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6 Attorneys for Plaintiff,
7 NEWPATH NETWORKS, LLC

8
9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**

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

13 Plaintiff,)

14 vs.)

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

16 Defendants)

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

**DECLARATION OF KERRY
NEWMAN IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Date: March 8, 2010
Time: 9:00 am
Courtroom: 10
Judge: Hon. Garland E. Burrell

17)
18)
19)
20 I, Kerry Newman, declare and state as follows:

- 21
- 22 1. I am over the age of eighteen, suffer no legal disabilities, have personal knowledge of the
23 facts set forth below, and am competent to testify.
 - 24 2. I am the Regional Vice President – Network for Sacramento and Las Vegas markets for
25 MetroPCS with offices at 785 Orchard Drive, Ste 200, Folsom, CA 95630.
 - 26 3. MetroPCS aspires to provide both indoor and outdoor wireless coverage for personal
27 business and emergency services to residents, visitors and the traveling public in the City
28 of Davis (“City”). However, MetroPCS currently has a significant coverage gap in the

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1 City and has experienced significant challenges in obtaining approval for wireless sites in
2 the City. If sufficient capacity and coverage is not available when needed, MetroPCS
3 risks lost revenue and increased loss of subscribers (churn) and the inability for our
4 customers to contact emergency services.

5 4. Part of the MetroPCS business plan is to provide wireless service to customers and
6 potential customers. Recent studies have shown that a large percentage of calls placed on
7 the MetroPCS network are stationary in nature and not mobile, indicating they are placed
8 and concluded within buildings and structures.

9 5. In addition, part of the MetroPCS business plan is to allow customers and potential
10 customers to have the flexibility to replace their home landline wired phone with a cell
11 phone. In order to be able to offer this option to the population it will require increased
12 signal strength inside homes and businesses.

13 6. MetroPCS' drive testing signal strength thresholds break down as follows as noted on the
14 following map attached as Exhibit 1:

- 15 • Dense Urban/Deep Indoor (**Dk. Green**) – Coverage that extends beyond first wall
16 areas within houses and dense office environments allowing users to experience the
17 same voice and data services indoors as outdoors
- 18 • Urban/Indoor (**Green**) – First-wall coverage or coverage close to the outside
19 perimeter of a house or small office allowing users to experience the same voice and
20 data services indoors as outdoors
- 21 • Suburban/Indoor (**Light Green**) – First wall coverage or coverage close to the outside
22 perimeter of residential areas allowing users to experience the same voice and data
23 services indoors as outdoors
- 24 • In-Car (**Blue**) – Coverage that extends inside vehicles
- 25 • Outdoor (**Red**) – Outside Street level coverage

26 7. Currently MetroPCS is in the process of enhancing its network to the next generation of
27 products and services using the Long Term Evolution (LTE) technology. This is similar
28 to, but better, than what some people currently experience with “smart” phones” such as

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1 the Apple iPhone. In order to compete we need to be able to provide significant indoor
2 coverage quality well beyond where we are today.

3 8. Since the launch of MetroPCS' service in February, 2002, the City has presented several
4 challenges to MetroPCS' wireless distribution strategy. The City's regulations with
5 regard to the permitting of wireless facilities are extremely burdensome which limits the
6 amount of cell sites and translates into coverage problems. This in turn, presents
7 difficulties for MetroPCS' sales operation to obtain distribution outlets. Several dealers
8 have attempted to operate in the City only to have to close their doors due to a
9 combination of poor sales and insufficient wireless coverage. As a result, MetroPCS has
10 been unable to grow its distribution beyond a single traditional MetroPCS retailer. In
11 other communities of similar size (Lodi, Manteca, and Woodland as examples)
12 MetroPCS would be supporting 3-4 traditional MetroPCS retailers and their
13 commensurate customer bases.

14 9. As mentioned above, MetroPCS' ability to serve or add customers in Davis is severely
15 hampered by the City's existing telecommunications regulations and policies, especially
16 limiting wireless facilities to only a handful of properties in the City and prohibiting the
17 siting of wireless facilities in or near residential zones. The limited locations available
18 under the City's regulations, the allowed heights of the towers or antennas, and other
19 factors create an extraordinary barrier to the provision of wireless services in the City for
20 new wireless entrants such as MetroPCS. Two recent examples include the following:

- 21 • MetroPCS' SAC330 project - commenced March 30, 2006 and the site finally went
22 on air December 31, 2009 (3+ years) and this site was a new multi-user facility built
23 by Commsites West, and it was placed on City property.
- 24 • MetroPCS' SAC331 project - commenced on March 30, 2006 as well and the site
25 went on air April 9, 2009 (3 years) and this site was a collocation with Verizon at
26 Davis High School.

