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7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

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

12 Plaintiff,)

13 v.)

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

16 Defendant.)

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

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DECLARATION OF WILLIAM H. MARSHALL 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.

20 I, William H. Marshall, declare:

21 1. I am the Assistant City Engineer for the City of Davis ("City"). I have held this
22 position since October 2000. I have held various positions with the City of Davis over a 30 year
23 period. I am a Registered Professional Engineer (Civil) in the state of California (1983). My duties
24 have included many aspects of the City's public works projects and engineering services, including
25 the design of public works improvements and responsible charge for the review of development
26 projects. I have also have been directly involved in the oversight of the sidewalk and street
27 maintenance programs. In that capacity, I have personal knowledge of the information and facts set
28 forth below and if called upon to testify about it, I could and would do so competently.

1 2. City staff issued NewPath 36 encroachment and related building permits for the
2 proposed distributed antenna system ("DAS") primarily in late-October 2009. The Stop Work
3 Notice lists 37 permits, but we later clarified that one of the permits (permit #09-777002656) was
4 not issued. Following is a list of each permit by number and the date each respective permit was
5 issued:

<u>Permit Number</u>	<u>Location</u>	<u>Date Issued</u>
09-77700271	1455 E 8 th Street	11/13/09
09-77700268	3700 Alhambra Drive	11/05/09
09-77700267	4000 E Covell Blvd.	11/05/09
09-77700266	3075 E Covell Blvd.	11/05/09
09-77700262	2500 Moore Blvd.	11/05/09
09-77700252	730 J Street	11/02/09
09-77700251	308 Antioch Drive	11/02/09
09-77700250	803 Linden Lane	11/02/09
09-77700249	2819 Lillard Drive	10/28/09
09-77700248	3606 Lillard Drive	10/28/09
09-77700247	809 La Paz Drive	10/28/09
09-77700246	812 Burr Street	10/28/09
09-77700245	2322 Westernesse Road	10/28/09
09-77700244	3215 Bermuda Avenue	10/28/09
09-77700243	1340 Lake Blvd.	10/28/09
09-77700242	3100 Loyola Drive	11/02/09
09-77700228	1427 E 8 th Street	10/21/09
09-77700227	515 E 8 th Street	10/21/09
09-77700226	646 A Street	10/21/09
09-77700218	2909x W Covell Blvd.	10/21/09
09-77700201	2500 Moore Blvd.	10/09/09
09-77700200	23 Russell Blvd.	10/09/09

09-77700199	875 Russell Blvd.	10/01/09
09-77700196	1306 Clara Lane	10/21/09
09-77700195	3700 Alhambra Drive	10/21/09
09-77700194	2500 Moore Blvd.	10/21/09
09-77700193	4000 E Covell Blvd.	10/21/09
09-77700192	3075 E Covell Blvd.	10/21/09
09-77700189	1813 Oleander Place	10/21/09
09-77700188	1010 E 8 th Street	10/21/09
09-77700187	402 Antioch Drive	10/21/09
09-77700186	513 Russell Blvd.	10/21/09
09-77700185	1241 Tulip Lane	10/21/09
09-77700184	23 Russell Blvd.	10/09/09
09-77700158	3200X Alhambra Drive	09/02/09
09-77700157	803 Linden Lane	10/21/09

3. I have reviewed the 36 permits issued to NewPath Networks, LLC's ("NewPath") and the related maps and application materials, including NewPath's equipment and grounding details, information sheets, elevation sheets, and site plans.

4. NewPath's proposed DAS project would include 24 wireless antenna facilities, 17 of the antennas would be stand alone wooden or metal poles approximately 42 feet high. The remaining seven DAS antenna facilities would be located on existing telephone or electric poles.

5. On December 28, 2009, I visited the proposed DAS stand-alone antenna sites. Attached hereto as **Exhibit A** are true and correct copies of the photographs I took on that date, with the exception of the photograph identified as Exhibit A-22, which I took on February 21, 2010. As these photos reveal, very little physical work was completed by NewPath and its contractors prior to the City Manager's issuance of the Stop Notice. The photographs of each site are listed below by address, permit number, and the pole location number. The Pole Location number corresponds to

1 the number of each site as shown on Attachment 6 to the City's January 19, 2010 Staff Report (Exh.
2 17 to NewPath's Memo. of P&As).¹ In addition, I have included short descriptions of the status of
3 construction, if any, at the respective sites as of February 19, 2010. The notice posted on 8 ½ x 11
4 inch white paper visible in the photographs is the Stop Notice Order issued by the City Manager in
5 November 2009.

