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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NEWPATH NETWORKS, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, Plaintiff, v. THE CITY OF DAVIS, CALIFORNIA, A GENERAL LAW MUNICIPALITY Defendant.	Case No. 2:10-CV-00236-GEB-KJM **DECLARATION OF JONATHAN L. KRAMER IN SUPPORT OF DEFENDANT CITY OF DAVIS' OPPOSITION TO 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.

I, Jonathan L. Kramer, declare as follows:

1. Unless otherwise indicated, I know the following of my own personal knowledge, and if called as a witness in this action, I could and would testify competently to these facts under oath.

2. References in this Declaration to "the City" mean the City of Davis, California, which is the Defendant in this matter. References herein to "NewPath" are to the Plaintiff in this matter.

3. I am a radio frequency ("RF") engineer holding multiple FCC licenses. I have been continuously licensed by the FCC since the early 1970s. I presently hold five FCC licenses and one license endorsement.

4. I am an Attorney and Counselor at Law admitted in California.

5. For approximately the past 18 years, I have been a wireless siting planner working with hundreds of governments and private firms. As a radio frequency engineer and an Attorney, I am a frequently-invited lecturer regarding wireless siting matters at wireless industry meetings; government meetings; at planning industry conferences; and as a facility member on attorney MCLE programs on this subject matter.

6. I have been involved with RF engineering reviews and wireless planning in over 750 planning cases. As a wireless siting planner, I regularly evaluate wireless projects tendered to local governments to determine whether a gap in a carrier's coverage exists, and whether that gap is significant or merely consists of dead spots not rising to the level of a significant gap.

7. My statement of qualifications is attached hereto as **Exhibit A**.

8. I have extensive experience in evaluating claims made by wireless carriers of the existence of significant coverage gaps, and in working with local agencies and the wireless carrier applicants in an attempt to identify strategies for filling those gaps if they are shown to exist.

9. In determining the existence or lack of a significant gap in a particular carrier's coverage, I would typically consider, among other factors, the carrier-developed existing coverage maps, carrier-performed drive tests to quantify existing coverage, other carrier testimony, and public information.

10. Drive tests of existing coverage performed under controlled conditions by the carrier and observed by the government are given the greatest weight in determining the existence of a gap in coverage because the observed signal measurements can be placed in proper context (i.e., known transmitter power; transmitting antenna orientation and elevation; network conditions occurring at the time of the test that could impact the results; etc.).

11. In the "DECLARATION OF JAMIE T. HALL IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION" dated February 1, 2010 ("Hall Declaration"), Mr. Hall discusses "a special 'comparative drive test' that was conducted […] to measure coverage in Davis." Mr. Hall said "[t]he comparative drive test was commissioned to analyze the coverage of wireless carriers including MetroPCS, Sprint, and T-Mobile in Davis." (Hall Declaration at ¶ 7.)

The "comparative drive test" performed by NewPath is attached to the Hall Declaration as Exhibit 1 thereto at pages 42-52 (and Exhibit 4 to NewPath's 1/14/2010 submission to the City), and purports to reflect the signal coverage of MetroPCS, Spring, Verizon Wireless, T-Mobile, and AT&T in the City.

12. NewPath's comparative drive test is unreliable as an indicator of a significant gap in coverage for a particular wireless carrier for a variety of reasons.

13. First, there is no federal law or FCC rule discussing, much less establishing the meaning of "Good," "Acceptable," "Marginal," and "Poor" signal strengths as used by NewPath (hereinafter, the "word terms").

14. Second, there is no federal law or FCC rule establishing the signal strengths associated by NewPath for each self-described level of coverage (i.e., "Good" signal strength is "-75 to 0" dBm, etc.) (hereinafter, the "signal strength bands").

15. Third, there is no wireless industry standard that defines the word terms used by NewPath in the comparative drive test.

16. Fourth, there is no wireless industry standard that defines the signal strength bands used by NewPath in the comparative drive test.

17. Fifth, NewPath's comparative drive test fails to disclose material information regarding whether all of the wireless carriers' networks in Davis and their cell sites were, at the time of NewPath's measurements, operating, or operating in their normal conditions.

18. Sixth, NewPath's comparative drive test fails to disclose material information regarding wireless carriers that serve their customers with multiple bands of service (the cellular band compared with the PCS band). For example, MetroPCS, Sprint and T-Mobile serve their customers using only PCS band frequencies, while AT&T and Verizon use frequencies in both the cellular and PCS bands. With regard to AT&T and Verizon, NewPath only shows a single drive test, so it is apparent that they did not measure – or did measure but did not report – all of the existing signal strength on both bands for at least those two carriers. Thus, even as a purported comparison of the signal strengths of all of the measured wireless carriers, the report fails to disclose material information.