27 10. Despite the approval of the projects above, MetroPCS still finds itself unable to fill the
28 significant coverage gaps left by the City's prohibition against siting facilities in or near

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1 residential zones (the majority of the City).

2 11. In addition, due to insufficient coverage, MetroPCS' ability to provide e911 services as
3 required by the Federal Communications Commission is severely hampered and that is
4 part of the reason MetroPCS has plans to build the DAS network.

5 12. In an effort to fill MetroPCS' significant coverage gap, MetroPCS entered into a contract
6 with NewPath Networks, LLC ("NewPath") to build a Distributed Antenna System
7 ("DAS") in the City. Under this arrangement, MetroPCS would be the anchor tenant of
8 NewPath's DAS system and would transport MetroPCS' Radio Frequency ("RF") signals
9 so that customers could receive and transmit calls (and data) in the City of Davis.

10 MetroPCS provided NewPath with each specific coverage requirements and NewPath
11 designed its DAS to fill MetroPCS' significant coverage gap.

12 13. Use of New Path Network DAS system will allow MetroPCS to cost-effectively achieve
13 increased coverage and capacity where it is needed most inside buildings and residences
14 where 70% of the MetroPCS customers are.

15 14. MetroPCS' goal is to allow MetroPCS subscribers to have service when and where they
16 need it both within their residences and outside on the street. MetroPCS customers would
17 experience fewer dropped calls, and are less likely to churn.

18 15. And, most important the DAS system can be shared by multiple wireless providers to
19 reduce the impact in and around Davis while providing more competition among all
20 carriers by using a neutral utility such as Newpath.

21 16. I have consulted with MetroPCS's RF engineers and reviewed the "Comparative Drive
22 Test" Report prepared by NewPath Networks and submitted to the court as Exhibit 1 to
23 the "DECLARATION OF JAMIE T. HALL IN SUPPORT OF PLAINTIFF'S MOTION
24 FOR PRELIMINARY INJUNCTION." MetroPCS agrees with the conclusions expressed
25 by NewPath Networks in the Comparative Drive Test" MetroPCS reviewed the
26 MetroPCS specific data in the Comparative Drive Test and confirmed their accuracy in
27 consultation with NewPath Network's engineers. Attached as Exhibit 1 are depictions
28 from the actual drive test performed December 28, 2009 by NewPath utilizing MetroPCS'

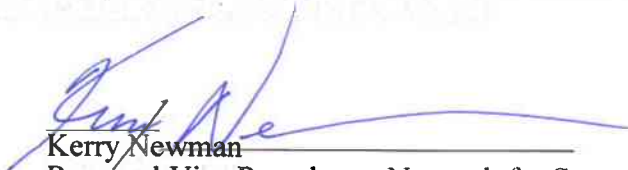
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coverage criteria objectives. These depictions continue to show a significant coverage gap for MetroPCS.

17. I have reviewed the "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" dated February 22, 2010. With regard to Mr Kramer's statement in ¶17, MetroPCS states that MetroPCS's network was working properly on December 28, 2009 during the drive test. Further, MetroPCS states that during the drive test conducted by NewPath on December 28, 2009, MetroPCS cell site SAC-331 was in service and cell site SAC-330 was not yet in service. However, the addition of site SAC-330 to the wireless network did not fill MetroPCS' coverage gaps and does not affect the analysis or conclusions in the Comparative Drive Test. To evidence this fact, MetroPCS commissioned a predictive coverage map, which is attached as Exhibit 2, using the industry standard Planet predictive tool. It is clear in the predictive map that cell site Sac-330 would not provide additional coverage in the proposed DAS area due to tower height allowances and available antenna elevations.

I HEREBY ATTEST THIS 1st DAY OF MARCH 2010 THAT, TO THE BEST OF MY KNOWLEDGE, UNDERSTANDING AND BELIEF, THE FOREGOING STATEMENTS ARE TRUE AND THAT I WOULD BE WILLING TO MAKE THESE STATEMENTS UNDER PENALTY OF PERJURY IN A COURT OF LAW.