- 6 a. **Exhibit A-1:** 803 Linden Lane (Permit # 09-77700157 / Pole Location
7 #DAV07) – new wooden pole installed, but pole was not installed in the correct
8 location and according to NewPath personnel, this pole is scheduled for removal
9 prior to Friday, February 26, 2010.
- 10 b. **Exhibit A-2:** 1241 Tulip Lane (Permit # 09-77700185 / Pole Location #DAV18)
11 – excavation of foundation completed and cage/mounting bolts are in place, but
12 the foundation has not been poured and conduit has not been stubbed into the
13 foundation hole. In addition, there is no evidence of conductors or fiber being
14 installed, nor is there a ground box or evidence of conduit having been run from
15 the east side of the street for power.
- 16 c. **Exhibit A-3:** 513 Russell Blvd. (Permit # 09-77700186 / Pole Location
17 #DAV06) – no construction has commenced.
- 18 d. **Exhibit A-4:** 402 Antioch Drive (Permit # 09-77700187 / Pole Location
19 #DAV08) – evidence of soil samples being taken, but no construction has
20 otherwise commenced.
- 21 e. **Exhibit A-5:** 1010 E 8th Street (Permit # 09-77700188 / Pole Location
22 #DAV24) – no construction has commenced.
- 23 f. **Exhibit A-6:** 1813 Oleander Place (Permit # 09-77700189 / Pole Location
24 #DAV13) – joint pole installation with new pole. New pole has been
25 constructed with the antenna, amplifier, meter box and ground box in place.
26 However, it does not appear the fiber is yet in place, there are no conductors and

27 _____
28 ¹ For ease of reference, the City's table – Attachment 6 to the City's January 19, 2010 Staff Report
(Exh. 17 to NewPath's Memo. of P&As) – is attached hereto as **Exhibit B**.

1 no evident service point or power conduit installed.

2 g. **Exhibit A-7:** 3075 E Covell Blvd. (Permit # 09-77700192 / Pole Location
3 #DAV14) – new wooden monopole has been installed with the antenna in place.
4 However, the pole is located on City property and NewPath does not have a
5 lease with the City for this site.

6 h. **Exhibit A-8:** 4000 E Covell Blvd. (Permit # 09-77700193 / Pole Location
7 #DAV15) – joint pole installation on existing pole; antenna array is in place.

8 i. **Exhibit A-9:** 2500 Moore Blvd. (Permit # 09-77700194 / Pole Location
9 #DAV16) – foundation hole for new monopole has been excavated and a pull
10 box has been installed in the sidewalk on the south side of the street.

11 j. **Exhibit A-10:** 3700 Alhambra Drive (Permit # 09-77700195 / Pole Location
12 #DAV17) – new pole to be installed, but all that has been completed is the
13 foundation excavation. There is no evidence of any fibers or conductors, nor is
14 there any evidence of installed conduit for power.

15 k. **Exhibit A-11:** 1306 Clara Lane (Permit # 09-77700157 / Pole Location
16 #DAV12) – new pole to be installed, but all that has been completed is the
17 foundation and conduit sweeps appear to be in place. There is no evidence that
18 conduits for power/fiber extend beyond the foundation.

19 l. **Exhibit A-12:** 646 A Street (Permit # 09-77700226 / Pole Location #DAV09) –
20 new pole to replace existing utility pole is anticipated, but the new pole has not
21 yet been installed.

22 m. **Exhibit A-13:** 515 E 8th Street (Permit # 09-77700227 / Pole Location
23 #DAV10) - joint pole installation on a new pole, but there is no antenna and no
24 evident fiber to the pole and no sign of power from the service point.

25 n. **Exhibit A-14:** 1427 E 8th Street (Permit # 09-77700228 / Pole Location
26 #DAV11) - joint pole installation on existing pole; antenna is in place and the
27 fiber has been strung on the pole and connected.

28 o. **Exhibit A-15:** 1340 Lake Blvd. (Permit # 09-77700243 / Pole Location

- 1 #DAV02) - no construction has commenced.
- 2 p. **Exhibit A-16:** 3215 Bermuda Avenue (Permit # 09-77700244 / Pole Location
- 3 #DAV03) - no construction has commenced.
- 4 q. **Exhibit A-17:** 2322 Westernesse Road (Permit # 09-77700245 / Pole Location
- 5 #DAV04) - no construction has commenced.
- 6 r. **Exhibit A-18:** 812 Burr Street (Permit # 09-77700246 / Pole Location
- 7 #DAV05) - no construction has commenced.
- 8 s. **Exhibit A-19:** 809 La Paz Drive (Permit # 09-77700247 / Pole Location
- 9 #DAV19) - no construction has commenced.
- 10 t. **Exhibit A-20:** 3606 Lillard Drive (Permit # 09-77700247 / Pole Location
- 11 #DAV20) – new monopole proposed near the center median, but no construction
- 12 has commenced.
- 13 u. **Exhibit A-21:** 2819 Lillard Drive (Permit # 09-77700249 / Pole Location
- 14 #DAV21) - no construction has commenced.

