 1957) (district court should uphold an ordinance "unless the ordinance is  
19 unnecessarily oppressive or unreasonable" and "courts cannot set aside city ordinances unless they  
20 are unconstitutional or ultra vires, or in some special connection or effect, unreasonable").

21 **1. The City's Wireless Ordinance is Not Preempted by State Law**

22 NewPath contends it is likely to succeed in this action because the City's Wireless Ordinance  
23 is "preempted both expressly and by implication by the California Constitution and state laws  
24 governing the regulation of telephone utility construction projects." (NewPath's Memo. of P&As at  
25 10:24-26.) In support of this contention, NewPath relies on article XII, section 8 of the California  
26 Constitution, which provides that as to public utilities, a city "may not regulate matter over which  
27 the Legislature grants regulatory power to the Commission [CPUC]." From this, NewPath makes an  
28 extreme and incomplete leap in logic to conclude that this provision precludes enforcement of the

1 City's Wireless Ordinance because the Wireless Ordinance's time, place and manner restrictions on  
2 the siting of wireless facilities conflicts with article XII, section 8 and provisions of the California  
3 Public Utilities Code.

4 NewPath's interpretation of article XII, section 8 is simply wrong. That provision gives the  
5 Legislature the power to preempt local regulation. The Legislature, however, has not preempted  
6 local regulation – but has instead expressly preserved local authority to so regulate. Section 7901.1  
7 of the Public Utilities Code states that "municipalities shall have the right to exercise reasonable  
8 control as to the time, place, and manner in which roads, highways, and waterways are accessed."  
9 There is no conflict then, as NewPath mistakenly contends, between the City's Wireless Ordinance  
10 and Section 7901.1, nor is there state preemption of the City's permitted local regulation via its  
11 Wireless Ordinance.

12 The Ninth Circuit recently upheld local regulation in *Sprint PCS Assets, LLC v. City of Palos*  
13 *Verdes Estates*, 583 F.3d 716 (9th Cir. 2009). In that case, Palos Verdes Estates enacted a wireless  
14 ordinance that allowed it to deny wireless telecommunications facilities ("WCF") permit applications  
15 for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public  
16 property." 583 F.3d at 720. Sprint applied for permits to construct WCFs in Palos Verde Estate's  
17 public rights-of-way. *Id.* at 719-20. Palos Verdes Estates granted eight permit applications but  
18 denied two others on the grounds that two of the proposed WCFs were not in keeping with Palos  
19 Verdes Estate's aesthetics. *Id.* Sprint sued, alleging the denial violated the TCA and the district  
20 court found in favor of Sprint on the grounds that the consideration of aesthetics as to sites in the  
21 right-of-way was invalid under the California Public Utilities Code. The Ninth Circuit reversed,  
22 holding that "California law does not prohibit local governments from taking into account aesthetic  
23 considerations in deciding whether to permit the development of WCFs within their jurisdictions."  
24 *Id.* at 725. In so holding, the Ninth Circuit explained that whether there was a violation of the TCA  
25 required the court "to determine (1) whether the City's decision was authorized by local law, and if it  
26 was, (2) whether it was supported by a reasonable amount of evidence." *Id.* at 721.

27 Relevant here is the first part of *Palos Verdes* analysis and whether the City may rescind the  
28 permits to NewPath on the grounds that the permits had not been issued, or even considered,

1 pursuant to the City's Wireless Ordinance.<sup>3</sup> This requires consideration of the City's powers to  
 2 regulate time, place, and manner restrictions. As the Ninth Circuit explained, the California  
 3 Constitution authorizes local governments to "make and enforce within [their] limits all local, police,  
 4 sanitary, and other ordinances and regulations not in conflict with general laws." *Id.* at 722 (quoting  
 5 Cal. Const. art. XI, § 7). This broad grant of authority is the City's "police power," which is "subject  
 6 to displacement by general state law but otherwise is as broad the police power exercisable by the  
 7 Legislature itself." *Id.* (quoting *Fisher v. City of Berkeley*, 17 Cal.3d 644, 209 Cal.Rptr. 682, 693  
 8 P.2d 261, 271 (1984)). "There is no question that the City's authority to regulate aesthetics is  
 9 contained within this broad constitutional grant of power." *Id.* (citing *Landgate, Inc. v. Cal. Coastal*  
 10 *Comm'n*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188, 1198 (1998)).

11 The threshold issue then for the Ninth Circuit in *Palos Verdes* was "whether the PUC divests  
 12 the City of its constitutional power" to consider aesthetics in deciding whether to grant a WCF  
 13 permit application – *i.e.*, whether there was a conflict between Palos Verdes' wireless ordinance and  
 14 the "general laws" in PUC 7901 and 7901.1. *Id.* The answer is "no." *Id.* at 723 ("We conclude that  
 15 neither PUC § 7901 nor PUC § 7901.1 conflicts with the city's default power to deny a WCF permit  
 16 application for aesthetic reasons."). "[A] company can 'access' a city's rights-of-way in both  
 17 aesthetically benign and aesthetically offensive ways. It is certainly within a city's authority to  
 18 permit the former and not the latter." *Id.* at 725.

19 Like Palos Verdes Estates, the City of Davis has adopted a comprehensive Wireless  
 20 Ordinance "to address adverse visual impacts and operational effects of these facilities through  
 21 appropriate design, siting, screening techniques and locational standards while providing for the  
 22 communication needs of residents, local businesses, and government agencies." DMC §  
 23 40.29.010(a). In short, neither the article XII, section 8 nor the PUC preempt the City from applying  
 24 its Wireless Ordinance to NewPath.

25  
 26  
 27 <sup>3</sup> As discussed in Section IV.A.3 of this Opposition, concerning effective prohibition, the second  
 28 prong is not yet ripe for review because NewPath has not re-applied for permits under the Wireless  
 Ordinance.

1 NewPath tries to get around this obvious conclusion based on the fact that the City of Davis  
2 is a general law city, as opposed to a charter city. (NewPath's Memo. of P&As at 12:2-7.) Such a  
3 distinction, however, has no bearing on the City's Wireless Ordinance. The police power in article  
4 XI, section 7 applies to general law cities as well as charter cities. In fact, the City of Palos Verdes  
5 Estates is also a general law city.