Kerry Newman
Regional Vice President – Network for Sacramento and Las Vegas
MetroPCS

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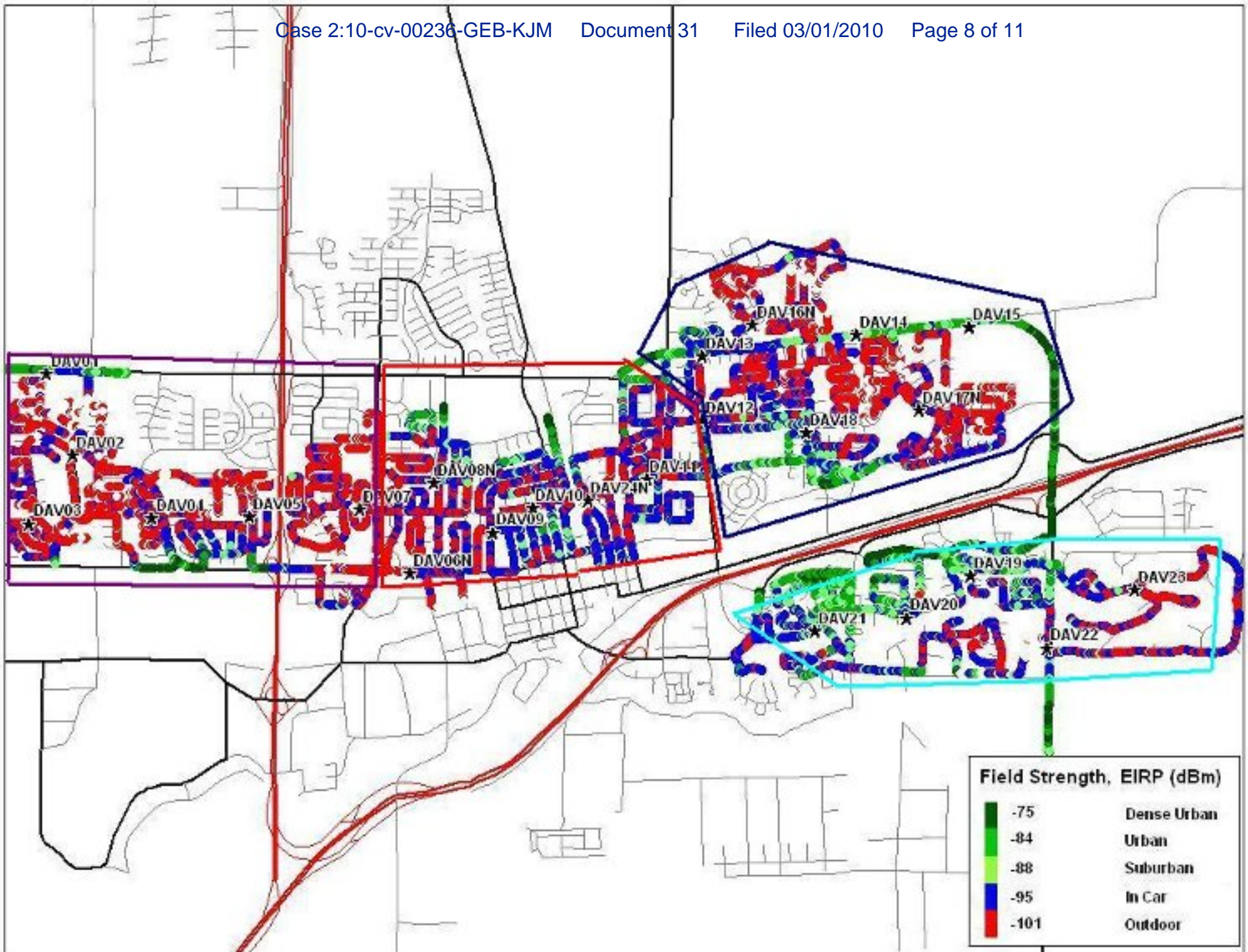
EXHIBIT LIST

<u>Exhibit No.</u>	<u>Exhibit</u>
1	MetroPCS Drive Test Map
2	MetroPCS Predictive Coverage Map