19. Seventh, NewPath's statement regarding MetroPCS, "The data below clearly shows the need for MetroPCS to improve their network in the Davis area" (sic) (Hall Decl.: Exh. 1 at pg. 47 / Exh. 4 at pg. 6) and Sprint, "The data below shows the need for Sprint to improve their network in parts of the Davis area" (sic) (Hall Decl., Exh. 1 at pg. 48 / Exh. 4 at pg. 7) are NewPath's naked assertions not rising to the level of a claim of a significant gap made by a wireless carrier.

20. Eighth, NewPath's comments regarding Verizon ("The yellow data points indicate areas of poor coverage that Verizon *may* seek to improve") (emphasis added; Hall Decl., Exh. 1 at pg. 49 / Exh. 4 at pg. 8); T-Mobile ("The areas on the map below that are light green or yellow are primarily residential coverage areas where T-Mobile" *may* seek improvement to their network") (emphasis added; Hall Decl., Exh. 1 at pg. 50 / Exh. 4 at pg. 9); and AT&T ("The areas on the map below that are yellow or light green are areas where AT&T *would* seek improvement to their network") (emphasis added; Hall Decl., Exh. 1 at pg. 51 / Exh. 4 at pg. 10) indicate that NewPath is applying its own assessments as to what these carriers may wish to do. As such, these statements are not reliable as to what those carriers actually assert about their own present signal coverages in the City.

21. Ninth, NewPath's conclusion that "MetroPCS, Sprint, ATT, and T-Mobile all have areas in Davis where the drive data shows that their coverage is marginal or poor, indicating a significant coverage gap" (Hall Decl., Exh. 1 at pg. 52 / Exh. 4 at pg. 11) is its own conclusion, based on its own word terms and signal strength bands, and incomplete data, and not on any claim or demonstration by any of the wireless carriers of any actual significant gaps in coverage.

22. While NewPath's Distributed Antenna System (hereinafter, "DAS") is its only means of improving network coverage, other methods of improving network coverage exist, including:

a. the installation of new cell site, sometimes called a 'macrocell' or 'microcell' (typically constructed using antennas mounted on monopoles and mono-trees; within flagpoles and unipoles); and

b. one wireless carrier collocating on the existing antenna site of another wireless carrier; and

c. installing a new macrocell or microcell camouflaged within an existing or

added structure such as a church steeple, a church cross, behind a rooftop parapet, or inside a cupola; and

d. installing a new macrocell or microcell with antennas affixed to an existing structure such as an shopping center sign, and office building, store, or other commercial or industrial structure; and

e. attaching antennas to an existing or new field light standard in a park or school; and

f. installing camouflaged antenna structures within faux windmills and faux wooden water tanks.

23. The list above is not exhaustive, but merely representative of the significant varieties of cell sites already constructed by wireless carriers. Thus, while NewPath provides one solution to improve a wireless carrier's signal coverage, it does not provide the only, best, or least intrusive means of doing so.

24. NewPath's inchoate system in the City is not apparently capable of immediate activation, even in part. It appears that NewPath has fully or partially constructed four DAS installations in the north and northeast portions of the City (Node 11, East Eighth Street opposite Valley Oak School; Node 13, Dennison west of Covell and east of Birch Lane; Node 14 East Covell Boulevard at the Wilson Way bicycle undercrossing; and Node 15, East Covell Boulevard at Haper Junior High School), however Node 14 is an installation placed on City property without City authority, thus only three nodes could be close to activation. However, there does not appear to be a completed cabled interconnection between the possible three node sites and NewPath's customer, MetroPCS at the existing MetroPCS cell located several miles away to the southwest and outside of the City on property adjacent to the University of California, Davis.

25. A DAS network requires a cabled interconnection between each DAS antenna site and the wireless carrier's connection point. My review of the exhibits attached to NewPath's Complaint in this matter, as well as the statements made and evidence provided by NewPath's representatives at the City Council hearing on January 19, 2010 do not show that they have installed the necessary interconnections (here, fiber optic cables) between the three nodes and the MetroPCS

cell site. For this reason, I conclude that NewPath is not capable of activating any portion of its DAS in the City.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 22nd day of February, 2010 at Los Angeles, California.

By: /s/ Jonathan L. Kramer
JONATHAN L. KRAMER

(original signature retained by attorney Harriet A. Steiner)