6 NewPath's faulty interpretation of the California Constitution and the PUC as preempting  
7 local wireless ordinances governing the time, place, and manner of wireless facility sites would  
8 render PUC 7901.1 meaningless. Such a result violates the basic tenets of statutory construction and  
9 should be rejected. *See Beck v. Prupis*, 529 U.S. 494, 506 (2000) (noting the "longstanding canon of  
10 statutory construction that terms in a statute should not be construed so as to render any provision of  
11 that statute meaningless or superfluous"); *O.W.L. Foundation v. City of Rohnert Park*, 168  
12 Cal.App.4th 568, 590 (2008) ("a statute is to be interpreted to avoid rendering terms meaningless or  
13 superfluous"). The broadly worded grants of authority in the PUC on which NewPath relies and  
14 article XII, section 8 of the California Constitution have never been interpreted to preempt any and  
15 all regulation of public utilities by municipalities. These provisions must instead be read in  
16 conjunction with Section 7901.1, which supports, rather than divests, the application of the City's  
17 Wireless Ordinance to NewPath.

18 **2. The City's Wireless Ordinance does Not Impair NewPath's State**  
19 **Franchise, nor does NewPath's Franchise Preempt the City from**  
20 **Applying its Wireless Ordinance in Accordance with PUC § 7901**

21 NewPath's assertion that the City is also preempted by its state franchise – namely its CPCN  
22 – also fails. The issuance of a CPCN does not grant NewPath blanket authority to construct wireless  
23 facilities wherever and whenever it may choose. NewPath is still subject to Section 7901.1's grant of  
24 authority to municipalities to reasonably regulate the time, place, and manner on which the public  
25 rights-of-way are accessed. *Williams Communications, LLC v. City of Riverside*, 114 Cal.App.4th  
26 642, 648 (2003).

27 The authorities NewPath cites are not to the contrary. Those authorities involved different  
28 CPUC regulated entities, subject to statutes where the Legislature demonstrated a clear intent to vest  
the CPUC with exclusive jurisdiction, and not limited by Section 7901.1 (which is applicable to

1 telephone and telegraph companies). For example, in *San Diego Gas & Electric Co. v. City of*  
2 *Carlsbad*, 64 Cal.App.4th 785 (1998), the court had to consider whether a local ordinance governing  
3 floodplain management was preempted as applied to San Diego Gas & Electric and its deposit of  
4 materials. The court first laid out the applicable legal principles, recognizing that a city's police  
5 power is broad and that preemption should applied cautiously. 64 Cal.App.4th at 792-93. It then  
6 found that the PUC jurisdiction was exclusive over San Diego Gas & Electric – but did not have  
7 before it Section 7901.1, in which the Legislature expressly granted municipalities reasonable time,  
8 place, and manner regulation over the public rights-of-way. *See also Bay Area Cities Transit Co. v.*  
9 *City of Los Angeles*, 16 Cal.2d 772 (1940) (involving Railroad Commission's jurisdiction over  
10 regulation of bus routes and basing decision on statute giving the Commission exclusive  
11 jurisdiction).

12 The CPUC "decisions" cited by NewPath involving telephone companies and wireless  
13 providers are also inapposite. First, *GTE Mobilenet of San Jose Limited P'ship*, D. 86-09-011, 22  
14 Cal. PUC 25 (September 4, 1986) precedes the adoption of Section 7901.1 by almost a decade. As  
15 the Ninth Circuit recognized, Section 7901.1 "was added to the PUC in 1995 to 'bolster the cities'  
16 abilities with regard to construction management and to send a message to telephone corporations  
17 that cities have authority to manage their construction, without jeopardizing the telephone  
18 corporations' statewide franchise." *Palos Verdes*, 583 F.3d at 724 (quoting S. Comm. on Energy,  
19 Utilities, and Commerce, Analysis of S.B. 621, Reg. Sess., at 5728 (Cal. 1995) ("[I]ntent of this bill  
20 [S.B. 621] is to provide the cities with some control over their streets."). As such, *GTE Mobilenet* is  
21 of no assistance in determining whether a CPCN preempts application of a City's Wireless  
22 Ordinance under Section 7901.1.

23 Second, *In re Frontier Local Services, Inc.*, D. 96-09-072, 1996 Cal. PUC LEXIS 947 at \*83  
24 (1996) is not a "decision" addressing the application of Section 7901.1. The Frontier "decision" is  
25 simply a decision by the CPUC to grant an application for CPCN. As part of that application, CEQA  
26 review was conducted and in response to comment on a negative declaration attached the CPCN  
27 decision, a CPUC staff member responded, without mention of Section 7901.1, that the CPUC's  
28 authority under PUC section 1001 preempted local use or discretionary permits for utility projects.

1 Such a staff response is certainly not binding given the absence of any consideration of Section  
2 7901.1 and the Ninth Circuit's controlling resolution of the matter in *Palos Verdes*.

3 Finally, NewPath is litigating a very similar dispute against the City of Irvine in federal  
4 district court and has been unsuccessful in that case with its argument that its CPCN and Notice to  
5 Proceed ("NTP") preempt local regulation. (See RJN, Exh. A.) In the *Irvine* case, NewPath applied  
6 to the City of Irvine to construct DAS facilities in the Turtle Rock neighborhood. NewPath initially  
7 challenged Irvine's Wireless Communications Ordinance as being an on-its-face prohibition barring  
8 NewPath from providing a telecommunications service. The federal court upheld NewPath's  
9 challenge to Irvine's Ordinance, but that decision was later vacated due to the Ninth Circuit's  
10 decision in *Sprint v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), which overruled *City of*  
11 *Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), holding that a "plaintiff suing a municipality  
12 under 47 U.S.C. Section 253(a)§ of the TCA must show actual or effective prohibition, rather than  
13 mere possibility of prohibition." 543 F.3d at 578. NewPath subsequently filed an "as applied"  
14 challenge against Irvine after the Irvine Planning Commission denied NewPath a CUP, primarily due  
15 to aesthetic concerns. Prior to the Planning Commission denial, the CPUC issued an NTP to  
16 NewPath for the proposed Turtle Rock DAS project. NewPath re-filed its CUP application and the  
17 Planning Commission again denied the CUP, a decision affirmed by the Irvine City Council on  
18 August 11, 2009.