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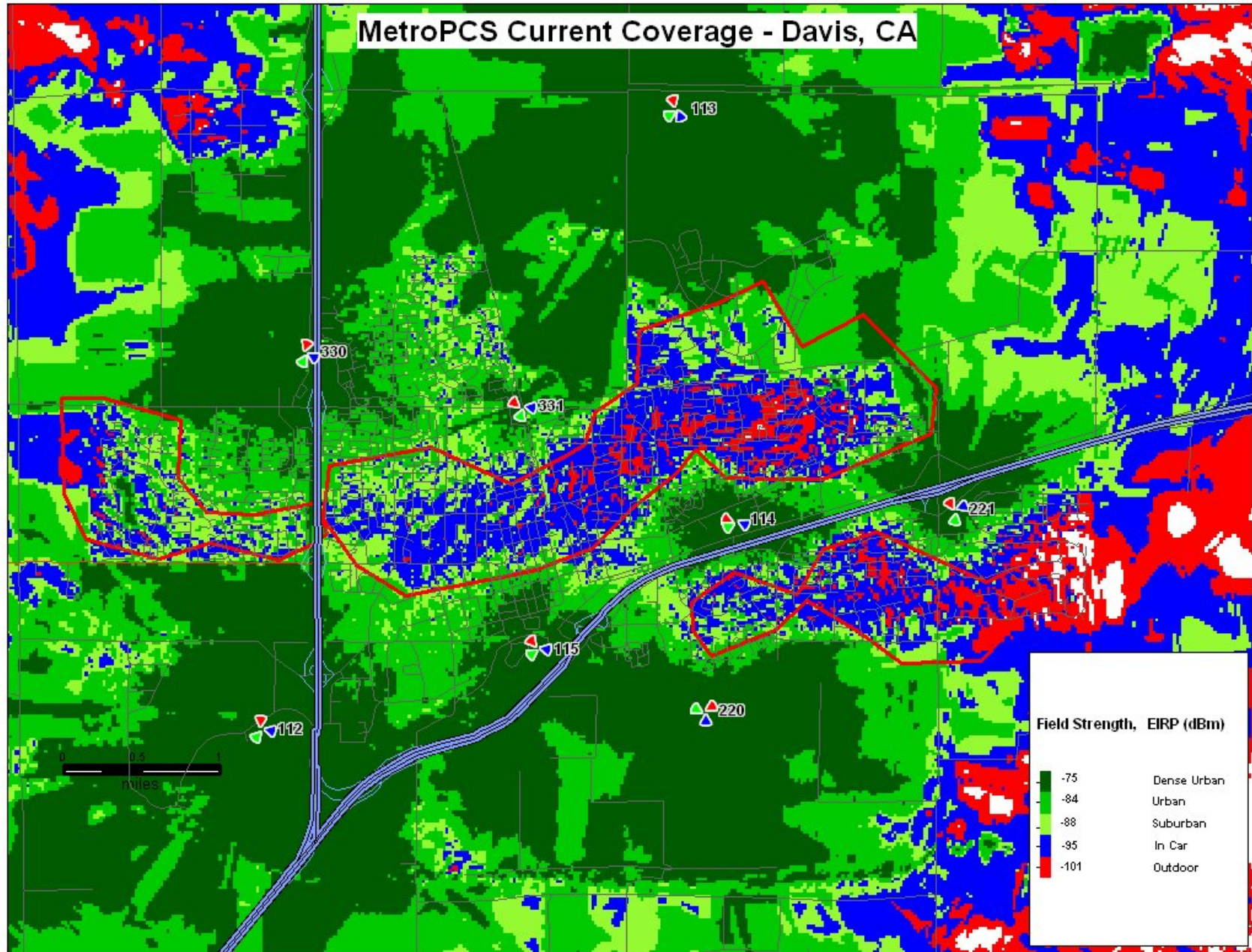
EXHIBIT 1



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EXHIBIT 2



CERTIFICATE OF SERVICE

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2
3 STATE OF CALIFORNIA)
4 COUNTY OF LOS ANGELES) ss.

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18
6 and not a party to the within action; my business address is 207 E. Broadway, Suite 201, Long
7 Beach, CA 90802.

8 On March 1, 2010, I caused to be served the following document(s):

9
10 **DECLARATION OF KERRY NEWMAN IN SUPPORT OF MOTION FOR
11 SUMMARY JUDGMENT**

12 on the interested parties in this action as follows:

13 Harriet Ann Steiner
14 McDonough Holland & Allen PC
15 500 Capitol Mall, 18th Floor
16 Sacramento, CA 95814
17 916-444-3900
18 hsteiner@mhalaw.com

19 I served a true copy of the foregoing document by way of the Court's electronic
20 filing/serving system, file and serve website. I declare under penalty pursuant to the laws of the
21 United States that the above is true and correct.

22 Executed on March 1, 2010, at Long Beach, California.

23
24
25 /s/ Robert Jystad
26 Attorney for NewPath Networks, LLC
27 E-mail: rjystad@channellawgroup.com
28

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