15 6. I have estimated the probable cost(s) of the future removal of all New Path facilities

16 that would be installed if they were to proceed with the scope of work envisioned under the permits

17 that they obtained in the Fall of 2009. Attached hereto as **Exhibit C** is the cost estimate that I

18 prepared – reflecting a total of \$4,638,000 in present day (2010) dollars and adjusted to reflect the

19 value in 2015 of \$5,740,000.

20 7. Nancy McKee, a registered Civil Engineer, licensed since 1988 and employed by the

21 City since 1984, assisted me in preparing the attached opinion of cost estimate. Ms. McKee is in

22 charge of the City's pavement management program, including the evaluations of pavement

23 condition, preparations of plans, specifications and cost estimates for pavement maintenance

24 projects, and for project administration. She has been performing these roles for approximately 11

25 years.

26 8. In addition, Steve Knopf, a Senior Engineering Assistant since 2003 assisted me in

27 preparing the attached opinion of cost estimate. Mr. Knopf has been a City employee for

28 approximately 24 years, has designed sidewalk replacement and other public infrastructure projects

1 (under the responsible charge of a registered civil engineer), including the preparations of plans,
2 specifications and cost estimates for pavement maintenance projects, inspection of the
3 improvements, and for project administration. He has been performing many of these roles for over
4 15 years. He is also the primary person in charge of the Public Works permit process.

5 9. The quantities and unit costs used in the opinion of costs was based on information as
6 to lengths and widths of street sections, obtained from our pavement management, historic bid costs
7 for the items of work, and professional judgment. Other quantities were obtained from the use of
8 drawing submitted by NewPath in September of 2009, along with the use of scaled aerial photos.

9 10. For the estimated cost of the removal of foundations for the proposed monopoles, I
10 personally contacted an estimator from Teichert Construction's Woodland office, and explained the
11 task as a complete removal of the entire foundations, 32 inches in diameter, 8 feet deep, using
12 reinforced concrete construction. He was told to assume demolition within the improved right-of-
13 way, including the restoration of structural pavement, and assuming the need for traffic control
14 measures during the demolition/construction operations.

15 11. It is important to note that the attached cost estimate does not include any costs or
16 expenses related to the removal of equipment, including but not necessarily limited to wires or fiber,
17 from "Joint Poles" owned by PG&E or other public utilities. This is because PG&E or the utility
18 owning the pole would be responsible for removal of the equipment, in the event that NewPath did
19 not remove the equipment. The City has no jurisdiction nor responsibility for those particular
20 facilities.

21 12. Likewise, the cost estimate does not reflect facilities that NewPath would have to
22 install to cross Interstate 80 in the vicinity of Pole Line Road. Any facilities NewPath needed to
23 connect south Davis across Interstate 80 would presumably require NewPath to obtain permits from
24 the California Department of Transportation ("Caltrans") to cross under Interstate 80. As the City
25 has no jurisdiction within the Caltrans' right-of-way, such facilities are not included in the removal
26 estimate.

27 13. Alternatively, the City owns ducts in the Pole Line/Interstate 80 overcrossing that it
28 could lease – a lease NewPath does not presently have. If, however, the Court were to issue an

1 injunction and the City subsequently agreed to enter into a lease with NewPath to utilize the City's
2 Interstate 80 overcrossing ducts, the City estimates at this time that the lease would be approximately
3 \$1.00 per linear foot, per month, for a total of \$950 per month with CPI adjustments. This \$1.00 per
4 linear foot, per month, estimate is simply an estimate – any such lease would be subject to City
5 Council direction and approval.

6 14. In addition, if NewPath's new wooden pole installed at 3075 E Covell Boulevard
7 (Permit #09-77700192 / Pole Location #14 on Attachment 6 to 1/19/2010 Staff Report) were
8 allowed to remain pending the outcome of this suit, NewPath would owe the City approximately
9 \$1,000 per month, which is the average lease for such use of City property, though any such lease
10 would be subject to City Council approval. Again, the \$1,000 per month is simply an estimate. The
11 City currently has cellular site leases that range from approximately \$600 per month for antennas
12 mounted on the city's water tank to over \$2,000 per month for large antenna sites. The most recent
13 monopole lease was approximately \$1,375 per month. No specific determination of fair market rent
14 for this site has been made. The pole is on property owned by the City and is not within the public
15 street right-of-way.

16 I declare under penalty of perjury under the laws of the United States of America that the
17 foregoing is true and correct, and that this declaration was executed on February 22, 2010 at Davis,
18 California.

19
20 /s/ - Williman H. Marshall
21 WILLIAM H. MARSHALL

22 (original signature retained by attorney Harriet A. Steiner)
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