19 NewPath filed a summary judgment motion, in part, on the grounds that Irvine was  
20 preempted by its CPCN and NTP from denying the project. The *Irvine* district court issued an order  
21 on December 23, 2009 (RJN, Exh. A), denying NewPath's motion for summary judgment,  
22 concluding on the preemption issue that while the CPUC had the authority to issue a preemptive  
23 CPCN or NTP – not all are necessarily preemptive:

24 Where the CPUC is explicit that the CPCN preempts local authority, as in  
25 the case of a site-specific CPCN, then the local government cannot  
26 contradict that action. However, where the CPCN is more general and  
27 does not expressly preempt local power, then local governments retain  
some authority under their inherent police power and Section 7901.1 to  
control the time, place and manner of facilities otherwise approved by the  
CPUC.

28 (RJN, Exh. A at p. 18.) The *Irvine* court then went on to hold that NewPath's 2006 CPCN – the

1 same CPCN they are relying on in this action against the City of Davis – and the NTP were not  
2 preemptive and did not preclude Irvine from applying its wireless ordinance procedures to NewPath.

3 Neither [the CPCN nor the NTP] contains any express preemption of local  
4 authority. The NewPath CPCN is not site-specific; rather, it applies state-  
5 wide. The NTP is site-specific; however, by its terms, it is limited to the  
6 issue of whether the DAS project comes under a CEQA categorical  
7 exemption. Irvine's denial of a CUP is not in conflict with this because its  
8 review is not coextensive with nor inimical to the CPUC Energy  
9 Division's expedited CEQA review.

7 (*Id.* at p. 20.)

8 NewPath's CPCN (Exh. 1 to NewPath's Memo. of P&As) is the same state-wide, non-site  
9 specific CPCN at issue in *Irvine* and does not preempt the City from exercising "reasonable control  
10 as to the time, place, and manner in which roads, highways, and waterways are accessed" pursuant to  
11 Section 7901.1 of the Public Utilities Code, provided that exercise of control does not result in an  
12 effective prohibition of service prohibited under the TCA. Likewise, the NTP issued by the CPUC  
13 for the Davis DAS project is like that it issued for NewPath's Irvine project. It is site specific, but  
14 was issued without a hearing and simply reflects the CPUC's determination that the proposed project  
15 fell within one of CEQA's categorical exemptions. As in *Irvine*, the NTP is merely an extension of  
16 the CPCN for specific projects, but does preclude – much less preempt – the City from applying its  
17 Wireless Ordinance to NewPath's proposed DAS facilities.

18 Finally, the face of the CPCN affirms NewPath's duty to comply with Section 7901.1 and  
19 submit an application in accordance with the City's Wireless Ordinance. The CPCN orders NewPath  
20 to "comply with all applicable rules adopted in the Local Exchange Competition proceeding ..., as  
21 well as other applicable Commission rules, decisions, [General Orders], and statutes that pertain to  
22 California public utilities, subject to the exemptions granted in this decision." (CPCN: Exh 1 to  
23 NewPath's Memo. of P&As - 2006 Cal. PUC LEXIS 118, Decision 06-04-030 (April 13, 2006), at p.  
24 4, item #5) (emphasis added). There is no exemption to Section 7901.1 in NewPath's CPCN. (*See*  
25 *id.*)

26 **3. NewPath's Effective Prohibition Claim under 47 U.S.C.**  
27 **§332(c)(7)(B)(i)(II) is Not Ripe for Review; and Even if Ripe, Fails as a**  
28 **Matter of Law**

As an initial matter, the City must emphasize that the "effective prohibition" exemption

1 analysis is not yet at issue and not ripe for review. The City considered whether the City Manager  
2 erred in rescinding NewPath's permits and concluded that he had not erred because NewPath had  
3 failed to initiate or tender any applications under the Wireless Ordinance and the proposed NewPath  
4 antenna locations were prohibited under the Wireless Ordinance, subject to future determination as  
5 to whether exemptions would apply based on state and federal law limitation. Specifically, the City  
6 found that:

7 Rescission of the improperly issued encroachment and related building  
8 permits at issue does not mean NewPath is effectively prohibited from  
9 utilizing its CPCN to access the public rights of way. Rescission of the  
10 permits simply means NewPath must apply for permits pursuant to the  
11 City's Wireless Ordinance. If NewPath shows that particular proposed  
12 sites prohibited under the Wireless Ordinance are necessary 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.

13 (RJN, Exh. B: Finding # 17.) Thus, NewPath cannot prevail on this effective prohibition issue. *See*,  
14 *e.g.*, *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352-53 (1986) (holding that  
15 rejection of landowner's subdivision application was not ripe for review as a takings claim where  
16 landowner only filed one application that was rejected because landowner had not attempted to  
17 obtain approval of a development in accordance with the applicable zoning regulations, and thus  
18 there had not yet been a "final determination" because no meaningful application had been made; the  
19 possibility still existed that "some development [would] be permitted."); *Williamson County*  
20 *Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 (1985) (holding that takings claim is not  
21 ripe for review until full effect of regulation at issue can be determined because "That effect cannot  
22 be measured until a final decision is made as to how the regulations will be applied to [plaintiff's]  
23 property.").

24 NewPath refutes this finding, asserting that there is no exemption or variance process in the  
25 City's Wireless Ordinance, and therefore they can proceed to litigation beyond the City's stated  
26 grounds for rescinding the permits as having been issued in violation of the Wireless Ordinance, to  
27 what is essentially a facial challenge on the City's Wireless Ordinance. NewPath is again mistaken.  
28 The City's Wireless Ordinance prohibits wireless facilities located in or within 500 feet of

1 residential, park, greenbelt, or corresponding planned development zones or designations. However,  
2 the Wireless Ordinance has an exemption from the 500 foot setback requirement for facilities in  
3 neighborhood commercial areas, permitting such use subject to a conditional use permit and  
4 stealthing of the facility. DMC § 40.29.050(b)(2). Additionally, the Wireless Ordinance exempts  
5 "any wireless communication facility, if and only to the extent that a permit issued by the [CPUC] or  
6 the rules and regulations of the [FCC] specifically provide that the antenna is exempt from local  
7 regulation." DMC § 40.29.060(j). This provision gives the City authority to grant permits to certain  
8 wireless facilities to the extent a particular facility or location is necessary and required to avoid the  
9 TCA's effective prohibition and Section 7901.1's reasonable time, place, and manner limitation on  
10 the City's power to apply its Wireless Ordinance. Such review, however, has not yet occurred  
11 because the rescinded permits were mistakenly issued based on NewPath's misrepresentations as  
12 encroachment permits under Chapter 32 of the DMC – not the Wireless Ordinance. *See* DMC §  
13 40.29.040(b) (Unless exempt or prohibited, "no wireless telecommunication facility shall be  
14 constructed without first undergoing the specific review process and obtaining the prescribed  
15 permit.").

16 In any event, the City's Wireless Ordinance does not, as NewPath contends, constitute an  
17 effective prohibition under Section 332 of the TCA. NewPath has correctly set forth the Ninth  
18 Circuit's two prong test for evaluating effective prohibition, *i.e.*, a significant gap in service and  
19 inquiry into the feasibility of alternatives. Other than that, NewPath has mischaracterized the City's  
20 Wireless Ordinance, the scope of the City's appeal hearing on January 19th, and the evidence  
21 presented at that hearing.

22 The City's Wireless Ordinance is not an outright prohibition on wireless facilities. The City  
23 has approved numerous facilities throughout the City. *See* map and photos at  
24 <http://cityofdavis.org/story/?story=telecomm>. The Wireless Ordinance is restrictive as to residential  
25 and other neighborhoods, but does not constitute an outright prohibition of wireless facilities. And  
26 as further noted above, the Wireless Ordinance permits exemptions for facilities that would be  
27 exempt under the TCA or PUC requirements. With this in mind, the TCA's effective prohibition test  
28 looks to the significant gap evaluates significant gap from perspective of the wireless provider.

1 *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 733 (9th Cir. 2005). A  
2 "significant gap in service (and thus an effective prohibition of service) exists whenever a provider is  
3 prevented from filling a significant gap in *its own* service coverage." *Id.* The TCA does not  
4 guarantee wireless service providers coverage free of small "dead spots." *Id.* A service gap must be  
5 "truly significant" and not merely individual 'dead spots' within a greater service area. *Id.* at 733,  
6 n.10. This is a fact-intensive inquiry with the burden being on the wireless provider to prove  
7 application of the Wireless Ordinance would result in a significant gap in coverage.

8 NewPath cannot establish a likelihood of success on the merits regarding this issue for two  
9 reasons. First, NewPath by its own admission is not a "wireless provider." Its system is a "dumb  
10 pipe." Only wireless providers can have a gap in service because only wireless providers provide  
11 wireless service. NewPath asserts first that it is not a wireless provider, so that it can argue the City  
12 is pre-empted and now argues that it has a gap in service as a wireless provider. It cannot have  
13 things both ways. Second, assuming NewPath can argue that it has a "gap in coverage" because it  
14 cannot locate every one of its desired antennas where it wants them, this issue is not ripe. Again, at  
15 the January 19th hearing, the City Council found that this issue would have to be evaluated if and  
16 when NewPath re-applied for permits pursuant to the City's Wireless Ordinance. It is possible some  
17 of the proposed sites would have to be accommodated, but the City had no such evidence before it  
18 when the permits were initially rescinded by the City Manager on December 5, 2009. At the time  
19 the permits were rescinded, NewPath had not revealed whether a provider has already agreed to  
20 lease NewPath's DAS facilities. Without a provider – there can be no gap in coverage.

21 Nor did NewPath's last minute evidence of an alleged service gap go unanswered. The City  
22 had no specific information regarding an alleged service gap until it received a stack of hundreds of  
23 pages of material from NewPath just days before the hearing, and on the morning of the hearing.  
24 Amongst those papers was a drive report and purported map reflecting MetroPCS' alleged service  
25 gap in the City filed with the City on January 15, 2010 – the Friday before the January 19th appeal  
26 hearing. Nevertheless, the City consulted with Jonathan Kramer, an expert radio frequency engineer  
27 and advisor who has for nearly two decades reviewed thousands of coverage maps in connection  
28 with wireless siting cases. (Kramer Decl. at ¶¶ 3, 5, 6, 7: Exh. A, and 8.) Mr. Kramer was present at

1 the hearing and explained:

2 [...] By way of a short background, NewPath Networks is the installer of  
3 the transmitters, but they don't control the transmitters. As you've heard  
4 this evening, Newpath Networks has contracts with various wireless  
5 companies who are not here tonight. And they're not, so far, within our  
6 process, so that since those carriers control the transmission from the  
7 NewPath sites, as you've heard NewPath doesn't have the license to do  
8 that, we need to talk to those carriers to find out what that information is  
9 [regarding whether there are alleged gaps in the coverage provided by  
10 each wireless carrier]. With that information, then we can make an  
11 independent determination as we're allowed to do under the state and  
12 federal law as to what the compliance issues are. But we're not at that  
13 point.

14 Similarly, the issue of significant gap is a fact specific question. We don't  
15 have the people who appear to be claiming this significant gap here at our  
16 table to ask them the questions.

17 Similarly, the least intrusive means to close a significant gap if shown,  
18 NewPath Networks has a particular technology. Other technologies exist.  
19 And you have to look at who has the significant gap to determine how the  
20 – how to close that gap if proven, and what the least – the least intrusive  
21 means are. Again the [Wireless Ordinance] process provides for that  
22 process.

23 (Hood Decl., Exh. A: Transcript at 99:9-25 and 100:1-9.)

24 \*\*\*\*\*

25 They [NewPath] have provided us with information, but again it's – it's  
26 secondhand information since we're not talking to the people who  
27 NewPath claims are providing definitions of significant gap. It's one  
28 removed from our review process at this point.

29 (Hood Decl., Exh. A: Transcript at 100:18-23.)

30 NewPath's drive test and propagation maps alone are not sufficient to establish a significant  
31 gap in coverage. Significant gap determinations are "extremely fact-specific inquiries that defy any  
32 bright-line legal rule." *Palos Verdes*, 583 F.3d at 727. The mere "presentation of radio frequency  
33 propagation maps" is not sufficient to establish the existence of a 'significant gap.'" *Id.* Further, the  
34 NewPath's drive tests are not credible evidence of a significant gap in service because, among other  
35 things, they are not reliable, and do not use industry recognized standards. (Kramer Decl. at  
36 ¶¶ 11-21.)

37 Moreover, to the extent that NewPath is attempting to assert the existence of a "significant  
38 gap," it is trying to do so on behalf of its client wireless carriers (such as MetroPCS and AT&T

1 Wireless) who are very capable of asserting their own permit applications and claims for exemption  
2 under the City's Wireless Ordinance.

3 NewPath cannot show a likelihood to succeed on this issue because it has not applied for  
4 permits under the Wireless Ordinance; it has not exhausted its administrative remedies; it cannot  
5 assert any gap claims of wireless carriers as its own; and because, simply stated, NewPath does not  
6 and cannot itself "have a gap" because it does not provide wireless service.<sup>4</sup>

7 **4. The City's Rescission of NewPath's Permits, as Reflected in Resolution**  
8 **No. 10-010, Series 2010, is Supported by Substantial Evidence**

9 NewPath's contention that the City's decision to rescind NewPath's permits was not supported  
10 by substantial evidence is simply a reiteration of its assertion that it is exempt from the City's  
11 Wireless Ordinance, and that the City failed to rebut the 11<sup>th</sup> hour evidence it submitted to the City  
12 Council regarding effective prohibition. For sake of brevity, the City reincorporates by reference the  
13 facts and arguments above.

14 In addition, the substantial evidence standard is very deferential to the City. "The upshot is  
15 simple: this Court may not overturn the [City's] decision on substantial evidence grounds if that  
16 decision is (i) authorized by applicable local regulations and (ii) supported by a reasonable amount  
17 of evidence." *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 723-25 (9th Cir.  
18 2005). The "substantial evidence inquiry does not require incorporation of the substantive federal  
19 standards ..., but instead requires a determination whether the zoning decision at issue is supported  
20 by substantial evidence in the context of applicable state and local law." *Id.* at 723-24. There was  
21 clearly substantial evidence to support the decision by the City Council – *i.e.*, whether the City  
22 Manager erred in rescinding NewPath's permits on the grounds stated – and in particular on the  
23 ground that the permits issued were issued by mistake and in violation of the City's Wireless  
24 Ordinance.

25 \_\_\_\_\_  
26 <sup>4</sup> The City would also note that a wireless provider is clearly subject to the Wireless Ordinance. To  
27 find that NewPath is exempt from the Wireless Ordinance but can then sell its capacity and use of its  
28 facilities to providers who themselves are not exempt would be contrary to maxim that one cannot  
do indirectly what one cannot do directly.

1                   **5. The City's Actions Do Not Constitute an Effective Prohibition of**  
 2                   **Telecommunication Services under 47 U.S.C. § 253; NewPath's Effective**  
 3                   **Prohibition Claim under § 253 Fails as a Matter of Law for the Same**  
 4                   **Reasons its Effective Prohibition Claim under 47 U.S.C. § 332 Fails**

5                   Section 253 of the TCA preempts state and local regulations that maintain the monopoly  
 6 status of a telecommunications service provider. *Sprint v. County of San Diego*, 543 F.3d 571 (9th  
 7 Cir. 2008). A "plaintiff suing a municipality under section 253(a) must show actual or effective  
 8 prohibition, rather than mere possibility of prohibition." *Id.* at 578 (overruling *City of Auburn v.*  
 9 *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001)). "[R]equiring a certain amount of camouflage, modest  
 10 setbacks, and maintenance of the facility are reasonable and responsible conditions for the  
 11 construction of wireless facilities, not an effective prohibition." *Id.* at 580. The focus in evaluating a  
 12 claim under Section 253 is on the actual effects of the City's Wireless Ordinance, not on what effects  
 13 the Ordinance might possibly allow. *Id.* at 578.

14                   The legal standard is the same whether an effective prohibition claim is asserted under  
 15 Section 253 or 332. *Palos Verdes*, 583 F.3d at 728. As discussed above, NewPath's claim is one  
 16 based on what effects the Wireless Ordinance might possibly allow. The Wireless Ordinance  
 17 prohibits all of the permitted antennas, but that does not mean it prohibits them in other areas of the  
 18 City or that exemptions will apply if a significant gap in service is proven.

19                   Finally, to succeed, NewPath would first have to prove, under *MetroPCS*, that (a) there is a  
 20 significant gap in the wireless carrier's coverage, and then (b) that the proposed solution is the least  
 21 intrusive means to close the significant gap. So, assuming that a wireless carrier (which NewPath is  
 22 not) established that that particular carrier has significant gap in coverage in portions of the City  
 23 there maybe numerous different ways to close this gap in coverage, many of which may be perfectly  
 24 consistent with the Wireless Ordinance, others of which may not. (Kramer Decl. at ¶¶ 22-23.) The  
 25 fact that the particular carrier would like, or even prefer, to close its proven service gap by entering  
 26 into an agreement to use specific sites selected by NewPath does not mean that NewPath's  
 27 installations are, in fact, the least intrusive means, nor does it mean that the City is mandated to  
 28 permit NewPath's chosen locations if other locations or other types of antennas can also close the  
 proven significant gap in service.

1                   **6. NewPath did Not have a Vested Right to Violate and the City is not**  
2                   **Estopped from Revoking NewPath's Permits**

3                   **a. There is No Vested Right to Invalidly Issued Permits**

4                   Vested rights apply where a party has "performed substantial work and incurred substantial  
5 liabilities in good faith reliance upon a permit issued by the government." *Winnaman v. Cambria*  
6 *Cnty. Servs. Dist.*, 208 Cal.App.3d 49, 56 (1989). But there is no vested right to proceed under an  
7 invalidly issued permit.

8                   A vested rights defense may arise in situations involving building permits where there is  
9 some change that affects the validity of the proposed project, such as a change in zoning. In such  
10 cases, the applicant may claim a vested right to continue construction according to the prior zoning  
11 regulations if the applicant has a *validly issued* building permit and has expended substantial funds  
12 and performed substantial work. This is not the case, however, where the permit being relied upon  
13 was issued in violation of the local zoning ordinances. For example, in *Horowitz v. City of Los*  
14 *Angeles*, 124 Cal.App.4th 1344 (2004), a homeowner (Beglari) applied for and was issued several  
15 permits for a large residential remodel, including a building permit issued in January 2001 by the  
16 city's building department. A neighbor challenged the permits in March 2002 via a city  
17 administrative process, and when that failed, filed suit in April 2002. While the neighbor's lawsuit  
18 was pending, construction continued and the homeowner received a certificate of occupancy in  
19 August 2002. The court, concluding that the residential addition did in fact encroach into the front  
20 yard setback, held that the permits had to be revoked. In so holding, the *Horowitz* court explained,

21                   Beglari's house must conform to the mandatory requirements of the zoning  
22 ordinance. As explained above, the remodeled house does not conform  
23 because the prevailing front yard setback was miscalculated by Beglari  
24 and mistakenly accepted by the City. Just as the City has no discretion to  
deny a building permit when an applicant has complied with all applicable  
ordinances, the City has no discretion to issue a permit in the absence of  
compliance. It follows that Beglari's permits must be revoked.

25 *Id.* at 1355-56 (internal citations omitted).

26                   The permits issued in error to NewPath, as explained above, were issued in violation of the  
27 City's Wireless Ordinance, and based on incorrect information provided by NewPath to City staff.  
28 Accordingly, there is no vested right to proceed with construction under the improperly issued

1 encroachment permits. "[I]t is well-settled that 'when an administrative agency acts in excess of, or  
2 in violation of, the powers conferred upon it, its action thus taken is void.'" *City & County of San*  
3 *Francisco v. Padilla*, 23 Cal.App.3d 388, 400 (1972) (quoting *Ferdig v. State Personnel Bd.*, 71  
4 Cal.2d 96, 104 (1969)).

5 The authority on which NewPath relies, *Wilson v. City of Laguna Beach*, 6 Cal.App.4th 543  
6 (1992), is not to the contrary. In *Wilson*, the City refused to issue permits for "granny flats" pursuant  
7 to its local ordinance even though the Legislature had enacted legislation expressly pre-empting  
8 local government and requiring them to permit such uses. This is distinguishable from this action  
9 where the Legislature has not preempted local legislation, but has instead expressly authorized local  
10 time, place, and manner regulation in Section 7901.1.

11 **b. The Doctrine of Equitable Estoppel will Not be Invoked as a**  
12 **Matter of Law where a Permit Violates the City's Ordinances Due**  
13 **to the Injury to City Residents that would Otherwise Result**

14 A similar result is reached under an equitable estoppel claim. The four essential elements of  
15 estoppel are that (1) the party to be estopped must be apprised of the facts and (2) must intend that  
16 the conduct at issue be acted on or must so act that the party asserting the estoppel has a right to  
17 believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of  
18 the facts and (4) must rely on the conduct at issue with resulting injury. *Lentz v. McMahon*, 49  
19 Cal.3d 393, 399 (1989); *Strong v. County of Santa Cruz*, 15 Cal.3d 720, 725 (1975). If any of the  
20 elements is missing, an estoppel may not be found. *Moore v. State Board of Control*, 112  
21 Cal.App.4th 371, 384 (2003).

22 Estoppel is not favored and will not be applied unless clearly warranted. "Estoppel is an  
23 equitable remedy and, as such, will only be applied to avoid injustice." *Tenzer v. Superscope, Inc.*,  
24 39 Cal.3d 18, 33 (1985). Most importantly, estoppel is applied defensively, not to obtain affirmative  
25 advantages. *In re Marriage of Umphrey*, 218 Cal.App.3d 647, 658 (1990) (estoppel acts defensively  
26 only; it can never be used as sword to gain unfair advantage by one seeking to assert it); *People ex*  
27 *rel. Department of Public Works v. Volz*, 25 Cal.App.3d 480, 488 (3d Dist.1972) ("Estoppel is  
28 equitable; applied too readily, it is harsh, rife with possibilities of a penalty outweighing the offense;  
it applies defensively only, never to give an unfair advantage to the party invoking it").

1 Equitable estoppel is rarely applied against a governmental entity. *Golden Gate Water Ski*  
2 *Club v. County of Contra Costa*, 165 Cal.App.4th 249, 259 (2008). Indeed, when estoppel is sought  
3 against a government entity, the courts often require "affirmative misconduct" by the government.  
4 *Tammen v. County of San Diego*, 66 Cal.2d 468, 480 (1967); *In re Marriage of Mena*, 212  
5 Cal.App.3d 12, 20 (1989); *Bolt v. United States*, 944 F.2d 603, 609 (9th Cir. 1991) ("Affirmative  
6 misconduct does require an affirmative misrepresentation or affirmative concealment of a material  
7 fact by the government, although it does not require that the government intend to mislead a party  
8 [citations]"). And courts are particularly reluctant to apply estoppel against governmental entities in  
9 the land use context. This is so because:

10 In the field of zoning laws, the courts are dealing with a vital public  
11 interest – not one that is strictly between the municipality and the  
12 individual litigant. All the residents of the community have a protectable  
13 property and personal interest in maintaining the character of the area as  
14 established by comprehensive and carefully considered zoning plans in  
15 order to promote the orderly physical development of the district and the  
16 city and to prevent the property of one person from being damaged by the  
17 use of neighboring property in a manner not compatible with the general  
18 location of the two parcels. [...] It follows that the doctrine of equitable  
19 estoppel will not be invoked as a matter of law even where a property  
20 owner relies on a permit issued by the public entity but the permit violates  
21 a zoning ordinance. To hold that the public entity can be estopped would  
22 not punish the public entity but it would assuredly injure the area  
23 residents, who in no way can be held responsible for the public entity's  
24 mistake.

18 *Id.* at 259-60 (internal citations and quotations omitted); see also *Strong v. County of Santa Cruz*, 15  
19 Cal.3d 720 (1975) (holding county was not estopped from asserting expiration of a use permit as a  
20 basis for reduction in the number of mobile home units even though it had approved construction  
21 plans after the expiration of the permit when it had no knowledge of that expiration).

22 NewPath has not pointed to any affirmative misconduct on the part of the City. In fact, there  
23 was none. Rather, NewPath's supporting declarations affirm that NewPath misled City staff –  
24 "discuss[ing] NewPath's status as a certificated public utility and how it is that the [CPUC] treats  
25 these entitled [sic] differently from cellular service providers." (Garcia Decl. at ¶ 3:13-15.) These  
26 declarations indicate that NewPath convinced staff it was exempt from the Wireless Ordinance  
27 simply because of its status as a public utility – "to be treated as any application from PG&E or  
28

1 AT&T." – without any mention of PUC Section 7901.1. (Sears Decl. at ¶ 17:15.)<sup>5</sup>

2 Moreover, the injury here would be to the residents residing near the proposed DAS 42 foot  
3 high antennas, the residents and visitors using the greenbelts and parks, and the impaired views it  
4 would create in neighborhoods like Village Homes where there are no overhead utilities marring the  
5 skyline. There was substantial evidence from the public at the January 19th hearing – as reflected in  
6 the public testimony, comment letters, and the petition signed by 225 residents of Village Homes.  
7 (Hood Decl., Exh. A; RJN, Exh. C.) Such injury is why courts rarely apply equitable estoppel  
8 against a government entity.

9 **B. There Is No Showing of Irreparable Injury to NewPath**

10 A party seeking a preliminary injunction must show both that there is no adequate remedy at  
11 law and that the party will suffer irreparable harm absent injunctive relief. NewPath cannot satisfy  
12 either requirement. This lawsuit offers an adequate remedy—not as immediate, of course, and more  
13 burdensome in that NewPath will have to prove its case on the merits—but adequate under the law.

14 Especially when a plaintiff seeks to enjoin state or local government, a significant showing of  
15 irreparable harm is required. Thus, "a plaintiff seeking an injunction against a local or state  
16 government must present facts showing a threat of immediate, irreparable harm before a federal  
17 court will intervene." *Midgett v. Tri-County Met. Transp. Dial*, 254 F.3d 846, 851 (9th Cir. 2001).  
18 "Mere financial injury will not constitute irreparable harm if adequate compensatory relief will be  
19 available in the course of litigation." *State of California v. Tahoe Regional Planning Agency*, 766  
20 F.2d 1316, 1319 (9th Cir.1985) (following *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466,  
21 471 (9th Cir. 1984)). The *Goldie's* court followed *Sampson v. Murray*, 415 US 61, 90 (1974) where  
22 the Court ruled:

23 "The key word in this consideration is *irreparable*. Mere injuries, however  
24 substantial, in terms of money, time and energy necessarily expended in  
25 the absence of a stay, are not enough. The possibility that adequate  
26 compensatory or other corrective relief will be available at a later date, in  
the ordinary course of litigation, weighs heavily against a claim of  
irreparable harm."

27 <sup>5</sup> The doctrine of unclean hands "closes the doors of a court of equity to one tainted with  
28 inequity or bad faith relative to the matter in which he seeks relief." *Jarrow Formulas, Inc. v.*  
*Nutrition Now, Inc.*, 304 F.3d 829, 841 (9th Cir. 2002).

1 *Id.* at 90 (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925  
 2 (D.C. Cir. 1958)). Moreover, the Supreme Court has held: "Mere litigation expense, even  
 3 substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v.*  
 4 *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

5 "Speculative injury does not constitute irreparable injury sufficient to warrant granting a  
 6 preliminary injunction." *Caribbean Marine Servo Co. Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.  
 7 1988). In *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466 (9th Cir. 1984), for example, the  
 8 trial court determined that Goldie's would lose goodwill and "untold" customers. The Ninth Circuit  
 9 reversed, holding: "This finding, not based on any factual allegations, appears to be speculative.  
 10 Speculative injury does not constitute irreparable injury." *Id.* at 472 (following 11 C. Wright & A.  
 11 Miller, *Federal Practice and Procedure* § 2948 at 436 (1973)).

12 Like the petitioner in *Goldie's Bookstore*, NewPath's only asserted injury is lost business  
 13 revenues and goodwill – an injury that does not rise to the level of irreparable injury.

#### 14 **C. The Balance of Hardships Clearly Favors the City**

15 To determine which direction the balance of hardship tips, "a court must identify the possible  
 16 harm caused by the preliminary injunction against the possibility of the harm caused by not issuing  
 17 it." *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999).  
 18 The harm to the public – namely the residents of the City of Davis has been discussed above, so for  
 19 the sake of brevity, the City simply emphasizes that the public interest far outweighs the limited  
 20 business and financial interest NewPath is seeking to foster. If NewPath were permitted to move  
 21 forward before this matter is resolved and ultimately loses, the damage to the physical environment  
 22 and restoration of landscaping could not be easily, inexpensively, or quickly undone.

#### 23 **D. The Public Interest Opposes a Preliminary Injunction**

24 The public interest factor is a separate factor to be considered in determining whether to  
 25 grant a preliminary injunction. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th  
 26 Cir. 2002). Further, the public interest analysis in preliminary injunction cases is focused on the  
 27 impact of granting or denying the injunction on non-parties rather than parties. *Bernhardt v. Los*  
 28 *Angeles County*, 339 F.3d 920, 931-32 (9th Cir. 2003). As the Supreme Court has admonished: "in

1 exercising their sound discretion, courts of equity should pay particular regard for the public  
2 consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-*  
3 *Barcelo*, 456 U.S. 305, 312 (1982). Here, the public interest clearly weights heavily against the  
4 grant of a mandatory preliminary injunction.

5 **V. THE PRELIMINARY INJUNCTION SHOULD NOT ISSUE BECAUSE NEWPATH'S**  
6 **MANDATORY INJUNCTION HAS A HIGHER BURDEN THAT NEWPATH HAS**  
7 **NOT, AND CANNOT, MEET**

8 There is a higher burden for mandatory injunctions of the sort NewPath seeks. *Dahl v. HEM*  
9 *Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). The proposed order NewPath submitted would  
10 reverse the City's decision to revoke the permits, would reinstate the permits, and would hold the  
11 stop work notice null and void. As a result of this proposed mandate, NewPath could, and  
12 presumably would, immediately again commence installing its wireless facilities, altering landscapes  
13 and roads in the City, and adversely affecting residents of the City. When a party "seeks mandatory  
14 preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be  
15 extremely cautious about issuing a preliminary injunction." *Martin v. Int'l Olympic Comm.*, 740  
16 F.2d 670, 675 (9th Cir. 1984).

17 The status quo here is the rescission of NewPath's permits and the halting of any further  
18 change to the local landscape. As explained above in the Statement of Facts and in the  
19 accompanying declaration of William H. Marshall, NewPath's construction of the DAS project was  
20 halted shortly after it began. Issuance of NewPath's requested preliminary injunction would reverse  
21 course and drastically change the status quo. As the Ninth Circuit explained in 2006:

22 "A mandatory injunction goes well beyond simply maintaining the status  
23 quo pendente lite [and] is particularly disfavored." *Stanley v. Univ. of S.*  
24 *Cal.*, 13 F.3d 1313, 1320 (9th Cir.1994) (alteration in original). Mandatory  
25 relief is unnecessary in this case because it will not further the "purpose of  
26 a preliminary injunction, [which] is merely to preserve the relative  
27 positions of the parties until a trial on the merits can be held." *Univ. of*  
28 *Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175  
(1981).

26 *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1158 (9th Cir. 2006).

27 //

28 ///

1 **VI. NEWPATH IMPROPERLY SEEKS ALL RELIEF BY THIS INJUNCTION**

2 NewPath proposes a preliminary injunction that would reinstate the permits and would hold  
3 the stop work notice null and void. In effect, NewPath would obtain by preliminary injunction all or  
4 substantially all of the relief it seeks through this lawsuit. The federal courts impose a much higher  
5 burden when the injunction sought "will provide the movant with substantially all the relief sought,  
6 and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Brewer v.*  
7 *West Irondequoit Cent. School District*, 212 F.3d 738, 744 (2d Cir. 2000) (quoting *Jolly v. Coughlin*,  
8 76 F.3d 468, 473 (2d Cir. 1996)).

9 **VII. SIGNIFICANT SECURITY IS REQUIRED BEFORE ANY INJUNCTION SHOULD**  
10 **ISSUE**

11 NewPath does not address the requirement that security be given before any preliminary  
12 injunction may be granted. Federal Rule of Civil Procedure 65(c) mandates, with emphasis:

13 The court may issue a preliminary injunction or a temporary restraining  
14 order **only if the movant gives security** in an amount the court considers  
15 proper to pay the costs and damages sustained by any party found to have  
16 been wrongfully enjoined or restrained.

16 Adequate security is "an essential condition" to an injunction.

17 The declaration of William H. Marshall sets out the City's current understanding of the costs  
18 and damages the City would sustain if the proposed injunction were to be granted. As explained in  
19 Mr. Marshall's declaration, very little of NewPath's project has been constructed at this juncture. If  
20 NewPath were issued a mandatory injunction allowing it to complete construction and were  
21 ultimately unsuccessful, it would cost the City approximately \$4,638,000 (and \$5,740,000 in 2015)  
22 to remove the facilities. (Marshall Decl. at ¶ 6, Exh. C.) Additional costs of approximately \$ 7,800  
23 would also be required if the City agreed to lease particular facilities to NewPath for four years. (*Id.*  
24 at ¶¶ 13-14.) Accordingly, the City requests that the Court order NewPath to post a bond of  
25 \$5,747,800 if a preliminary injunction is granted, plus attorneys' fees and costs as set forth below.

26 The grant of a bond set at the full amount of the defendant's costs and damages to be  
27 sustained from a wrongful injunction is critical because, "in the absence of such a bond, there may  
28 be no recovery of damages for the issuance of a temporary injunction even though it may have been

1 granted without just cause." *Benz v. Compania Naviera Hidalgo, SA*, 205 F.2d 944, 948 (9th Cir.  
 2 1953) (per curiam on denial of rehearing); *accord, Buddy Systems, Inc. v. Exer-Genie, Inc.*, 545 F.2d  
 3 1164, 1167-68 (9th Cir. 1976). "If a bond is posted, liability is limited by the terms of the bond or  
 4 the order of the court that required the posting." *Id.* at 1168. These rules make the amount of the  
 5 bond critically important to fair treatment of a defendant. As the Seventh Circuit held, with added  
 6 emphasis:

7 **When setting the amount of security, district courts should err on the**  
 8 **high side.** If the district judge had set the bond at \$50 million, as Abbott  
 9 requested, this would not have entitled Abbott to that sum; Abbott still  
 10 would have had to prove its loss, converting the "soft" numbers to hard  
 11 ones. An error in setting the bond too high thus is not serious. (The fee for  
 12 a solvent firm such as Mead Johnson or its parent Bristol-Myers Squibb  
 Co. to post a bond, a standby letter of credit, or equivalent security is a  
 very small fraction of the sum involved.) [citation] Unfortunately, an error  
 in the other direction produces irreparable injury, because the damages for  
 an erroneous preliminary injunction cannot exceed the amount of the  
 bond.

13 *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 888 (7th Cir.), amended on other  
 14 grounds, 209 F.3d 1032 (7th Cir.), *cert. denied*, 531 U.S. 917 (2000); *accord*, 13 Moore's Federal  
 15 Practice § 65.50[1] (3d. ed. 2009).

#### 16 **VIII. AS A NONRESIDENT PLAINTIFF, NEWPATH MUST POST SECURITY**

17 In addition to the requirement for security for costs and damages the City may sustain as a  
 18 result of any injunction, NewPath is also properly required to post security for costs because it is a  
 19 nonresident plaintiff. Federal courts have inherent power to require nonresident plaintiffs to post  
 20 security and typically follow the forum state's rules and practices in this regard. *Simulnet East*  
 21 *Assocs. v. Ramada Hotel Operating Co.*, 37 F.3d 573, 574 (9th Cir. 1994); *In re Merrill Lynch*  
 22 *Relocation Mgmt., Inc.*, 812 F.2d 1116, 1121 (9th Cir. 1987); *A. Farber & Partners, Inc. v. Garber*,  
 23 417 F. Supp. 2d 1143, 1143-46 (C.D. Cal. 2006). As this action is founded on both diversity and  
 24 federal question jurisdiction, it is appropriate to look to California Code of Civil Procedure section  
 25 1030§, which provides:

26 (a) When the plaintiff in an action or special proceeding resides out of the  
 27 state, or is a foreign corporation, the defendant may at any time apply to  
 28 the court by noticed motion for an order requiring the plaintiff to file an  
 undertaking to secure an award of costs and attorney's fees which may be  
 awarded in the action or special proceeding. For the purposes of this  
 section, "attorney's fees" means reasonable attorney's fees a party may be

